BEFORE THE ENVIRONMENT COURT
AT CHRISTCHURCH

ENV-2020-CHC-127

IN THE MATTER OF	**The Resource Management Act 1991**
AND	**Of a notice of motion under section 149T(2) to decide proposed Plan Change 7 to the Regional Plan: Water for Otago (referred to the Environment Court by the Minister for the Environment under section 142(2)(b) of the Act)**
	OTAGO REGIONAL COUNCIL
	Applicant

Hearing Commenced:	28 June 2021 held in Dunedin
Court:	Environment Judge J E Borthwick Commissioner Bunting Commissioner Edmonds
Appearances:	P Maw and M Mehlhopt for Otago Regional Council D van Mierlo for Aotearoa New Zealand Fine Wine Estates Limited Partnership L Phillips for Beef + Lamb New Zealand Limited P Williams for the Director-General of Conservation K Reilly for Federated Farmers of New Zealand Inc. H Atkins and L Ford for Horticulture New Zealand Limited C R Perkins for Landpro H Atkins and L Ford for Horticulture New Zealand Limited K Reid for McArthur Ridge Vineyard Limited, Mount Dunstan Estates Limited, Strath Clyde Water Limited R Dixon for Minister for the Environment M Baker-Galloway for Otago Fish & Game Council and Central South Island Fish & Game Council P Page and B Irving for Otago Water Resource Users

Group
P Anderson of Royal Forest and Bird Protection Society of New Zealand Inc
J Winchester and S Lennon for Te Rūnanga o Moeraki, Kati Huirapa Rūnaka ki Puketeraki, Te Rūnanga o Otakou, Hokonui Rūnanga (Kai Tahu Ki Otago) and Waihopai Rūnaka, Te Rūnanga Oraka o Aparima, Te Rūnanga o Awarua (Ngai Tahu Ki Murihiku) and Te Rūnanga o Ngai Tahu (collectively Nga Rūnanga)
P Page and B Irving for Clutha District Council, Waitaki District Council, Queenstown Lakes District Council, Dunedin City Council and Central Otago District Council (the Territorial Authorities)
J Welsh for Trustpower Limited
H Rennie for WISE Response Society Inc

NOTES OF EVIDENCE TAKEN BEFORE THE ENVIRONMENT COURT

TABLE OF CONTENTS

COURT RESUMES ON MONDAY 28 JUNE 2021 AT 9.33 AM

MR MAW CALLS

SHANE ANTHONY ENRIGHT (AFFIRMED) (VIA AVL)

Q. Good morning, Mr Enright. I'm going to ask you some questions just to confirm who you are and who you're appearing for before I then proceed on to ask you to read out your summary that you have helpfully prepared, but can you please confirm your full name for the Respondent?

A. Yeah, my full name is Shane Anthony Enright.

Q. And you are appearing today in support of a submission filed by Southern Lakes Holdings Limited, is that correct?

A. That's correct.

Q. And Southern Lakes Holdings Limited filed a submission on plan change 7?

A. That's correct.

Q. And you have also prepared, to assist the Court, a memorandum and a set of planning provisions, and the planning provisions that I have are planning provisions dated the 18th of March 2020, and those were circulated in accordance with directions towards the first weeks of this hearing, is that correct?

A. If I understand you correctly, you're referring to the several amendments that I filed with the Court, yes.

Q. Now, just so I'm clear, the amendments that you are seeking to be made to plan change 7, are those still the amendments that are set out in your document dated the 18th of March 2020?

A. Yes, they are, although I have seen some amendments that have been presented, I think, on the 16th of June, which supports some of those, at least, yeah, yeah, already.

Q. Okay. I will likely ask you some further questions about that, but before we get to that point, you confirm that the evidence that you're about to give is true and correct to the best of your knowledge and belief?

A. I do.

Q. Now, you have prepared a written summary, and a copy of that has been handed around the Court this morning. Perhaps you could read that summary, if that's what you're intending to do this morning.

A. Thank you. I would like to. I've provided that to the Court, at least, there's a, yeah, a summary or a synopsis of what I would like to present as my evidence.

Q. Okay, if you could proceed with that and then remain for any questions.

A. Thank you.

WITNESS READS BRIEF OF EVIDENCE

"Your Honour, and other court members, I'm representing, as mentioned, Southern Lakes Holdings, which is a farming business today. It's its only activity, so effectively representing the Enright family that has farmed in that region for, you know, many years, came into that region about the late 1800s. I appreciate that the Court is considering water-users in this process and in the formation of the plan change 7, it's most necessary. In my view, it behoves the Otago Regional Council in its application of water management processes to consider not just the environmental implications but the implications on its region and people in its region, in the Otago Region.

Southern Lakes Holdings itself has invested significantly into the use of water resources. We have four small irrigation projects, we've undertaken a considerable number of application processes, and to summarise one application process we more recently applied for, in 2017, that has cost us to date $53,303, simply for the consultant that we've been forced to utilise for that application process, and I think this undermines or explains the complexity of the process with Otago Regional Council today, that someone with two degrees at university is forced to utilise a consultation firm at such an expense. I don't draw any salary, I've never drawn a salary as a director from this farm or Southern Lakes Holdings. I've received no income in the entirety from 2007 to 2000 and, you know, I think, 20, which this is considering, and yet we've spent $53,000 just on the consultants for this process, and that undermines, sorry, I think that helps to explain the level of complexity that we're dealing with with the Otago Regional Council. However, we are forced to do because these

investments are necessary if we are to even consider that the farm would have a sustainable future, and that future, today, is not guaranteed, and I have simply highlighted a couple of examples where the processes for dealing with the Otago Regional Council have been quite difficult, and I guess it's not dramatic to say draconian.

One example is a consent process for the consent that we have, which was number 2692, and my father was informed in 2003 that he was required to renew that water consent, and that is drawing water from an area in the high country known as Humbug Gully. At this time, my father's eyesight was so impaired that he was blind in 50% of both eyes and he was unable to read those documents, and that's unfortunate, but we did inform the Otago Regional Council, and it had very little patience or consideration of the disability.

Under time pressure, that permit or that consent was renewed, but in the process of that renewal of that consent, now referred to as 94655, it resulted in a change in the locations that we were allowed to take water from, and hence a change in the water sources, and that was due to an incorrect Otago Regional Council report on those sources, because the member of the Otago Regional Council producing that report was not familiar with the historical titles of the property and made certain assumptions that my father at the time was unable to really deal with under the time pressure, and that person concluded incorrectly as to their located. Those forced changes at a time when my father was quite vulnerable and resulted in the farm being disadvantaged.

This is one example in terms of my father. I'm sure you've heard other examples from other members or other farmers in the Otago Region. My own personal example was in 2013, I received a notice form the Otago Regional Council that they had cancelled the right to take water from one of our water sources, Dunstan Creek. There was no direct consultation with us at the time, so this effectively came out of the blue, it was quite a shock, quite a concern for us, because water resources, ultimately, for a farm, are just so integral and important.

So we were forced at short notice to install an irrigation system that was considered, under the Otago Regional Council guidelines, to be an efficient spray irrigation system, and we were forced to do that simply to maintain that water right. The timeframe that we were given to do that resulted in a lack of opportunity for consultation, and effectively, we made a poor choice in that irrigation equipment, and in the end, it was found to be ill-suited to the weather conditions, the environmental conditions, and actually our labour requirements, and that was because the irrigator has been severely damaged by a number of times we had very high wind conditions, north-westerly winds blowing through those areas and we had flood conditions at times where the irrigation tracks have been repeatedly damaged due to flooding conditions, and there forced us to have limited use of that irrigator, and it really does need to be simply replaced with a different choice that copes better with those situations.

That is coupled with the labour shortage in this remote area. There is no accommodation within that area, it's a very remote, old mining town in Central Otago, and so that particular choice requires a lot of labour to utilise it, but had Otago Regional Council taken a more consultative approach with Southern Lakes Holdings as opposed to the measures that it took in cancelling the water resources at short notice, this farm would have been must better served by simply the time to research better solutions and would have made more efficient and effective use of those water resources within the Otago region, and for sustainability of a farm in the Otago region.

What we see plan change 7 doing now is it assumes that the volume measurements are also reported from a point of take over the national communications networks. It assumes that there is access to communication networks that enable you to communicate effectively the water usage. In our region, we don't have that, you know, we're in a remote area that doesn't have a mobile network, for example, and there isn't New Zealand or Otago regional communications infrastructure available to us in that area, but plan change 7 doesn't acknowledge these basic infrastructure issues, and it does not, therefore, accommodation in plan change 7 that there are large data gaps where water usage has not necessarily been able to be communicated and

recorded. Coupled with the practices of Southern Lakes Holdings on this particular creek, we are part of a community of water users, and in this case, we have voluntarily reduced our water usages over time in order to favour other users on the water scheme, and that has an impact, also, in the calculation of an annual volume limit.

Plan change 7, in its present form, in this case, it's clause 10A.4.4, which is a method for calculating the annual volume limit, if we consider that in its present form, it would render this irrigation system ineffective in a dry summer, and I'm referring not to that clause in the form that it was originally when plan change 7 was announced, but in it's form as put forward on the 16th of June this year, which was recently reduced. It doesn't consider the limitations on use of some irrigators because of exceptions such as severe weather conditions where they are regularly damaged, flooding conditions, high – and I am referring to very high – north-westerly winds that come through our region. They belt through. What they do with our irrigators is they tip them over; they damage them severely. We have limited engineering resources in this remote region to repair them and limited labour opportunities there. From our point of view, that small irrigation system, which was a response to Otago Regional Council processes, would have cost today $250,000, and it ultimately is integral to the operation of our farm and its sustainability.

What Southern Lakes Holdings and my family is effectively seeking, and it is detailed in its submissions, which we put on the 26th of February this year, in terms of amendments to plan change 7, is simply to recognise that there are exceptions when making calculations to annual volume data that cannot be reasonably expected to represent the volumes that are actually taken, because there are data gaps, and so there is more water taken than can be recorded, because we don't have communications infrastructure necessarily in place, and therefore, we have to rely on small companies and the limitations on that equipment, which isn't always reliable, and it doesn't represent the design of those irrigators, which are necessarily designed to deliver the minimum amount of water to sustain plants so that they can remain alive. If we simply use just the limited amount of data available and we calculate our annual volume limits,

then those annual volume limits are significantly lower than what we actually need to sustain those plants in those paddocks, and which the irrigators are designed to deliver.

I just wanted to refer to the inclusion of deemed permits relating to the damming of water and the discharge of water. These are consents that are important to many users in the Otago region. In relation to our experience with the Otago Regional Council, we were required to upgrade the efficiency of our water irrigation system from what was effectively flood irrigation to a more expensive spray irrigation, and so, again, significant investment has been made to develop for our farm, the ability to take water, to convey water across large regions of the property, because we are in the high country, to store water, and then to install irrigation infrastructure. So Southern Lakes Holdings has invested into a storage dam that is very integral to that spray irrigation system. We have two centre-pivot spray irrigators. Without storage, we would not be able to sustain those irrigators over a dry summer, simply because the water sources are inadequately available to continue the irrigation without storing water.

The irrigation equipment on two of our irrigation projects are now completely dependent on the storage dam, and those new irrigation systems have taken five years to fully develop because it takes five years to develop pasture, the paddocks, and the fencing systems to match those irrigators to do this economically, yet those permits are now under review, and that would effectively devastate those irrigation systems if those rights or permits were to be removed, so it seems critical that we consider removing from plan change 7, at least, the deed permits with respect to dams and water discharging from those dams. That is our recommendation for plan change 7, to remove the deemed permits relating to dams and discharge from those dams.

Plan change seven – and I am referring to the calculation of monthly volumes in this case – calculates, or proposes to calculate, the monthly volume usage over the arbitrary calendar month, so, in the case of January, 1st of January to 21st of January, and this doesn't really represent at all a weather pattern. It has no relationship or bearing to a weather pattern. In other words, if you have a

dry months, it may be from the middle of December to the middle of January, and so, in another year, it might be from the 1st of January to the 31st of January, but I think it's quite clear that weather patterns don't follow arbitrary calendar months, so that when we calculate the water that we are using over calendar months, that reduces the representation of what is actually needed by those irrigators.

It seems also unnecessary to calculate this way, because modern computers simply have no limitation to aggregate the water usage requirements of users over a moving 31-day window. There are no limitations of computers to doing that, it is a very basic calculation, it is a common calculation to have a moving window, and so that is why we have highlighted that amendments be made to plan change 7, and, your Honour, I am referring to clause 10A.4.3 in plan change 7. We are recommending that we remove the definition of that month from a calendar month to be more representative of a period of 31 days or, technically speaking, it is a moving average window of 31 days, and that would be more reflective of measuring the water usage and the weather patterns in Central Otago. It would also limit the opportunity for underestimating the calculation of water needs by users.

Lastly, I wanted to make some comments on plan change 7 and its limitations for new irrigation areas. In the case of our farm, our family farm, or Southern Lakes Holdings have already designed for and commissioned equipment to extend the irrigation area, so we have put in pipes underground, we have put in infrastructure within our pump sheds to allow for the use of our water permits to have an additional area. We have brought on an irrigation area of perhaps 40 or 50 hectares, and it has been uneconomic for us at that time to fully install all of the equipment necessary to irrigate the entire area, which would be 90 hectares, but we have invested already that money and that infrastructure for those increased areas of irrigation. What we are seeking from amendments to plan change 7 is that it recognise those already undertaken investments and the infrastructure that has either been installed or commissioned or in use prior to plan change 7 being notified.

Thank you, your Honour, that is the full extent of my evidence this morning. I appreciate you considering it.

THE COURT: JUDGE BORTHWICK

All right, Mr Maw has some questions for you, and then we will see whether or not the members of the bench have likewise.

EXAMINATION: MR MAW

Q. Thank you, your Honour, and good morning again. I do have some questions, and I thought I might start with understanding a little more about the irrigation set-up on the property. You have talked about two centre-pivot irrigators. When were they installed?

A. The centre-pivots were, sorry, installed in December ’14 and January ’15.

Q. And they’ve been operational since that time?

A. They’ve been at various stages of operation. Mr Maw, you might appearance that in a high country element, there are a lot of landscape barriers to putting a large irrigator on that property. There are significant a number of tree breaks, hillsides, creeks, all matter of landscape problems, so the progression of those irrigation systems have taken a considerable number of years in order to develop their travel, very expensive getting in excavators and earth-moving equipment and all manner of, can I say, physical barriers getting those implemented, so they’ve been in various stages over the years. They aren’t entirely complete even today.

Q. When you think about the period of time, September 2017 to March 2020, in terms of the full extent of irrigable area with respect to those two pivots, would most of the area have been irrigated during that period?

A. Well certainly by 2020 most of the area has been irrigated yes. Not at the initial stages, they would start with perhaps 10%, then move to 15% as we physically worked on those lands and redeveloped the lands which – and removal of trees and put in crossings that for creeks, many creeks and you’ve got, let’s say, I don’t know, maybe 30 wheels or 15 crossings to make.

Q. And if I'd asked you to shade for me on a map the area of, the maximum area of land under irrigation over that three year period, you'd be able to do that for me?

A. Yes, I would over the – over any particular period I'd be able to give you an estimate of that.

Q. Now you also mentioned that there had been some further investment made with respect to future areas of land that your company would like to irrigate and you mentioned that some investment had been made into pumping infrastructure. Have irrigation mainlines also been installed with respect to those future plans?

A. That's correct and that's what I was highlighting earlier when I was presenting, is that the piping has been installed with consideration of those irrigation systems, so that isn't already installed under the ground, the – we have the evidence to back that up of course, we have the engineering designs for those areas, it's really pretty obvious that that's what our intent was, this was not something where we're considering as an afterthought, the engineering reports show the amount of water that can be – that can travel within those piping systems and those piping systems are designed for an increased capacity of water and they are necessarily designed that way, but they are necessarily more expensive. So, had we not considered irrigating those larger areas, our costs would have been significantly reduced because we simply would have used smaller pipes than were required and that considerably reduces the costs involved.

Q. Now I'm interested in the storage dam that you mentioned. When was the storage dam installed?

A. So the storage dam is actually an old mining dam in our case and so that was effectively installed many, many years ago, we've been fortunate to leverage an old mining dam but we've had to make changes to that dam of course in order to provide for the water being stored in it and securely being installed in it and being discharged from that dam.

Q. And have you had to get any additional Resource Management Act permits with respect to that dam?

A. Fortunately not, unless I don't recall needing to go through any process with that dam, no. I don't recall having any, no.

Q. And when you mention discharges from that dam, those discharges into a water race with respect to connecting up your irrigation infrastructure or are they discharges into the stream or water body that the dam is in?

A. So I'm not sure I fully understand the question, but I think perhaps I can answer it anyway, the water comes via an old mining race into the storage dam and it is discharged into that creek which then returns to the main body of water which is in this case Dunstan Creek, it's a large body water downstream.

Q. And so the dam is authorised by the old mining deemed permits, have I understood that correctly?

A. I understand that is correct, yes.

Q. And when you made the investments in the infrastructure relying on that dam, you were aware that those deemed permits were expiring in October 2021?

A. I wasn't aware that they would be expiring, no. I was aware that they would be perhaps under review.

Q. Now you talked about some of the challenges that you may face in respect of gathering the necessary data to show the amount of water that has historically been taken and you referred to various weather events and the challenges that those pose. In terms of the rule framework that has now been recommended jointly by the expert planners, they have recommended the introduction of a restricted discretionary activity pathway which will apply where there are gaps in the dataset such that the controlled activity pathway is not available. Are you aware of the restricted discretionary activity rule that has been recommended? Is that something you've had a chance to look at?

A. There is, well that's some frustration for me because I have requested it from the Otago Regional Council directly and in fact if you look at my, were to have the opportunity to look at my preliminary submission to the plan change 7 system, which I submitted, obviously some time ago, some time in 2020, there was a recommendation that – sorry, I just need to take a little time to find that request. Right so on the very end of that which is

in this case page 6 of that submission, I highlight in a box on that page, quite happy to allow you time to find that if you'd like.

1020

Q. Can you just describe really precisely what it is you're looking at, so we're all looking at the same document?

A. So this is the preliminary submission dated 25th of March 2020 by the our family's Salt Lakes Holdings in response to the invitation to respond by Otago Regional Council on plan change 7.

Q. So have you had an opportunity to consider the restricted discretionary activity rule recommended by the planners or is that not something that you've had an opportunity to consider?

A. Well as I say and it says here in that submission, I – because there was notice and there was an email and notification of plan change 7 which stated, "there is a rule for activities that do not have five years of data and that do not meet not planned criteria for a short term consent". So this is what I'm presented with by Otago Regional Council and I highlight in a box on my document, specific rules are required that make clear the treatment of activities where there is not five years of data available and I have recommended that, in that same box, that submissions should remain open until these have been available for consideration and specific policy should be added with consideration given to high country operations where national infrastructure which I was referring to before in my evidence are not available to accommodate the level of measurement required and to my knowledge there has been no release or response from the Otago Regional Council on that submission that have released this specific rules to – that would govern where data is not available. So, I hope that answers your question, we certainly made a request for this.

Q. Have you read any of the outputs from the planner's joint witness conferencing that has taken place throughout the course of this hearing?

A. I've read the recent appendix to which was released on the 16th of June, yes.

Q. And when you read that appendix did you see that there was a restricted discretionary activity being recommended to deal with situations where there was insufficient data or a data gap?

A. Can you guide me as to where that is in that appendix?

WITNESS REFERRED TO RULE IN APPENDIX

Q. Sure if I can take you to do rule 10A3.1A.

A. Yes?

Q. And if you tracked down through that rule you will see there that the council have reserved its discretion to consider whether water meter data in combination with other relevant methods and data as agreed with council, accurately represents…

A. Sorry Mr Maw which clause is this?

Q. Sorry it's over the page, if you're tracking down and I'm looking at a sub-paragraph (a) under a heading that the "Council will Restrict Its Discretion to the Following Matters".

A. So this is – sorry we're still going to 10 point…

Q. 10A.3.1A.

A. Okay I don't have that in this, a capital A. I've got 10A.3.1.

Q. It's possible we're looking at different versions of the document. What's the precise date on the one that you're looking at?

A. I thought it was the 16th of June – sorry, as at 18th of June 2021.

Q. Does that version have some blue shading in it in terms of the provisions?

A. Yes it does.

Q. Right I think we are looking at the same version. So, if you scroll down to rule 10A.3.1A.

A. Existing, okay I've found that now, yes.

Q. And you'll see within that rule there is some grey shading sort of on the next page?

A. Correct.

Q. And then I'm drawing your attention to the second box shaded grey that commences with, a sub-paragraph (a) and then a roman i.

A. Right I'm with you, thank you.

Q. Now this rule is intending to respond to situations where insufficient data is available for a variety of reasons and it seeks to provide a pathway for consideration of the use of other relevant methods to establish the amount of water taken historically.

A. Yes, it's unclear to me the intent of that or what the rules are on reading that. It says it will restrict its discretion, I'm not sure that that gives us any guidance on how it will apply that discretion which was the subject of our request in the first instance because it's a considerable concern for us. We would like to understand the policies and how regional council might apply consideration for water usage or water needs or investments into water usage. It's very unclear from that paragraph how it might consider the application's discretion and that's essentially it, I mean it's the nub of the concern here is we have no guidance on that and from our family point of view we have no ability to consider the impact of that on our sustainability of our farm.

Q. Now you mentioned in your summary this morning, where you highlighted some concerns with the way by which the monthly volume was to be calculated and you described the reference to a calendar month as somewhat arbitrary. Have you had an opportunity to test any real-world examples of the differences between a rolling 31 day average and a calendar month average?

A. Yes, I have and I apologise in the (inaudible 10:28:18), I'm an engineer and inherently have used these mechanisms because they are quite common in my field of endeavour. I did provide considerable evidence regarding the weather patterns in the Otago region in my submission. I drew these weather patterns directly from the national database for weather patterns, so we fortunately have a national weather station and Lauder which is maybe 15 minutes from us and I drew data from that and I put that into my submission – my preliminary submission on the 25th of March. So, yes I have been able to test that but I – and in addition to that the use of a moving average to represent any phenomena or any scientific or natural phenomena, use of a moving window, averages are very common measure rather than having an arbitrary timeframe that doesn't relate at all to the natural pattern that we are observing.

Q. Thank you. I have no further questions. If you could please remain for questions from the Court.

A. Thank you, Mr Maw.

QUESTIONS ARISING – NIL

THE COURT: JUDGE BORTHWICK

Q. Thank you very much for coming and getting up so early, we will consider everything that you have said including your original submission, so thank you very much.

A. I appreciate that consideration, thank you, your Honour.

WITNESS EXCUSED

THE COURT: JUDGE BORTHWICK

So we're moving to the joint empanelment of the priority witnesses. Okay, so everybody who is participating, if you can come forward?

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. Actually I meant to ask you Mr Maw. Did you think Ms King would be empanelled now or later given that she makes but a few comments, but critical comments and then she gives this detailed brief, how do you want to handle that?

A. Both. I thought that given that she participated in the conferencing, that I might have her participate in this discussion but that it – she would then be called separately in relation to her brief.

THE COURT: JUDGE BORTHWICK

Q. Anyone got any issues with what Mr Maw proposes? All right, fine, well very well, we'll do that.

TOM WILLY DE PELSEMAEKER (AFFIRMED)
SALLY ANNE DICEY (AFFIRMED)
MURRAY JOHN BRASS (AFFIRMED)
TIMOTHY ALLISTAIR DEANS ENSOR (AFFIRMED)
SIMON SHIELD WILSON (AFFIRMED)
ALEXANDRA LUCY KING (AFFIRMED)
SEAN WILLIAM LESLIE (AFFIRMED)

MR MAW:

Q. Good Morning witnesses. What I thought we might do to start is have each of you starting with Mr Brass, confirm your full name for the record and at the same time confirm that you participated in joint witness conferencing and produced a joint witness statement dated 18 June 2021 and that you are a signatory to that document which you can confirm perhaps by simply saying I do. So starting with Mr Brass?

A. **MR BRASS:** My full name is Murray John Brass and I confirm that I was part of that conferencing.

A. **MR DE PELSEMAEKER:** Good Morning, my full name is Tom Willy De Pelsemaeker, and I can confirm as well that I was part of the expert conferencing and a signatory to the joint witness statement.

A. **MR ENSOR:** My full name is Timothy Allistair Deans Ensor and I was also part of the conferencing and a signatory to the JWS.

A. **MS DICEY:** Morning. My full name is Sally Anne Dicey, and I confirm that I was party to the 18th of June expert conferencing, JWS.

A. **MR WILSON:** Morning. My full name is Simon Shield Wilson and I confirm that I was a party to the JWS.

A. **MS KING:** Good Morning. I'm Alexandra Lucy King and I was also a part of the JWS on the 18th of June.

A. **MR LESLIE:** Good Morning. My name is Shaun William Leslie. I confirm that I was party to the joint witness statement on June 18th.

Q. Thank you, now looking at the front page of the joint witness statement it is clear that perhaps you are and appeared and participated in the conferencing in different capacities. Now the four witnesses on the left participated at planners in terms of that conferencing and my understanding is that the three witnesses on the right starting with Mr Wilson participated not as planners but as technical witnesses. I'd be assisted if, starting with Mr Wilson, you could explain the basis on which you were participating in the conference?

A. **MR WILSON:** So, it was as a technical witness. My team is involved in the initial rounds of compliance when it comes to working with water users, so we do the initial assessments and we'd in the context of this deal with receiving the notifications, forwarding it on if it was the Council's role to do so, etc, so I'm not part of the compliance team but I do work closely with them, so I participate in that capacity.

Q. And Mr Leslie, my understanding is you are also in that team and appeared in a similar capacity?

A. **MR LESLIE:** That's correct and in addition to that, I was pulling data from the ORC's databases to feed directly into the conferencing.

Q. And Ms King?

A. **MS KING:** Hi Alexandra King. So I was there to assess the provisions in terms of the consenting function.

Q. Thank you. Now you have prepared a joint witness statement, are there any corrections that need to be made to that statement?

A. **MR DE PELSEMAEKER:** There is one. It is a tiny typo. It is, sorry, I'm just getting to the relevant clause. It's just above the controlled activity rule. It's under the heading 10A.3 Rules, note 3. And under note 3, the second line, entry condition 7, that should probably be entry condition 8.

THE COURT: COMMISSIONER BUNTING

Q. Could you just repeat that to me?

A. **MR DE PELSEMAEKER:** Yes, absolutely. Under the heading 10A.3 Rules. There are three advisory notes, the third one on the second line, you have reference to entry condition 7, and that should be entry condition 8.

EXAMINATION CONTINUES: MR MAW

Q. And all witnesses agree that that correction should be made? And, subject to that correction, do you all confirm that the evidence that you're about to give is true and correct to the best of your knowledge and belief? For the record, all witnesses so confirmed. Now, Mr de Pelsemaeker, I understand that you have prepared a brief powerpoint presentation in – highlighting the recommendations which have arisen following this joint witness conferencing. If it would assist the Court perhaps Mr de Pelsemaeker could take the Court through –

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. Sure. Do we have written copies of, hard copies of that?

A. No. We can –

Q. It's easy enough obtained though. Okay. Right, thank you.

MR DE PELSEMAEKER:

Thank you. I'll go through it quite quickly. When we started off the expert conferencing, the planners go together in advance 'cos we had limited time and the first thing we did was actually go back to the different options that had been

discussed in the Court and look at them with a fresh set of eyes and going back through the Court records and the transcripts, we were able to identify four different options really. The first one is to do nothing scenario, which in a way the benefit of that is it's probably the simplest solution. It would keep the whole rule framework very simple and it would achieve the outcome of having a simple and cost effective process, but the cons of that is that really there is a risk that you're actually not achieving your goal of enabling existing activities to continue on the (inaudible 10:39:17) scale because abandoning the priority system might actually result in some people losing reliability of supply. The other thing as well is it might be an impact on flow regimes and, therefore, you might loose in a number of streams some high values as well. So in that regard, that option didn't really achieve two pillars of the plan change really which is like making sure you don't lose any further environmental values and allowing existing activities to continue. The second option we looked at was relying on a voluntary approach so stimulating catchment or water users to organise themselves in catchment groups and develop flow sharing agreements.

1040

That has some clear benefits, you'd allowed them to work together on a flow regime that they can all live with, from a council point of view as well, it removes some of the difficulties in terms of implementing a system that tries to replicate priority rights. The problem there is that and we've heard this through evidence as well, when people – when water users develop a flow regime, it takes seasons sometimes to trial that. So it takes a lot of time to develop it and we've heard also that you need a flow trigger – sorry a trigger to kind of instigate it. Like an incentive for people to come together. And that brings us back to the need for a minimum flow so in absence on information to kind of set those minimum flows in all the places where they are needed, that did not seem a viable option as well. Or not the best option.

The third option was to set minimum flows on the main stem of the Taieri and the Manuherikia and I believe we discussed it previously in Court as well. It would help to maintain the flow regime in the main stem but minimum flows, as I said before they don't provide much guarantees in terms of preserving flow regimes in the tributaries. Especially in the Taieri and the Manuherikia where

flow regimes can be determined by how much water is being released from a dam. Also it would mean that in a number of instances in those catchments and specially thinking about the Taieri, a lot of deemed permits have already been replaced. So you'd have to rely on a section 128 review for those consents and again, but both the second and the third option, you'd actually end up with flow regimes that everybody can agree on or that are clear and transparent. But it actually are different from the flow regime that exists now.

So, then we actually landed on the fourth option which is just to amend the policy and rule framework in plan change 7 to put an instrument in place that tries to not continue the priority rights but replicate the effect that rights of priority currently have on flow regimes. There are some drawbacks and you're probably hear from Ms King and Mr Cummings later on. It puts – for council there are significant implications, also for water users but when it comes to finding an instrument that replicates that flow regime, we came to the conclusion that that is probably the best option, so we worked on that basis as well.

So translating that option into an amended framework for plan change 7, we thought we need to amend the policy first, policy 10A.2.1 and put in it additional limb which basically says, "avoid granting consents except where on the new consents the effect of right of priority is replicated", then we it comes to the rule framework, what we arrived at was to have an entry condition and the controlled activity rule and also in the restricted discretionary rule, that basically requires the applicant to propose in his application, a condition that replicates the effect of rights of priorities. And then also we proposed to set new matters of control and discretion in those respective rules as well. We also thought it would be useful to define what a right of priority is, and we based ourselves on some of the language that is in the Water and Soil Conservation Amendment Act.

One of the other outcomes of the expert conferencing is that we also started working on draft consent conditions. The planners came up with a draft consent condition – two actually. One for the dominant consent holder and one for the subservient one, and both are different. To make or to kind of streamline the process we thought it would be a good idea to include that proposed condition

or those proposed conditions into the application form. And an example of the application form is appended to Ms King's evidence. And my understanding is also that there have been subsequent amendments proposed by Mr Cummings and Ms King as well to make those conditions more workable from a regulatory staff and an enforcement point of view. One of the other things that we looked at was the feasibility of developing a schedule that sets out the priorities to provide transparency to plan users being either people that want to apply for a new consent or consent officers processing those consent applications, and I tried to do that myself, I picked out three examples, Pig Burn, Small Burn and then also I tried to do Low Burn. And what I find was it works quite well when you are dealing with a small catchment with a limited number of deemed permits with priorities. It becomes quite time-consuming when you are trying to look at more complex catchments.

Now, that is not the biggest hurdle. I think the biggest hurdle is that in the end, it is the objective of having a schedule is to provide transparency and what I've found with trying to tackle the Low Burn is you quickly, actually get into a situations where it is very difficult to provide transparency in a written document. One of the reasons is because what I found in – it is probably not an isolated instance as well is that the priorities often, they exceed, or they go across catchment boundaries as well. For example, some of the deemed permits in the Low Burn have priorities that link back to priorities in Roaring Meg, so it becomes quite complex to kind of show that in a written or in a printed format.

The other thing as well is when I was doing schedule – trying the schedule, I use information from the consents database. When we previously discussed it, there are some inaccuracies especially when it comes to the historical information that has been put into the database, so there is a risk that you are relying on incomplete or inaccurate information and then there's me also as well trying to translate it into a schedule, the risk of human error. And when you compare that to the actual deemed permits which – or the mining privileges that often have those priorities listed on them, in the document itself, you probably have better assurances in terms of accuracy and reliability when you go straight to the original documents than to go to the schedule. And that information is

actually readily available for permit holders on their permit document. So, my experience from doing that exercise was that it's not a straight-forward process and you could actually create confusion by having a schedule that is not fully accurate and also within time, things will change quite quickly as consents get renewed or deemed permits gets renewed, so it needs to be updated very, very regularly so yes, there's that risk and I think my colleagues as well, they tried to do it as well and I think they came to a similar conclusion almost, so it's better to rely actually on the actual consent documents, in my opinion.

1050

Now I think it would be fair as well to kind of not ignore the concerns that have been raised by my colleagues as well, Ms King and Mr Cummings in their briefs of evidence. As I said before, there are implications for Council in terms of data management, enforcement role, you might as a councillor you also have the risk of getting involved in conflict mediation. There are implications for permit holders as well. it will mean for them that they might have to make sure that their water meters are telemeters which is currently not the case and not everywhere the case. Telemetry is required on the regulations but it's going to be phased in so what it means is that water users in some cases might have to fast track that process and put in telemeter water metres earlier than required. Also, depending on the option that we go for in terms of fine tuning the consent conditions, one of those suggested options clearly shows that there's a significant burden of proof on dominance consent holders that want to rely on their conditions and then finally it make it in some cases it can make the application process more complicated as well. Again that's illustrated in Ms King's evidence, especially where you're dealing where – with application processes where deemed permits are proposed to be split across different shareholders and they don't come in all at the same time or where deemed permits are with a different priority status, are proposed to be amalgamated into one consent, so, and that's where I'll leave it at that but we are all happy to take any questions.

CROSS-EXAMINATION: MR MAW

Q. Thank your Mr de Pelsemaeker. Just a point of clarification, you noted that the witnesses agree that option B, the recognising the effects of

priorities was the preferred option. Now my reading of the joint witness statement was that the planners had recommended that option, but perhaps the technical witnesses had preferred an alternative option. Have I read that correctly?

A. **MR DE PELSEMAEKER:** That's correct, yes. Yes.

Q. What I might do, I have some questions just to explore, the joint witness statement and on the way through that process I'd like to tease out perhaps some of the underlying differences between the planners and the technical witnesses to perhaps better understand the positions that each of those two groups had reached throughout the conferencing. So to start that process I'm interested to hear firstly from the planners, some further information in relation to why option B, and I'm referring to paragraph 1B in terms of the option that had been preferred, as to why that option had been preferred and I'm particularly interested in the planners addressing both the efficiency and the effectiveness of that option, so perhaps we might start by understanding when the planners were considering the efficiency of that option, what is it that they had in mind when considering that that was in their minds the most appropriate option?

A. **MR DE PELSEMAEKER:** Sorry, I'm collecting my thoughts. In terms of efficiency and effectiveness, that assessment is against the objective of the plan change and that is to transition towards a new regime promulgated under the new planning framework and as I said before, the efficiency with which that transition can occur is dependent on us not having to – or not losing ground in terms of the state of the environment and I think if we replicate the effects of rights of priorities of all the options considered, that is probably the best mechanism to ensure that those values that we're trying to protect and that we're trying not to lose during that transition period that they are actually protected or maintained.

Q. So when you're giving that answer, are you thinking about efficiency and effectiveness essentially as a concept conjointly or are you focusing just on the efficiency point in terms of the answer you've given?

A. **MR DE PELSEMAEKER:** What was conjointly, yes I would also say –

Q. So I –

A. **MR DE PELSEMAEKER:** Yes, sorry.

Q. I'm looking just to understand whether – what the considerations taken into account in relation to efficiency, we'll come back to effectiveness once we've perhaps understood the efficiency component?

A. **MR DE PELSEMAEKER:** Yes, well the efficiency component as well and that's what I wanted to add onto that, we tried to come up with a planning framework that provides a pragmatic response in terms of keeping to control the activity pathway as simple as possible as well and that it's just by putting it on the new consents that replacing permits as a standard condition and it is basically up to the dominant consent holders to enforce – not to enforce but to rely on those consent conditions.

Q. Mr Brass?

A. **MR BRASS:** I guess from my thinking in terms of efficiency, the preferred approach is probably not quite as efficient or simple as simply ignoring priorities entirely, but I would consider it to be the second most efficient in the sense that it's an existing regime which is already documented in terms of existing priorities and which consent holders are well used to operating under and from that point of view is, therefore, more efficient than the two other options which would have required developing something that wasn't yet in place, but having said that, while it was the second most efficient in my mind, the effectiveness considerations then changed my view in terms of which is the preferred.

Q. Yes and we will come back to the effectiveness. Mr Ensor, Ms Dicey, are there any additions you'd like to make in terms of efficiency of the option?

A. **MR ENSOR:** No, I concur with Mr Brass' conclusions there.

A. **MS DICEY:** I agree. I think Mr Brass has put that very, very neatly.

Q. We'll move on then to understanding the effectiveness component. I'm interested to understand what it was that the planners had in mind when they were thinking about effectiveness. So what was being taken into account and then how was that – how did the taking into account of those components contribute to the recommendation in terms of the preferred option?

A. **MR ENSOR:** I think key for me was in relation to the objectives referenced to a transition rather than a step change into a new regime, so in terms of

it being effective, it needed to, the recognition of priorities was key to transitioning through to a new regime, a new unknown regime by for want of a better term, maintaining a status quo of sorts as opposed to a – what could potentially be a step change through loss of priority where hydrology or the flow regime may change significantly from what is occurring currently. So that was a key contribution in my mind to the effectiveness of including priorities.

Q. Do any of the other planners have an addition to make in terms of what they had in their minds when considering effectiveness?

A. **MR DE PELSEMAEKER:** I agree with Mr Ensor. I would also say that one of, yes, well part of the objective of the plan changes as well to enable existing activities to continue as they currently are and it also, so carrying over or replicating the effect of rights of priorities assists in that regard as well.

THE COURT: JUDGE BORTHWICK

Q. We'll finish that line of questioning and then we'll take the morning break. So Ms Dicey, did you want to add to that?

A. **MS DICEY:** I agree with both my colleagues on that matter. I think the effectiveness was the real driver for this preferred option. It's really the only option that supports existing activities to carry on with regard to priorities and covers off the kind of, the dual concerns of the access to water retaining existing access to water plus protecting potentially some of those flow regimes and related effects from those flow regimes.

CROSS-EXAMINATION CONTINUES: MR MAW

Q. When you say the related effects, are you – do you have in mind the incidental environmental benefits?

A. **MS DICEY:** That's correct.

Q. Any other comments from any of the other planners in relation to the effectiveness? Well, perhaps we'll press pause for now and take the morning adjournment.

COURT ADJOURNS: 11.01 AM

COURT RESUMES: 11.20 AM

CROSS-EXAMINATION CONTINUES: MR MAW

Q. Now before the adjournment, we were exploring the efficiency and effectiveness of the option recommended by the planners who participated in the joint witness statement conferencing, I'd now like to explore the same subject matter with the technical witnesses who participated in the joint witness conferencing and I have my eyes on paragraph 3 of the joint witness conference where Ms King, Mr Wilson and Mr Leslie consider that option 1A is more efficient and effective and just for the record, option 1A is the option which simply results in the rights of priority ceasing to have effect on 1 October 2021. So in a similar way to the way I explored it with the planners, I'd like first to understanding what the technical witnesses had in mind when they were thinking about the efficiency of the options and how that informed their recommendation that option 1A was more efficient?

A. **MR WILSON:** I guess focusing on efficiency, and Ms King can speak from a consenting perspective, but from a compliance and enforcement perspective, we didn't consider that Option 1B would be efficient. So it wouldn't be easy to implement.

A. **MS KING:** So from a consenting perspective it's – I considered it more efficient to not include priorities because it's less information that both the applicant has to supply and their counsel then has to then consider.

Q. Mr Leslie anything different?

A. **MR LESLIE:** No not really.

Q. So the efficiency consideration was really one about the extra steps that would need to be taken both by consent applicants in preparing their applications but also with respect to the Council in processing those applications and then perhaps a third limb, the enforcement, the extra enforcement that may arise?

A. **MR WILSON:** And potentially the – depending on what the clause is read, the extra steps that the consent holders would have to jump through in order to enable that enforcement.

Q. If we move onto effectiveness, what is it that you had in mind when you were thinking about the effectiveness of the provisions?

A. **MR WILSON:** So for me it was more that I have yet to be convinced that Option B would be effective at continuing the effects of the current priorities.

A. **MS KING:** And I agree and in terms of effectively transitioning these permits for a short term I, in my opinion it's more effective that the priorities weren't included.

Q. When you were thinking about effectiveness did you have in mind the incidental environmental benefits that may accrue with the priorities coming down?

A. **MR WILSON:** I guess my take on it is that I'm not sure, and we discuss it further in the document, but whatever we put in place to replicate priorities, may not necessarily replicate the effect of the priorities as they stand today, there will be some permits that have priorities that have already been renewed and, therefore, drop out of a chain, there will be others that aren't being renewed, there may be some that currently collectively hold a priority which are then split up so it's easier for them to exercise, so I'm not convinced that – and it's getting outside of my area of expertise but I'm not convinced that you will replicate the same effects as the current priorities give you.

Q. Now before we move on from the efficiency and effectiveness assessment, you have included quite helpfully in the joint witness statement, at Appendix 1A, section 32(a)(a) analysis of the various options and there was one part that caught my eye in that assessment and I'm on page – oh the first page of the appendix and I'm looking at option 2 which is the option that has been recommended by the planners and in the box on the right-hand side there, there's reference to the risk of acting or not acting and sufficiency of information and there's reference there to or there's a statement that there is sufficient information available to understand the importance of priority rights in some catchments and it was the reference to some catchments that caught my eyes there and I was interested to understand what information you were thinking about when you were thinking about or used the phrase "sum catchment" so

how widespread in your mind is the issue that you're trying to address by the option that you've recommended?

A. **MR DE PELSEMAEKER:** I think that's the issue that we've been grappling with all along since we started this discussion, is that we have evidence that priorities are being exercised, we have evidence that in catchments or in water bodies where there are deemed permits with priorities, there are also galaxiids but they're like snapshots really, we don't have a whole overview of how widespread the problem is because it's a risk that we can't quantify. I tried to quantify it but it's really hard to do it. I think we cannot act given the significance of the values that are involved. I, personally I have tried to kind of I guess confine the scope, geographical scope of this and also I think in light of the concerns raised by my ORC colleagues as well, I think it's probably something that we need to keep alive. In the past I tried to – I talked to Ms Dicey and Ms McKeague as well trying to actually identify the catchments or the water bodies where priorities effectively being exercised but that is a very hard exercise and it is without contact every single deemed permit holder individually, you can't really speak on their behalf. Also, yes, it's a subjective matter. More recently, actually over the weekend and on Friday, I tried to explore another avenue which is to identify the catchments where galaxiids might be or where there is a high likelihood of them being and I have to say we've heard previous evidence at the start of the hearing that our knowledge as to where they are occurring they're specific distribution is not 100% complete, so we have a general feeling based on Dr Allibone's evidence, he indicated we have a general idea of their distribution, where exactly in water bodies they are, we don't know that everywhere but I think if that is definitely something that is worthwhile exploring, I actually talked to a freshwater ecologist at the ORC last week and asked him to assist me with a process of eliminating, I've got to take my notes but we did actually make a list of all the catchments in the Clutha FMU and the Taieri FMU which are the key ones where you have priorities and where you have galaxiids. Now there are also some priorities my understanding in North Otago and there might be some galaxiids there as well but what we managed to do that there was

actually narrow down the number of water bodies quite significantly. Just to give you a bit of an idea and again those numbers are very preliminary, when we look at the number of water bodies and catchments and those two FMUs, they have surface water takes on them, we've got approximately 500 water bodies divided over nearly 60 catchments. When we eliminated the ones where galaxiids do not exist or are unlikely to exist, so we only keep the ones where galaxiids have been recorded or where there is a potential that they'll be, and also we eliminated the catchments like the Lindis and I believe the Luggate as well, where the deemed permits have already been – they are still current but the replacement consents are in place, then we arrived at a list of 88 water bodies and again, approximately a dozen catchments. So it narrows it down significantly. I think there is opportunity to narrow it down even further, by eliminating catchments where there are deemed permits but none of the deemed permits have priorities or where's there's only one deemed permit where the priority left and that is not an inconceivable scenario because a lot of those little water bodies only have two or three maximum deemed permits on them. I also must say that we had very limited time, we didn't through the Taieri catchment as well, so we might be able to eliminate a number of other water bodies in that FMU. That helps us to identify where priorities can be carried over in order to safeguard in-stream values. I acknowledge that it's not a full response to the problem because in a number of catchments, the benefit of having priorities is more focussed on a water user outcome and keeping the reliability of supply.

1130

Q. In terms of the other planners and perhaps technical witnesses is there anything that you'd like to add in terms of reference to the "sum catchments" is that phrase is used in the table?

A. **MR BRASS:** And I would agree with Mr de Pelsemaeker that there will be some catchments where the issue doesn't arise but for me, the key thing was that there is sufficient information to understand that there is an issue in at least some catchments where the loss of priorities without some replication could lead to loss of quite significant values which I

guess, sort of leading into the other part of that assessment there, is that there is a risk of not acting if priorities are not replicated or managed in some way. There are values that would be at risk, as a result.

A. **MS DICEY:** Agree with Mr Brass' comments. In addition in terms of the sum catchments, one of the key ones that we heard quite a bit of evidence about I think, was the Manuherikia. And that related not just in terms of the loss of indigenous species values but also water user access to water and the potential to upset the status quo of sorts within that catchment. And that of course affects a large number of water users, I would have concerns about potentially eliminating some or only focussing on catchments with galaxiids, (a), potentially because we don't necessarily always have the information about where those populations are but also that doesn't address the water user access component of the priority system.

A. **MR ENSOR:** I just briefly comment on the "sum". For me that was recognition that we couldn't put "all" in that statement, we didn't have a level of understanding about the environment to say all. And we understood that there was enough of an issue to address it and Mr Brass has touched on that but that's why "sum" is used in my mind.

Q. Okay, I'm going to move on now to the provisions that have been recommended and to that I thought we might usefully start with the addition that's been recommended to policy 10A 2.1, it helpfully highlighted with blue shading within the joint witness statement. And the question that I have in mind is relating to the use of the word "effect" within that policy, the policy recommended starts with "The effect of any deemed permit right of priority …" and I'm interested to understand what you had in mind when you were using the "effect" in that context.

A. **MR DE PELSEMAEKER:** The effect on the flow regime.

A. **MR BRASS:** that would be my view as well. There are …

THE COURT: JUDGE BORTHWICK TO MR DE PELSEMAEKER

Q. Mr de Pelsemaeker was your response to that? Question is, what is the meaning of the word "effect" and your answer was?

A. It's the effect on the flow regime.

Q. Oh, effect on the flow. Just pause there a second, I just now want to re-read the policy with that in mind. The effect on the flow regime of any deemed permit. That's how we are to understand that policy? I've just interpolated the policy to read in, "flow regime".

A. The effect on the flow regime, that was created by the exercise of rights of priority.

Q. Yes. Right.

THE COURT: COMMISSIONER EDMONDS TO MR MAW

Q. I've got a follow on question, but you might want to go along in terms of this policy, I can put it out there and then you can decide whether that's the right time to ask it. I guess the question I have, is the policy talks about the priority regime existing at 18 March 2020, and I was having some difficulty with that date particularly when I looked at what you had in the rules.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. I would think it fair to say that there are a lot of words in there that we need to tease out. So, I think we should hear your examination and see if we eliminate some of our questions because I think we've got questions perhaps on a number of the phrases and words used, trying to understand what you are meaning here.

A. Some of them have been highlighted including that date so we will – I intend to explore that.

Q. So, perhaps if we ignore the date and just think about this policy in principle, yes.

CROSS-EXAMINATION CONTINUES: MR MAW

Q. So, yes. So, starting with and we were exploring what the effect that you had in mind was and my understanding is it's the effect of the priority regime on the flow regime.

A. **MS DICEY:** That wording I think also partly reflected a response from us to concerns raised about the fact and Dr Sommerville's legal opinion that the rights of priority will finally expire and so we're not just assuming that

they're carrying forward. So to me it was also recognising that what once existed, no longer existed put plan change 7 is trying to replicate that and the effect of that and to me it actually goes further than just a flow regime because it's again, it's about access to water as well. So they're interlinked of course. Yes.

Q. Just to tease out then a little further in your mind, the effect of the priority regime could be a very broad matter, where is, if it's the effect on the – where it's the effect of that regime on the flows with in-stream, that's a more narrow sub-set of what the priority regime in its current form achieves?

A. **MS DICEY:** I wouldn't say what I suggested was very broad, it's still around the continuing theme that we've talked about all the way through with priorities, was really two-fold; access to water and the incidental environmental effects of that.

Q. Perhaps I'll put my question a little differently. You weren't intending to bring down the current way by which the priority regime is implemented, that wasn't one of the effects you were thinking about when you used the word, "effect" in?

A. **MS DICEY:** No.

1140

Q. Now I have highlighted the date, the 18th of March 2020 and I was interested in the effect of using that date in a context of the way in which the rules work and in particular, the way in which the definition is framed up, in terms of reference to the date, "one day prior to expiry". So perhaps the first question is why is the date 18 March 2020 used in the policy?

A. **MR DE PELSEMAEKER:** The intent there was to make sure that where priorities have been abandoned to replacement of resource consent, to not revive them. So, make sure that where priorities exist, at the moment that that effect is being carried over; so it doesn't work retrospectively.

A. **MR BRASS:** There's also one other element which is that some of the applications which are currently in play, may well not be resolved until after the existing deemed permits have expired and the right of priority associated with that, has then extinguished. So this was to create to a point in time at which we could, if you like as an accounting exercise say,

"this was the right of priority that existed at that point in time and that's therefore what is to be re-created on the replacement consent".

Q. Is there a disconnect then when you look at the definition of right of priority and reference there to the date of the 30th of September 2021?

A. **MR BRASS:** The intention there, as I understand it was those dates are based on the final expiry as set in the Act. So it would ensure that the definition remains relevant post that particular date. So that's about that recognition but for accounting purposes if you like, suggesting the date of notification of the plan in terms of when priorities would be assessed from.

THE COURT: JUDGE BORTHWICK

Q. Pause there a second, I've now caught up with the purpose of the question and you're referring to the two lines following sub-clause (d) aren't you? And from the 1st of October includes priority right, it was still enforced on the 30th of September 2021?

A. **UNKNOWN MALE VOICE:** Correct.

Q. Okay so is there a disconnect from the 18th of March with the two dates there, now that I finally caught up. What was your answer again Mr Brass?

A. **MR BRASS:** So, in terms of the definition, it was to apply to, if you like the existence of the right of priority. So if somebody was still going through a consent replacement process, post 30 September, the definition would ensure that the right of priority still has an existence in terms of the definition, so it hasn't completely disappeared. And then with it having been maintained through the definition, the date that you set the allocation that you design your replacement condition on would be based on the date of notification of the plan. It may be possible to align those, I haven't turned my mind fully to that.

Q. I thought your answer to the previous question by counsel was quite clever in terms of putting the 18th of March date there was to, so that no one gets caught out, if you like, depending on which way we go on the legal issue. No one gets caught out. So you can always look back to the 18th of March, and say, yes, it's whatever those rights were as of that date. Now I'm not so sure how solid that date is but for present purposes it

doesn't matter. If you got rid of those two lines following sub-paragraph (d), what's the problem? So where ever you stand on the legal issue, whether the right falls away or doesn't fall away on the 1st of October of this year, if you can reach back in time to the 18th and say well if they had a priority then, we need to grab that or do something in relation to that.

A. **MR BRASS:** I think the concern then was that there are references to rights of priority or the effects of rights of priority elsewhere in the various proposed changes to the plan change. So, it was to ensure that for people post 30 September, that those references remained valid through the definition.

Q. Could you provide us an example?

A. **MR BRASS:** So, in controlled activity 10A 3.1.1 and over the page, "the council reserves control over the following matters". So that's a reference to the exercise of rights of priority which doesn't directly tie back to that date of notification of the plan –

Q. No I see.

A. **MR BRASS:** – so it's ensuring that that reference there and it may well be others but that's the one that I can see, oh sorry and similarly the matters of discretion in the discretionary activity. So it's to ensure that those references remain valid and are distinguished, post the 30 September.

Q. Okay, putting the dates aside, with the reference to the 18th of March 2020, what you are trying to do here is still enable a pathway through for applicants for replacement consents who have not had their application processed by the 1st of October 2020 and where the Court may make a determination that those rights from that date have ceased to effect and can't be carried over under 124. Is that right?

A. **MR BRASS:** Yes that is correct.

Q. All right well I'll keep that in mind. That's quite a clever idea but I'll keep that in mind. Not sure that you get there but good.

THE COURT: COMMISSIONER EDMONDS

Q. So, is the valid permit definition, does that have something to do with it because that does actually talk about a, in the context of chapter 10A, means a resource consent or deemed permit and then it has, "they has not expired or has expired but where the consent-holder can still exercise the permit under section 124 because one of the entry conditions is a valid permit, isn't it?

A. **MR BRASS:** That is correct in terms of the permit but I think where it also and it maybe an abundance of caution but allowing for the possibility that the right of priority may not automatically carry through with the deemed permit under section 124. So if you're in a situation where the effective legal requirements were such that you could still refer to a deemed permit under section 124 but the right of priority had been extinguished, we wanted to sort of have that date that you could tie it back to.

1150

Q. So that it remains extinguished?

A. **MR BRASS:** No, so that there is a date that you can refer to. So when you're crafting a replication of the effective of the priority. You've got, even that right of priority itself no longer exists, you can go back to a point in time and say, what was it that existed at that point in time. Now, it may be, in the normal course of event, you would simply deal with the conditions that were still in effect through section 124, but we are wanting to cover the potential that right to priority were not being carried over through section 124 and referring to Dr Sommerville's views on that matter. So, it may be that this is not required depending on where that goes, that's a legal question. From a planning perspective, we wanted to ensure that that scenario was covered.

Q. Okay, so why didn't you just make that 18th of March date a 30th of September 2021 date? In your policy. Mr Brass, I'm asking you, why didn't you do that?

A. **MR BRASS:** We actually – and I'm just turning my mind back because we had quite some discussion and iterations on that, and I'm open to if any of the planners have a better recollection –

Q. Do you not recall what your answer – your thinking was there?

A. **MR BRASS:** I wouldn't guarantee it, no.

Q. Can't guarantee to recall, okay. All right. Tom De Pelsemaeker, do you recall?

A. **MR DE PELSEMAEKER:** No, I think it was just trying to capture the situation at the point of notification.

Q. Of the plan?

A. **MR DE PELSEMAEKER:** Of the plan, yes.

Q. Was it a more sensible date to have it prior to the – the legal issue which hasn't been determined, but if it did come in against, and that's what you're trying to cover, why not the 30th of September, because at least most people will look up the legislation and go, oh, yeah, I know what that's about. The 18th of March, people might be struggling to sort of…

A. **MR DE PELSEMAEKER:** I cannot see any drawbacks from lining up the definition, or actually lining up the policy with the definition, the date and definition.

Q. Mr Ensor, do you recollect?

A. **MR ENSOR:** Nothing different in terms of the reasoning in lining it with the date of notification. I've got a nagging suspicion that there was something else, but it doesn't to seem to be – Murray might have recalled.

A. **MR BRASS:** I think part of the concern there was the converse of applications which have not resolved until post the 30th of September, as that if an application was completed and a replacement consent was being issued prior to the 30th of September, that if you referred to the 30 September date, it doesn't work because you're not yet at that date. So, if a consent was being issued in August for example, a reference back to the date of notification of the plan would be valid. A reference to the date in the future –

Q. I see, yeah, okay.

A. **MR BRASS:** – will have been expired or will have been replaced. It was that concern.

Q. Alright, Ms Dicey, you have got anything different to add?

A. **MS DICEY:** only addition was that for memory, and I'm not sure this was something I raised was that the 18th of March date was intended to kind of prevent anyone almost resurrecting a priority that had fallen by the

wayside already consent had been replaced, the priority hadn't been replaced, but it still exists on some old document, and sometime tries to resurrect it.

THE COURT ADDRESSES MR MAW (11:54:12)

CROSS-EXAMINATION CONTINUES: MR MAW

Q. I want to explore that last point just a little bit further, because I too am interested in the gap between those dates and what the implications might be, and I'm interested to know from the technical witnesses, whether deemed permits do in practice fall away or are surrendered or whether they are actually still in existence up until the 1st of October 2021.

A. **MR LESLIE:** To some extent, that depends on the consent holder. We have a number of deemed permits in our system that are still current but they have actually been replaced by a resource consent as a status, "of not yet commenced" because, well there's a variety of reasons why that happens including the fact that the applicant has made the choice that they would rather just let the deemed permit expire than having to deal with the paperwork of surrendering a resource consent.

A. **MR WILSON:** Having said that though, there are a number of deemed permits which over time have been surrendered, I think around 200, from memory, yes.

Q. Ms King, in terms of the types of conditions that have typically been applied to RMA permits issued in replacement of deemed permits, is there a condition requiring that before the new RMA permit is exercised, the deemed permit is surrendered?

A. **MS KING:** Commonly it will say either the permit needs to have expired or surrendered, it's in one condition kind of merged, yes. So it needs to have done either of those things for this new permit to commence.

Q. Right so then picking up on the point Ms Dicey was making, which was one of seeking to ensure that, I know I may have misunderstood this but you were concerned that the potential re-exercising of a permit, after the 18th of March?

A. **MS DICEY:** So wasn't so much thinking of re-exercising an expired or surrendered permit but if that permit had been replaced, whether somebody with an RMA permit, whether somebody tried to resurrect a priority when they see this hit the ground. I think it's very unlikely. Yes.

Q. So staying with the policy, do the planners consider there would be some merit in clarifying the intent or the precise meaning of what the actual effect that is seeking to be replicated is? And we talked about the flow regime, was what it was speaking to but was there, do you consider merit and actually, precisely recording that?

A. MR DE PELSEMAEKER: I personally do. I think, just thinking back on what Ms Dicey said previously, I think reference to the flow regime actually captures both, looking after in-stream values and providing a flow regime that gives sufficient certainty of supply – not sufficient but the same certainly of supply as previously.

A. **MR BRASS:** Yes I support that and also in terms of efficiency, re-created the flow regime or replicating the flow regime is a relatively straight-forward matter of fact. If there are effects on people's access to water or in-stream values, then they'd require quite a bit more effort to understand so certainly my view is that the references to the flow regime which is a straight-forward matter of fact and the other effects would then flow from that but independently, if you like.

A. **MS DICEY:** Just thinking on the hoof really but I'd be a little bit nervous potentially. Referencing the flow regime, does that then open up the need for an assessment of what the flow regime whether there actually galaxiids in that stream, whether they'll be affected by any change. I think it potentially creates yet more complexity. At its very simplest replicating the effect of priorities is simply replicating the ability of one permit holder to tell another permit holder to do something. And so my preference, on the spot, probably not to go down that path.

THE COURT: JUDGE BORTHWICK

Q. Would your answer change if instead of a flow regime, you actually refer to what it is, which is a flow sharing regime? To me the benefit to the environment is completely incidental and it's also contingent on a number

of other factors. So that's what it is, it's flow sharing as between abstractors. So would your views change if that's what the reference was?

A. **MS DICEY:** Perhaps not flow sharing because again I think the subservient doesn't see it as a sharing when they're told to simply turn off. I think the concept around sharing in the community is far more about ensuring everybody has access to some water rather than someone's got the ultimate right over somebody else. So I'd be again a little bit cautious about that wording as well. Maybe, "replicating historical access to water", wording more along those lines perhaps.

A.

CROSS-EXAMINATION CONTINUES: MR MAW

Q. When reading the policy, is there a risk that the current drafting reflects an actual regime that existed on an actual date?

A. **MS DICEY:** Sorry could you repeat that?

Q. So, looking at the drafting, is there a risk that what the policy is requiring is that the flow regime that existed on a particular date is to be replicated.

A. **MS DICEY:** Again I think I'd come back to the simplest perspective of all the effect ultimately is, is the ability of one person to tell another person to cut back on, at any given time, depending on the flow scenario.

A. **MS KING:** I think that there is a risk, that looking at that date you would need to go back in time and find out what priorities were existing then to know what the effect was at that date. If you're looking at it simply, you could read it that way.

A. **MR WILSON:** Just to add, that in order to replicate the effect, you have to replicate it on multiple permits so there's dominant and then subservient. So if one of those permits has been renewed in the meantime and you can't replicate the condition on that permit, I'm not sure how you replicate the effect.

A. **MS DICEY:** And that's where the date may be helpful, so the effect of the deemed permit situation existing as of 18th of March rather than, as existed historically in the early 1900s.

Q. And so in light of this discussion, is there some further work necessary to be more precise about what the effect is, that's coming down or to be replicated?

A. **MR DE PELSEMAEKER:** I think in terms of the risk that the current wording would trigger risk that applicants would be required to take comprehensive assessments…

THE COURT: JUDGE BORTHWICK

Q. Sorry, applicants who'd be required to undertake comprehensive was it?

A. **MR DE PELSEMAEKER:** Comprehensive assessments.

Q. Yes, on this.

CROSS-EXAMINATION CONTINUES: MR MAW

A. **MR DE PELSEMAEKER:** I think that risk is fairly limited given that you have a controlled activity and that it's fairly constrained. The benefit would be in considering applications under a non-complying pathway. It needs to be clear that the date refers to the priority regime itself and not to the effect that was occurring on that specific date. So, if that's not clear then the policy needs to be amended, specifying which effects. I think clarity is always better, really, but I don't have any words in my mind now as to how you specifically can do it. Flow regime might be too wide. Yeah.

Q. Ms Dicey's been thinking.

A. **MS DICEY:** I'm not sure it would assist. I think it would almost be better to go the other way, which is the control (inaudible 12:05:51) for two reasons. One, the first is that it is coupled with a control activity pathway as the primary pathway, and so I think that in itself will keep it simple, particularly if it's coupled with a clear application form as well, which actually just suggests the condition to the applicants. The second is that it almost would be better to go simpler rather than more complicated, from my perspective, by taking out the word "effect" and using the world in the rule, which is simply to replicate the right of priority and to leave the effect component out of it altogether.

Q. Thinking about that a little further, if you were to replicate the current right of priority, it would include the current way in which rights of priority can be exercised and enforced.

A. **MS DICEY:** I think the word "replicate" leaves enough room for the controlled activity to create something slightly different, but in essence, replicating the effect of it.

Q. At its heart, is it the thing that you are seeking to replicate is in fact the ability for a dominant permit-holder to, I'm going to say, call priority over the subservient permit holder, and everything else is incidental to that, as in, the flow regime is incidental to that option or mechanism being available, the incidental, the environmental benefit is also incidental to that, so is that the key element that needs to be replicated?

A. **MS DICEY:** Yes.

Q. So then, when we're thinking about the policy, might the policy be crafted in such a way that it focuses really clearly, that it's that element of the right of priority that is to be replicated?

A. **MS DICEY:** Yes, possibly.

THE COURT: JUDGE BORTHWICK

Q. Possibly? Yes or no? What's the possibly?

A. **MS DICEY:** Trying to think that through on my feet.

Q. Yeah.

A. **MS DICEY:** And then trying to think ahead as to what the wording might be around that.

Q. So you don't actually have to write the words, all you have to do is just really reflect on Mr Maw's questions, because it will be the same questions from the Court, which is let go of the wording of the Act, because you're kind of not reflecting what's in the act anyway, so it's going to cause confusion, I think, and let's go to the heart of what it is that you want to achieve. So your answer a couple of questions back to Mr Maw, Ms Dicey, your answer was – I think it was you – all you want to do is be able to tell your neighbour to turn off. Okay, well, that's pretty simple. I think I can put that into planning language rather than just "tell

your neighbour to turn off," but if that's at the heart of it, why don't you just say it? Why isn't that in the policy? Which, I think, is Mr Maw's question.

A. **MS DICEY:** That's a fair question.

Q. Yeah.

A. **MS DICEY:** And so my answer would be yes to Mr Maw's question, and partly to explain, well, our use or my use of the right of priority is, I think, water users in Otago are very familiar with the right of priority wording, so I think that laypeople will understand what is meant by that, so familiar words.

1210

Q. I get the benefit of familiar words, but the potential problem that you have with that answer is that people understand rights of priority, it means I can tell my neighbour or neighbours to start reducing the water cut-off, but you don't intend people to start reducing, you just intend to cut off, so already, there's a disconnect between historical practices, which are well understood within Otago, and what it is that's going on in here. Now, we need to talk about the start, you know, the reducing aspect of this, anyway, but, yeah, I don't know. So I understand the benefit of using language consistently, but this policy doesn't and you don't mean it to, so perhaps new language is required. Mr Ensor.

A. **MR ENSOR:** Look, from my understanding, the effect of any deemed permit right of priority regime was that there was only one effect in it, and it allowed a dominant party to give notice to a subservient party, but if there is some uneasiness about that word or consideration that it could be interpreted in multiple ways, then I think it's worth looking at.

Q. Well, Mr Ensor, you have concern yourself, having signed up to this joint witness statement because I understood the legal effect of a right of priority was that I could ask my neighbour to reduce or to cease, so there's two effects. Only one is contemplated by the panel of planners, so you're already in that camp of, mmm, I wonder if there could be an interpretational issue in terms of consistent usage of language and how well language is understood, you know, by the community, so you're there already.

A. **MR ENSOR:** Yeah, I accept that.

A. **MR BRASS:** Part of my concern, which I think sort of led to my view in terms of using wording along the lines of "the effects of rights of priority" was that, to an extent, a right of priority that currently exists operates as a private property right. They are expressed that way in legal terms, they are valued when people are valuing properties. That is something that the Resource Management Act cannot create, it cannot create that sort of private property right, so it was looking to find wording which expressly pulls them into a resource management issue as opposed to a private matter.

Q. But, you see, the problem with that answer is this: that you, then, in your definition used land law language of dominant and servant. Now, that is land law, and so then you immediately start to bring in this idea of ownership, and, of course, one of my questions is do we think we've got property and water now, and where does that go in terms of s 112, or 122, I've forgotten which way.

A. **MR BRASS:** Yeah, and I guess, from my point of view, that was where I was thinking the aim was to recreate the same effect in terms of the flow regimes and what that means for instream values and existing uses, but as a resource management activity, as opposed to a private property right, and I'm –

Q. Yeah, no, I appreciate that, and I think that's probably the correct approach as well, and this isn't to pour scorn or anything on anything you've done, this is your proposal, so, for my part, I will be looking to see how to make it work, but the question is what you want to work, you know, is it reducing and ceasing or is it just ceasing? Yeah, and anyway, is the value of this tool – I mean, it will be valuable for some people, but is the value of the tool that it actually sets up the flow-sharing regime anyway? That is the private agreements, and that's the value. Sorry. Plain-speaking is, I think, use plain language is what I'd encourage, yeah.

CROSS-EXAMINATION CONTINUES: MR MAW

Q. So just staying with the policy for one further question of clarification, have I understood correctly that the planners are not intending that the current enforcement mechanism relating to priorities is to be brought down? So

at the moment, there's a mechanism where a user has to head off to the High Court to seek relief if the regime or if the notice is not given effect to. I'm assuming that that's not an effect that you had in mind to be replicated. Can you perhaps clarify that?

A. **MR DE PELSEMAEKER:** Correct, that's correct.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. I couldn't understand – actually, just by the by, there's a legal issue there, because I couldn't understand why the evidence was that you'd have to go off to the High Court anyway. When I looked at s 413, it's to be enforced by the region under the normal mechanisms. I didn't follow all the way through, but I was at a loss to think why the High Court on that one.

A. Yes.

Q. Obviously, I hadn't read far enough.

A. Yes, I'll have to go back and refresh my memory.

Q. If you can come back to that, yeah. Anyway, High Court's not what's intended?

A. No.

CROSS-EXAMINATION CONTINUES: MR MAW

Q. In fact, well, the enforcement, is the enforcement mechanism intended to be different from the enforcement mechanism that currently exists?

A. **MR DE PELSEMAEKER:** That's correct, enforcement would now be undertaken by council.

Q. And so, looking at the policy, ensuring some clarity in that regard might be helpful?

A. **MR DE PELSEMAEKER:** Within the policy? I don't immediately see a need to have that in the policy, personally.

Q. Perhaps the matter, again, could be clarified by making it abundantly clear what the effect of the regime that is sought to be replicated is.

A. **MR DE PELSEMAEKER:** Yes, I think that's a better way to approach it. Just reflecting on what has been said a few minutes ago as well, I did notice that Ms King raised some concerns as well as to how the effect

might be interpreted by consents officers and whether there is risk that actually, instead of bringing down the priorities, applicants might propose a totally different mechanism, which is a residual flow, which would not do that, because priorities are exercised, you know, sporadically in most cases, whereas residual flows, they are there all the time, and so that avoids that risk as well, in my opinion.

Q. Ms Dicey, did you have anything to add just a moment ago? No? Right, I wonder whether we might move on now to the controlled activity rule, so I'm looking at VIII, so it's the blue-shaded box, which, as I understand it, is the entry condition into the controlled activity pathway. Now, I'm it'd to explore what it was you have in mind at a principal level in terms of what needs to go into the application, and then test that as against the wording that's actually been recommended. So the first part of that exercise, what is it that you're anticipating should be offered as a condition, by way of entry condition to the controlled activity pathway?

A. **MR DE PELSEMAEKER:** That was something we discussed during expert conferencing. Coming up with a proposed condition and what specifically needs to come into that or needs to be captured by the conditions for dominant and subservient ones was, again, explored with input from Mr Wilson, Ms King, and Mr Leslie.

1220

Q. Any additional explanations as to what was intended to be required?

A. **MR ENSOR:** A recognition of whether a consent holder had dominant or subservient position in terms of priority.

A. **MS DICEY:** Yeah, I agree with Mr Ensor that the application would include the list of priorities relevant to that permit, and then also the application form would include a draft condition which an applicant could simply tick, so the intent behind that thinking was really to again to focus on efficiency, make it as simple as possible for both the applicant and the Council.

Q. And so, thinking back to the discussion around the policy, is this condition driving at the ability of one permit holder to have a priority over another or alternatively a subservient permit holder agreeing that somebody else

has the right to restrict their take, that that's what this is about, it's that aspect of the priority regime.

A. **MS DICEY:** That's correct.

Q. So, when we think about that being the purpose and then we go back to the drafting of the rule, I just want to see whether that outcome is captured, because at the moment as I read the condition, towards the end it says that, "the application replicates the right of priority expressed in the deemed permit." Now, when you think about the definition that's been inserted in terms of the right of priority, is that intending to refer to the matters covered in the definition or a subset of those matters?

A. **MS DICEY:** Can I just clarify what you're focused on there, are you meaning the words, "expressed on the expiring deemed permit," whether that limits it, as opposed to the wording used in the definition, is that what you're saying?

Q. No, just starting with the words used in the definition, so the right of priority.

THE COURT: JUDGE BORTHWICK

Q. Perhaps another way of putting that is to say that the definition has a number of elements, for example, the definition says the right which enables you to instruct another person to cease or reduce their take. So, there's two of the elements, and so did you intend both those elements to be captured under the entry condition, or actually, only just some of those elements to be captured under the entry condition, is that what you were getting at?

A. **MR DE PELSEMAEKER:** So, when you refer – sorry, can I ask a question? Are you referring to – when you refer to elements, cease or reduce?

Q. Mhm. That's the example, there's other elements, yeah.

A. **MR DE PELSEMAEKER:** That was discussed –

Q. No, sorry. So, Mr Maw's question is this, Mr Maw has said, when he looks at the last part of the entry condition that says, "that replicates the right of priority expressed in the deemed permit," and then you go to the definition, and you go, well, okay, what's the right of priority, how is it

defined. It has a number of elements, two of which are cease and reduce, and we know that your evidence is you're not intending to capture reduce. So, what then are we to take out of the words, "an application that replicates the right of priority expressed in the deemed permit," when we already know you don't want to do that?

A. **MR DE PELSEMAEKER:** It is not a matter of not wanting to do it, we initially had reduced in there but reduced post-significant issues in terms of enforceability and also practically. If it is required to reduce taking then for clarity reasons it would be best that on the notice provided through the subservient permit holder, the dominant permit holder would stay by how much. Now that changes all the time because flows change all the time as well.

Q. Okay, so with that in mind, you don't in fact want to replicate the right of priority in the definition, do you?

A. **MR DE PELSEMAEKER:** No, it is –

Q. No, so that's what Mr Maw is getting at and so if that's the case, is this entry condition clear?

A. **MR DE PELSEMAEKER:** Mm, it is really the order between the permit holders that we want to bring over, not all the other aspects.

Q. Yes, and so it's about actually letting go, if you like, letting go of the legislation and saying what it is that you want to do.

A. **MR BRASS:** In this again, is difficult in terms of how you structure it but the effect of the ability to require someone to reduce would in a practical sense be carried over because of you're the subservient consent holder, you don't want to be told to switch off completely if you can avoid that. So, in a practical sense if reducing your take to half will mean there's enough water at the dominate intake point, that the condition is not triggered, then by reducing, you have operated the condition in that way but we weren't able to come up with some wording that would carry that across in a RMA enforceable context, so it's in my view, it's left sitting there as something that people are able to operate themselves, in effect but not as part of the wording of the condition because of the enforcement difficulties that Mr de Piemaker's referred to.

EXAMINATION CONTINUES: MR MAW

Q. When you look at the text in the chapeau of the right of priority definition, might that wording actually be closer to the key issue that might need to be reflected in the policy? So, this is the right allowing the holder of a permit to instruct another permit holder or holders, to cease or reduce their takes when there's insufficient water to take to meet the authorised allocation. Is that really the key issue here that's the trigger for brining these things or re-creating these things?

A. MR DE PELSEMAEKER: The definition is very much focussed on the dominant permit holder, so I think it is important that where you have the subservient one that does not hold priority, as the dominant one over another one, that it is also reflected in the policy and any other wording in the plan change framework. So, simply transferring the language, I think might not work but, yes, it's definitely food for thought.

A. **MS DICEY:** I think that is the core aspect of the right of priority, the ability of one person to tell another one to turn off or turn down or picking up what my colleague just said, or to have to turn down or turn off; is the core aspect of it, yes.

Q. Now coming back to the wording in the entry condition, that refers there replicating or replicates the right of priority expressed in the deemed permit, now when you look at the definition of "right of priority", is it the intention that you are replicating that right as that right is set out within sub-paragraphs (a) through to (d)? So, are you replicating in the context of (a), for example, the provisions of the Water and Soil Conservation Amendment Act?

A. **MS DICEY:** No you're not replicating it exactly as it existed but yes, the definition is focussed on explaining what a right of priority is.

Q. So, what is it that is to be replicated when you look at the entry condition?

A. **MR ENSOR:** It's the right of allowing the holder of a permit. The (a), (b), (c) and (d) as I understand it is to explain that the authorisation.

Q. So, I'm probably paraphrasing here, what you're seeking to do is to replicate the effect of one permit holder having an opportunity to require another permit holder to cease taking water, that's the element that is sought to be replicated?

A. **MR ENSOR:** As correct.

Q. Well I should perhaps also say, or the flipside of that in terms of a subservient permit holder.

A. **MR ENSOR:** In the inverse, yes.

Q. So then when you think about this entry condition and you think about the policy as informing perhaps what the entry condition is about, again there's perhaps a need to better capture precisely what it is that is needing to be replicated in terms of this right.

A. **MS DICEY:** Yes, I think that's probably fair.

A. **MR ENSOR:** I agree, I think we've had a reasonably lengthy discussion about this and there's enough uncertainty in the room that's it's worth looking at that again in the context of what we've been discussing around the chapeau of the definition probably is the starting point.

A. **MS DICEY:** And I'll just add to that as well and I think partly this reflects our journey with acknowledging that the rights of priority finally expire, but wanting to capture them in a point of time and carry them over but yes, it needs to be acknowledged that they're not exactly as they were back in the day. Yes.

A. **MR BRASS:** And just as part of that – part of the reasoning behind that, goes back to my earlier comment about transferring from a private property right arrangement which is where mining privileges started life to a resource management consideration and so that, certainly in my mind has been a large driver for looking for wording, the effect of, as opposed to simply one person's right over another person but I'm open to being convinced otherwise on the legalities of those terms.

THE COURT: JUDGE BORTHWICK

Q. So, you're still worried that if you just use direct language, "I've got a right to tell you to cease", sounds likes like private property and so that's language that we don't want to go in that direction. Is that what the issue is there?

A. **MR BRASS:** That was certainly my concern but if that language can be used in a way which doesn't create that issue, then I'm certainly open to using that language.

Q. Okay, mhm.

CROSS-EXAMINATION CONTINUES: MR MAW

Q. You used the word “the ability.”

A. **MR DE PELSEMAEKER:** I had similar concerns to Mr Brass. Also, we actually often went back to the definition during the expert conferencing, and the reason why we got so far away from it is because there are a few elements in there that are problematic. We talked about reduce and crease. Also, the reference to there being insufficient water as well was considered to be a hurdle from a compliance point of view as well, so that’s why we kind of strayed away from it. I think we need to be mindful if we try to go back that we’re still keeping those discussions in the back of our mind.

THE COURT: JUDGE BORTHWICK

Q. Go back where, sorry?

A. **MR DE PELSEMAEKER:** Sorry?

Q. When you say “if we go back,” you mean back in the direction of what?

A. **MR DE PELSEMAEKER:** Back in the direction of using more language that is consistent with what’s in the definition.

Q. You mean s 13 of the Water and Soil Conservation Act, or –

A. No, like, basically, you know, how we have the definition here in PC7 where it’s basically one water user telling another one to stop seizing, yeah, stop taking water.

Q. Mmm, okay, mhm.

CROSS-EXAMINATION CONTINUES: MR MAW

Q. I was going to move on to the matter of control in relation to the controlled activity, so the new matter of control, (b)(a), and I’m interested to know what was intended in relation to this matter of control. So when I read the wording there: “Any condition that replicates the effect of the exercise of the right of priority,” that’s starting to introduce a further concept in terms of the exercise of the right of priority, and I’m interested to know what it

was the group was intending to capture by referencing the effect of the exercise of the right of priority.

A. **MR ENSOR:** Perhaps I could start off with the exercise being a reference to the mechanics, I suppose, of the process, the notice, and the process around it.

Q. Is there a distinction that you're intentionally drawing between the effect of a right of priority and the effect of the exercise of the right of priority?

A. **MR ENSOR:** I don't recall there being a clear distinction. There was replication of the effect of the right of priority, and then bringing in this process element, the process around exercising that priority.

Q. Was the intention to have Ms King and her team have to enquire as to whether or not the priority was actually being exercised?

A. **MR ENSOR:** No, that wasn't the intention.

Q. So Ms King –

A. **MR ENSOR:** I'm assuming you're meaning as part of the application process.

Q. Mmm, Ms King, when you read this matter of control, is it clear to you whether you should be enquiring as to the effect of the exercise or simply the effect of the priority?

A. **MS KING:** So reading that, it looks as if I should be assessing the exercise of priority, so then undertaking an assessment of whether that had ever been done and then replicating the effect if it had been done.

Q. And having heard that response, planners, collectively, does that highlight, perhaps, a need to refine the drafting of this matter of control?

A. **MS DICEY:** I do remember some discussion about this with Ms King at the expert conferencing, and the intent wasn't for consents officers to have to assess things such as whether they had been exercised and what effect that might have on species, et cetera, so if that's – we perhaps didn't get as far as we could have, should have, with that one, so it could be refined, I think.

A. **MR ENSOR:** Yes, if that is how it may be interpreted then I agree with Ms Dicey. The intention is that the consents officer can see that there's a condition that replicates that mechanism and not go further than that.

Q. And is that again capturing what is at the heart of this issue that one consent holder can ask or has the ability to ask another consent holder to cease taking.

A. **MR ENSOR:** Yes, in the inverse, yes.

Q. So, again, if you're tracking down through the policy through to the entry condition into the matter of control that's being reserved, if that direct thread can be connected through those provisions, that would perhaps better reflect what it is you collectively had in mind.

A. **MR DE PELSEMAEKER:** Correct. Yep.

Q. I should say, it is very easy for me to ask the questions, to actually do the drafting, I appreciate there are some complexities so please don't take my questions as criticism. I'm really trying to make sure that the drafting reflects what it was that you had in mind when you were putting the words together. Now, in terms of the drafting, the same issues would presumably apply because the same phrase is used on the restricted discretionary activity, and so, if the – and perhaps you can just confirm it's the same wording in terms of the matter of discretion that's used.

A. **MR DE PELSEMAEKER:** That's correct.

MR MAW ADDRESSES THE COURT (12:42:45) – TIMETABLING

MS DIXON ADDRESSES THE COURT (12:43:25) – CONFIRMATION TO CONTINUE THROUGH LUNCH

CROSS-EXAMINATION CONTINUES: MR MAW

Q. All right, I want to explore the definition a little further and I want to just understand how some of these concepts are intended to be replicated or not, and I want to start with the distinction between ceasing or reducing a rate of take, and I just want to understand in the first instance whether the recommendation from the group collectively or perhaps there might be some alternative viewpoints, is for both elements to be replicated, so both ability to cease taking and the ability to require a reduction of taking.

A. **MR BRASS:** My recollection of the attempt there was to reflect what existing rights of priority state and that wording does have "the decease

or reduce" and what, this is perhaps highlighted is that we may need to think about how that is carried over if the new version is not exactly the same, how we capture that but I think it's important that those words are be there in terms of the definition of what an existing right of priority is because in the wording used, that is the wording used.

Q. So, you're still saying it's still important somewhere to capture what the existing rights are, as opposed to looking forward in terms of what we want to achieve on a replacement consent?

A. Yes, so understanding what the existing right is from which we then work out how we best replace or replicate that. So this was about a statement of fact about an existing right of priority on an existing deemed permit or mining privilege.

Q. Is it important to have your reflection of what you say is the existing right when it's already there in the Act, in the RMA? To be fair what you got here, I don't think actually is accurate, if it's meant to reflect the existing right, it's introducing new language which doesn't appear either in the RMA or in the Water and Soil Conservation Act, so if that's what your intention was, it's just simply looking back, historically. Why do we need to do that? Firstly, is that what your intention was?

A. That was my understanding of the intention and I'm open to any other views.

A. **MR ENSOR:** Yes that was my understanding as well. In the policies and rules, we're referring to an entity or the effect of an entity and the intention was to reflect that, historical.

Q. Okay.

EXAMINATION CONTINUES: MR MAW

Q. Want to stay on the theme of whether the concept of a reduction of take is intended to be brought through and I'm interested to understand from the planners first, how it is they envisage a notice might be given which captures a reduction?

A. MR DE PELSEMAEKER: I previously discussed it when we had expert conferencing, we had the benefit of people from the regulatory team being there and having the reference to reduction on a notice, it needs to say

how much reduction is required and that is problematic in a dynamic system.

A. **MR BRASS:** Just to expand on that, I think perhaps the underlying problem is that the existing rights of priority operate based on the dominant holders' rights, so it's the amount of water that's available at their intake and does that give them enough to meet their allocation? The problem in an RMA perspective, is it an issuing a notice to the subservient holder, that needs to specify what they need to do which needs to be at their point of operation, not at the dominant's and it's that mismatch between the two which operate as a private property right, if you like, originally but is now difficult to carry across to implement that in an RMA perspective where you're telling one person what to do but it's actually entirely driven by what's happening at different point.

1250

Q. I'm interested in anyone with any practical experience who's able to assist by explaining how this current concept of reductions actually plays out, so Ms Dicey you seem the most likely candidate; in your experience if a dominant permit holder wants to call priority on a subservient holder and they only require a reduction in take, how does it actually work?

A. **MS DICEY:** I haven't actually got personal experience of this. But my understanding is that it's often just a phone call or a text saying, "I'm not getting enough water can you turn down please" and it might be, I don't know, whether it's an amount and I don't know whether a time specified and I would imagine that it would vary significantly. There may be a reasonable understanding of what's happening at somebody else's point of take but often, yes, on the flipside I also know of situations where water users, think they know what's happening at someone else's point of take and actually through kind of the last, how many years of flow metering, those assumptions haven't always proved to be correct. So I imagine it varies considerably and it is, as Mr Brass alluded to, it's more difficult in the RMA context where you may not as the – so the dominant priority holder actually know for sure, how much somebody else may need to turn down by to get you the water that you're seeking, taking into account the

complex hydrology that we can have on a lot of these tribs, so there may be flow losses between the points of take. Yes.

Q. So, just big picture, in terms of how you see this working, if this type of an approach is adopted, is it still the view that there would be informal arrangements as between water users, will be the predominate way in which the water sharing is occurring but that the driver for that is the regulatory backstop of the ability to give a notice?

A. **MS DICEY:** Yes that's very much so how I see this working. I think that people largely carry on as they have and will be loath to get the council involved, will be loathed to actually have to follow a lot of the notice provisions and that will be a backstop, a last resort really. And for that reason, that's kind of one of the reasons with the joint witness statement, I noted the concern that I had about it, were not actually replicating if we don't include the ability to instruct a reduction rather than simply a cease but I agree with Mr Brass' comments earlier that this is the backstop; the power to issue a proper notice, to go to the regional council and to ask another permit holder to cease their take altogether is a sufficient backstop that, in the vast majority of cases people will be communicating with their neighbours to ask them to turn down or turn off as the case may be, without even issuing a formal notice and involving the regional council. And so the backstop of the regulatory involvement, enforcement will be sufficient in most cases I think, a vast majority of cases for people to comply.

A. **MR BRASS:** And just part of what has, sort of informed that understanding is that from around the table, we don't have anybody who is aware of a case where a dispute over priority under the existing regime has gone to a "court of competent jurisdiction", I think is the old wording or to council to enforce. So in practise, they have been addressed between the parties but the fact that there is a stick being held behind the back has what, given that the power to operate.

THE COURT: JUDGE BORTHWICK

Q. This is important, you Mr de Pelsemaeker you're not aware of any, I still think it's the regional council enforcing the action because I still haven't caught up with your High Court pal but anyway you're now aware of any action being taken in any court of competence jurisdiction to enforce the rights under a deemed priority?

A. **MR DE PELSEMAEKER:** Not personally aware of any.

Q. Ms King are you aware of any?

A. **MS KING:** No, I'm not aware of any.

Q. Mr Wilson?

A. **MR WILSON:** No, your Honour.

Q. No, okay. Thank you.

A. **MR LESLIE:** The best I can think of, I don't know if it was related to priorities or not, but the best I can think of is situations where the regional Council has gone out in the field to investigate complaints because there's no water left in the stream rather than there's not enough water left in the stream or where an upstream neighbour's drying out the stream.

Q. And those complaints of no water left in the stream, is that by an irrigator, or could that be by a member of the public?

A. **MR LESLIE:** I'm not really in –

Q. Not sure, okay.

A. **MR LESLIE:** – a position to speak to the details. I'm just operating of a general recollection.

CROSS-EXAMINATION CONTINUES: MR MAW

Q. Now, staying with the definition if I might. There's reference to the phrase "insufficient water," and my understanding is that that phrase has caused some questions to be asked in the context of potential compliance. So, it would be helpful if you could explain why that phrase has been used and where it is has come from. So, what was the purpose of including in this part of the definition?

A. **MR DE PELSEMAEKER:** I believe the phrase "insufficient water" comes from the Water and Soil Conservation Amendment Act.

Q. So, in a sense, all you were thinking to do, and I think you gave this answer to the Court, was pull through the existing meanings in terms of –

A. **MR DE PELSEMAEKER:** Correct.

Q. – this right of priority. You weren't seeking to draw a distinction between that underlying legislation and that which is in the definition.

A. **MR DE PELSEMAEKER:** Correct.

Q. Now, at the end of the definition, there's reference to not creating, again the phrase, "the right of priority for the purposes of section 124B(2)." I'm interested just to understand why it was considered appropriate to include that carve out.

A. **MR DE PELSEMAEKER:** I was reading over the documents yesterday evening and it was actually referred to in the notary. So, there's duplication. So, in my view that can be taken out of the definition. So, it is replicated under the heading "10A.3 rules notary."

THE COURT: JUDGE BORTHWICK

Q. What was the mischief that you were seeking to avoid by referring to the section 124(b)?

A. **MR DE PELSEMAEKER:** I have to rely on my memory, but in the Acts there is provision made for applicants applying to be basically lined up in a priority sense, first in, first served. So, it was to avoid any doubt around that, and I think that section specifically makes reference to the word "priority."

CROSS-EXAMINATION CONTINUES: MR MAW

Q. As I read, and I'm curious to the language used as between the note and the definition, the note refers to, and says that "the right of priority and the entry condition does not refer to a right of priority for the purposes of 124(b)(2)," whereas the definition notes that it does not create a right of priority, and what I was wanting to understand was whether those were two different things that were being addressed.

A. **MR DE PELSEMAEKER:** They are one in the same. In all honesty, I think the discrepancy between the two sentences is probably a reflection of the time constraints we were working under, and I agree there is

opportunity to fine tune the wording in the note as well, because it does not make reference to the ADR rule as well.

Q. So, it what you are seeking to capture here, or to refer to that you were not intending to create a right of priority –

A. **MR DE PELSEMAEKER:** To create a right of priority, yes.

Q. – for the next time round that consents get considered.

A. **MR DE PELSEMAEKER:** Correct, yep.

THE COURT: JUDGE BORTHWICK

Q. So, if that was to be retained as a note instead of part of the definition, the word "create" should be read instead of refer.

A. **MR DE PELSEMAEKER:** Yes, I think it's quite appropriate.

CROSS-EXAMINATION CONTINUES: MR MAW

Q. The final question I had about the definition was helpfully a very swift drafting issue. When I look at sub paragraph A, I wonder whether the first word of that sub paragraph which is also A, is in the wrong place and whether that should actually follow the word "I" in the chapeau.

A. **MR DE PELSEMAEKER:** That's correct.

MR MAW ADDRESSES THE COURT (13:01:53)

LEGAL DISCUSSION (13:03:25)

QUESTIONS ARISING: MS IRVING – NIL

THE COURT: JUDGE BORTHWICK TO MS WILLIAMS

Q. Ms Williams?

A. I'm not sure that the matters that I've been noting are helpfully explored with the panel today. They might be better explored specifically with Ms King and Mr Cummings.

Q. That's fine.

A. And also with Mr De Pelsemaeker when he does his evidence in reply.

THE COURT: JUDGE BORTHWICK TO MR PAGE

Q. Nobody else? Mr…

A. I do a brief line of questioning for the panel but it doesn't require Mr Ensor to be here.

Q. I require Mr Ensor to be here and listen to everything that has to be said about priorities with the exception of the enforcement and consenting regimes so we can carve him out from that.

A. I don't have any questions for the panel about the drafting of what they've produced, what I want to do is explore briefly, the implications of the do nothing option which –

Q. I think you should, yeah, ask Mr Ensor about that too. Have Mr Ensor for that question.

A. Yes, all right. Well, it's three or four minutes' worth.

Q. Yeah, sure.

A. In that case, do you want me to do that now, Ma'am?

CROSS-EXAMINATION CONTINUES: MR PAGE

Q. Could we go to the operative regional plan as on common bundle page 59? If we can keep going – that's 56, to page 59. All right, so I'm going to ask a couple of questions about the implications of policy 5.4.3 that you can see on the screen, which is, for the transcript, on common bundle page 59, and my questions are intended to explore the implications of what is being described as the do nothing option, and what I understand the do nothing option to be is not to include the carryover of rights of priority under plan change 7, and so the first question I have for the panel is, when you have the chance to read policy 5.4.3, do you agree with me that this creates, for decision-making under the operative regional plan, a requirement to consider the effects of granting consents on the existing priority regime? And I don't mind who wants to answer that question for me.

A. **MR DE PELSEMAEKER:** Yes, I recognise the policy. Actually, it was raised during the expert conferencing as well as a probably creating a link, because the difficulty that we have is that chapter 10 is a standalone chapter when it comes to replacement consents, and, yeah, that is a

policy that would or that could be taken into account when you look at new consents to take order.

Q. Yeah.

THE COURT: JUDGE BORTHWICK

Q. New consents, did you just say?

A. **MR DE PELSEMAEKER:** Sorry, consents for water takes that were not previously authorised.

CROSS-EXAMINATION CONTINUES: MR PAGE

Q. Does anybody else wish to address the point?

A. **MR BRASS:** I think it's probably just confirming what Mr de Pelsemaeker has referred to in terms of takes that are not presently authorised is that that person, as I understand it, would not come into play for controlled activities under plan change 7.

Q. Yes, and so my next question – does anybody else from the panel wish to address that before I ask my next question? No? So my question that follows from Mr Brass's answer and Mr de Pelsemaeker's answer is that if chapter 10 doesn't include a policy similar in its effect to 5.4.3, does it follow that plan change 7 would have the effect of having a different water allocation policy framework that the operative regional plan?

THE COURT: JUDGE BORTHWICK TO MR PAGE

Q. Have a different – say it again – a different what?

A. Water allocation policy framework.

Q. Just let me think about that.

CROSS-EXAMINATION CONTINUES: MR PAGE

A. **MR DE PELSEMAEKER:** The effect of going back to the do nothing scenario –

Q. Yes.

A. – would be that this element from the operative planning framework is not replicated –

Q. Yes.

A. – in plan change 10.

Q. Yes, and so –

A. In plan change 7, sorry.

Q. Yes, and so the concern about avoiding effects on existing lawful priorities, if that's not carried over into chapter 10 through plan change 7, does that then constitute a change of policy around water allocation if decisions under plan change 7 can't take into account policy 5.4.3? Ms King.

A. **MS KING:** Would that depend on the rule that it's being applied under? Under the operative plan, from my understanding, and please correct me if I'm wrong, if you are applying under the RDA rules in the plan, you wouldn't necessarily look to this policy anyway.

1310

Q. All right. Jared, can we go to common bundle page 183, please? And hopefully, when we arrive at 183, we might find the list of matters for discretion under rule 12.1.4.8. Yes, keep scrolling up, please, Jared. There we go. We're back. Can we look at the clause which is XVII? Scroll down to that, pause there. Now, I'll just give the panel a moment to read clause XVII. Ms King, is that the provision that you had in mind?

A. **MS KING:** Yes, I think, then you could assess that policy, and then I agree that it potentially might change.

Q. Yes. So is it the case that if what plan change 7 is trying to do is to carry over the status quo for a period of time, that we need some kind of mechanism, equivalent to what's in the operative regional plan, to enable priorities to be observed? Answer it if you wish, Ms King.

A. **MS DICEY:** I'm holding the mic, so I'll talk. Yes would be the simple answer.

A. **MR BRASS:** Just with the distinction that the existing policy is a matter which counsel has discretion over how to apply, the propose controlled activity, anyway, would be something that just applied automatically, so there's a shade of difference in how they apply that matter.

Q. Yes, thank you, but, so returning to where I started, if plan change 7 doesn't have a mechanism of that kind, would that actually represent a change in the way that water allocation decisions are made through the

consent process, because we are missing something that the operative regional plan already deals with.

A. **MR DE PELSEMAEKER:** It changes the way which the decisions are made, water allocation decisions are made. Whether that means a change in actual effect on the ground, potentially, or in some, at least.

Q. And is that – since you've got the microphone in your hand, Mr de Pelsemaeker – is that change deliberate, or is it simply an accident of omission?

A. **MR DE PELSEMAEKER:** It was not a deliberate decision to exclude priorities. What I can say about that is that we have not monitored the exercise of priorities, so we didn't have any good information to say they were actually being exercised. Yeah.

Q. Okay.

THE COURT: JUDGE BORTHWICK TO MR PAGE

Q. Were your questions, Mr Page, directed at, you know, the general proposition, towards a general proposition that one should – that is, consent authority – always be considering what is the effect on another water user, is it, of allowing the exercise of a permit, so whether the taking of water under a water permit should be restricted to allow the exercise of another water permit, is that a matter of general proposition or is that a matter that you're directing more towards the presence or absence of some policy mechanism for priorities? I wasn't sure where you were going, because certainly, the policy that sits above it has two arms, the existing lawful users, and it talks about priorities in the second part.

A. Well, what I'm doing, ma'am, is exploring the implications of the do nothing option, since that's still live.

Q. Okay, so we're now at do nothing, and so priorities are not even – don't have a look in.

A. But what I'm trying to explore with the panel is whether the do nothing option is actually a change of policy, because –

Q. Yeah.

A. – because the operative plan does address effects on priorities and contains a mechanism to deal with that, but plan change 7 does not.

Q. So, I'm sorry, you've just lost me a little bit. Is this with a view to saying, look, what you've got here is too difficult, let's go with something that's already written up in the operative plan, and you've referred us to a policy and a matter of discretion. Is that what this is about?

A. No, what I'm trying to tease out –

Q. Yeah.

A. – is that do nothing seems to be the easy option.

Q. Yes, I don't know, but, yeah, okay.

A. But what I'm doing is attempting to draw attention to the implications of the easy option as actually representing a change in water allocation policy that hasn't been deliberately crafted into plan change 7, it's just an accident of not dealing with the priority issue.

Q. Well, is it an issue for any party that if you have a do nothing option – now, I do know that we've got witnesses who are –

A. Yes.

Q. – saying that, but I don't understand that any party present before the Court today is advocating a do nothing option, because that may have an impact on users' reliability and an incidental or a secondary impact on the environment, particularly in relation to galaxiids. I'm missing something here, I don't know what I'm missing, sorry.

A. Well, the only reason why I'm pursuing this is because the council has a dual personality at the moment. We've got Mr de Pelsemaeker, who favours one outcome, and we've got the consent administration team –

Q. Who favours another.

A. – who, for their own reasons, favour another, and I don't know what the council's position is right at the moment, so I'm exploring the implications of either outcome.

Q. Okay, okay. So there's nothing in this plan change. Why's that? And so the proposition is that, therefore, that's a change in policy in terms of managing the effects on other water users of a replacement consent.

A. Yes, because policy 5.4.3 sits in the operative plan to address the effects of granting decision consents on priorities.

Q. Yeah, plan change 7.

A. And plan change 7 does not.

Q. Mmm, okay.

A. That's all.

Q. That's it?

A. That's it.

Q. All right.

A. So I don't have any further questions on that subject, ma'am.

1320

Q. Okay. It is an interesting question, though, in terms of what is the council's position at this hearing. I shouldn't laugh, but it's like, where is your client, but you are the client, so, you know, I actually have you in my sights, Mr Maw. So nobody pretends that any of this is easy, and if there's problems with the drafting, then the drafting, if you like, is of huge value, because then what it indicates is, well, it's not as simple as trying to replicate stuff that's already in a statute. So that's the value, it's actually, well work that one up, see how it goes, oh there's some problems yes. And so maybe then as I've reflected before we need to let go of some of that. I mean I understand that the priority system is really well understood but if this is to be carried forward and this is not an indication of the Court's thinking at all but, this is the solution that you've presented so, from my part I'm interested to see, can it be carried forward or not. So, Mr Maw has covered a number of things that I wanted to talk to you about, what is the effect that is to be replicated? Whether replicated is in fact, a useful term, I suspect it's not because you're neither replicating what is actually in the legislation nor are you replicating what's in your definition, so that's going to be problematic and quite apart from the issue of whether or not flows are to be reduced and I think your advice is not but not worry about not replicating the effect of the current rights of priority by not recording the reduction of flows. Mr Brass your evidence is, in practice this behaviour is likely to emerge or to continue to be the case because people would reduce in order to remain on longer without actually there being a direction which is to cease. So your reflecting on what is current behaviour within the – now in terms of the exercise of those consents and I didn't hear anyone had any issue with that.

A. **MR BRASS:** That is correct.

Q. And I think the important point raised by Ms Dicey is that quite apart from, the value in of all this is because it's quite a coercive mechanism that then stands behind what are existing relationships within catchments and sub-catchments to, on an informal basis manage flows as between existing permit holders. And so that's what this value is, it's not, you don't imagine that people are going to be ringing up the council and saying, "well we want enforcement actions or prosecutions". The other thing that seem to me and you're all nodding, so that seems to be correct, that's how you see the mechanism. And the other thing that struck me as being just a little odd but I suspect I know your answer to this is that one of the things to be replicated was the maximum authorised allocation as authorised by one of four things and I'm thinking, no it's not. Well, maybe you intended that. You're not looking to under the right of priority definition, am I right in thinking you are not looking to replicate the full take as currently authorised under deemed permit?

A. **MR DE PELSEMAEKER:** That is correct. Yes. And yes, I think we probably need to reflect on how that words within the definition.

Q. Yes you do. If it even survives because your maximum authorised allocation which you're driving at, is actually now, which is under the schedule it's not as "authorised by these permits" at all. Do you all agree with that? Okay. Now as I understand it but I might be mistaken in this, I don't think counsel who've made submissions in relation to deemed permits and right of priority are saying that those authorisations that you refer to in the definition under sub-paragraph (a) and (b), so these are authorisations under the Water and Soil Conservation Act and the amending Act continue to exist because they ceased on enactment of the RMA under section 366. So, that's as I understand the law and maybe your lawyers are going to tell me that that's wrong but I didn't think they took any issue with that. So, those rights ceased under section 366. Everybody agree with that? Right. And all the planners are indicating that they agreed with that. So, if that's the case then there's no utility, no value in referring to (a) and (b) in the definition. Was interested in what you meant in sub-paragraph (c) to the rights of priority. So here you've got a deemed permit that is issued under section 413 so this probably just

reflects my ignorance or lack of knowledge about the consenting regime or permitting regime. Did those permits for everybody get re-issued under section 413? Is that the case or not the case? I don't know? You think so? Because I couldn't see anything under section 413 which would have indicated that.

A. **MR LESLIE:** The short answer is no. My understanding is we essentially have three different types of deemed permits which is why I think part of the reason why there's the reference to (a), (b) and (c). So we have the mining privileges which have come through, was from the 1800s and have continued right through and are still valid under the RMA. We have the notified uses which were issued in the '70s and '80s, some of which replaced mining privileges and went on to become deemed permits. And then we have a swath of consents that were issued from the '90s through to the early 2000s where there was a, as I understand it, there was a bit of uncertainty over the implications of section 413 and so people were coming in with their mining privileges and the notified uses which had an expiry date on them, that met the requirement under section 413 but they were getting them issued as new permits which were deemed to be deemed permits under section 413.

A. **MR BRASS:** And my recollection of the distinction there being issued and granted was that, where they were issued because they were still a deemed permit that council had no discretion. It was simply an accounting exercise to reflect on paper the existing situation. Hence the use of the term "issued" whereas granted implies, accounts for that, some discretion of a matter.

Q. It maybe that the definition doesn't survives or something else comes in its place but I'm just wondering with that explanation in mind, is sub-paragraph (c) actually required if what you've got is a valid permit? If it's valid, it's valid and the idea that you are issuing something, will get people like myself going, "wonder what that's all about" and it's not really helpful if it's valid and it's a deemed permit, it's probably captured by your definition for valid permit. What you think? Yes, everybody's happy, so (a), (b), (c)s gone? Perhaps, yes because we're just dealing with valid permits, (d), now I thought that was really interesting, what is (d),

"resource consent granted in substitution of a deemed permit or mining privilege", what is that? Is that Small Burn or is that something else?

A. **MR DE PELSEMAEKER:** Small Burn and possibly something else.

Q. Okay so at least Small Burn.

A. **MR DE PELSEMAEKER:** But it would be captured as well, I think by the definition of a "valid permit".

Q. Well, if that's the case, because I don't know that we should have bespoke provisions for Smallburn who probably doesn't even know that consent is being discussed at this hearing. If it's valid and everybody agrees, and I do not recall the details of Smallburn except that something happened and instead of a new permit issuing, there seemed to be another deemed permit. Whether that was right or wrong to do that, if it's valid and there's no issue…

A. **MR DE PELSEMAEKER:** It is just a safety net, B is just a safety net to capture any irregularities -

Q. Yeah.

A. **MR DE PELSEMAEKER:** – that might have occurred in the past.

Q. I sat there, and I thought, does that actually cover all re-consented deemed permits to date, like 75% on the Taieri Catchment. No.

A. **MR DE PELSEMAEKER:** No. It is an exemption.

1330

Q. And if it could be interpreted to, if you like, allow deemed permits back, which is the very thing you don't want, you've already said you don't want to happen, then maybe you need to think about that a little more in terms of wording or think about actually does the valid permit definition actually cover this? Right. The other question that I have is the "regime" and I wondered what you meant by "regime' and whether the word "regime" was intended to colour the defined term right of priority. Regime, I thought that was interesting because, yeah… is it meant to be colouring the right of priority? Which on its face – at its minimum, rather, is at least the ability to be able to cease taking. Was it meant to colour that? Well, by colour I mean, does it mean to introduce practices that have emerged in some catchments in response to those rights? Including the entering into of

formal and informal flow sharing agreements? That's a regime, is it meant to capture that?

A. **MS DICEY:** No. –

Q. It wasn't

A. **MS DICEY:** – from my perspective it definitely wasn't meant to capture that.

Q. All right. Could it?

A. **MS DICEY:** I don't think it would but if you've thought of that then possible, yes.

Q. I did. Yeah, no, I did, because, and again, because, and it's a reflection back of the evidence that you gave from Mr Maw's questions, it's actually, what you're doing here, what you're hoping you'll achieve here is the state is getting regulatory force to a coercive instrument which in practice will be observed by people within the catchment, and it would be exceptional and at the moment, unheard of, that Council's asked to enforce. So, it may well give rise to – it may well be the basis upon which these other informal, formal flow sharing arrangements are entered into, but that's not – that may be what happens in practice, but it's not what's intended to be secured in this provision, is that correct?

A. **MS DICEY:** That's correct.

Q. Now, this again, it might be my ignorance, but it was just something how you phrased something at paragraph 6 of the JWS and you say there that the wording of the controlled activity rule was intended to exclude Council officers assessing whether or not a proposed condition was appropriate, and I was thinking, can you do that? As a consent authority, could a consent authority – okay, so, it's restricted its attention to the matter of control, but surely it can say, well, that's a wonky condition. I'm not talking about this, I'm talking generally.

A. **MS DICEY:** Yeah, I don't think you can actually a prevent a consent officer through a matter of control.

Q. Okay, and that would certainly be the case at the RDA.

A. **MS DICEY:** Yep.

Q. So, if you can't, is there anything arising out of that statement, but not allow processing officers to assess whether the condition is appropriate, because I recon they probably could, but I might be wrong.

A. **MS DICEY:** The intent behind that was to try and limit a consent officer saying, "well, there's regime of priorities in this catchment, now I need to go and understand whether that the result in flow regime has an impact on a galaxiid population and whether I should tinker with that or not." So, that was what we were driving at, to really wanting to try and limit through the wording, that occurring.

Q. So, limit through the wording any enquiry behind, if you like, the rights as between permit holders, would that be fair?

A. **MS DICEY:** Yes, that's correct.

Q. And that's perhaps what the policy was that Mr – the effect of the policy that Mr Page was referring to earlier, because that's looking at rights as between permit holders. All right.

13351335

(no overlap)

Q. One thing that did bother me about excluding the restriction – the ability to tell your neighbour to start to reduce – and again, it may be in practice, that's what folk will do anyway, but I was worried whether, if it's just straight out cessation, that you could get to very low flows more quickly than you would otherwise under a regime that says, look, people, we all ought to start to reduce, it's in our bets interests, and, if that was the case, could you, under a cessation condition, alter not only reliability as between consent holders, but the flow in the river, to the detriment of the instream values?

A. **MS DICEY:** I think by the time priorities are even a question in someone's mind, in terms of calling a priority, the rate of abstraction has already reduced, so that's typical of takes from tributaries in Otago, that through the summer months, people aren't able to access their maximum rate of take, and they're dropping anyways, and so, say, if you're just talking about two permit holders, both of them would be on vastly reduced rates of take anyways.

Q. You mean before you get to cessation?

A. **MS DICEY:** Yes.

Q. Why's that? Is that just, like, common sense and good neighbourly behaviour?

A. **MS DICEY:** That's my understanding, that there is a level of kind of working together in that folk –

Q. Yeah, okay.

A. **MS DICEY:** Yeah.

Q. So you don't think that the cessation – you think it may be in theory that you'll get to absolute low flows in terms of the dominant permit or the superior interest, but in practice, people will be on a regime where folk are gradually reducing?

A. **MS DICEY:** Yes, I think that is correct.

Q. Does everyone agree?

A. **MS DICEY:** In a lot of circumstances, I mean, again, there's always such big variety of how people action these things, so –

Q. You can't presumably rule out the odd –

A. **MS DICEY:** Yeah, yeah.

Q. – undesirable behaviour.

A. **MS DICEY:** That's right, but I do think the flows in summer are self-limiting in their nature, that they do drop off, and people do respond to that, and a lot of the time, people's systems are designed for that. Historically, they'd access water in spring and put a bigger amount of water on their paddocks in spring, and then anticipate that reduction, and I think one of the examples you heard was Mr Weir in the Pig Burn, and he'd only used it three times in 10 years, and he was down to stock water, and so he was judicious in terms of how he was using that on his neighbours, but again, yes, that's only one example.

Q. Anybody got anything else they'd like to add to that?

A. **MR DE PELSEMAEKER:** Going through the expert conferencing, I think probably all of us thought about that, like, we can only go so far in trying to maintain those flow regimes. We've had some evidence in the Court as well, I think it was Mr Hickey who said the status quo in a dynamic system is never going to be a status quo, because you'll have delay effects, there will always be changes. Ultimately, we're kind of relying on

people's behaviours, and those can change, so I think any option can only go so far.

Q. Yeah, and so the key element is that it is a dynamic system, yeah.

A. **MR DE PELSEMAEKER:** Yeah.

Q. Mr Brass.

A. **MR BRASS:** And also, for me, was being in a situation where there are uncertainties, there are variabilities, the plan change is intended to carry over until a new plan comes in, so it's really that 80/20 rule, or viewing things with a risk management lens, so accepting that, you know, we're not going to be able to craft a perfect solution, and if we could craft a perfect solution, you can implement it without requiring a whole lot more effort and activity on peoples' parts than this plan change is supposed to be triggering, so it's finding that right balance.

1340

Q. Okay, and so it was interesting that, Mr de Pelsemaeker, you raised evidence from Mr Hickey, because I'm pretty well sure it was Mr Hickey who said, look, the rights of priority and maintaining the rights of priority is not a foolproof way for saving those galaxiids, because within a dynamic system, he said – my recollection was, anyway – was that there's more going on than the exercise of the rights of the priority had to be. Flows were changing within Otago as a consequence of improvements to irrigation efficiency, moving from border dyke wild irrigation to spray irrigation, and then the subsequent throughput via groundwater/surface water into the rivers, and that was also impacting galaxiids. Does everyone recall that? And so – yes, sorry, Mr Brass.

A. **MR BRASS:** Yes, sorry, I would just add to that that even if we could lock in exactly the existing situation, for some species of galaxiid, they are in decline under that existing situation, so, as I say, even if we could lock something in, that does not automatically protect those species or those populations.

Q. So realistically, the outcome for some species may be that they, what, remain threatened or continue to what?

A. **MR BRASS:** The risk remains.

Q. The risk remains, so if they're threatened now, they'll be threatened under this system, and they may indeed become extinct, is that what you're saying?

A. **MR BRASS:** I would cross my fingers and hope not extinct, but certainly, loss of extirpation of local populations.

Q. Loss of what, sorry?

A. **MR BRASS:** Of local populations.

Q. Yeah.

A. **MR BRASS:** So for a number of those galaxiids, there are a small number of discrete and separate populations remaining, so each one of those populations that gets lost doesn't make the population go extinct but does increase the risk to the overall population.

Q. Mmm. So, in order for this transitional plan – you're recommending not only transition the right to be able to tell another to turn off, so that's one right, not only, but it's also trying to hold true – it's also important in terms of the outcomes for galaxiids that there be no further improvement which is enabled through a plan in terms of efficient irrigation systems, is that what you're saying? That no more land conversions occur without a better understanding of what the interface between land and water.

A. **MR BRASS:** That would certainly be the case in terms of the long term in terms of plan change 7 and restrictions on increasing irrigation area. I guess that's really operating as a proxy in terms of trying to manage the impacts on instream flows, so again, it's probably a risk-management approach as opposed to something that's a fully-formed regime.

Q. Mmm, and does changing land use also have an impact or potential impact on the flow regime, and therefore, on the population of galaxiids?

A. **MR BRASS:** Yes, if that changes the way that an existing consent is operated, and it's quite possible for a consent to stay within its existing limits and conditions but be operated in a different way or utilised more fully, and while it's not really a matter for plan change 7 directly, also, the potential for any downstream effects in terms of runoff, discharge, et cetera, from changes in land use. So again, as a risk management approach, minimising the amount of things that are changing in the system does at least help minimise the risk.

Q. Right, and so that's how you conceptualise this plan change. What it is is it adopts a risk management approach in terms of minimising any further changes within the environment, both the land environment, water environment, which may then have a deleterious effect on the existing populations of galaxiids, is that fair?

A. **MR BRASS:** Yes, in terms of galaxiids, that's certainly my understanding.

Q. Anybody take a different view in terms of what this plan change is endeavouring to achieve?

A. **MR DE PELSEMAEKER:** No, I agree with Mr Brass.

Q. Okay. Mr Ensor, you do too? Yeah, and Ms Dicey?

A. **MS DICEY:** In terms of trying not to worsen effects on these populations, yes, but yeah, the kind of do nothing, the push pause and allow continuing decline is the kind of background concern for me, so I'm not sure if it's achieved that, so just, yeah, yeah.

Q. And by that answer, I take it that you're not looking at option A, but what you're saying is that plan change 7 is a do nothing approach, even where rights of priority, or at least the right to tell your neighbour to cease taking, is brought forward in an effective mechanism.

A. Yeah, that's right. I was referring more to plan change 7 in an overarching sense.

Q. Yeah, yeah, yeah, yeah. Okay, all right.

MS DIXON:

(inaudible 13:46:22). I've got to ask if Mr Ensor could be excused. This is the point where he really needs to (inaudible 13:46:27) if he's going to make the plane this afternoon.

LEGAL DISCUSSION – WEATHER FOR FLIGHT (13:46:40)

COURT ADJOURNS: 1.48 PM

COURT RESUMES: 3.02 PM

THE COURT: JUDGE BORTHWICK

Q. Just a couple more questions from me. First question's this: for larger catchments where there are many deemed permits such as Manuherikia, how do you see this working out, assuming that the regime is well one regime, the controlled activity or RDA activity applies. Is that going to be difficult or easy to do with those many, many deemed permits. So that's what we given to understand.

A. **MS DICEY:** There are many deemed permits in those catchments but I'm not sure how many of those actually linked through priorities. So, say if there's 200 in the Manuherikia, there are sub-groups of linked priorities, is my understanding. So sometimes you might have a trib where there are just two that are interlinked. I haven't seen a permit with more than, maybe 10 priorities interlinked on it, that's off the top of my head but I can't recall one.

Q. So if you're thinking like the main stem of a river, say the Manuherikia or the Taieri or whatever, you're not thinking that there's going to be 100s of these interlinked permits?

A. **MS DICEY:** No, not at all.

Q. So, for something like the main stem of the Manuherikia, how many linked deemed permits with rights of priorities would there be, do you know roughly?

A. **MS DICEY:** Sorry, off the top of my head. I think there are about six within four to six within the main stem itself.

Q. Sticking with the main stem of the Manuherikia, are there also resource consents to take and use water. So you've got the old deemed permits which are trundling along but these are resource consents which are granted under the Act.

A. **MS DICEY:** To my knowledge, all of the key main stem takes from the Manuherikia are still authorised by deemed permits. There may be some outliers, some small privately-held permits and I'm not sure whether they were ever interlinked through priorities or not. So, I'm not clear on those resource consents.

Q. So this is where we're really interested in this questioning of interlinking, if at all between resource consents granted for water permits in the ordinary way under the Act and deemed permits for the same water body. Can you comment on how this works in with something like that? So, perhaps the scenario I would put to you is that, I am the downstream permit holder on a deemed permit and there's an upstream RMA consent. How does all work in together? The RMAs and the deemed permits?

A. **MS DICEY:** In a situation like that, the resource consent is either been granted, in the first instance as a water permit under the RMA, it was never subject to a deemed permit priority or it's a replacement of a deemed permit which may or may not have had an interlinking priority. In which case at its renewal, the priority would have fallen away and they're usually in those circumstances, nothing would have replaced it. There may be some informal kind of system between the parties, the two permit holders. So to my mind it really only applies to those interlinking, remaining deemed permits with priority where most of them are still remaining as deemed permits. And in the catchments I've worked to, to date, that is been a driver for them to act collectively in replacing their permits and so I think what we've seen with some that haven't yet come in is that they've held off and were going to come in as a group. So, in many of those cases where there are significant interlinking of those priorities, mostly there won't be that many permits that will have been replaced.

THE COURT: COMMISSIONER EDMONDS

Q. What if there are, intermingled or RMA permits that effectively might be taking water and then somebody with a deemed – on the priority system effectively wants to tell somebody below, although have to be above somebody with an RMA permit wouldn't it? To do something because they've got insufficient water. The cause of the insufficient might not be the deemed permit, it may be the RMA permit which there's no ability to tell the RMA permit to turn off. So what would happen in those situations? How many of them are there and what would it mean in terms of the person's ability to require that the priority arrangement be adhered?

A. **MS DICEY:** So, there are situations like that where you have some people who have replaced already and that is basically just the new status quo, as much as there is the status quo, in terms of some of those priorities may have fallen by the wayside and they either just don't get called or they can't be adhered to. Often, I would imagine that in some cases there maybe an informal arrangement or often the property itself and the infrastructure on that property will reflect, if it has been something that has been part and parcel of the regime on that tributary, then infrastructure may reflect that. The way the farm may have been developed, will reflect that and so, the setup of the takes may reflect that but basically there will be no ability for a deemed permit holder to call priority on someone, my understanding who's now holding an RMA consent.

1510

Q. **JUDGE BORTHWICK:** Would it be fair to say that for those permits which have been re-consented now under the RMA, that if that took place under the operative plan then that policy that Mr Page referred us to 5.4.3 was applied and considered at the time that the consent was decided? And in other words that the consent authority, in deciding to grant that permit did have regard to existing, I haven't got the words in front of me but the other existing lawful users including those persons who had deemed permits and with, I assume, right to priority. In other words, that policy is brought into account together with the assessment matters, Mr De Pelsemaeker.

A. **MR DE PELSEMAEKER:** I never worked in a consents base, but what I think would have, or would likely to happen is that consents officer would consider the policy, but it wouldn't actually bring down the priorities on the resource consents.

Q. No, I understood, I just need to know that it was considered, and then how that might be reflected in consent conditions, if at all.

A. **MR DE PELSEMAEKER:** Probably, if it was at all considered it would have been through the rates of takes or the volumes allocated, making sure that any downstream users would still end up sufficient water.

Q. Water. Mr Brass.

A. **MR BRASS:** But also note in my experience such consents because they've gone through the operative plan process, have been required as part of that to assess instream ecology, other users, and probably, particularly residual flows, sometimes minimum flows are applied, but I think there is a tension there within the operative plan in that you've got that policy which says to consider existing users, but you also have the policy which sets the allocation for that water body as all of the existing takes added up. So, in my experience it hasn't often been that you consent to being conditioned in a way that sort of winds that back. So, they would normally still have the ability to take without being subject to priorities in my experience.

Q. Is that because the allocation is the sum of all takes?

A. **MR BRASS:** Yep, so, therefore the water is technically available –

Q. Yeah.

A. **MR BRASS:** – you get your consent granted.

Q. All right. Ms King, what about you? What's your experience?

A. **MS KING:** Yes, I would have to agree with Mr Brass in terms of the allocation being available and then you may take in a parties as an affect a party, and you might get written from the party, or residual flows and flow sharing regimes also might be incorporated in consents.

Q. And Mr De Pelsemaeker.

A. **MR DE PELSEMAEKER:** Just one thing I want to add to that is we also have a policy in the plan, policy 642A which basically works a little bit like the schedule. So, when you have fully allocated catchments you come in for a consent. You only allocate based on historic use, except that the methodology is not spelled out. So, that again is a mechanism to make sure that the priority, is probably a bad word, but that the effect of the priority is translated into the allocated volumes and so you're not going to encroach on the allocation or water use of downstream users.

Q. Okay, Mr Ensor, did you have anything to add?

A. **MR ENSOR:** No, I didn't. thanks.

Q. All right, so, we're to understand that if there are any resource management consents out there and we understand there are resource management consents out there, that issues as to the allocation for those

consents and the interaction of the using of that allocation have relative to deemed permits have been taken into account on consenting and that's not a matter that we need to turn our minds to? Everybody's nodding. Okay.

THE COURT: COMMISSIONER EDMONDS

Q. So, when you say that, you're talking about the priorities that there are on the deemed permits also being considered as part of that? Or not? Because I wasn't clear from your answers, and perhaps Ms King could start, because the last time you appeared in front of us, Ms King, I think you said – well, what I took out of it, and this might be quite wrong, was that priorities wasn't something that you concern yourself with.

A. **MS KING:** No, it isn't currently something we concerns ourselves with.

THE COURT: JUDGE BORTHWICK

Q. I thought Mr De Pelsemaeker's answer to – reference to policy 642A, I think you said just then, was that the – was to the effect that allocation under the deemed permit was brought into account.

A. **MR DE PELSEMAEKER:** Yes.

Q. Yup, and so perhaps if maybe you respond to the commissioner's concerns.

THE COURT: COMMISSIONER EDMONDS

Q. Isn't that a different point?

A. **MR DE PELSEMAEKER:** It's a different point, and again, I'm not a consents officer, so I cannot whether priorities have deliberately been considered, but the effect of a priority would have been – is visible, so to speak, on the water taking graph. It would have ramifications in terms of the volumes or the quantities of water that are being taken under the consent audit – sorry, the permit that is supposed to be replaced. So, when it comes to renewal, policy 642A will ensure that the effect is captured and the allocations allocated under the new consent. Does that make sense?

Q. So, are we back to the trace point, then? So, that the use that all these people that may have priority rights –

A. **MR DE PELSEMAEKER:** Yeah.

Q. – and may or may not have exercised them. When the consents people looking, they're going back to the trace to see what was actually being used at various times, various conditions –

A. **MR DE PELSEMAEKER:** I'm not sure if –

Q. – hydrological conditions, et cetera.

A. **MR DE PELSEMAEKER:** Yeah, I'm not sure if they will actively look at that. I think, I'll let Ms King speak.

Q. Yeah, yeah.

A. **MS KING:** So, no, we don't actively look at what priorities were being exercised and how they were being used, but we do look at things like downstream users and what flow they were taking, and that helps us under 642A to allocate the water back to them, which if priorities were being used would help us make that determination, but we don't specifically look to see whether the priorities were being exercised.

Q. Right, so you're looking at the records of what they have been taking.

A. **MS KING:** Yes, yep.

THE COURT: JUDGE BORTHWICK

Q. Mr Leslie.

A. **MR LESLIE:** Just in addition to what Alex was saying, that's part of where the analysis that I perform on water use patterns comes into it, is if there are any certain patterns in the work that I do, I will rely that to the consents team so that they can take that into account.

THE COURT: COMMISSIONER EDMONDS

Q. But you don't go looking to find out whether that was as a result of people's priorities. You just take it as you see it in terms of the record?

A. **MR LESLIE:** yes.

Q. Thank you.

A. **MS DICEY:** Just picking up on what Mr De Pelsemaeker was saying about looking at the allocation, and I think that does take you so far in

understanding people's access including potentially to some extent, priorities and how they may have been called on you or you may have called them, but it only goes so far because it doesn't necessarily reflect the timing. So, it's a total amount, or the maximum grate, but not the timing at which you've accessed the water which can be the critical component of priorities. So, when flows are low, you get to call priority and access flows. I think – it has been, in my experience, it has been quite a hands off approach by the Council and that possibly reflects the history of priorities in terms of leaving it to priority right holders to deal with amongst themselves, and that's almost reflected in the re-consenting, and we've actually, as their consultants worked with them to understand if the priories are important to them and if they are, then how does the effect of them get recognised going forward, and again, as I said, that's often been at a catchment scale, or sub-catchment based scale, and if they are important within that catchment, people have come together, worked together, and through the full assessment, have developed something else together.

1520

Q. All right. Anybody else like to answer? Mr Brass.

A. **MR BRASS:** For completeness, note that there is an element of a priority remains in the sense that most recourse consents will be subject to a minimum flow or a residual flow. They have to switch off at that point. Deemed permits don't. So, they have the ability to continue. So, while they can't call priority on resource consents, they do get to keep taking water after resource consents have had to switch off under low-flow circumstances.

A. **MR DE PELSEMAEKER:** I acknowledge that but the deemed permit catchments, if I can call them that. Catchments that are dominated by deemed permits, they might have minimum flows on them but they are not effective yet. So the effects of those minimum flows wouldn't have kicked in yet. So they would all be deemed permits as well as consents, would not be held to any minimum flows in those catchments and as because another policy in the plan, that basically says, "they're only kick in 2021, on the expiry of deemed permits unless all the consent holders

in that catchment commit to implementing that minimum flow earlier", which I don't think has happened.

Q. No. For the purpose of this discussion, the deemed permit catchments are which catchments in schedule 2A? So Manuherikia, presumably is one?

A. **MR DE PELSEMAEKER:** Manuherikia, Taieri, Luggate, Kakanui, I think there's a deemed permit on the Kakanui.

Q. Kakanui.

A. **MR DE PELSEMAEKER:** Yes, Lindis which is not yet but soon to be in the schedule hopefully. Have I forgotten any?

Q. Arrow?

A. **MR DE PELSEMAEKER:** Arrow is not yet in the schedule.

Q. Not in the schedule and what about Cardrona?

A. **MR DE PELSEMAEKER:** Not yet in the schedule.

Q. All right, so penultimate question and this is one I asked the lawyers but obviously didn't like it, so I'm going to ask you instead which is, if there's a vires issue, a legal issue that we have to consider generally with what you've proposed because what you're proposing is a condition that givens the dominant consent holder the right to tell somebody to turn off. I asked the lawyers could the vires issue, if there is one be overcome by requiring this could actually been our part of policy, requiring the applicant to obtain neighbours' approval and the neighbours' approval to be given for the application, on the terms sought. So that's really important. It's for that application, on the terms sought; so it's not conditional to anything. What do you think, if there's a vires issue there and I think there is potentially, could that overcome that, that's I guess in part, a legal question, in part a planning question. So the policy is, whatever the policy is but it has that as a component and an application has been lodged together with the approvals or affected party approvals.

A. **MS DICEY:** Just to make sure I've understood you correctly, the workaround could be, if there is a vires issue, the workaround that you're suggesting is, so two permit holders, the dominant, subservient, the dominant has to obtain, the subservient…

Q. Approval for the application on the terms sought.

A. **MS DICEY:** On the terms. So the condition be applied against this subservient.

Q. But the subservient has actually agreed to it.

A. **MS DICEY:** Yes. I had contemplated something like that so almost a, whether it's a simple written approval as part of their application. I guess the potential stumbling block is that the subservient says, "no I don't like the idea of you carrying on your priority" and then almost pulling all of that group of priority holders down the non-complying pathway.

Q. Yes. Well there's no doubt you could get a rouge applicant but is the answer to that and this is the second part of the question for a subservient permit holder, that they too are obliged to get the approval of the dominant together with any servient, so that everybody is being held to obtaining approvals for applications on the terms sought and no one's going rogue if you like.

A. **MS DICEY:** And perhaps, it's the 80/20 rule again. It might be even be a 90/10 rule and we did talk about those kinds of things quite a lot at the conferencing. I think that could be effective and I think that's actually very close to them "I will agree to this condition" but it's just taking a step further and getting the other priority holders within your subset to also make that clear that they've agreed. Yes.

Q. Agree.

A. **MS DICEY:** It's only a small step further.

Q. Mr Ensor, you happy with that?

A. **MR ENSOR:** On the face of it, that would seem like an option. It might also be an opportunity to alleviate some of the concerns raised by ORC technical folk in terms of contact details and all those sorts of things, it would potentially provide a vehicle as it were.

Q. Yes. We've got to talk about that with Ms King and so, I saw it, either coming in the policy or coming in the entry conditions for the RDA or for the controlled, do you want to comment on that? It has to have some real force behind it.

A. **MR ENSOR:** I initially jumped to mind as being an entry condition. –

Q. An entry condition to.

A. **MR ENSOR:** – the policy can be more general about the priority issue.

A. **MR DE PELSEMAEKER:** I agree with what Ms Dicey and Mr Ensor said. Yes, I'm just, kind of sink, let it sink in.

Q. Okay, come back to you.

A. **MR BRASS:** I think it could be made to work but I would probably still have a preference if the use – essentially the applicant volunteers that condition as part of their application, be it through a tick box or whatever. If that can be constructed in a way that it deals with the vires issue I think that would be simpler.

Q. Yes this is to deal with the vires issue. My gut is that there is a vires issue and so what are you saying there? So, I would assume that every, the entry condition, if it's an entry condition, the entry condition is under the application. The applicant wouldn't be volunteering this as a condition. The applicant would be obtaining neighbours' approval to the application on the terms sought and that would be – I'm suggesting that it's not just the dominant obtaining neighbours' approval from the subservient but if you're also subservient then you're going back upstream to the dominant or downstream to the dominant, or actually whatever direction it goes. And looking at other subservients, that's what I'm suggesting so that everybody in that little water body or long water body's caught. Thoughts? Do you want to think about if further? How did you see it?

A. **MR BRASS:** My concern is that is adding a moderate amount of complexity to the process. If that was required to deal with the vires issue…

Q. Might be also required to deal with the rogue subservient permit holder.

A. **MR BRASS:** Yes I consider that that rogue situation could be dealt with under the plan and enforcement proceedings as per normal.

Q. Now this is where your neighbour says, "I'm not going to give neighbours' approval for you to turn off my water. I am not."

A. **MR BRASS:** Yes that only arises if that neighbours' approval is required. If the consent as the plan is currently structured doesn't require that neighbours' approval, then that rogue doesn't actually become an issue.

1530

Q. But is that right though because isn't the reason to bring this issue up, in raising this issue, it is because there is a potential for the flow regime to

change and access to water to change hence people's hither to reliability of supply changes. So how can you say that people would not be affected by that. I mean, on that understanding, people might rightly say, at the 1st of October, there will be significant effects if there's not a policy response.

A. **MR BRASS:** Yes, and sorry I certainly was not intending to say that there wouldn't be an effect on parties. My thinking is more that, in terms of dealing with the vires issue. If the vires issue can be done by constructing the application in a way where the applicant has volunteered that condition without requiring a written approval process, then that would be a simpler way of addressing it, but I have to defer to the lawyers if agreeing to that condition is part of your controlled activity as opposed to a non-complying. Whether that counts as having volunteered the condition sufficiently to address the vires issues, I'm not sure.

Q. Okay. All right –

A. **MR BRASS:** But if that was possible, that would be my preferred approach.

Q. To do what I've suggested, or to not do anything and just deal with it by the application?

A. **MR BRASS:** To just deal with it via the application for the sake of simplicity.

Q. Ms King, have you got any comments?

A. **MS KING:** Yeah, I do agree with Mr Brass in terms of whether there is the ability to word the application in a way that the applicant would not only propose the conditions on their own consent, but any conditions that would mean that someone had dominance over their consent could also be applied, and I wonder if that's a way around that issue. I probably couldn't comment on how easy it might be for an applicant to get written approval from someone prior, if that makes sense, and I agree with Mr Ensor in terms of it being an entry condition rather than a…

Q. Policy.

A. **MS KING:** Policy.

Q. But you don't think an entry condition is necessarily required? Is that what you're saying?

A. **MS KING:** I think if it was in the application form –

Q. Yeah.

A. **MS KING:** - where they had proposed it, but my only concern with that is if it's not an entry condition and they don't tick the box –

Q. Yeah.

A. **MS KING:** - you get yourself into a bit of a tricky situation.

Q. So then –

A. **MS KING:** So, then it would be –

Q. – on balance, an entry condition.

A. **MS KING:** Yes.

Q. Okay. All right. Anybody else want to comment?

A. **MS DICEY:** I do agree with Mr Brass, and perhaps it's simply that as a subservient deemed priority holder, by ticking the box saying you will agree to the condition, then you're inherently giving your written approval for somebody else to call priority over you. So, perhaps that actually…

Q. So, you're thinking this more applies to anybody who's in that category of being subservient.

A. **MS DICEY:** Well, it's less of an issue for the dominant permanent holder, because they are the one that'll be giving the instruction –

Q. Yeah, yeah.

A. **MS DICEY:** – so, they're not losing out. So, it's really about the subservient priority holders being told to give up their access by another permit holder to water, but by ticking the condition saying, yep, I agree to this condition, then they're effectively giving their written approval for that dominant person to call priority over them, and that's what the condition is doing, is allowing someone to do that over them.

Q. As written or to be tweaked?

A. **MS DICEY:** As written, with maybe some of the tweaks suggested.

Q. All right. Mr De Pelsemaeker.

A. **MR DE PELSEMAEKER:** Yeah, I agree with Ms Dicey. It's good to have the condition in the application and written approval on the terms of that application means that they agree to that condition. It also avoids the issue that written approval is being given, but it results in a flow sharing

mechanism that is agreed by everybody but is different from the priority users.

Q. So, if they don't tick the box, then what?

A. **MR DE PELSEMAEKER:** I'm not familiar with the mechanics of consenting enough.

Q. Okay. Non-compliant?

A. **MR DE PELSEMAEKER:** Non-compliant. Yeah.

Q. Okay. Think about that.

A. **MR DE PELSEMAEKER:** If it's in the entry condition, it would be yes.

Q. Yeah. But I think on balance you're not suggesting any amendment to the entry condition? Or are you?

A. **MR DE PELSEMAEKER:** Not substantial –

Q. No, no, on this specific issue.

A. **MR BRASS:** No, no, yeah.

Q. No, okay, got it, all right, and then the last question was it seemed to me that, by now, hopefully, anybody who was wanting to seek a replacement consent, particularly for those consents expiring on the 1st of October, will have got their application in. If you wished to take advantage of either the controlled route or the RDA route, you are going to have to amend those applications substantially, and everybody's agreeing to that? Yeah, so we can't assume that – well, one of the issues raised by you, Ms King, is what if you've got an applicant that's turned up, and, well, people who are the beneficiaries of a deemed permit who are wanting to slice and dice the deemed permit, you know, amongst the shareholders of a race, which, I think, is an example that you might have given us, then what are you meant to do with that? And the answer is I don't think this process contemplates those applications. They might have to, if they want their water for the next six years, under a controlled activity rule, they're going to have to amend that application and bring it back in line with the original permit. Would that be fair?

A. **MR WILSON:** There may still be the issue, though, with one of the downstream permits is looking to slice and dice, so would you then require them to amend their application as well?

Q. I would have thought the answer to that is if everybody wants to take advantage of this, then yes, is my thought. I can't see how you can do it otherwise. Ms Dicey?

A. **MS DICEY:** I don't think there's going to be a lot of slicing and dicing of anything under PC7. I think my understanding is that everything will just go on hold, and there will be a substantial reconfiguration of applications and basically going through the application form to realign the applications with the controlled activity or the RDA. Yeah.

Q. So this is really important. Does anyone see it any differently from Ms Dicey?

A. **MS KING:** It's kind of tricky to comment on what applicants are going to potentially do.

Q. To do, yeah.

A. **MS KING:** I am aware that a few applicants have been in the system for a really long time, and I don't know how open they would be to amending their application that significantly, but again, I can't really comment on what applicants might or may not do. I am aware that, where applicants have applied separately from shareholders, like you mentioned earlier, it is sometimes based on the fact that those relationships aren't the best.

Q. Happy?

A. **MS KING:** Yes, and so I don't know whether this will hinder that or create a pathway that they actually do end up applying together. It's quite hard to say how it will go.

A. **MS DICEY:** I just add to that, the applicants that I have been working with, I think they feel that if PC7 becomes operative in the form that it currently is, with the noncomplying activity pathway basically a closed door to them, they feel like they have no choice but to significantly alter their applications, yeah.

A. **MR ENSOR:** Just thinking a little bit about the entry condition versus just a tick box, I guess, and I'd have to give this more thought, probably, but having an entry condition, in a way, allows for some flexibility in the form that come –

Q. That it comes in?

A. **MR ENSOR:** – that these come in, and whether there was a slicing and dicing, then you might be able to achieve the objective without ticking the box. You'd have a very similar condition, for example.

Q. Mhm, so what's your scenario there, sorry?

A. **MR ENSOR:** I'm thinking if there was a number of shareholders on a race, for example, and their permits were coming in separately, there might be an opportunity for something slightly bespoke, if the written approval is provided, rather than just relying on a standard tick box.

Q. Yeah.

A. **MR ENSOR:** Yeah, early thoughts, obviously.

1540

Q. That's a good thought, though, because one of the things that worried me about something that you said, Ms King, was, well, folk might have been doing things their own way or going their own way for the last 30 years under deemed permits. Perhaps changing the point of take, perhaps – that was one of the things I know you did actually mention, changing the point of take, they may well be, have – there were other things that you mentioned as well, which the region may not be across, and so you get these applications in for the first time, and it's like – again, part of the answer to that is under the controlled and RDA, well, people might have to be substantially amending – they may have to be doing 136 applications. I don't know, but we can talk about that later. So those are my questions, anyway. Ms Commissioner, have you got any questions?

THE COURT: COMMISSIONER EDMONDS

Q. Well, I just wondered about transfers. How are transfers dealt with in terms of this new rule framework?

A. **MR DE PELSEMAEKER:** Actually, I started thinking about it after reading Ms King's evidence, and maybe that's a little bit too late, I admit that. Ms King basically set out two scenarios, or a mixture of two scenarios, whereby you have transfers of shareholdership, if I can call it that, which makes the process more complicated, more complex, but it doesn't seem unsurmountable, in terms of you might still be able to achieve the outcome that you look for. The other one is the transfer or point of take,

but I take Ms Dicey's comment, a lot of people, a transfer of point of take will often by accompanied by an investment in new intake infrastructure and irrigation infrastructure. A six-year permit is probably going to be discouraging that. However, I'll be honest, I did think over the weekend, like, does there need to be, in the controlled activity rule, a mechanism that, yeah, basically addresses that risk that there still is going to be a transfer of a point of take. Where that is coupled to a priority, you might have totally different outcomes.

Q. And so what are you suggesting then? How might you deal with that problem? Might it be an RD sort of thing?

A. **MR DE PELSEMAEKER:** It might be, and it might be in the controlled activity that you put in it. I'm just thinking out of the top of my head now, that there, yeah, that you try to consolidate the current point of take within the controlled activity, and if you don't meet that, go to an RD, but that is, yeah, listened, just off the top of my head now.

Q. So would there be quite a number of examples of these points of take that have never been regularised on the deemed permits, would there?

A. **MR DE PELSEMAEKER:** Sorry, been?

Q. Would there be quite a number of deemed permits where the point of take actually differs from what was authorised. A lot of people might have bothered to fix it up on the basis that, well, hey, we've got to do something about this sometime, in 30 years or whatever, anyway.

A. **MR DE PELSEMAEKER:** I recall some of the evidence that was suggested as well that the point of take is often not – I think it was the evidence of Mr Cummings – that point of take is often not properly aligned with what is on the consent or on the permit itself. Yeah. That is to be addressed, I guess, through regular auditing of those permits.

Q. So, I'm sorry, I'm a little lost as to what you think. I mean, if this is an issue, how might it be dealt with?

A. **MR DE PELSEMAEKER:** Yeah, I don't know how big the issue is, and, again, it comes down to risk management, I guess. I don't know how – like I said, I don't know how many people are intending to change the point of take. Is it worthwhile putting something in the controlled activity or in the rule framework to address that? It depends how big the risk is,

because, by doing that, you might actually constrain people as well, or disincentivise that pathway.

Q. So if you're forced down the noncomplying route, which you could be, what's it likely to mean on the noncomplying activity route if things are pretty neutral all around in terms of effects, for example?

A. Well, under the noncomplying activity rule, you could consider the effects of the change of the point of take and what it means for the environment. There, you have that opportunity –

Q. I was just thinking, if you wanted to follow all the other entry things, but say, well, we can't do this one, but actually, really, it's pretty neutral in terms of the other controlled activity sort of things that you worry about and the effects, then you'd presumably get your noncomplying activity relatively simply, would you? No, a risk factor?

THE COURT: JUDGE BORTHWICK

Q. I guess my concern was more what Mr Cummings might have been talking about, that you hadn't done on audit – not you, personally – but ORC has not audited these takes, and that there have been changes happening over the last 30 years which should, you know, permit holders should have sought permission from the regional council to amend permits, like amending the point of take, or transferring to another person or whatever, you know, Mr Cummings talks about, and so your database is a bit out of date, but then whose problem is that? It's ORC's problem. It's got a duty to –

A. **MR DE PELSEMAEKER:** It is, and I think in the last couple of years as well, we have done – again, Mr Cummings, later on, might be better placed to comment on that, but we've gone through catchments, I believe two years ago. We did the entire Manuherikia to audit water-metering data, and I think the same happened with the Cardrona not so long ago, so that has been done, but there are still, I believe, a number of irregularities.

Q. Right, so the question is whether those irregularities trip up this plan change.

A. **MR DE PELSEMAEKER:** Well, yeah, and I don't think that the discrepancy between where the point of take is on the consent and where the point of take in reality is not that big that it will trip up the plan change. What could trip up the mechanism that we are trying to put in place is people actively seek to change the point of take.

THE COURT: COMMISSIONER EDMONDS

Q. All right, so does that mean, then, that you're thinking that it mightn't be a desirable thing, then to have an easier pathway for an alternative point of take? On balance, is that when you've arrived?

A. **MR DE PELSEMAEKER:** In easier pathway, yes but not such that it encourages them also, if you simply allow for it under the controlled activity rule that could actually hinder you to achieve your outcomes which is to keep that flow regime going.

Q. Right so that's the control, that's something like RD?

A. **MR DE PELSEMAEKER:** Yes, if you can take the effect of that into consideration then the RDA could be a possible way to address that.

A. **MR ENSOR:** I was wanting to maybe comment on the irregularities between the point of take on paper and on the ground and I suppose it's probably another risk-based discussion as to how, if what we're trying to do here is reflect what's been happening rather than what's been on paper and then maybe the risk is a little more acceptable because of it's been wrong for 30 years that's what the environment is.

Q. Yes understood. Mr Leslie?

A. **MR LESLIE:** At the risk of being corrected by Mr Cummings tomorrow, my experience is that the majority of the discrepancies between what that paper says where the point of take is and where it actually is, are down to the fact that the deemed permits that have been re-issued or recorded by the regional council record the location spatially as a grid reference which is saying it's, somewhere in this 100-metre by this 100-metre square which creates difficulties when you're trying to talk about a specific point, and you might even have multiple waterways in the same grid reference.

1550

Q. Okay.

A. **MR WILSON:** I was just going to add that where metering is in place there is a process to capture the location of that metre as well, not saying that means there's not anomalies out there or differences between that and the paper but we do have information on where the abstraction point is supposed to be and a process for exemptions where the metering is different from the abstraction point.

THE COURT: COMMISSIONER EDMONDS

Q. I have just one last one, because I didn't feel that I got a full answer to my earlier question which was the position where you might have an RMA permit which has got conditions and things on it, and then down below that you've got someone with a priority one and they want to call time on somebody higher up because they're not getting enough water, and it may be the reason they're not getting enough water is because the RMA permit is able to take it all. So, I guess my question is then, well, how is it reasonable to call time on somebody higher up in terms of your insufficient water lower down when actually it's an RMA permit that's causing that problem for you.

A. **MS DICEY:** So, just to understand and make sure I've understood you correctly. Priority two, upstream, RMA permit in the middle –

Q. Yeah.

A. **MS DICEY:** - and then priority one downstream. So, that might well be a situation in reality. The other example equally the same, or different, but equally the same effect is priority two up above, priority one down below with the drying reach in between, or drying reach somewhere between the two, yeah. Those are the instances, and there are many of them, where the priorities probably didn't get called and didn't get utilised. So, they've sat there, may have got called at some time in the distance past, but when the RMA permit came on stream, then maybe the priority just went by the wayside. Equally with the drying reach, maybe there was no point in calling because the water still won't turn up at the higher water priorities, winner take. So, there are lots of instances where priorities exist, but for whatever reason, they practically don't have effect.

Q. But what's to stop the person calling time on it?

A. **MS DICEY:** Historically?

Q. No, I'm not worried about historically, I'm looking at what might happen under a future regime.

A. **MS DICEY:** So, I guess the two link in my mind. Historically there has been nothing to stop them. In the future there will be nothing to stop them besides the social cohesion of rural communities, really, and again, I think it would be a very unusual situation with potentially significant social ramifications in some of these small communities.

Q. Okay. Thank you.

A. **MR WILSON:** I was just going to add. I think that's a very good questions and it's one of the problems that I have with carrying the priority system forward, and I think there's a sort of next level of that where you may have three in a row, and the one in the middle previously might have been the deemed permit that was in the priority scheme, and has now turned into an RMA Permit and dropped off, which puts more pressure on the priority at the top, cause the person at the bottom used to be able to call priority over two permits, and now only has one they can exercise over.

Q. Thank you.

THE COURT: JUDGE BORTHWICK

Q. Okay, and I apologise, I didn't actually read properly your serving right of priority consent holder condition, which I see why you're saying on receipt that the subservient consent order is agreeing to turn off upon notice. So, have read that properly now. I guess the question still remains, should that be conditioned up as an entry condition? Think about your responses, Mr Ensor, you are free to go. Right, and then we're just, I think, turning to your balance. If anyone's got any questions rising from the Court's questions? No, okay, and then turning to your balance of your questions, Mr Maw. So, we'll just let time for Mr Ensor to slip away.

CROSS-EXAMINATION CONTINUES: MR MAW

Q. I just wanted to pick up on this issue over the transfer of the point of take, and it occurred to me whether we might be conflating two separate things

into one application, and whether the correct way to think about the – well, the correct way to think about addressing this issue where the point of take has changed is that that may require a separate application to change the point of take, and following the mechanism under section 136 of the Act, but that wouldn't necessary get in the way of dealing with the replacement of the permit under the provisions recommended for plan change seven. So, I'm just interested in whether perhaps I've understood that correct. I'm looking at Ms King in terms of how you process that type of application.

A. **MS KING:** Yes, you have understood that correct. It would probably be easier for the applicant to apply for a section 136 separate to their application as you've said. I do agree with Mr Ensor in terms of the risk potentially being low if it's the difference between the paper, location and the actual on the ground location, because obviously that's been status quo for a while. My biggest concern is where someone applies to transfer a point of take, it might remove them out of where their current priority position is, them disrupting the entire priority regime, for lack of a better word, within that stretch of the river.

Q. So, then when you're thinking about how you might process that application and you're following a prescribed process in section 136, you'd be then turning your mind to the effects of the proposed transfer and the effect that might have on upsetting the, call it the apple car, upsetting the regime in terms of access to water.

A. **MS KING:** Yes, you would.

Q. Now, turning back to the joint witness statement, and there was a comment at paragraph 14, Mr Wilson and Mr Leslie noting or expressing a view that 15:58:13 would be required to properly enforce the conditions. Now, I am – I'll put that out there for you to answer if you're able to, but I'm interested to understand what the issue there was, or it may well be that's an issue that Cummings can usefully address when he's called.

A. **MR WILSON:** It's just around the Council's ability to monitor these things and have the information to check. So, if we receive a complaint saying, I've issued a notice telling someone to cease, we need to have information to see whether they've ceased or not and the easiest way to

do that is to look at their abstraction records, and the easiest way is to have those coming in on a daily basis. So, have the information already in front of us.

Q. Okay. No, I understand that. All right. Moving on to the part of the statement that begins at paragraph 20, and here the three technical witnesses have expressed some of their concerns in relation to issues arising from carrying over the priorities, and I was interested to explore those a little if I might. Now, the first one I wanted to understand further was the point being made at paragraph 22, and there there's reference reducing the certainty of supply that they had under the deemed permit property priority regime, and I just didn't quite understand the point that was being made there. So, I wonder whether you could explain that a little further.

A. **MS KING:** So, the point Mr Wilson and I are explaining there is that if there is a deemed permit which did have priority which has already been replaced and that priority rank has been taken out of the system then the lower rank now has less surety of supply because the dominant priority holder may – prior it had two consents to potentially, ask to switch off, now it's only got one. So the surety of supply for that one user might be less.

1600

Q. And that a situation Mr Wilson was describing a moment or two ago?

A. **MR WILSON:** Correct.

Q. Now when you think about that situation, isn't the reality that that does reflect the status quo now is there is an RMA permit in the middle of the two?

A. **MR WILSON:** I think it reflects the status quo today. Depends I guess where you draw that status quo line and also I guess potentially the permit that has been renewed may still be a current deemed permit which is just going to expire in three months but there's priorities on it today that won't be there in three months.

THE COURT: JUDGE BORTHWICK

Q. Sorry I didn't understand the last part of that.

A. **MR WILSON:** We have a number of current deemed permits that have already been replaced but not surrendered. So there is priorities on that current deemed permit but the replacement's already been issued so today, there are priorities but from the 2nd of October there won't be a priority on the replacement consent.

Q. And the council did that under the operative plan, under what policies? There are policies referred to you by Mr Page and I think Mr De Pelsemaeker in his last response which required you have a look at the effect of another users.

A. **MS KING:** Yes, so under that potential consent application we would have assessed the effects on other users within that catchment under the operative regional plan and made a decision to grant that consent based on that. So that consent may have extra conditions to look after supply to those other users.

EXAMINATION CONTINUES: MR MAW

Q. We have covered the balance of the questions I had there – or the questions from the Court have addressed the questions I had. I did want to finish by looking at the example draft conditions which are attached as appendix 3. Now I am not sure who is holding the drafting pen or who I should direct these questions to, so the entire panel feel free to answer. But just looking through the drafting there, the first question that arises in my mind and I'm looking first at the dominant permit, sub-paragraph, "(a), that the consent holder may serve the subservient consent holder." The concept of service is a variable concept and I'm interested to understand what precisely you had in mind when referring to the word "serve" in the context of this condition, what's the mechanism, how is the notice to be served to a subservient permit holder?

A. **MS KING:** I'm not actually sure if we had any specific way that the dominant would serve notice on the subservient, however reading Mr Cummings' evidence it is quite clear that it may pay to be more specific in that wording there. I'm not sure if anyone has got any further comment.

A. **MR DE PELSEMAEKER:** I think the wording as they are now, they open up a number of potential avenues to serve notice. Also referring to

Mr Cummings' evidence, there are pros and cons to different ones. For example, the email one is a very quick one, but there are some issues around email addresses in part C, then by mail is probably the more common one but it implies a delay. So, perhaps it is best to leave it open and look at it on a case by case basis, what is the best possible way or most practicable way of serving the notice.

Q. Might the issue be overcome by the subservient permit holder specifying in their application how they wish to be served?

A. **MR WILSON:** I wouldn't have thought so, cause consents can be transferred during their six-year life. So, there's no guarantee what applies at the time of application applies for the life of the consent.

Q. Might that issue be picked up when a notice of transfer is given, though, if you think about the mechanism for transferring a permit.

A. **MR WILSON:** We'd certainly pick up that information at that point, I guess it still comes back to the privacy issue of the Council sharing that information.

Q. And the corollary perhaps to the service question, when reading the subservient consent holder condition, the phrase there is "receipt of written notice from the dominant consent holder." Was that left intentionally broad to cover a range of modes of service? Or was there something in particularly that the group had in mind with those words?

A. **MS KING:** Again, I think it is helpfully broad considering how broad the dominant is. Again, reading Mr Cummings evidence, it would be helpful if the subservient were to sign off receipt notice or notice of receipt so that if there were enforcement action, we were aware the notice was actually received.

Q. There might be some challenges with that by the recipient of a notice simply refusing to acknowledge service. So, at a conceptual level, what I've heard is perhaps keeping it broad at this stage to enable a range of options to be relied upon and I'm not sure whether I can go so far as to say there might be an opportunity to specify a mode of service on the part of the subservient consent holder as part of their application.

A. **MS KING:** It would potentially be helpful if Council did include that in the application form and then to let the dominant know the preferred mode of

service with the subservient potentially providing contact details if that was the mode that they preferred.

CROSS-EXAMINATION CONTINUES: MS WILLIAMS

Q. Just thinking about the transfer situation and thinking about the privacy issue, I'm wondering if that could be overcome by having something in the original application perhaps or the original effected party notice however that's done and then potentially something also on the transfer application which basically provides a waiver of privacy for a new person that is taking the permit over to acknowledge that they understand that their contact details will be provided to the dominant permit holder and also providing that information about their preferred contact.

A. **MS KING:** I'm just unsure about the legality of that, because are you stepping into the Privacy Act realm, or, yeah?

1610

Q. Well, that's what I'm saying, that you are asking that person to say that they understand that on a transfer to the new person, saying, because they're presumably also going to be signing the transfer application, to say that they understand that their details will be passed on, because, in the existing permit anyway, priority, or replication, we'll call it, of the priority, and that their details will be passed on to the dominant holder, to be able to contact them on what their preferred mode of service is.

A. Yeah, I'd be happy with that, if that was an option.

Q. Thank you.

THE COURT: JUDGE BORTHWICK TO COMMISSIONER EDMONDS

Q. Thank you. Commissioner, do you have any questions?

A. No.

Q. (inaudible 16:10:59), and I have no questions, so no questions. Okay, so good.

A. Long day.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. Where to from here? In terms of these provisions, I mean, like, do we wait and see what comes out of Ms King and Mr Cummings before going further, or is this thing, you know – it certainly sounds like summary drafting is required. What do you want to do?

A. I would have thought we might best proceed with Ms King and Mr Cummings, because there may be additional matters that come out that might then usefully be picked up if there is to be some further drafting, so I suggest we continue on and hear that evidence.

Q. Okay, and then think about where to from after that, all right.

THE COURT: JUDGE BORTHWICK TO WITNESSES

Okeydokey, right. Well, thank you very much for your evidence, that's a huge effort, and as I said, even though cross-examination – and I know the Court's questions at times can sound really picky, but the task, you know, the task that was set you and how you've responded has been really helpful in terms of highlighting, perhaps, a route we can go down. Yeah, so it's all good work, so thank you, mmm.

WITNESSES EXCUSED

MR MAW:

I thought we might move on to Mr Cummings and give Ms King a break for a wee while.

THE COURT: JUDGE BORTHWICK

Okay.

MR MAW CALLS

MICHAEL ANTHONY CUMMINGS (AFFIRMED)

Q. Good afternoon, Mr Cummings. Can you please confirm your full name for the record, confirm it's Michael Anthony Cummings?

A. Yes, it is.

Q. And you have prepared a statement of evidence dated 24 June 2021?

A. Yes, I have.

Q. And in that statement of evidence, you confirm that you are the senior environmental officer in the compliance monitoring coastal Otago team at the Otago Regional Council?

A. Yes, I am.

Q. And that you have 15 years' experience with issuing, monitoring, and enforcement of resource consents, deemed permits, and permitted activities in relation to the rights and obligations of the taking, conveyance, and use of water, specifically in the Otago region?

A. Yes, I do.

Q. And you've set out in paragraphs 4 through 5 the background experience that you have in this regard?

A. Yes, I have.

Q. Are there any corrections that you wish to make to your statement of evidence?

A. Yes, I've got two corrections to make.

Q. If you could just take us through those, please.

A. Certainly. My first correction is in paragraph 15, the second sentence, I would like to replace the word "should" with the word "could" so the sentence reads: "Rather, the council could instead rely on its powers."

Q. Thank you, and there was a second correction?

A. There is a second correction, in paragraph 111.

Q. Yes.

A. It's the very last sentence, and once again, I'd like to replace the word "should" with "could" so the sentence reads: "Rather, the council could simply rely…"

Q. Thank you. Subject to those corrections, do you confirm that the evidence in your written brief and the evidence that you're about to give is true and correct to the best of your knowledge and belief?

A. Yes, it is.

Q. If you could please remain for any questions from my friends and questions from the Court.

THE COURT: JUDGE BORTHWICK TO MS IRVING

Q. Anyone got any questions?

A. Just some brief questions, your Honour.

Q. You're for OWRUG right now?

A. Yes.

Q. Okay.

CROSS-EXAMINATION: MS IRVING

Q. Mr Cummings, I really just want to clarify a couple of points you make in your evidence. Perhaps if we could start with the discussion around the need for the monitoring to be calibrated so that you could understand whether or not people were continuing to take, whether it was in breach of the priorities and so on. Is that calibration really just requiring that to be consistent with what's required under the water monitoring regulations?

A. Are you asking in particular for the dominant consent holder, the subservient, or just in general?

Q. Just in general.

A. Yes, this is the basis for which we make our decisions.

Q. Yeah, and so in relation to consents for water permits, it's common, isn't it, for conditions to be imposed requiring compliance with the water

monitoring regulations and ensuring calibration of the water monitoring equipment?

A. Yes, it is.

Q. So, in that sense, it's nothing new that would be required to help administer this regime, is it?

A. No, but there are requirements under the water measurement and reporting regulations that require that there is to be telemetry. Under the regulations, the 2020 amendment actually specifies a particular timeframe where they've actually got to provide that telemetry, and in the most extreme cases, that's 2026.

Q. So they'll have to continue to comply with those obligations regardless of this regime.

A. Well, they don't have to abide by the requirement to telemeter their water take until such stage as 2026.

Q. Right, and if they don't have telemetry in currently, the alternative is to simply request a download of the monitoring information, isn't there?

A. That's right, and this information is generally held by a third party.

Q. Yes, correct. In relation to just the contact information, when an applicant makes an application for a resource consent, one of the pieces of information that is required is an address for service, correct?

A. That is correct, yes.

Q. And it's common these days for that to include email contact information?

A. I don't know. Unfortunately, I've been outside of the consenting team for quite some time. They do provide email addresses, but whether that's valid or useful as an address for service, I can't comment on, I'm sorry.

Q. In your experience with enforcement, are there circumstances where resource consent holders are required to provide contact information for the likes of affected parties to register complaints? And I'm thinking things like landfills, for example, where there might be odour complaints, or mining activities where there might be issues around dust, and applicants will provide contact information, publicly available, so that people can contact them if there is an issue.

A. I'm not aware of any requirement under consent to do that.

1620

Q. Do you think there would be any reason why a consent condition couldn't require the provision of email or telephone contact information?

A. I can think – well, yes that is possible as a requirement as a consent condition I believe, even though that's outside the scope of my expertise. What I would wonder though would be, if we were actually requiring the transfer because the activity's shifted. The transfer actually only refers to the holder rather than adjusting any of the conditions of the consent.

Q. So you don't think it would be possible for that information to be kept up-to-date as part of the consent condition?

A. Yes, it is possible to keep that information up-to-date. We work very hard with our records to make sure that they're up-to-date. There are circumstances where some of the people responsible for the activities are not necessarily, they're consent holder and that makes things a little more complicated.

Q. Yes, but as the consent holder you'd expect that they would have an obligation or at least pass on to the person that they employ probably to implement their consent if they had been issued with a notice of some description that would affect that person's role?

A. Yes, that would be a reasonable expectation.

CROSS-EXAMINATION: MS WILLIAMS

Q. Just a few matters your Honour. Mr Cummings I'm taking it that you are very much looking at enforcement from a prosecution perspective potentially?

A. I looked at this from all possible avenues that we can undertake.

Q. But the standard of evidence that you've indicated would be required, would be sufficient to support a prosecution if it got to that point?

A. That's right.

Q. And that's why for example, in your view it would be helpful if a dominate consent holder was to serve a notice on a subservient consent holder, that they had a witness accompany them if they were doing that in person?

A. Yes.

Q. And that's because you would see this as potentially heading towards a prosecution?

A. Yes, we always hope for the best but prepare for the worst.

Q. Yes, and it's certainly clear from the compliance plan that you've helpfully attached to your evidence and that's appendix 1, that the council's approach is actually to take a number of steps and approaches to enforcement before we get to a prosecution isn't it?

A. That's right. Yes.

Q. And so very much along the lines of talking to the potential problem consent holder in the first instance?

A. Yes.

Q. And then you talked about education and a whole series of steps before you would get to prosecution?

A. Yes.

Q. And that would be something that a dominant permit holder would also be aware of, that you would because you told us you will, actually be looking to take a number of steps before you would be looking to prosecution?

A. That's right, yes.

Q. And it might be that that person may then feel that for the instance they don't necessarily need to strictly follow the – or reach the standard of proof that might be required for a prosecution when the know that that's actually not what the Council's going to do in the first instance at least.

A. I don't know, I wouldn't want to put words into dominant consent holders' mouth.

Q. All right. Thank you. You've already talked with Ms Irving about the telemetry issue and that the alternative and the expectation of Council is that where people don't currently have telemetry in place because they're not yet required to under the measuring and reporting of water takes regulations, that they would still be able to download and provide that information within 24 hours of request, is that right?

A. I think 24 hours would be a bit of a reach, but they certainly would be able to provide that information if it was available, if their equipment was operating as it should.

Q. And of course, if their equipment isn't operating then that would actually potentially provide a defence for you in any event.

A. That's right. Yes.

Q. Yes. You've made some comments on the draft conditions, and I'm looking here at paragraph 71, and you've suggested, for example, the addition of the word "upstream" to the phrase "subservient consent holder."

A. That's right. Yes.

Q. And that's simply to clarify that obviously if a subservient consent is downstream, it actually makes no difference.

A. That's right.

Q. You also proposed that the dominant holder be able to exercise their right at any time. Having heard the discussion from the panel earlier today, do you agree that there are problems with that approach of a dominant consent holder being able to say at any time, no matter what the actual flow of water is, that, excuse Mr subservient holder, that's two kilometres upstream of me, I'm telling you to turn off.

A. Yes, I agree with the panel. There are issues with that. When I thought of that and considered that it was – when I was thinking of that, it was taking one of the ingredients away, or one of the requirements that I'd have to prove if I was to actually take this to court.

Q. Yes, and that was around the insufficient flows -

A. That's right.

Q. - that your concern that term "insufficient flows" is a bit loose.

A. That's right. Yes.

Q. However, part of the purpose of the replication, now we use that term, of these conditions is to provide for the incidental environmental effect of these applying to maintain flows at the low flows. So, actually the insufficient water or insufficient flow is a fundamental part of the priority regime, I'll call it that. do you understand that?

A. I do understand that, however, that was outside the scope of what I was asked to prepare for.

THE COURT: JUDGE BORTHWICK TO MS WILLIAMS

Q. Can I just ask, Ms Williams, which paragraph you were referring to then? I just want to note up the response that's all.

A. That's a good point, your Honour. I sort of scribbled a whole heap of notes, and this is at paragraphs 101 –

Q. Okay

A. – and in particular at paragraph 105, you do discuss there about there's full discretion to give notice, but it wouldn't be replicating the existing priority regime.

Q. Okay. Thank you.

THE COURT: COMMISSIONER EDMONDS

Q. Yes, I did have a couple of questions, thank you. Afternoon. So I wanted to know how frequently the council uses the three-two-nine water shortage direction? Only, in perhaps you could give me a general sort of answer and if I need any follow up I can follow up on a…

A. This hasn't been used very often at all in fact. It's just been put there as an option that we can consider unfortunately well not unfortunately, the delegation for making a call under that section or a decision under that section is well above me, so I wouldn't know the thresholds were or how to comment on that further. But I do know that it is an option that council does have.

Q. And when you said it's not been often used, can you give me some kind of idea of when it has been used.

A. I know of once when it's been used.

Q. So what year was that?

A. I couldn't comment on that. I can't recall that.

Q. I presume that was during the irrigation season was it?

A. Yes it was over, it was definitely over a summer and it was a few years ago.

Q. And so did it have to be renewed, so I see you can only have it lasting –

A. For 14 days.

Q. – for 14 days and then you can keep renewing it. So how long did – if you can remember?

A. I believe it was renewed once or extended once.

Q. So that was for a month and so a portion was restricted or suspended, so presumably did the extent set out – in the manner set out in the direction? So I presume there was quite a long list of things that people had to do.

A. My role with that was in regards to ensuring people were aware of it. It only had to be advertised in the paper but we made sure that – we contacted people and made sure that they were aware of the rule and that they were following the rule. They were still allowed to have water under certain circumstances like for stock water or domestic use, but beyond that, I couldn't comment on the technical aspects of that particular rule.

Q. But you didn't have to take any enforcement action?

A. No.

Q. Other than perhaps reminding people about what – the fact there was an order and better follow it.

A. Yes.

Q. So the other thing you suggested is that section 17 of the RMA might be another mechanism that could be used. So how often would regional council have used section 17 with a regard to water matters?

A. In regards to water matters, I don't know sorry.

Q. So when you wrote that, what hypothetical possibilities were you thinking of?

A. The examples that I'm thinking of where issues like section 17 have been used have been involved with discharges. So discharges into the environment. I know that they've been used, I'm not sure what – for the exact details of what they've been used for.

Q. The discharges have been but you're not aware any in terms of quantity of takes and that sort of thing?

A. No I'm not aware of being used for – no.

Q. So, going back to my original question, so what do you think might be a hypothetical possibility in terms of the takes in the use of water?

A. The example I've written is in regard to using an abatement notice to request people to cease taking water, the abatement notice is set for a particular period of time with particular restrictions on it. And provided the

recipient of the abatement notice abides by those rules. There's no further enforcement action.

Q. Okay. Thank you.

THE COURT: COMMISSIONER EDMONDS

Q. Just thinking about that. If you think that what the planning team has come up with is problematic, why does section 17 make it any easier? In fact, it's probably harder, cause you know, nobody's giving you written notice or anything else.

A. The challenges that I have with what was proposed by the joint witness statement are regarding whether it was the dominant consent holder was entitled to, and whether the subservient consent holder actually received the information.

Q. But how does section 17 overcome those two evidential gaps or evidential issues?

A. It overcomes that in the same way that our, the Council's minimum flows and requirements under that, if we've got control over how information – how the notice to cease taking water is given, it makes my job an awful lot easier when it comes to challenging someone that might have adhered to that instruction to cease.

Q. So, you think – your two problems are, a, whether notice is received?

A. That's right.

Q. Okay. So, that's a factual issue, and then the second is whether or not the dominant consent holder is entitled to exercise –

A. That is right. Yes.

Q. – the right. Okay. So, you think section 17 bridges the gap on the factual matter where the notice is received – bridges that gap or address that gap, how? Because you would still need a dominant consent holder telling a subservient consent holder to, in this case who had been told to cease, and there would need to be evidence of notice being given, at least, and if not notice being received, an inferred notice being received due to the method of service. So, it's the same issue either way, so how do you stoop across it?

A. Sorry, I've realised now what the disconnect is. The section 17 would be considered if Council was aware of in stream values that were at risk because of somebody's activities, and going outside –

Q. Yeah, okay. So, it's in stream values, it's not actually abstractors behaving in a way that ensures that the flow in the river is available to be taken.

A. That's right. Yes.

Q. Well, maybe the disconnect there then is that, as I understand it, the right of priority in the past or currently sets off a flow sharing regime for want of a better word and that is for the benefit of abstractors and it might have an incidental benefit to the environment as it turns out, but it's for the benefit of abstractors, so that's it's primary focus, and that in deed is what is proposed to be its continued primary focus, abstractors being part of the environment.

A. Yes.

Q. It's only a side benefit that galaxiid might continue to survive or subsist under this regime but nevertheless that's how it's been promoted.

A. Yes.

Q. So, you would use section 17 duty to look after galaxiid, not abstractors?

A. That's right. Yes.

Q. All right. Okay. All right, that's helpful. Have you got any questions?

THE COURT: COMMISSIONER EDMONDS

Q. I think my only question, really, is you've set out in your process that could be followed if one priority holder seeks to serve notice on another. Has this ever happened in the past to your knowledge?

A. Not to my knowledge.

Q. So, this would be a whole new territory for…

A. That's right. Yes.

Q. Okay, well thank you for that. Thank you, your Honour.

QUESTIONS ARISING – NIL

THE COURT: JUDGE BORTHWICK

Thank you very much for your evidence Mr Cummings it looked like a very late night – served or it could have been a late night with Ms Mehlhopt I'm not sure but we got it on the day. That was like a minute before midnight. So Thank you very much, big effort. Thank you.

WITNESS EXCUSED

MR MAW RE-CALLS

ALEXANDRA LUCY KING (RE-AFFIRMS)

Q. Welcome back.

A. Thank you.

Q. You confirm your full name is Alexandra Lucy King?

A. Yes.

Q. And you are the team leader, consents coastal Otago at the Otago Regional Council?

A. Yes.

Q. You have prepared a further brief of evidence dated 24 June 2021?

A. Yes.

Q. And within that brief of evidence you've set out your qualifications and experience at paragraphs three through to six?

A. Yes.

Q. Are there any corrections you wish to make to your statement?

A. No.

Q. You confirm that to your statement of evidence and the evidence you are about to give is true and correct to the best of your knowledge and belief?

A. Yes.

Q. If you could please remain for any questions from my friend and questions from the Court?

CROSS-EXAMINATION: MS IRVING

Q. Just want to clarify at your paragraph 13 in your brief of evidence, you record your opinion that was recorded in the joint witness statement that more efficient and effective option for – as for the rights of priorities to cease in 1 October. Is that it? In that there's just nothing that regulates I suppose the relationship between water users or did you have an alternative method or regime in mind?

A. I did turn my mind to this and I did try to be as helpful as possible if priorities were transferred in terms of providing those potential consent conditions and things. I did not come up with a new idea.

Q. Was going to ask if you had, what it was. Perhaps just want to talk to you about the Pig Burn example that you worked through in your evidence and I think you expressed some concern around the complexity of taking or re-implementing a priority regime based on the application as being filed for the Pig Burn catchment and you highlight in your paragraph 38(e)(i) through to (v) sort of changes or components of the Pig Burn application that sort of addition a layer of complexity to implementing a priority regime. Is it your understanding that in that application there was a suite of residual flows and so on that accompanied that re-configuration of the regime on that water body?

A. Yes.

Q. And did you make any enquiries about whether or not the Pig Burn water users would continue to pursue that re-configuration if plan change seven and the continued activity pathway associated with it was to become operative.

A. No, I base this test on the application in front of me.

Q. I just want to, I suppose, ask you some of the same sorts of questions that I just worked through with Mr Cummings in relation to your paragraph 47 in terms of issues around how notice might be given, confirmation of notice received and so on. Do you see there being any barriers to resource consent conditions that require provision of an email or contact phone number for the purposes of the notice requirements?

A. Yes. So, when you asked this question, I did turn my mind to it for a couple of minutes, and I understand Mr Cummings concerns if it was to be transferred to a new holder, that there potentially might need to be a variation to a consent condition. I did come up with an option that it could be a contact management plan or similar, where the consent the holder needs to keep that updated and therefore the consent condition would not need to be varied.

Q. That was my next question. That's what I had in mind, too.

CROSS-EXAMINATION: MS WILLIAMS

Q. And thank you Ms King because that very helpfully also addressed one of the questions that I was going to ask, and so, you would just on the

same issue of a contact management plan condition, would that mean that for example if you have a change in personnel managing the undertaking of the activities, the consent holder remains the same, but people move on, and so you've got a new manager in effective who's managing the activity managing the operation of the consent and you would see that also being able to be captured by something like a contact management plan.

A. Yes, I think it would. It would potentially follow along the similar lines to other management plans we have that we ask the consent holder to keep it updated –

Q. Yep.

A. – and either provide it to the consent authority annually or upon request, and so if any of those changes are within there then Council has got the ability to get a hold of them.

Q. Would you impose on the consent holder a positive obligation to advise of any change?

A. Yes.

Q. Yes, okay, so that would address the change in personnel, and obviously on a transfer as discussed before, again that would also capture the ability by having a positive obligation, that would also capture the transfer to a new holder of the take at the same point of take.

A. Yes.

1650

Q. You've also – I actually now want to go back to policy 10A.2.1. In this you discuss at paragraphs 27 and 28 of your evidence, and in particular, this is where we have the reference to the 18 March 2020 date which there was some discussion with the planners on the panel this morning, but I don't recall you actually be asked about that date, and so I just wanted to explore with you, your reasoning at para 28 where you consider that would be sufficient and appropriate with a minor amendment

A. Yes, I did have time to consider the questions Mr Maw put to the panel this morning and he made quite a good point in terms of and I think I did comment on the fact that it would almost mean an assessment of the effect of the priority regime at that date.

Q. Yes. And is that a concern for you? That it would essentially lock in place something then which may not be actually in effect as of now?

A. It is a concern that that it a route that potentially you would need to assess. I don't think I can comment on whether it would be the same in now versus the 18th of March.

Q. Yes, and certainly from your perspective, if the purpose of plan change 7 is to largely a transactional plan change for it because it's a transitional plan change, you would not want to have to go and assess the effect of the priorities, is that correct?

A. Yes, that's correct.

Q. Okay. I just wanted to also explore with you I guess a little – the possibility that again was discussed with the joint panel around having either an entry condition or something in the application which requires essentially that the linking permit holders to consent to each other's permits, if I put it that way. You know what I'm talking about? And would that perhaps get across some of your concerns again as expressed in your evidence around not actually having all the information to put all the priorities into the permit?

A. Yes I think it may, in terms of – are you saying that then applicants would nearly be all applying at the same time for that specific catchment?

Q. I'm not sure that they'd necessarily be applying at the same time but because each applicant, as an entry condition has also got to obtain the approval and basically buy-in of particularly the subservient permits that that potentially picks up on some of your concerns about things getting missed.

A. I think it may. The reason I say "may" is because we would be working under the assumption that everyone got everyone that was necessary and I am aware that there are some catchments which I think Mr De Pelsemaeker discussed that link to water bodies and I just need to make sure that everyone involved had given written approval for the entry condition.

Q. As part of the application would they be required be provide a copy of the existing permit? I'll call it a permit.

A. Yes.

Q. And that will have described in some way the existing rights of priority one it? Won't it?

A. Yes.

Q. So that it certainly gives you that starting point to check and you would then be following up on if there was someone that is listed there that is not then providing that approved party as part of the application?

A. Yes.

Q. And that would then enable you to identify perhaps where people were no longer operating and had essentially surrendered takes?

A. Do you mean no longer operating priorities or no longer operating deemed permits?

Q. No longer operating the deemed permit.

A. Yes, it may but then that also brings me back to my point of it potentially disrupting the entire priority regime if someone has surrendered or is no longer going to apply for that permit. So it would alleviate concerns regarding who would be involved in that priority system but it would still – I would still then have a concern about a priority regime being disrupted if a user had surrendered.

Q. So what you would actually perhaps also want as part of the application, would be a statement from someone who has surrendered a permit to just confirm that they have surrendered the permit or are no longer operating under that permit?

A. Yes, but I would still have the problem of regime being upset if that person had surrendered.

Q. But actually, if they've already surrendered then it would continue the regime as it is now.

A. That is under the assumption that they hadn't been utilising that previously.

Q. That does make that assumption yes but okay.

CROSS-EXAMINATION: MR MAW

Q. Ms Williams my friend put a question to you in relation to whether requiring written approvals might provide a "further backstop", my words not hers to ensure that you'd identified all of the relevant permits. When

you think about that proposition, doesn't simply identifying the permits in the application achieve the same outcome because if the permits not identified in the application, the applicant wouldn't know to go and get a written approval from somebody, so it doesn't actually take matters any further?

A. No, I agree.

THE COURT: JUDGE BORTHWICK

Q. Right, two points of clarification. So you were talking about it and I'm not quite sure that I quite get it yet. Where you've got deemed permits which are linking to water bodies.

A. Yes.

Q. Talk me through what the issue is there.

A. I can think of the Low Burn where is also links to the Roaring Meg catchment. It just – I guess it just brings up complexities in terms of how that priority then sits within the Roaring Meg catchment.

Q. Now just to slow it down a little bit. So Low Burn, I'm familiar with that catchment. But are you saying that water's taken out of Low Burn catchment and put into the Roaring Meg catchment? Or is something else happening?

A. No, so one permit holder holds – so there's two permits that I can think that link the Roaring Meg and the Low Burn and they both have priorities within those catchments. So it's just…

Q. How does that actually happen? Like, if I was to grab their deemed permit, what would it say, roughly?

A. You're testing my knowledge a touch.

Q. That's all right.

A. It would have the priority ranking for both catchments within.

Q. Within the same permit?

A. No, I think thy would be separate – actually I can't answer that I'm sorry.

Q. Because I couldn't see but then it's probably my lack of imagination or just haven't seen enough of these deemed permits because I've only seen what Mr Maw gave me. But I just didn't know why it was a problem if you're taking water, say from the Low Burn catchment and its

discharged into the Roaring Meg catchment; why that caused a problem for deemed permits. Just say if the deemed permit pertains to, you know the Low Burn, well people just continue to take in accordance with their rights, their subservient or dominant rights.

A. Yes I do see your point. I think maybe the point I was trying to convey and maybe I didn't quite do it probably was, it just creates another level of complexity in terms of – the application I was looking at was one permit holder who held shares in both a Low Burn and a Roaring Meg catchment and were applying to merge them into one RMA permit.

1700

Q. And then I think that was – that could be complex, not sure how they're doing that but that doesn't matter because, that was the question that I put to the panel was: "Do you anticipate people substantially amending their applications to take advantage of the controlled activity rule or the RDA rule?" and the answer was, "yes". They're going to have to be going under the existing regime, if I can put it that way and not doing these merging or divvying ups or whatever has been proposed and understandably has been proposed in response to the operative plan and this notify plan. So, I guess the question is, is that a problem, yes, is that a problem for this plan change now recommended by the planners and together with the priorities mechanism, a priorities mechanism or is that a problem which you see arising if people insist on their application for resource consent, which if that's what they're doing, it sounds like a non-complying activity, but I might be wrong.

A. Yes, I think, I am unable to comment on what applicants may or may not do. I am aware that a lot of them will amend to come in line with PC7, however, I do think that there would be a number that maybe would try and go down the non-complying pathway for a variety of reasons, one being that they've been in the system for a substantial amount of time.

Q. Is that because they're fed up? Or is that because – what does being in the system, why does that necessitate a different outcome? Now, that from their point of view it might, because jeez I've invested a lot of money in this, and I get that.

A. Yes, so that would be the basis of my reasoning there, that they have applied for an application some time ago and invested a lot of money in the application as it currently stands.

Q. Okay. Do you think you need to come back tomorrow – I'll check overnight the Low Burn Roaring Meg application to see whether there is some complexity on the existing deemed permit or whether you're thinking of that reflects the applicants own desire to merge into one resource consent, takes from two different catchments.

A. Yes, I can confirm that with you.

Q. Yes, confirm that one way or the other, be really keen to know the answer to that, and then second question, just really, is dealing with the surrendering of the permit, and that could be problematic because the regime is upset, and does that – is the concern there that, say you've got five deemed permits on a single water body and number three is surrendered in total so it no longer exists, so to number one and number two under this scenario, a downstream, so it's the easy scenario, so instead of being able to call upon three permits to reduce or cease they can only call on two and that's problematic.

A. Yes, I think the basis would be that the surrendered permit had been used previously.

Q. Had been used.

A. Yes.

Q. So, if it's surrounded, then that order remains in the system.

A. Yes.

Q. Yes, and so in that sense it's not really problematic at all because number three is no longer in the system, the water remains in the system and number three has gone somewhere, whoever the permit holder was, and so then one and two are rightfully looking at four and five to cease when flows start to recede.

A. Yes, and so in terms of flow availability for the one and two, it would probably be a positive, but if we are also looking any environmental gains with holding the priority system, that may also be disrupted.

Q. I see. So – yeah, there's not a lot you can do about that. if somebody doesn't want to remove their water permit.

A. No, no, we can't force anyone.

Q. No, couldn't force anyone to remove a water permit. So, that's nothing – I can't see how I can handle that.

A. No, and I – where I could try to come up with some way of handling it within the priority regime if we would move it forward, it was just a thought I had that I thought I should put down but didn't also have any way of adding that in.

Q. What was your thought? Sorry.

A. So, I just knew it was a concern I had, so I noted it down, but I didn't have any way –

Q. Right.

A. – rectifying it within the plan change.

Q. No. Okay, but that could be entirely hypothetical, that is that there is a hypothetical existing deemed permit holder who doesn't wish to renew their consent, who doesn't wish to apply for a replacement consent and does not, and that water remains within the system.

A. Yes, I think where the concern became apparent for me was looking at the Pig Burn example, where the third priority was shifting to the fourth priority location but surrendering their previous consent.

Q. Now, if you're going to do that, don't you need a 136?

A. Yes.

Q. Yes, and then isn't that the time to have a look at, well, what are the implications?

A. Yes.

Q. Yeah. Have I missed something in thinking it's a 136, if you're going to shift your take down to – yeah, have I missed something in that, is it as simple as that?

A. Within the application under my paragraph 38(b)(1), it says: "This application does not seek to replace the take for the third priority at that point," so, yes, I think it would be a 136 matter, as you have just said.

Q. Okay, all right.

THE COURT: COMMISSIONER EDMONDS

Q. So are 136s dealt with all (inaudible 17:06:34) not requiring any written approvals and things?

A. I haven't processed any that have required any written approvals.

Q. So they're dealt with non-notified, are they?

A. The ones I have dealt with have been. I can't say whether they all have, unfortunately.

THE COURT: JUDGE BORTHWICK

But what you're –

THE COURT: COMMISSIONER EDMONDS

Q. Why do you deal with them all non-notified? Is there a rule in the plan that allows for that?

A. The ones that I have assessed, I have assessed that there weren't any affected parties to the move of abstraction.

Q. And so other people, other priority people you assessed weren't affected, or weren't you worrying about the priority question?

A. The ones that I have processed were on the Pomahaka, and they were within – there were no permits between the take move location, if that makes sense, so it just moved 100 metres downstream, and there were no other users within that 100-metre stretch.

THE COURT: JUDGE BORTHWICK

Q. So as I understand, what the planners have proposed in the JWS is not a vehicle to allow the consenting team to come in and have regard to the effect on the environment as a consequence of anything, the non-human environment, the galaxiid environment in particular, so it's not a vehicle for that? That might be, again, the benefit of it, but it's not the vehicle to allow you to come in and do that.

A. No, I agree.

Q. Yeah, and so if there is a s 136 application, though, I think what you're saying, because somebody wants to move their point of take, you'd be

looking at the wider sense of environment, both human as well as creature, in-stream environment.

A. From my understanding, yes.

Q. Mmm, all right, thank you.

THE COURT: COMMISSIONER EDMONDS

Q. I did ask earlier about the effect of having an RMA permit sort of interposed in all of this, but I guess I'd just like to think about it slightly differently now, with an RMA permit right at the bottom of the tributary or something, somebody's gone in and they've done that and they've been thinking, oh, well, the whole deemed permit thing's going to go and people are going to have to come and get new consents all the way up this tributary, but if the priority system is retained, those people that had the RMA permit, they've been working on potentially a false premise, would that be right?

A. In terms of the thinking that the priorities would be gone by –

1710

Q. Yes, that they would be gone by the first of October or thereabouts and there would be a set of consents upstream of them, RMA permits –

A. Yes.

Q. – regulating what's to happen higher up in the catchment.

A. Sorry, I'm not quite sure if I understand the question. Do you mind rephrasing or retelling me?

Q. Well, if you've got a tributary and you've got an RMA permit that somebody's got at the bottom, and they've gone off and they might have got their deemed permit replaced as an RMA permit, and they would have been thinking, oh, well, we've got our RMA permit, so we know what the regime is in terms of what we can take, but everything upstream of us is in a bit of a state of flux because what's gone on with the priorities in the past, people are going to have to come RMA permits –

A. Yes, that is –

Q. – because the deemed permits are going to fall away.

A. Yes, that is a possibility that that may have occurred, that everyone was under the assumption that priorities were ceasing to exist in October 2021.

Q. So might it be possible that a person in this position may end up in a disadvantaged position from where they thought they might end up?

A. Yes, it is a possibility –

Q. In terms of investments they've made, for example?

A. It is a possibility. I think it would possibility be dependant on their priority rank, so if they were a lower priority rank, for example, the Pig Burn, the lowest in the catchment's the lowest priority rank, so no one was able to call on them anyway, so it would kind of depend on a case by case basis whether that has any effect on their RMA consent.

Q. So what you're saying is they didn't have any leverage to begin with because they didn't really have any priority?

A. Yes, whereas if that was the first priority right at the bottom of the catchment and they had a lot of leverage, then I think that maybe, they would be at a disadvantage.

Q. Right, okay, thank you, that's where I was trying to get to. Thank you.

QUESTIONS ARISING: MR MAW

Q. Just to round out the s 136 transfer question, is your understanding that there's a very wide list of matters that can be taken into account when assessing a transfer application?

A. Yes.

Q. And as I read that, the consent authority shall have regard, in addition to s 104, 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. So when you hear that description, and it's out of s 136(4), that would give you the broad range of matters that you might need to consider when looking at a transfer, perhaps moving further downstream from an intervening consent holder's abstraction point?

A. Yes.

THE COURT: JUDGE BORTHWICK

All right, well, thank you very much for your participation, thank you.

WITNESS EXCUSED

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. Okay, so we are running a little bit behind, but no doubt we will catch up tomorrow.

A. That sounds suitably optimistic.

Q. I am optimistic. No, I am, actually, I'm sure we'll get there.

A. I do wonder, in relation to the – well, there's two things going on. We've got next the legal submissions on priorities. Now, those submissions have all been pre-filed, and I wonder whether there may be some efficiencies gained if counsel were to give a summary of their submissions rather than reading right through their submissions in the Court's hands on that.

Q. Oh, I see, okay. You could, perhaps with a particular focus on 124, because that's where you all disagree with Dr Somerville, who disagrees back, and he's actually filed his submissions, so that should be available, hopefully on the website, hopefully shortly, anyway.

A. That might be helpful to see that in advance.

Q. Yes, so, Daliah, can you also send that to the lawyers as well, upload it?

A. Okay.

Q. That's where the focus should come, I think, because I don't think you take any issues with – there were three issues –

A. Creature of statute.

Q. – creature of statue, everyone agrees, and the third issue, which I've utterly forgotten.

A. Which was can you have a plan that has a rule that has the effect of priorities, I think was the third.

Q. And so that's under consideration, yeah.

A. Yes, so it's really the second.

Q. Yeah, it's really the second, yeah.

A. Okay, well, we'll collectively –

Q. Bearing in mind, Dr Somerville's also to come back on the vires of what's been proposed as well, which is he's going to be doing that not this week but next Monday, given his other commitment.

A. Yes.

Q. And that's also why, you know, if there's going to be changes, it would be good that he see it, not just work his way through an old copy, mmm.

A. Yes, now, on that point, we had prepared some written submissions addressing the vires point. I know I was intending to deliver those immediately following the s 124 submissions, if that was the right time to deal with that.

Q. Yes, it is.

A. And my understanding is my friends have prepared perhaps a summary of the points that they wish to make in that regard, so we'll deal with both of those.

Q. No, Ms Williams is shaking her head.

A. Oh, no.

THE COURT: JUDGE BORTHWICK TO MS WILLIAMS

Q. She's doing that tonight?

A. Sorry, your Honour, simply, I was going to address it orally only, and I wasn't sure quite what my friends were doing.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. All right, okay, oh, well, we'll take it as it comes, but again, it's important that it does come in so that Dr Somerville can have regard to that, so not only have regard to the submissions, but I think have regard to the drafting as well, does it overcome any, you know, because if the question of vires exists regardless of the date, you know, the drop-dead date, is it 1 October or is it later, the issue arise. One way or the other, I think we are all agreed you are grappling with the issue.

A. Yes, and so then just we'll deal with that perhaps first in the morning.

Q. Yeah.

A. Now, I'm just flagging that because I appreciate we've got some witness availability challenges perhaps brewing tomorrow with respect to the empanelling of the planners collectively with respect to the objective. I wonder whether Ms Jackson can the Court as to constraints?

MS JACKSON:

So it would be helpful if we could set a time so Mr Ensor and Mr Hodgson can know when to join because they (inaudible 17:18:00).

THE COURT: JUDGE BORTHWICK TO MS WILLIAMS

Q. Yeah, so everyone was thinking about a time, so I'm in your hands.

A. I was just going to say, your Honour, that Mr Brass isn't on the flight tomorrow morning that he was expecting to be on, he's been moved to an afternoon flight.

Q. Okay.

A. (inaudible 17:18:22)

Q. So he's going to be here tomorrow morning?

A. So he can be here tomorrow morning. He would have to be away by, I think, 2.30 tomorrow afternoon.

Q. Okay, mhm.

A. So just in terms of timing, just so that you're aware of that, your Honour.

MR MAW:

I wonder whether we might start with the empanelling of those witnesses and then follow that with the submissions on priorities.

THE COURT: JUDGE BORTHWICK TO MS JACKSON

Q. It would be better, if everybody's happy with that. Okay, all right. So, in terms of Mr Hodgson and Mr Twose and Mr Ensor, are they actually, though, available in the morning?

A. They just wanted time so that they can (inaudible 17:19:06).

Q. Okay, and everyone's still happy with a 9.30 start?

A. Yes.

Q. Okay, all right, so be there at 9.30 and we'll crack on with the empanelment, and, Ms Perkins, I haven't heard anything from Ms Perkins.

A. She's happy to attend via AVL.

Q. AVL, okay. So who have we got with AVL, we've got, sorry, Ms Perkins by AVL, Mr Ensor.

A. Mr Twose, Ms Styles, and, depending on the weather, Mr de Pelsemaeker (inaudible 17:19:48) snowed in.

Q. Mr de Pelsemaeker?

A. Yeah, he lives up in – 400 metres above sea level.

Q. I should not have let him go.

UNIDENTIFIED FEMALE SPEAKER:

He's still here.

THE COURT: JUDGE BORTHWICK

Q. Well, okay, oh, yeah, well, and Mr de Pelsemaeker, that's fine, yeah, and maybe Mr Hodgson. His lawyers say he's unavailable, but don't say what he's unavailable doing, so we've asked for clarification, and hopefully, we'll know one way or the other, and Mr Brass, is he around, going to be around? He's around, okay, in person. All right, very good, and in terms of testing the AVL, how are we set for that? Good. All right, very good. All right, we'll crack on at 9.30 with the joint witness statement. The first focus is on the objective (inaudible 17:20:45), and then we can release some witnesses, hopefully. Thank you very much.

COURT ADJOURNS: 5.21 PM

COURT RESUMES TUESDAY 29 JUNE 2021 AT 9.32 AM

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. Good morning anything arising overnight?

A. Two matters your Honour. The first is tidying up a loose end from yesterday wherein Ms King was assigned some homework to report back on in terms of an application.

Q. Oh, yes, she was.

A. Now two ways in which we might deal with that, we could have Ms King re-sworn and she could answer the question first up. Or alternatively she is participating in the impanelling of witnesses on the objective so she could just give her answer as part of that once she's sworn.

Q. We'll do it the second way. Yes.

A. The second matter relates to the proposed RPS and counsel have conferred in terms of a potential timetable to deal with both evidence and legal submissions on the relevance of that and Ms Mehlhopt, well, will address you on the particulars of those dates.

Q. Okay.

THE COURT: JUDGE BORTHWICK TO MS MEHLHOPT

Q. Ms Mehlhopt?

A. Good morning. So we circulated a proposed timetable amongst counsel. I discussed some of that this morning, so the proposal would be that Mr De Pelsemaeker would provide a supplementary statement of evidence by Wednesday the 14th of July, appreciating that he's in Court several days this week participating. The parties would then file any planning evidence in reply to that on Wednesday the 21st of July. That would be followed by legal submissions from the council on Friday the 23rd of July with parties' legal submissions to follow on Wednesday the 28th of July with –

THE COURT: COMMISSIONER BUNTING TO MS MEHLHOPT

Q. So what's 23rd of July?

A. So 23rd of July was the Otago Regional Council filing legal submissions, parties' legal submissions, Wednesday the 28th of July and then any legal submissions in reply from Otago on Friday the 30th of July. So the sequential exchange, it would be anticipated that it may be something that could be dealt with on the papers given that's sequential exchange but that would depend on obviously your Honour and if any directions are sought by parties to these matters to be heard.

Q. I'm going to put a page limit over those submissions and across the evidence as well. We have just got a super abundance of paperwork and can't see that's in everybody's interests to be continuing, this approach. So what is a reasonable – I haven't actually looked, haven't been tempted to look at the obvious. So any sense of how – what are the issues that arise that might be relevant here to this? A good question isn't it? It's not the whole RPS hopefully.

A. Yes, it would be – the relevance of the RPS to the issues that the Court is actually to determine as part of this plan change.

Q. So then one of the preliminary steps should be counsel conferring over what those issues are, as they might be relevant to the Court's determination. Yes?

A. Yes, as to what those…

Q. Because thus far it's only been mentioned I think by Mr Page in the context of duration. So is that the only issue? Or was it something else?

A. Yes, and it would be obviously there's a question of what weight to be giving to the document, given that this stage that the document's at and also in reference to the language in the provisions and the strength of their direction. And then, yes Mr Page has referred to the timeframes in the RPS in relation to the freshwater visions and then there are also provisions relating to for example, renewable electricity generation and provisions that other infrastructure such as community water supplies, so it would be for the planners to work through the documents in terms of having regard…

Q. I think they need guidance though, what are the issues, that might be relevant, informing or determining this plan change. So when can and I think parties need to get on to that before Mr De Pelsemaeker commits

himself to writing a brief of evidence. So when can parties have that done by?

A. So, looking at that, if Mr De Pelsemaeker's providing evidence on Wednesday the 14th then to give him time to consider that, I think we would need those issues landed the Wednesday before that. So it would Wednesday next week but that might be – it may need to be Friday next week given everyone's involved in the hearing. You may want to hear from other counsel as to their availability to work through that.

Q. So that's the 9th of July is that?

A. Yes that would be.

Q. Okay normally I ask issues to be framed up as a question as well for the Court to determine which then has to take into account the language of the Act vis-à-vis the implementation or giving effect to, in fact I can't recall off the top of my head of this proposed RPS which as you note, quite righty will be subject to weight arguments as well. So, how would you go about that? Again, because whatever the issues are, those are the issues which will start to guide the planners.

A. Yes and I guess it would be informed by the council's closing submissions next Wednesday as well which will deal with the issues for the Court to determine on PC7 and then we can pick up.

Q. Okay. Everyone happy with that? Issues to come in before people commit to writing and then I do what a paper limit. Yes. So what's a reasonable number of pages? So, no more than six pages for evidence and how many pages for legal subs?

A. I would have thought it would be a similar page limit for legal submissions, your Honour.

0940

Q. So, no more than six pages even for legal submissions or evidence without prior leave of the Court. That actually for avoidance of doubt includes any attachments which people might care to attach to a brief or to a sup, so, no more than six. Yes, that's getting at you Ms Irving, that was cute, has to stop though, please. All right, so, no that's good. Thank you very much. Now, overnight from the Court I have drafted something for deemed water permits, a potentially policy, a potentially entry

condition, and so, I'd like to put it out there and it's a question of timing and I've got most of those planners, we can put it out there with them and let them go away. Yeah, so I've done something. It's not perfect. I haven't been able to get rid of word "sufficient," but there you go, and the so the approach I've taken is having listened to the planners yesterday, I had then adopted an approach which is quite akin to criminal law where you are looking at the essential elements which must come down in a policy or a conditions. So, what are the elements of the offence, everybody will remember that from their law school days. So, I've taken the same approach. What are the essential elements that have to come into the police and then implemented by an entry condition, so that's how I've approached it, so that's very much taken from what the planners were saying yesterday was important to them, so, you'll see a condition which is talking – an entry condition which is talking about ceasing taking water, it's not about reducing and ceasing, it's just ceasing taking water. I think you're actually talking about a residual flow, so I've started to use RMA type language as well. So, I have given that to Rachel who's given that to Jaren. So, this is just my offering, it is not perfect, it is still subject to vires issues, but it might get the conversation started, and yesterday it got the conversation and I think there's some significant issues with what we've seen thus far, so here's another go, taking – adopting quite a different approach. Okay, that's not to indicate that the Court is worded to anything that were not, it's just something that I've tried to work through. Okay, so we've got people coming back and this time it's for the second JWS and we're going to lead with the objective. So, everyone involved, come forward.

MS WILLIAMS ADDRESSES JUDGE BORTHWICK (09:43:28)

A. Excuse me, your Honour, just whilst the other witnesses are lining up, Mr Brass is now snowed in so he is appearing by AVL and I do have to get him sworn in to formally produce that second supplementary brief.

Q. What did he do?

A. Excuse me?

Q. Has he filed another brief? No, he did, yes, he did.

A. Yes, he did file that extra brief.

Q. Now, I see – yeah, that's fine. No, very good. So, after he's sworn in, have him produce that.

A. Thank you, your Honour.

THE COURT: MS BORTHWICK TO MR MAW

Q. But same process as yesterday, I think, Mr Maw if you could do what you did yesterday, have everybody in, lead with any questions that you might have – do you want to get Mr Brass to confirm that brief of evidence on behalf of Ms Williams?

A. Yes.

STEPHANIE STYLES (AFFIRMED) (VIA AVL)
CLAIRE PERKINS (AFFIRMED) (VIA AVL)
TIMOTHY ALLISTAIR DEANS ENSOR (AFFIRMED) (VIA AVL)
MATTHEW TWOSE (AFFIRMED) (VIA AVL)
VANCE HODGSON (AFFIRMED) (VIA AVL)
MURRAY BRASS (AFFIRMED) (VIA AVL)

EXAMINATION: MR MAW

Q. Good morning witnesses. If each of you could state your full name for the record and confirm that you each participated in joint witness conferencing on the 4th and the 21st of June 2021 and you signed the joint witness statement that was the product of the joint witness conferencing, and we'll work our way along the table for those in the courtroom and then I'll ask each of you by name to confirm those points, and whilst we are working through the people, if you could also confirm that the evidence that you're about to give is true and correct to the best of your knowledge and belief would be sufficient. So starting with Mr Farrell?

A. **MR FARRELL:** Yes I can confirm all of that.

Q. Could you state your full name for the record?

A. **MR FARRELL:** Mr Ben Farrell.

Q. Thank you.

A. **MS KING:** Alexandra Lucy King, I can confirm all of that too.

A. **MS McINTYRE:** Sandra McIntyre. I confirm that I was involved in the conferencing on the 4th. I wasn't able to attend on the 21st, so instead of that I contributed by first conferring with Mr de Pelsemaeker, Mr Brass, Mr Farrell and contributing by email both leading up to the conferencing and in terms of completing the JWS following the 21st conferencing.

Q. And you confirm the other matters?

A. **MS McINTYRE:** Can you remind me what they are?

Q. Yes, that the evidence you're about to give is true and correct –

A. **MS McINTYRE:** Yes.

Q. – to your knowledge and belief?

A. **MS McINTYRE**: Yes.

Q. Thank you.

A. **MS DICEY:** Sally Ann Dicey, I can confirm all of that.

A. **MR DE PELSEMAEKER:** Tom de Pelsemaeker, I can confirm all of that too.

Q. Ms Styles?

A. **MS STYLES:** Good morning. Stephanie Amanda Styles, yes I can confirm all of that.

Q. Thank you. Ms Perkins?

A. **MS PERKINS:** Claire Rose Perkins, I can confirm all of that, and just note as stated on the JWS that I joined slightly later on the second day, on the 21st.

Q. Thank you. Mr Hodgson?

A. **MR HODGSON:** I confirm I was there on the 21st but not on the 4th.

Q. You confirm the other matters?

A. **MR HODGSON:** Yes I do.

Q. Thank you. Mr Ensor?

A. **MR ENSOR:** Timothy Allistair Deans Ensor, and I confirm the matters and my attendance as recorded in the JWS.

0950

Q. Thank you. Mr Twose?

A. **MR TWOSE:** Yes, so Matthew William Twose, I can confirm all the matters and then in terms of attendance at the two witness sessions on 4th and 21st of June, as recorded I attended for the objectives' discussion.

A. **MR BRASS:** Full name is Murray John Brass, I confirm that evidence I give will be correct however I did not attend this set of JWS however I also could not attend the expert conferencing and did not sign JWS however I provided a second supplementary brief of evidence, provided my response to it and I have been involved in previous expert conferencing and discussions outside conferencing on the matter of (inaudible 09:51:04).

Q. Can you then just for the record confirm that you did produce a supplementary state of evidence and confirm the date of that supplementary statement.

A. **MR BRASS:** Yes I provided a second supplementary of evidence dated 24 June 2021.

Q. Thank you and that evidence and the evidence you're about to give is true and correct to the best of your knowledge and belief?

A. **MR BRASS:** Yes it is.

Q. Thank you, are there any corrections that need to be made to the joint witness statement? No corrections. Now there's one preliminary matter that I would like to attend to before we start working through the joint witness statement. And that's a matter that arose yesterday in relation to a question your Honour put to Ms King with respect to a particular application for resource consent. And Ms King could you please address the Court, having undertaken your homework last evening.

A. **MS KING:** Yes I can. So I went back and had a look at the application and the Roaring Meg catchment priorities are separate to the Low Burn priorities, however the application that is in the system looks to have one permit which would have both priority from Roaring Meg and Low Burn on it.

THE COURT: JUDGE BORTHWICK TO MS KING

Q. Is that because there's a – I'm not sure how they do this but is that because there's a common point of take or is it because that permit's working really hard, there's multiple takes for a single user or multiple users?

A. Yes so it's one user and they transfer water from the Roaring Meg catchment into the Low Burn catchment and then re-take it from Stratford Creek in the Low Burn.

Q. Okay. So, if the proposal is and I think everybody's agreed, applicants are going to have to amend their resource consent applications. Is there anything that you foresee creating difficulties for an applicant such as that one?

A. I did have a think about this and I think the best way for this applicant would be to separate those two consents so that the two documents rather than merging them into one.

Q. Yes. Thank you. I take it that particular applicant's already doing this? Is…

A. Yes.

Q. Just reflecting current practice?

A. Yes it is.

Q. Yes, okay, no that's really helpful. Thank you very much Ms King.

THE COURT: COMMISSIONER EDMONDS TO MS KING

Q. So you attached a whole lot of marked-up material to your evidence for your appendix 1, the application form.

A. Yes.

Q. And I'm assuming looking at your evidence, your focus in doing that was to address what you saw as issues in terms of the priority question?

A. Yes I did.

Q. Would that be right?

A. Yes.

Q. Because I was just a little bit puzzled as to, given the nature of a controlled and a restricted discretionary activity; why you would be asking applicants to deal with – to tick a box agreeing with the assessment below and "adopted as my own", asking them to tick a box in respect of part 2, the NPS for freshwater, the RPS documents because I was puzzled as to why they would be relevant under the controlled and restricted discretionary rules which are mechanistic.

A. **MS KING:** Yes, so that is a good question. I think this application form was adopted from previous ones and it made potentially have been left in for that reason, but it isn't an overly onerous assessment the application the applicant would have to undertake within this. It's just that they are agreeing to adopt that within there.

Q. Well, I'm puzzled as to why they were to have to agree to adopt that.

THE COURT: JUDGE BORTHWICK

Do a part 2 assessment?

THE COURT: COMMISSIONER EDMONDS

Because I can't, yes, I can't see the relevance of it, but –

THE COURT: JUDGE BORTHWICK

Q. So are you required applicants for a controlled activity to undertake a part 2 assessment or something?

A. **MS KING:**

No, I wouldn't, I'm – I think it may potentially have been left in there from the previous application for which I – (inaudible 09:56:00) take it out.

A. Okay, I guess what we're saying is you know, those things become hooked for applicants to hang themselves?

A. Yes, no, I agree.

Q. In terms of the effort required under this plan change, so if it's – shouldn't be there.

A. Yeah.

Q. It needs to be removed but –

A. Yes.

Q. But I think you've taken that on board.

A. Yes, definitely. I can remove it. It was just the application form was in there.

Q. Yeah.

A. Just to be helpful.

Q. That's okay. It was actually really helpful to see it but, yeah, thank you.

A. Yes, no I can definitely –

THE COURT: COMMISSIONER EDMONDS

That's not to say there aren't other things in here.

THE COURT: JUDGE BORTHWICK

No, no.

THE COURT: COMMISSIONER EDMONDS

That require a thorough review but I thought I'd focus on the, the one that stood out.

THE COURT: JUDGE BORTHWICK

Yeah.

THE COURT: COMMISSIONER EDMONDS

Thank you.

CROSS-EXAMINATION CONTINUES: MR MAW

Q. Now the matters that were considered through the joint witness conferencing comprised three topics, first the consideration of the objective. Second, there were some miscellaneous minor matters that were attended to, and third, the topic of stranded assets. Now Mr De Pelsemaeker, have you had an opportunity to prepare a summary of the content of the joint witness statement as you had for the one yesterday?

A. **MR DE PELSEMAEKER:** I do. I prepared a small presentation that maybe can be put on the screen?

Q. Yes, if we can – there we go.

A. **MR DE PELSEMAEKER:** Put on the screen?

Q. If you could take the Court through that?

A. **MR DE PELSEMAEKER:** Yep. So, Your Honour and Commissioners, as we did yesterday, we thought it would be useful to start off with a small overview of the matters that we, that are set out and the JWS that was signed after conferencing on the 4th and 21st of June. During those conferencing sessions, as Mr Maw was saying, we covered three topics, objective, stranded assets, and also minor amendments. Now, I propose

to only take you to the first two ones. The minor amendments are really amendments for clarity and consistency and they're actually what we try to do with the majority of them was just formalise the discussions that we had during previous empanelment, so we're not gonna take you through them right now but we're happy to ask any questions if there would be any around that. Now, moving onto the first topic. It's about amendments to the objective and reflecting back on previous empanelment and the discussions and the questioning that took place there, we panels – sorry, we planners, we felt that there was merit in amending the objective for different purposes. Clarify the outcome. Also, we had a discussion about can we clarify the nature of the work transition from something towards something. Also, make sure that there is enough support for the framework that allows existing activities to continue and then also provide policy guidance for decisions that need to be made under the non-complying activity pathway and also to some to be under the restricted activity pathway. When we started with looking at amending the objective, we ran into the issue that we basically started with one statement, one objective statement and if you try to put too many ideas into that, you kind of lose focus, so we all agreed that in order for all the different elements within the objective to have a clear focus, we actually thought it would be better to separate them out into different objectives, still making sure that they all worked together.

1000

A. Now, on the plan it agreed on a first objective, a redrafted objective, A.1.1, and that objective tries to do three things. It specifies the outcome of the plan change which is enable an efficient and effective transition, although he changed the word enabling to facilitating, because facilitating – when you think about the word "facilitating," you think about a process, facilitating a process, and so it emphasises the process focused nature of the plan change. In that objective, we also tried to clarify what the transition is, from where to where, so it's a transition from the operative fresh water planning framework, and we put in there the word fresh water, because at the moment it is looking at fresh water in isolation, towards an integrated, new, regional planning framework, and the integrated, the

word “integrated signals” that it looks at, resource management in a more holistic way in accordance with (inaudible 10:01:20). Also, we referred to a new regional planning framework signal that’s it not just a new land and water plan but also a new RPS, and then finally that objective also sets out the three different activities that the objective relates to. Now, after that, the opinion started to diverge a little bit, and we ended up with two versions for the next objective or objectives. Ms Dicey will take you through version A, but since I have the talking stick, I might as well continue and talk a little about version B. Version B contains two objectives, the first one, new objective 10.A.1.2, it really, what it tries to do is, it focuses on enabling existing activities to continue if they continue under their current scale, there is no increase in historic use as well, so, that actually that new objective is actually very consistence where first limb of the new objective proposed on the version A as well, it’s almost identical. So, there’s not a lot of difference there. The second new objective proposed on the version B, which is the third one, that actually seeks to provide guidance when we’re dealing with applications that seek to increase the rate of take, still within the consented limit of the previous consent where there is an increase in the scale or where a longer duration is sought, and what we came up with is an objective that says that we can allow for that, but the outcome that needs to be achieved is still that we provide for the implementation of that new planning framework. We considered making reference to environmental effects but given that plan change seven does not really have a framework for assessing these effects, we didn’t see much merit in doing that. the other thing, as well, by referring by again to the implementation or the transition to that new planning framework, we ensure that there’s consistency with first objective. So, it works in the same direction as the first objective, and also we felt that the plan supporting this version, we felt that making sure there is a low risk of environmental effects might assist with ensuring that the transition towards the new planning framework is actually happening, but in itself it’s not enough, you also need to look at the duration of the consents, make sure that those activities can be reconsidered in time as

well. Perhaps somebody else from the planners might add something to that. No? Okay, I might pass on to Ms Dicey, now.

A. **MS DICEY:** So, the difference between the version A and version B is really the same sticking point that we had with the May expert conferencing. I think the version A group didn't feel comfortable with hanging the objective with the words "not compromising," against a future outcome that's entirely unknown. So, again we didn't want to use those words in the objectives. We also didn't want to just pick out the prioritisation of freshwater acknowledging that the new integrated framework will be dealing with more than just freshwater, but other national planning documents as well. So, while PC7 is just focused on freshwater, the future land and water plan will border the mat, and so we tried to keep things as similar as possible, and so there is a lot of consistency between the version A and version B objective, the real difference is that instead of hanging things on a future planning framework and prioritisation of freshwater, we just focused on the risks associated with any increase in the scale or duration, and I don't think we thought that was a perfect answer because it still introduces, kind of, new concepts in terms of what is a low risk, but we felt that was still safe for ground. Any additions from anyone else from the video link?

Q. I'm sure you have friends out there, Ms Dicey.

A. **MR DE PELSEMAEKER:** Now, moving onto the second topic of discussion between the expert conferencing was the issue of coming up or actually refining a potential framework for dealing with applications where there is risk of stranded assets, and what we ended up was an amendment to policy 10A.2.1. An amendment to the rule framework as well, so provide for restricted discretionary activity pathway to an amendment to a rule that we previously recommended, and the definition of mainline irrigation infostructure as well. So, in terms of the rule framework, what we are proposing is that there are a number of conditions that need to be met in order for those types of activities to be allegeable under the RDA pathway. Mainline irrigation pipes need to be installed prior to the notification date of plan change seven. The additional area that can be irrigated is only for a limited land users,

viticulture and orchids, and also there should be on increase in water use above what is in accordance or in accordance with historical use. We also added a number of matters of discretion that actually not carry one matter of discretion, but they comprise two elements. One is Council retains discretion over the maximum size of the additional area that is to be irrigated, and the second one is use of good management practices on that additional area. We contemplated putting in a matter of discretion that focuses on water quality effects, but again because there is no clear framework to assess those, we thought maybe its to tackle it from that way, and that was through discussion with Ms King as well. It's not a perfect solution, again, probably the 80/20 rule a little bit, but we thought that that is manageable to some degree, and then finally because the RDA is becoming a little bit of a repository of different activities, I thought it would be good to just kind of set out what the RDA is doing now, if it were to be adopted and if we make provision for that expansion of irrigated areas within that rule. So it does four things now. It allows for irrigation expansion provided two conditions are met, one relating to the installation of Mainland Irrigation pipes and the other one relating to a land use or land uses. It also allows you to consider other data or other methods to calculate historical usage, also if you want to take water metering data post-2020 into account. That is the avenue as well. And when there is simply not sufficient data because of a technical issue as well, so those are the four, actually conditions that we try to cater for – situations we try to cater for under the RDA.

1010

Q. Four or three? You had three bullet points.

A. **MR DE PELSEMAEKER:** Three bullet points but yes, somewhat –

Q. Four concepts.

A. **MR DE PELSEMAEKER:** – quite related. Yes. And we're happy to take any questions.

CROSS-EXAMINATION CONTINUES: MR MAW

Q. Now I'm going to start with the objective and the two versions that have been captured in the joint witness statement. Now just to assist me with

understanding who to be looking at when asking about the various options, it would be helpful if you could show me by way of show of hands which of you were supportive of version A and version B. Right that's quite helpful. So all of our remote attendees were version –

UNIDENTIFIED FEMALE SPEAKER:
(inaudible 10:11:55)

MR MAW:
Sorry?

UNIDENTIFIED FEMALE SPEAKER:
Mr Brass.

CROSS-EXAMINATION CONTINUES: MR BRASS

Q. Oh, Mr Brass has disappeared. You just had your video off Mr Brass.

A. **MR BRASS:** Just saving bandwidth, working from home.

Q. If you wish to say something, just flick your video back on and that will send a signal that you have contribution to make. Now in terms of with the remote attendees. If you do wish to add something to the discussion perhaps put your hand up's going to be the easiest way to flag attention and I'll make sure I loop back to make sure that we can give you an opportunity as we work through the process. So I want to start with the objective and I want to start with version A of the objective. So those planners who had supported this version, it strikes me that the contentious element within that objective relates to the introduction of the concept of an environmental risk and the risk needing to be low. Now it occurs to me before we get to that point I actually did have a question for all of you in relation to the plan architecture. So I just might just roll back a page. So this question relates to all of you and particularly the planners. There was a desire to split the objectives up in to multiple objectives and you've set out your reasoning at paragraph 4 to improve readability and provide more specificity around the outcomes to be achieved and I just wanted to check that your collective understanding; if you are to split the

objectives up into multiple objectives, is it your view that the objectives should all be read together?

A. **UNKNOWN FEMALE SPEAKER:** Yes, I think I speak for everyone but I'm not going to assume that.

Q. Mr Brass? Yes, Mr Brass is nodding. And the flipside of that, do any of you foresee a risk that particular objectives and my focus perhaps is on the enabling objective might be highlighted to the detriment of other objectives when the plan provisions come to be applied and I'm interested also in Ms King's view on that, based on her experience dealing with the processing of applications.

A. **MR ENSOR:** In terms of version A, I think the risk remains relatively low. The first objective is very process-based, it is talking about this transition and it doesn't drag in too much more and the second in version A, the second objective really sort of deals with those – with the activities that are being enabled. Separating the two out with the low test, coupled with what we have in front of us in terms of a non-complying activity in my view, creates a relatively low risk of there being too much mischief caused by splitting them up.

A. **MS MCINTYRE:** And I guess if I can comment in relation to version B, we've, I think addressed the way the two, well apart from that first part which Mr Ensor's already talked about which essentially is about the scope of the plan change. The two addition objectives in version B are tied together by reference in both of them with a first, our 10A 12, ties the enablement specifically to the existing scale and historical use of the permits whereas 10A 3 specially talks about, this is when the scale and rate of volume of take may need to be increased. So, they're two sides of the same equation and I think they clearly hang together.

A. **MS DICEY:** I agree with the comments of Mr Ensor particularly because and Ms McIntyre but because Mr Ensor was commenting on version A, I did always see there was a bit of a disconnect with the architecture of PC7 in that the vast majority of activities were being incentivised to go down a controlled activity pathway but the whole plan was framed in "avoid" language which is I suppose is one effective way of pushing applicants down the controlled activity but I think the enable, particularly

in relation to the existing scale, consistent with historic use is far more in line and sets up and anticipates the controlled activity pathway for the majority of applications.

A. **MS KING:** And from a consenting perspective, I agree with Ms McIntyre that the second and third in version B are clear enough. To know which ones to be looking to.

THE COURT: JUDGE BORTHWICK TO MS KING

Q. Sorry say that again, the second and third?

A. The second and third objectives in version B.

Q. Yes.

CROSS-EXAMINATION CONTINUES: MR MAW

Q. So, when you are processing an application, you'd be looking at the full suite of the objectives and not troubled by the fact that they've been split up into three separate objectives?

A. No, I would be looking at all three.

A. **MR TWOSE:** Yes, good morning yes look I was just going to simply add Mr Maw that in a fashion we did look at, a quite an expressed linkage of literally just stating the – or cross-referencing back to the first objective which is essentially 1.1 (b) and (c) but it's really a stylistic thing that either version A or version B, it refers to "deemed permits" or "water permits". So it's fairly clear I think in terms with the three are joined.

1020

Q. Thank you, now I have a question in relation to the first objective that it would appear you all agree on and my question relates to the word, "operative" within that objective and whilst I understand that at the present time there is an operative planning framework but there will always be an operative planning framework over the transition period and I have been exercising my mind as to how the current planning framework might best be referenced. So my first question is, is it the current state of the planning framework that is the start point for the transition that you were intending to capture by reference to the operative freshwater planning framework

A. **MR DE PELSEMAEKER:** The answer to that would be, yes, that is the current one, however, because this is going to be part of the operative framework, planning framework, it will cease to exist once a new planning framework becomes operative, so, I think that kind of avoids the confusion in that regard.

A. **MS MCINTYTRE:** I think you've picked on a slight ambiguity in there because I think well, we are talking about the current – I mean, Mr De Pelsemaeker's talking about the current framework, I think to clarify, we're talking about the framework at notification of this plan change because as we're all aware now, that framework has changed as of last week with the new RPS, and I think we certainly hadn't that that would be considered as part of that operative framework that we're talking about there, so I think there is a potential issue with that word, we may need to clarify it more.

Q. So, just from an intention perspective, was it a planning framework that existed, say at the date of notification, is that the start point that you had in mind when framing up this objective?

A. **MS MCINTYRE:** I believe it was – it certainly was for me.

Q. The record there is nodding from the participants on the AVL screen. Doe anyone take a different view in relation to what it was that was forefront of mind? No, and I'll put you on the spot, and bright ideas as to how that might be capture in the wording?

A. **MR ENSOR:** I mean, it could be – well, I actually don't think there's much of an issue with it currently, but there could just be a direct reference to the plan, the current operative plan by name, but I think it in a way including, sort of scooping PC7 up under this and then losing it all once the new integrated framework comes along is sufficient.

Q. Mr Twose?

A. **MR TWOSE:** Well, I think I agree with Mr Ensor, but possibly, the only practical way might be just to put in the date of notification so that the operative planning framework of – so, it's understand that it's a pre-PC7 operative water plan.

Q. Thank you. Mr De Pelsemaeker?

A. **MR DE PELSEMAEKER:** I'm just conferring with my colleges, because if we put it at the date of notification, it would not include the current operative RPS, and that is part of the – because it wasn't operative at the time, yeah…

Q. Is it then, is it the transition, and the question is, what was the starting point of this transition? Was it simply a planning framework that existing as at the date of notification?

A. **MR DE PELSEMAEKER:** Yes, but I think it's also important to make clear that after notification, we had an RPS which became operative as well, which should not be part of the planning framework that you will – it will not be part of the future planning framework, so I think that could be a complexity if we simply refer to the notification date. It could cause some confusion perhaps is what I'm saying.

Q. Ms King, you're the one who may have to deal with this. Does reference to the operative freshwater planning framework create any difficulties from an implementation perspective?

A. **MS KING:** It hadn't popped into my mind until this questioning, so I'm just trying to work through it now. Ms De Pelsemaeker has a good point in terms of the current RPS. Possibly because I didn't foresee it being an issue, I knew what it meant, so I don't think from a consenting team perspective it's a problem.

A. **MR DE PELSEMAEKER:** One way perhaps that we can deal with it is by referring it back to the NPS of 2020 and the framework that gives effect to those – to that instrument, because it is established that the current plan as well as the operative RPS does not give effect to that.

Q. Ms Perkins?

A. **MS PERKINS:** Yes, I just – I sort of agree with Mr Ensor. I don't think it's too much of an issue because we're not talking about assessments under that here, we're just talking about how this PC7 is about the transition from one planning framework to another, it's not really addressing anything else in here other than saying what particular activities are covered by Plan Change 7 in the fact that we are creating a transition, so I don't see that we probably need to – that we really need to add anything else to address the word "operative" versus it being the

current planning framework, because as Mr de Pelsemaeker noted there is – especially with the RPS, that I don't think it really makes much of a difference at the end of the day.

Q. And Mr Twose?

A. **MR TWOSE:** Well I agree with Mr de Pelsemaeker and, look, you can simply slide the – if you're going to go with a date as a solution to this, then simply slide that along. I mean, PC7 won't – you know, it'll be operative post the date of the RPS anyway so you could simply just use that as your fixture point, or the day before the PC7 becomes operative, for example, or thereabouts. If a yes to the date is the solution to this, but again I just reiterate, you know, that it's – you know, in terms of actual impact, yeah it haven't occurred to the majority of plans before and possibly may not for our colleagues thereafter.

Q. Mr Ensor, your hand was possibly just scratching your hair. Is there anything final you wanted to add on this topic?

A. **MR ENSOR:** No, no, no more.

Q. Very good. Okay we will move on. Parties may perhaps comment on that in closing if it presents any issues but it's helpful to understand what the thinking was in terms of the use of that phrase. So I want to move forward now to consider the Version A of the objective, so those planners that have recommended the second objective which is set out at paragraph 8 of the joint witness statement. Now perhaps the most contention – contentious element is subparagraph B where there is the introduction of this concept of a low risk for additional environment effects resulting from the proposal, and my first question is how might a consents officer go about interpreting the threshold of a low risk in the context of a plan change that doesn't set any environmental outcomes? And I might start perhaps with Ms King in relation to that, perhaps from an implementation perspective.

A. **MS KING:** The wording here does pose an issue for me in my perspective from a consenting point of view because I'm unsure whether – are you doing a risk assessment on the environmental effects? I'm just unsure about the wording there and what that would then mean for undertaking an assessment.

THE COURT: JUDGE BORTHWICK

Q. So you're unsure what is a risk assessment or –

A. Yeah, yeah.

1030

Q. Okay.

EXAMINATION CONTINUES: MR MAW

Q. So perhaps to assist with understanding what this particular part of the objective we're seeking to pick up and address, I wonder whether one of the planners recommending this part of the objective might describe what it was that was to be captured by this element?

A. **MS DICEY:** I don't mind kicking off – Sally Dicey – so to my mind, and this differs a little bit between us as to who was involved just in aspect conferencing on the objective and who was also involved in the stranded assets discussion. I was involved in both, and with the stranded assets, there was the proposed potential increase in scale, and then, through noncomplying, there might also be an increase in duration beyond six years, and also increase in scale and other matters. Could be anything under the noncomplying, and so this really set the stage in my mind for the RDA pathway with the stranded assets, and so it linked through to the additions to the RDA pathway in relation to that, so that was quite confined in terms of how this aspect of the objective could be utilised, and then, with the noncomplying, I know, I agree and acknowledge that it does introduce a new concept, but in the noncomplying space, there will be a whole raft of considerations that will be brought to bear on this, and so those other factors, you know, MPS considerations, et cetera, will also be in the mix, so I'm not sure if someone else wants to add something to that.

THE COURT: JUDGE BORTHWICK

Q. So can I just clarify?

A. **MS DICEY:** Sure.

Q. You thought that this objective would set the pathway for the RDA stranded assets, and also inform the outcomes for noncomplying activity, so it's got two purposes in your mind?

A. **MS DICEY:** Yes.

Q. Yeah, okay.

CROSS-EXAMINATION CONTINUES: MR MAW

Q. Ms Perkins?

A. **MS PERKINS:** Yeah, I just note that I agree with what Ms Dicey has just said to the kind of two components of this, and I think it was important in our thinking that there was the first step for that pathway from the stranded assets conversation that comes after as well.

Q. Mr Ensor?

A. **MR ENSOR:** I guess, in the simplest terms, in my view, was that if there were going to be some exceptions, then there needed to be some recognition of the objective of how that may come through, and whether there was – I guess the stranded assets is the easiest example because the matters are relatively well-defined, I understand, from what I've seen, and there isn't probably a huge amount of assessment that needs to go on around low. The noncomplying activity pathway is a bit of a different story, but I think we're probably getting to the point now with the avoid nature of the framework around it that it's a relatively small risk that that will be taken, and it would be up to those involved to try and determine what low is in that context, with site-specific and situational-specific matters in mind.

Q. Mr Hodgson –

THE COURT: JUDGE BORTHWICK

Q. Just pause there a second. When you're talking, Mr Ensor, about the avoid, can you just key me in to which avoid you're talking about, where that might be found? So here, we've got an objective. Is the word "avoid" in the objective or not?

A. **MR ENSOR:** Sorry, it's in the policies.

Q. It's in the policy for – on duration?

A. **MR ENSOR:** In the policy that was – yes, correct.

Q. Yeah.

A. **MR ENSOR:** Sorry, I'm just scrolling madly and not quite successfully doing that, but, yes, in relation to duration.

Q. In relation to duration, so how does your answer – you felt comfortable with the non-complying activity because there are avoid policies in relation to duration, so what does that mean? Does that mean you can increase your scale or duration? Yeah, I don't understand how avoid gives you comfort. Could you just tease it out, how the avoid policy is a comfort?

A. **MR ENSOR:** It was in relation to a risk surrounding the use of the word "low" in the objective, and the question around having to do an assessment of what "low" means. In terms of the instances where an applicant might take a less-defined pathway, so, for example, the stranded assets example is quite well-defined, but in terms of something else, where they might want to increase duration, for example, the relevantly strict direction in that policy in my view means that the issues of interpretation around what is low or not will be relatively minimal.

Q. What's the strictness that you're referring to? The relatively strict direction in that policy, so which policy are you now talking about?

A. **MR ENSOR:** The one, the avoid policy in relation to durations.

Q. Okay, all right. I think I understand what you're saying, but –

A. **MR ENSOR:** I guess I'm saying that probably not that many applicants are going to take that pathway, and therefore require a consents officer or others to interpret low in the objective in that context, but what it does do is support the exception that has been identified, for example, stranded assets.

CROSS-EXAMINATION CONTINUES: MR MAW

Q. Mr Hodgson, you had a contribution to make, and I am going to come back to this point about the interplay with the policy shortly, but Mr Hodgson, you had something that you had flagged.

A. **MR HODGSON:** Sorry, I was – yeah, my concern was just in regards to the stranded asset issue and whether we may have, effectively, an

orphan policy. We've got the, I think, very useful changes have been made in terms of a method and a policy change to address the stranded asset issue. My concern was whether, at an objective level, there was that support, and hence, that support that I've got for version A.

Q. So is it fair to say that, in your mind, you weren't seeking to open the noncomplying activity door further ajar with respect to activity seeking a longer than six years' duration?

A. **MR HODGSON:** I wasn't, no. I think that would be a fairly difficult proposition to navigate through this framework.

Q. Now, other planners who had supported this objective, did they have in mind the dual purposes as Ms Dicey has expressed, so both providing a parent for the stranded assets provisions, and also consideration for activities through the noncomplying activity pathway, or just one of those?

A. **MS STYLES:** If I may, excuse me, I was very much of the view that the group have all expressed, that this piece of this objective is trying to do multiple purposes, setting up the RDA pathway, and also trying to clarify what the point of the noncomplying pathway is. The other thing that was on my mind, and I know others', was the contemplation of a discretionary activity pathway, which had come up in some people's evidence with different activities, such as the hydro and community water supplies, and other things that have been popping around with that discretionary activity, so having something in the objective that turns to consideration of things that are outside the controlled activity, which is the first part of the objective, the second objective, or the second objective in version B, is needed just simply to explain what the purpose is or what you test back against. In terms of the duration aspect, whilst we're all quite clear that that is very limited by the wording in the policy that sets up an avoid terminology, it seemed, to those of us who were discussing this, in the version A, that there needed to be something somewhere that anticipated that there could be activity seeking noncomplying or another status consent for a longer duration than six years, and simply saying "avoid" leaves everyone in a vacuum of what you may or may not consider, and this is where we were trying to attempt to give some guidance on what a

consent-processing officer might turn their mind to when they're looking at those types of consents.

1040

Q. Is there a risk that introducing this element to the objective will result in the directive language in the policy being read down when it comes to application of the objectives and policies in the plan, in the context of a noncomplying activity application?

A. **MS STYLES:** I think everything would have be to be taken on, in its context. It's going to depend on what an old complying activity consent is seeking. They could be doing many different things as my colleagues have mentioned, whether it be an increase in scale or water, application or duration, and so we're going to need as a consent processing officer, to consider the objective and the policies that are relevant plus the nature of what is being proposed. It – you can't just simply pick pieces apart when you're processing a non-complying activity and all matters are relevant.

Q. Ms King, sorry to pick on you again, when you're thinking about this from a consent processing perspective, do you foresee some risk that applicants will say less weight should be placed on the avoid policies because there's a, an objective which opens the door in terms of consideration of activities which they say have a low risk of adverse effects?

A. **MS KING:** Yes.

Q. Now in terms of the planners who were supportive of Version B, you have provided some commentary or comments on the Version A. I would invite you now to share your views in relation to Version A and I think the concerns or views were expressed at paragraph 12 of the joint witness statement, so.

A. **MS MCINTYRE:** Since the microphone's here, Sandra McIntyre, I guess my two key concerns with Version A are first that I think the I suppose the uncertainty in about what is a low risk of environmental, a low environment risk that it seems to me takes us back into the same arena as the problems that we discussed, that we discussed at length in the hearing about the previous non-complying policy which was tying to

effects being not more than minor. It seems to me that exactly the same problems arise with this objective and I agree with Ms King, that that's gonna be a real issue in terms of processing non-complying consents. The second problem I have with it, is that it doesn't provide any guidance at all in relation to what is a key, one of the key aims of this plan change which is to ensure that takes and uses of water can be considered within the framework of the new plan and the new MPS and that framework, when it is in place, so there's nothing in Version A which actually points to that key consideration.

Q. Mr De Pelsemaeker?

A. **MR DE PELSEMAEKER:** I agree with Ms McIntyre. During the presentation I actually had points in paragraph 12 in mind and I hope I expressed them well. What I did not mention was about the uncertainty around low risk, the concept of low risk of environmental effects and I've read what's been said about that. It, yeah, it is uncertain. I also think that it's essential that we are able to implement or achieve the outcomes that are gonna be set in the new land and water plan and without those outcomes, without them being known, it is kind of hard to say what environmental effects are acceptable. Yeah, that's all I wanted to add to that.

Q. Thank you, Mr Brass?

A. **MR BRASS:** Yes, just to add that my main concern with that version is that it's not explicit about the need, the limit, consent, duration, and the example in Plan 1.1 is recent decision, I'm sorry, I forget the correct name of the applicant but it was the (inaudible 10:45:01) golf course, and in that case, the activity status predated plan change seven, but as notified plan change policies were considered, in that case the effects were considered to be no more than minor and consent was granted through 20 35, so effectively the non-compliant longer duration pathway, and we looked at that version A, I think that where the risk of additional effects is low, those sorts of applications would be able to pass through that even though in that case it's locking in for 14 years, a take which is well above (inaudible 10:45:53), which does then make that difficult to pull that back under a new allocation regime when the new plan comes into place.

Q. I'm going to move on next to version B, but before I do so, are there any final remarks that any of planners wish to make with respect to version A in response to the points that have just been made? Mr Farrell?

A. **MR FARRELL:** I will concur with my colleges in terms of those who support version B in what they just said. Just an observation, I think, and I'm not sure how the topic A group might take this, but I think there's a lack of appreciation of the extent to which the way that their version of the objective is written relies on the avoidance policy, policy 10A2.2 having real potency, and I think, Mr Maw, your question of Ms King, I agree with Ms King's response that if that objective survives, then if I was a commissioner or decision maker, I'd really be testing how potent is the avoidance test in policy 10A2.2, because the objective itself, in my mind, really does question that avoidance policy. So, to my mind, the objective recommended by version B planners is not a good parent to the avoidance policy. Version A sorry.

THE COURT: JUDGE BORTHWICK

Q. So, the objective of version A is not a good parent.

A. **MS DICEY:** Just listening to the discussion, I acknowledge some of the issues with this, it's always, I mean PC7 is not a plan change that allows for environmental assessments in the round and doesn't set up a full framework in the round for that, and that is what is so challenging around the non-complying pathways, there just is nothing, no indication of what should be considered and what should be given primacy in terms of thinking. I think some of the issues that have been raised with that second arm of the version A objective are partly because they're hanging off the "and enable" introduction for that objective, and potentially starting separating them out as the version B, last two objectives have been separated would be helpful in starting, so it would be enable and then linking into the A, sub paragraph, and then sub paragraph B actually hanging off a start that is more akin to the version B third 10A.1.3, so that's the ensure, blah, blah, blah, are only allowed to, so, more of that, so that would do less to potentially weaken any avoid policies that come after that, so, it's more limiting, rather than the enable, which is really

speaking to the controlled activity. So, that might assist with that, and I do just note again, that if an applicant is going down that non-complying pathway, this is another test, it's not the only test, so there will be a full in depth assessment at that stage with an avoid policy in the mix which they're – I'm not sure we can compare decisions made at the moment under PC7 when the operative planning framework is still in play. It's not just PC7 in isolation, and so it will be a non-complying activity assessment which considers both whether effects are no more than minor. The application against the policy framework, including low risk, and I think quite a lot of evidence would be required on that matter, so it's not a confined application or assessment at that stage.

1050

Q. Okay, we'll move on to version B now and explore its meaning. The first question that I have relates to the introduction, or a recommended introduction of a definition of transition period. Now, when I read the definition of "transition period" it is covering what looks like a different – it might be a different period of time from the transition referred to in the first objective. I'm interested to understand whether a distinction has been drawn between the transition period referred to in these recommended objectives, compared to the transition referred to in the first objective.

A. **MR DE PELSEMAEKER:** That is correct. That's good observation. In my view the transition in the first objective is not a period, it's an action, whereas in the objectives – the following objectives, 10A.1.2 and 10A.1.3 under version B, you are referring to the period in which this transition is occurring, so they're slightly different concepts. Transition seems to be an obvious concept, but I think there is confusion – there is risk of confusion between – because we've used the word "transition," we've used the word "interim period," and we need to be careful as to how we use them. We've used the word "interim period" to refer to the period between now and when the new framework is becoming operative, but that is actually not the same as the transition period. The transition period is determined by the length of your consents really, because that's how long it takes to implement that framework. So we thought it would be a good idea to clarify that, and also put some constraints around that, bring

it back to the six-year timeframe, especially when you look at the second objective which – under version 10A.1.2 enabling activities to continue during the transition period. It kind of brings it back to that six-year period. It makes it clear – crystal clear that it shouldn't continue for any longer. So that was the whole rationale behind it. Providing clarity and bringing it back to the need to constrain the transition period and therefore the consent duration.

Q. Any additions in relation to that explanation from those in support of version B? Okay, and we'll move on to what I detect to be the most contentious element of these two objectives and that appears to relate to the reference to not compromising the implementation of the new planning framework, and concerns have been raised in terms of how that phrase might be interpreted when there's no understanding as to what that planning framework might look like. So starting again with Ms King. As you read that part of the objective how might you go about implementing that?

A. **MS KING:** I do note that there can be issues with referring to a document which – or documents which are unknown. However, when I read that it just reinforces in my mind the short-term duration so it would be – yeah, just reinforcing that you aren't compromising by recommending a shorter duration.

A. **MS McINTYRE:** If I can just add to what Ms King has said, I agree with her and I think there's a key difference to be made that the criticism of this wording that has been made by the people who support Version A, is that you can't determine whether or not you're going to compromise outcomes that haven't yet been set, but that's actually not what this wording points you towards. This wording is specifically talking about not compromising the implementation of the new framework, and as Ms King said, that takes you directly to consideration of whether you are going to be able to look at the uses that are being given consent within the new framework in it so it directly takes you to that question of duration.

Q. A second criticism made with respect to that part of the objective relates to the reference to a planning framework that prioritises the health and well-being of waterbodies and freshwater ecosystems, and as I

understand the criticism, it strikes me that it is about saying that that is too narrow a focus in terms of what a new planning framework may be seeking to achieve. I'm interested in a response to that criticism.

A. **MR DE PELSEMAEKER:** We had some discussion amongst ourselves as to what concept should we bring in there to signal that what is gonna be in the new planning framework is gonna be change, paradigm shift from the current one. We thought about references to Te Mana Te Wai, but it's a little bit hard because then you are looking at something that at that point and yet there is now an interpretation of that articulated in the proposed RPS but that could still change, but having a reference there to prioritising the health and wellbeing of freshwater bodies to me signals a radical change from the current framework which is trying to do everything for everyone, and in doing so probably has too much of an emphasis on letting existing activities occur as they were and a good example of that to me is the how the current allocation framework works, because it doesn't deal with over-allocation. Just fully allocated and that's where the thresholds is.

Q. And the final matter I wish to ask you about in terms of the drafting relates to the third objective, sub-paragraph (b), which it picks up the phrase, "Continue operating beyond the transition period". Now my question is one of perception with respect to (inaudible 10:58:45), this objective in whether that is sending a signal that may cause distress in the rural community in terms of the ongoing operation of activities beyond the transition period, and I'm interested to know whether any of the planners have read that objective as sending a signal that is perhaps not appropriate to be sending at this point in time?

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. Sorry, I'm a little lost as to what signal? The signal to the rural community?

A. Yes, that activities won't be able to continue operating beyond the transition period.

1100

Q. Can I just read that, with that in mind? I see, so the signal being in particular to vote who use, are taking, using water for irrigation, that they may not be able to operate beyond the transitional period which would be a missed step, you know?

A. Yes.

Q. Yes.

CROSS-EXAMINATION CONTINUES: MR MAW

A. MR DE PELSEMAEKER: I assume you mean continue operating under the consent granted under the PC7 framework, beyond? That would resolve the issue, would that provide more clarity? So it's not that the activity cannot continue but under the current conditions set under new consent. It is a possibility that it might be interpreted that way.

A. **MS MCINTYRE:** I think if you were to read (b) in itself without broader objective, you could take that perception but I think what it's actually – if you read the objective as a whole, what it says is that you're only allowed to continue operating beyond the transition period if it doesn't compromise and that, I think, what that flags and again, going back to the wording, "in terms of prioritising health and well-being of waterbody". What that does is that sends a signal to people that to continue operating in the future they are going to need to start looking at how their activities are going to provide for that prioritisation which I think is an appropriate signal to be sending.

Q. And perhaps one of the things I have on my mind is that it possibly doesn't send the signal that there may be time at the expiry of the transition period for users of the water resources to adapt, so the phasing in, the timeframes for achieving the outcome of a framework that is prioritising the health and well-being of water. I may be reading that differently to others but it was certainly something that struck me as I read through this objective.

A. **MS DICEY:** At the risk of butting in a version B discussion, I don't think there's ever been a signal to the rural community within PC7 that there will be an allowance for transition after PC7. That's not covered or addressed in PC7. PC7's only concerned with what's happening within

its own lifetime really. And I think the rural community probably or water users are already concerned around the factors that you've raised. So I don't think that changes anything.

Q. Okay, right I'm going to handover version B to those in support of version A to provide some further commentary in relation to the issues that have been raised at paragraph 10 of the joint witness statement and we have covered some of those matters but I'm interested to hear from the planners who have raised those concerns.

A. **MS DICEY:** I think you've covered them pretty well Mr Maw. The only comment that probably came to mind for me is that whether it's compromise– so in terms of the very last part of 10A.1.3, about not compromising the implementation. Whether the wording is not "compromising outcomes" or "compromising the implementation", to me doesn't really make a big difference. We're still not exactly sure about what outcomes will be being sought to be implemented under any future planning framework. I guess that just circles back round to the original issue we had even at the last expert conferencing, is an objective that it's very difficult to measure outcomes against this objective under PC7 because particularly in the early stages we really have – when the vast majority of permits actually likely to be processed under PC7, we may not even have a draft land and water regional plan, it's – we won't have one and so we really are crystal ball gazing.

Q. Any other comments on the version B from those in support of version A? Okay, we shall move on. I thought we might next address the stranded asset –

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. Should we leave stranded assets, so we can finish off objectives and then let folk who've got hearings go? Unless they're desperate to get in on stranded assets and are time rich.

A. Yes, as in, does the Court wish to ask its questions next?

Q. Well, yeah, but any –

A. And other counsel.

Q. – cross-examination as well. It just seems to me what was critical was that we had at least two people who were in hearings. So, and I was particularly concerned about the objective, because its purpose has not having heard now everything is not been signalled in the JWS sufficiently well. So, okay. So, we're all happy with that, anybody got any cross-examination on the objective? Yep, Mr, Welsh.

CROSS-EXAMINATION: MR WELSH

Q. I just have very, very limited, because most of the matters have been covered by Mr Maw, but I just wanted to clarify, and I don't mind who answers, in respect of the first objective, 10A11, where A, B, and C sets out the permits or the applications to which the plan change seven is intended to cover, and my question relates to A, which relates to the new takes, and my understanding when you look at the policy is that there's the ambit of plan change seven for new takes, new permits is limited to that policy direction on duration, and I just wonder if the language is a little bit loose around managing those, and whether it should instead read something along the lines managing *the* duration of permits for takes and uses, because plan change seven has no other provisions relating to that. Any comment on that?

THE COURT: JUDGE BORTHWICK

Q. Does anyone disagree with Mr Welsh?

A. **MS DICEY:** I think that's a reasonable change, yes.

Q. **MR DE PELSEMAEKER:** Yeah, I agree, there is no risk in doing that and it provides clarity.

CROSS-EXAMINATION CONTINUES: MR WELSH

Q. My second question which goes against all rules of cross-examination in terms of an open question without knowing the answer, is that can someone from the version B team please give me an example of an application that would compromise the implantation of an integrated regional planning framework.

A. **MS MCINTYRE:** An example of an application that would compromise the implementation is one that was granted for a 35-year term, because that can't be reconsidered. It's subject to the limited provisions, and we've talked bout the issues around 128 consent reviews. A long-term consent would compromise that.

Q. Right, so in response to that answer, is that based somewhat on a pre-conception that there's a precedent effective associated with a single application that's granted 35 years, somehow compromising the implementation of an entire regional plan and framework coming through?

A. **MS MCINTYRE:** No, if the new planning framework is to give effect to, I think, to the NPS, among other things, the NPSM, then there are matters within that NPS, particularly in relation to address over allocation which are going to need to be looked at, not just across the board, but are going to need to be looked at in terms of individual applications, it's not a – it's actually a matter that will need to be looked at in terms of certainly a large a proportion of applications or the consents that are out there now, it's not just a matter of precedent I don't think.

1110

Q. Right, and does anyone else in the plan version B team have a view that single application granted beyond the six years would compromise an entire regional plan framework implantation?

A. **MR FARRELL:** I think it is going to be a bit more contextual than that and to add to what Ms McIntyre was saying, I think on a case by case basis, if you've got submitters, and for example, Nga Tahu Runanga and Fish and Game showing up and saying that there are environmental outcomes for example, or integrity issues around implementing the MPS freshwater that are at stake, then I think that would be an example of how you might be compromising future planning framework.

Q. Mr Farrell, does that mean that you adopt the position compromising wider than just purely duration?

A. **MR FARRELL:** Yes, and I was going to actually say, because I didn't get a chance to put my hand up back in the first question you had, I don't actually agree with my counterparts, that the suggestion you had is

appropriate because certainly managing the duration is the focus in terms of providing for a short-term framework, but beyond that the framework is the non-complying activity status and it intentionally opens up all tests that might apply in the non-complying activity status, and so at that point, beyond six years I think it's more than just duration.

Q. And Ms King, do you have any issues as to the process and application, with an applicant, for example, saying: "I can't possibly compromise the entire regional planning framework because I'm just one applicant," versus the counter which may be that you are seeking long-term consent or you raising effects that Fish and Game and co may have an issue with. How are you going to assess an application against the word "compromise," which is not one that appears in the act at all?

A. **MS KING:** Sorry do you mind just asking me that again?

Q. Well, I'm just wondering, trying to place myself in your shoes and wondering how you would assess an application when an applicant says, "I'm just seeking a longer-term consent. It's just me. I can't possibly compromise the ORC's rolling out of its regional planning framework by granting me a longer-term consent." How would you approach that argument against the arguments of Ms McIntyre who says, well it's one application for a longer-term consents so therefore it compromises the framework or Mr Farrell who raises effects' concerns with the application. Just how are you going to approach the assessment of that application?

A. **MS KING:** I guess it would be on a case-by-case basis dependant on what, in what way the application might compromise the implementation. So looking to Ms McIntyre's example where you need to be looking at allocation which could then compromise the implementation of a new allocation framework under the new land framework. And then in terms of Mr Farrell's example where effects might compromise the implementation, it would obviously be dependant on what those effects are, and I'll have to step through that whilst considering the objective. So, I'm not sure if I can give you a very specific example unfortunately.

Q. No, I think that's the answer.

QUESTIONS FROM THE COURT: JUDGE BORTHWICK

Q. Court's questions, I have some questions, not about objective 10A1.1 and no questions in particular about version B, 10A1.2. So, the questions relate to the version A objective, 10A1.2 and the version B objective, 10A1.3. So, just looking at 10A1.2, the first thing the I noted and it's probably just an editing thing but your sub-paragraphs (a) and (b) are conjunctive. Which if they are a conjunctive, they're pulling in different directions. Agreed? So that should be an "and" or an "or" if that goes ahead?

A. **MS DICEY:** Yes. We did play with that wording a bit and I did have that concern as well.

Q. Okay. Everyone happy that's a disjunctive and an "or"? Okay? So, I think you've already have answered this but the second thing that I ask myself, well, what does, looking at an increase in scale, so that's the sub-paragraph (b), that seemed to me to include, well almost anything really. It could obviously include rate of take and volume or area, might pertain to the infrastructure, laying out of the infrastructure maybe or something else. Can somebody help me, what does scale mean in this context?

A. **MR DE PELSEMAEKER:** It includes those matters, increases in scale, increases in the use, the scale of – the use of the water as well. Yes. It might include other things that we could not foresee at the time when we were thinking about it.

Q. So, it includes the increase in use of water and I think you are agreeing it can include an increase in area. and it can also include the increase in take – take and use.

A. **MR DE PELSEMAEKER:** Intake – yes take and use, yes.

Q. Plus other things not imagined yet. Okay.

A. **MS DICEY:** I'm not sure in head whether it included the "take and use" or the rate because those two things are almost separated out in both versions actually.

Q. So, tell me – slow your observation down there.

A. **MS DICEY:** Sorry, to my mind it doesn't include an increase in the allocation because in both versions those two things are actually dealt

with separately. In the version A version it's – that consistent with historical use…

Q. *Or* and this is where the "and" "or" becomes important. So we're just looking at your version A. "At their existing scale and consistent with historical use *or* where the risk of addition adverse environmental effects resulting from any proposed increase in scale or duration". So I've interpreted the scale of the take and use or scale meaning something else maybe area or duration.

A. **MS DICEY:** So, we did have a conversation about whether scale – could the word "scale" alone could just cover off the use of the water and we thought that was too, might be too ambiguous and that's why we specifically included reference to the historical use. To my mind "scale" was more about area than anything else but I acknowledge that perhaps that's too broad and yes. Others may have a different perspective on that.

Q. I've noted Ms Dicey that you think scale means "area" and does not mean "take and use", based on – the historical take and use. Correct?

A. **MS DICEY:** That's correct.

Q. Anybody else who supported version A, does scale mean "area"?

A. **MS PERKINS:** Generally when we were talking about this, it wasn't the context of the irrigation area but I accept that if this is to cover those situations that might fall into that non-complying category, then that would also cover those people that did for some reason want to seek increases beyond what they historically taken. And if this is a – the part of the objective that covers those non-complying activities, that scale would also need to cover those that might not comply with the controlled activity limb entry condition of the historical use.

Q. Yes, so Ms Perkins you're "area" together with plus historical use and increase in historical use?

A. **MS PERKINS:** I think the way it's framed, it does cover me and probably would need to.

Q. Yes and the question's what did you want it to do. That's really only, yes. Is it those two things or it something else? Pardon.

A. **MS PERKINS:** We mostly did talk about area. We mostly did talk about it in the context of area when it came to the stranded assets part of the conversation but I did miss some of the initial conversation on this with the group.

Q. Could scale mean something else in your mind?

A. **MS PERKINS:** I don't think so, I think the scale really is in relation to those components of the entry conditions. So where you're talking about the area or the volume or rate of take. In my mind that's where the scale comes.

1120

Q. Right. Ms Styles, you've got a particular interest in hydro. What do you think scale could mean your client, yeah, and this is your client now seeking to advance either an RDA or a discretionary or perhaps even a non-complying activity, what would scale mean to your client?

A. **MS STYLES:** For my client, it's largely related to the quantum of water which is the scale of the take, so when – they're not talking about scale in an area or a spatial sense, and I guess from my perspective that's limited for the trust power situation because they already take as an opportunistic take what is available, so they do no deliberate taking that will ramp up a scale. Essentially, the scale of what they take is limited by water in the river at the time. So, there's no intent to increase the infostructure in a way that would enable a greater scale of water to be taken and that was why the issue of being able to determine what the historical use it for trust power is key because it needs to reflect those seasonal and weather related events that change the scale of taking according to the water availability. For me, the question here was particularly related to the duration element and how that relates to longer term consenting for trust power.

Q. So, as I understand it, schedule B as it's – the schedule in the plan as it's proposed to be amended by the planners now addresses trust powers opportunistically to take water, is that correct? There's no scaling back of that opportunity.

A. **MS STYLES:** It better addresses it.

Q. Sorry?

A. **MS STYLES:** It better addresses it –

Q. Better addresses it.

A. **MS STYLES:** – in so far that there is some water meter data that trust power holds.

Q. Okay.

A. **MS STYLES:** - but what trust power's also suggesting is sometimes they may need to show historical use through more than just the few years of water metre data, which is where the other entry conditions that go to the RDA rule kick in.

Q. So, in terms of your client's trying to achieve here, and what your supporting, scale does not go to a concern about the use of water or historical use of water, scale goes to duration. So, that's setting you up, if you like, for a longer duration in an RDA discretionary or non-complying context. Correct?

A. **MS STYLES:** Correct.

Q. Thank you. Mr Twose. Same thing, what does scale mean to you in terms of the, you know, the territory authority's interest.

A. **MR TWOSE:** Thank you. Well, as with Ms Styles, area is not a particularly relevant consideration, but the quantum of water. So, when you read B, the scale of the take and us the freshwater, so, it's low, medium, high takes. But again, I would also that with the version A 1.2B, it is as Ms Styles mentions, duration, I think, is a primary consideration for the TAs. When you're talking about scale, the change to – or the proposed version A 1.2B actually ties in with the RDA matters of discretion where in, and I'm referring to 3.1A.1, in double A, for community water supplies, with an existing water permit volume and rates, the extent to which there is need to provide for population growth within the term of the consent. So, that could be well be circumstances, your Honour, where the take needs to scale up for those factors.

Q. Okie dokie, give me that reference again, 10A 3…

A. **MR TWOSE:** Sorry, I'll read it out in full for the RDA, so that –

Q. If you give me the reference before you do, 10A…

A. **MR TWOSE:** Yeah, 10.A.3.1 A.1, this is the RDA activity.

Q. Oh yeah.

A. **MR TWOSE:** And then just going down to the matters of discretion, it is (AA).

Q. So, in a sense, scale, for you, also means scaling up for population growth.

A. **MR TWOSE:** Correct.

Q. So scaling up, what would you be scaling up, your rate and take?

A. **MR TWOSE:** Well, conceivably both, yes, so it talks about both the volume and rate limits.

Q. Yeah, volume and, yeah, your historic use would be scaled up to the population growth.

A. **MR TWOSE:** That's right, but with the caveat in (AA) that it's under the ceiling of the existing water permit, maximum volume and rate limits.

Q. Just remind me, existing water permit, the permit to be replaced, is that correct?

A. **MR TWOSE:** That's correct.

Q. Yeah, okay. So, Mr Twose, I've noted that scale would be applied in relation to the territorial authority's interest, both to support a longer duration and to support the RDA?

A. **MR TWOSE:** Yes, that's correct, your Honour.

Q. Yeah, okay, for scaling up, all right. Is there anything else that I'm not aware of, any other activities which might seek or which might view scale in a particular way, any other interests that are here? Nobody, all right. The second thing that really struck me was this phrase: "additional adverse environmental effects." You see, I sat there thinking, well, for consenting purposes, the comparator environment would be the existing environment, so the existing environment sets your baseline, which environment the concern of the regional council is that it is either degraded or degrading, so that's now my comparator environment, and so when you're looking at this objective, you're looking at adding to adverse effects on your existing baseline environment. Is that what you intended? So additional adverse environmental effects sets up a comparator to your existing environment, the environment as it exists now is your baseline, which environment might be degraded or degrading.

A. **MS DICEY:** That, I think, really reflects for me the evolution of this in relation to the stranded assets question.

Q. I want you to park up stranded assets and now start thinking about irrigators. Is that what you intended?

A. **MS DICEY:** Under the noncomplying rule?

Q. Yeah, would – yes.

A. **MS DICEY:** Yeah.

Q. But I also think, to be honest, I'll tell you what I think, that this actually sets up a pathway for consenting under a noncomplying rule or supports your pathway for consenting for discretionary, and does so in a way which now sets up the existing environment, which, in some places, is degraded or degrading as the comparator environment. Is that what you intended?

A. **MS DICEY:** That wasn't what I'd intended, and I hadn't actually contemplated this with regard to a discretionary activity rule, so it was only within the context of what we'd been tasked to do, to setting aside other relief sought in terms of the stranded assets, and thinking about, as well, how that might apply to noncomplying. So it's hard for me to set aside the stranded assets component of it because it was very much focused and we had quite a lot of discussion about that if there are stranded assets and you're only adding a discrete area, whether the assessment should be on the whole activity in the round for the RDA, and we agreed that it should only be about the additional area, because the existing area irrigated could just proceed down the controlled activity pathway and be accepted on that basis, so it was really focusing that assessment just on the additional area, but, yes, I take your point in terms of the noncomplying and the baseline there. I suppose that's the baseline from a policy perspective, but still, those other factors, the assessment in the round under the noncomplying activity pathway of no more than minor as well, and all the other factors that come into play, or considerations.

1130

Q. Did you turn your mind to this as being a consenting pathway via – it would be unusual, but it has been proposed by you and Ms Perkins in earlier evidence – that there could be a consenting pathway for irrigation, the taking of water for irrigation purposes or for farming purposes via a

noncomplying pathway. Which pathway is to set aside Ngāti Rangi, which is your desired pathway under your discretionary activity? I thought this was another go at it.

A. **MS DICEY:** Another go at a discretionary pathway?

Q. Another go at setting up a pathway which would have the same effect of the pathway that you would –

A. **MS DICEY:** No.

Q. – which would enable a large number of applications for resource consent.

A. **MS DICEY:** No, that wasn't the intent when we drafted this, and Ms Perkins can clarify from her perspective. It wasn't a go at, you know, coming at that from a back door kind of round.

Q. So, with that in mind, would it have that effect, additional adverse environmental effects? You see, I put this with a proposition, and I'll take an extreme one, but it's come in through – I think he was a farm management consultant for OWRUG, given economic evidence, and anecdotally, he said he knew of applications or farms south of the Waitaki River, on the plains out there, border-dyking and conversation to spray irrigation. Under current border-dyking, they were producing loads of up to 200 kilograms of N per hectare per year, and the proposal was to go to spray, with a significant reduction in the N output, and so that seemed to me to be there's two good things happening there, there's two good things happening there, there's a significant output in the N output, and potentially, although it depends on whether they wish to irrigate more area, a reduction also in the take and use. So you've got those two things happening, and just when I was looking at this, I thought, well, couldn't you just take those two outcomes, a reduction in N and a reduction in the volume of take and use, and say, well, there's no risk of additional adverse environmental effects, we are, in fact, reducing the possible environmental effects. Is that not a possible outcome?

A. **MS DICEY:** That is a possible outcome against this policy alone, and that's where I come back to relying on all the other considerations that would come into play through the noncomplying pathway.

Q. And, where I'm sitting, I don't know what you mean by that. So I've given you the application because it was just so interesting in its extreme number of the N output for that farm that he had in mind, so what is the risk of additional adverse effects? This is on your baseline environment, from a proposed increase in scale, so that could be, in this case, area, potentially, or duration – well, that's just duration – and the use of freshwater is low. So what do you have in mind?

A. **MS DICEY:** The broader considerations under s 104 in terms of the MPS.

Q. No, I've given you the scenario, so how would you apply that scenario? What would be the things that you would be looking for with that scenario?

A. **MS DICEY:** Off the top of my head, sorry, give me a second. Yeah, it's incredibly hard without having a full scenario to look at because there's all the other factors that will be at play in terms of the duration that they're seeking, the –

Q. Like, what, in relation to the duration that they're seeking?

A. **MS DICEY:** Seeking a longer-term duration, how that lines up, because there's still the avoid policies within PC7 as well, so there's still the avoid policies underneath this.

Q. So they're seeking a longer duration, but there's a policy that says avoid seeking a longer duration?

A. **MS DICEY:** That's right.

Q. So how do you see – how would one – if you're looking at that as the example, how does that work? You see, I don't get how that works in practice. You know, if it was to come before me, you've got an objective that actually contemplates a longer duration, and that is subject to there being no – that the risk of adverse environmental effects is low, and I guess, I don't know, maybe the focus then comes on the added environmental effects, which are effects as a consequence of the extended duration. Yeah, so then you've got a policy that says avoid the extended duration.

A. **MS DICEY:** Yes.

Q. So how does this work out, in practice? Because I just don't understand.

A. **MS DICEY:** So there is still the policy barrier of whether the application is consistent with the policy framework in terms of one of the gateway

thresholds, so potentially, that trips it up in terms of the gateway, and then it's back to no more than minor, or assessing the effects of the application in the no more than minor threshold, and so that spins the application back into that no more than minor assessment that still remains for the noncomplying activity.

Q. Okay, so what you're saying is even though the objective contemplates a longer duration, and there policies that say avoid a longer duration, that you couldn't get through the noncomplying activity gateway because of the policies that don't contemplate the longer duration, so you're back into the are we no more than minor, and then the question that I have in my mind is how does that no more than minor gateway test line up against there being a low risk of additive environmental effects in this objective? Does it line up? Is there synergy, or is there not meant to be synergy?

A. **MS DICEY:** I think the two would be separate tests, so there would be two separate tests that you would have to pass, so you would have to be able to show that there's no risk of additional adverse environmental effects from any increases in the scale or duration, but on the whole, in the round, there still can't be more than minor adverse effects. So the increase or the risk of additional adverse effect only relate to any part of the proposal that is an increase in scale or duration, but then the whole activity still needs to be assessed in terms of effects.

Q. So I've got the risk element on pertains to the increase in scale or increase in duration, but the no more than minor test applies both to that and to all effects of the activity on the environment in general, is that right? So the no more than minor –

A. **MS DICEY:** Yes.

Q. – test pertains both to the increase in scale, increase in duration, and other.

A. **MS DICEY:** It would be a holistic assessment of the effects of the activity. Others may well have a different view.

Q. I'm just thinking about what your view means, at the moment, before we go on to the next, make sure that I've got it down right, and from what you have told me, I understand you to say this is not an attempt to get around

Ngāti Rangi, which we would say that you now assume that, assess the environment as if the activity is not taking place?

A. **MS DICEY:** No, that wasn't in my mind at all.

1140

Q. But wasn't it your concern that if Ngāti Rangi applied, you'd never get a resource consent granted

A. **MS DICEY:** Yes, but I wasn't going down that pathway, or that wasn't in my mind when considering this –

Q. Accepted. I clarified that. Now I'm coming back to your case as presented a few weeks ago. The concern with Ngāti Rangi and the reason for proposing the discretionary activity pathway was to, if you like, get around the difficulties that Ngatirunga posed for you.

A. **MS DICEY:** Yep. So, and that again is why I emphasised at the start that for me this speaks far more to the RDA pathway because in my mind that non-activity pathway, the door is firmly shut, so for me I really drafted this more the RDA pathway –

Q. Stranded assets –

A. **MS DICEY:** – stranded assets, yep, yep.

Q. Okay. Does anyone – it seems from the basis of what territorial authorities have said and what hydro have said, and irrigation has said, that there are different ways of viewing this objective and the implementation of the objective through this plan, would that be fair? That each – each group has a different interest or outcome in mind? Ms Styles is nodding, Mr Twose nodding also, and Ms Perkins has definitely said that, and – sorry, Ms Perkins – Ms Dicey, you said that, Ms Perkins you're agreeing? Yes. Does that of itself pause – give you concern sufficient to pause going down this line? That the outcomes, unless in this – the outcomes aren't sufficiently articulated. It means different things for different people. And Ms Dicey's nodding.

A. **MS DICEY:** Yes, I see that would be a concern.

Q. Ms Styles? Ms Styles is nodding. Mr Twose is nodding. Mr Ensor is nodding. Is anyone – all right. I guess as a matter of general principle my feel for permits – if the duration is increasing then potentially – depends what your activity is – but potentially your effects are

accumulative over that increased period of duration which may lead to a greater cumulative adverse effect on the environment. So duration is not a neutral element in any resource consent. Does anyone disagree with that as a general proposition. Ms Dicey?

A. **MS DICEY:** No, I don't disagree with that. If I may, can I circle back round in terms of the objective meaning different things to –

Q. Different interests, yes.

A. **MS DICEY:** – yeah, and just so you're reflecting on that, perhaps that's okay as long as – I mean, the meanings that my colleagues refer to when they actually talk through those, I thought, oh yeah that's acceptable. Actually, no that's fine. I'm happy for the objective to also cover the community water supply or the hydro activities or aspects that they mentioned and as long as it's – as long as we're sure that it's confined to things that we all feel comfortable with are appropriate, then I actually have a sense of comfort. It's maybe just whether the word "scale" just needs to be added in the B to clearly cover the take and use or the matters so its scale is not meaning different things to different people. Perhaps that's the pathway through it.

Q. Okay, so scale might mean, from what I've been told, area or take and use or duration. It's one of those three things if it means anything?

A. **MS DICEY:** Although duration is specifically referred to –

Q. Is already there anyway.

A. **MS DICEY:** – separately.

Q. It's area or –

A. **MS DICEY:** So it would be area and historic use, or for use, so they're treated separately in A, so they're treated as they are distinctly scale and historic use in A, but then in B I think there's a risk if the word "only" – only the word "scale" used and "historic use" is dropped off there's a risk of differences in interpretation and perhaps it would just be clearer to bring some reference to taking and use down into B as well, and then that avoids that difference in interpretation.

Q. Mmm. All right. If – I take your point that from your perspective at least, Ms Dicey, that you felt that something in the objective was needed to signal the RDA for stranded assets because that's picking up an

environmental effect, which it seeks to address by good management practices, is that correct? That that's why this is needed?

A. **MS DICEY:** That was the thinking, yes.

Q. For that specific exception?

A. **MS DICEY:** Yes.

Q. But then we've heard from your friends, Ms Styles and Mr Twose, that actually they also had outcomes in mind for their own respective interests or clients and that's fine, that's understandable. But I was wondering as a general proposition, if you had objective 10A.1.1 as you edited it – I actually thought it was an elegant solution, sorry Mr Maw, but I didn't see the problems myself but – objective 10A.1.1 together with the objective version B 10A.1.2, so with those two objectives secured, if there was an outcome which is process only, as it is for controlled activities, and perhaps with the exception of stranded assets, the other RDA matter and process only for TAs and hydro, Trustpower, and maybe Ms Perkins' Trustpower client as well – not Trustpower client – Ms Perkins' hydro client – if they were process exceptions then the only thing that you need, I was wondering is the only thing that you need, is simply to amend your existing 10A.2.3, policy 10A.2.3, to do what the council had done originally or do something like what the council had done originally, and that is to add at the end of the original 10A.2.3 the exception which is the exception where the effects of a proposed activity on the environment will be minor. So you've got the outcomes, you've got the process exceptions, and then you've got the out for the unknown future activity. Now, I suspect Ms McIntyre you're not going to like that. Why are you not going to like that? So with all of those exceptions carved out under the rules like we discussed?

A. **MS McINTYRE:** The experience in terms of the way the consents have been processed and the decision – the considerations that there have been in decisions for deemed permits under that essential policy framework with the no more than minor thing is that the no more than minor effects assessment gets looked at through the lens of the regional plan water which – and the policy framework and that, which has a very narrow consideration of the types of effects that we – that are considered

so – and I think as was evident in our evidence at the beginning, that doesn't, at the very least, does not allow for any real consideration of the effect on Kāi Tahu values. That's one example and that's the example that's certainly the Kāi Tahu parties are particularly concerned about, but it is just one. The reliance entirely on that consents are no more than minor has tended in the way that the decisions have been made, not to recognise the point that you've just made that duration is not neutral. It hasn't considered that and that would be a key concern that I have with it.

1150

Q. I mean, I take your point about the operative water plan. It is what it is and you get the results that you do, probably. Because you've got objectives intention and then you haven't got important people and community to the (inaudible 11:51:14) is not there, it's excluded, and so – but going forward if this plan is made operative – plan change is made operative, we don't have to, you know, in a sense, bother about what the operative regional plan is or is not saying about the range of effects which might be relevant. Things get processed under this particular chapter, where in all effects including effects on Kāi Tahu for longer duration consents have to be in the framework. The no more than minor test is problematic because it assumes - problematic for a whole list of reasons that I said in the Southland decision in terms of plaintiffs being oracles as to what the scale of effects are, and in particular, the assumption that duration is natural is just wrong, I think, or wrong in many instances, not every instance. So, is what you're pointing to there though implementations issues by the regional Council?

A. **MS MCINTYRE:** Well, I think that all the decisions that are being made on deemed permits are being made by an independent commissioner based on all the evidence, based on both the assessments that the regional Council is making and other evidence in front of them, I think the conclusion that I reached in terms of the way those decisions have been going is that this plan change has not been clear enough as to the reason for the limit on duration, and that's why I've kept coming back in in my evidence in terms of this JWS to the need to have something in the policy

framework which makes it very clear why that limit on duration is important for this plan change, because certainly, and I suspect that part of the reason that that has been, I suppose, underemphasised, has not been given much weight in terms of decision making is because we're sitting against a context and a background where certainly in the regional water plan more broadly and the way in which applications have been dealt with today, it has been a sort of a tendency to go to the longest duration possible, so we are sitting in that context, but I think because we are sitting in that context, again, that just emphasises the need to have a really clear direction in here as to why we need to be limiting that duration.

Q. Okay, thank you. Mr De Pelsemaeker.

A. **MR DE PELSMAEKER**: I agree with Ms McIntyre. I think that no more than minor test is all so, a bit problematic, because we don't know exactly what the effects are against what? You know, things like water quality, seems simple, seems straight forward but when it comes to effects on, of cultural values, for example, we don't know where they are so it's really hard to undertake that test. It's not articulated in the plan and it's work that needs to be done for new land and water plan, so I agree with – it all comes back to the duration.

A. **MS DICEY:** I may have misheard you but was the suggestion to add the no more than minor on the end of policy 10.2.3?

THE COURT: JUDGE BORTHWICK TO MS DICEY

Q. Yeah, or will be minor.

A. Will be mine – oh, will be minor because I think was that quite similar to an earlier version?

Q. Yep.

A. Which had, yeah.

Q. Everybody hated you know but no – and it's like, I – I get why people were hating because I've had a look at many of your transcripts before coming to this hearing and Mr Ensor's transcript in particular it articulates why it doesn't find favour, you know, because it's excluding for example TAs and excluding hydro.

A. Mmm.

Q. But if you took them out the big picture.

A. The carve out.

Q. On a process basis only and I know that doesn't resolve the stranded assets issue.

A. Mmm.

Q. But if they're out of the frame, what remains, yeah.

A. I think for me as well there was also the broader issue of that, the reflection of one of the gateway tests means that you've also shut down the policy test with the non-complying and so that basically is a de facto prohibited activity rule.

Q. I thought, yeah, is that necessarily true though? So you've already got – so what you're doing is you're providing the exception to the six years, so six years except activities whose effects are, whose effects will be minor, so they're looking at a longer duration which is not neutral, I agree with you, Ms McIntyre, that is not a neutral proposition, so whatever that is, have to be no more than minor and I think Ms McIntyre, you're saying you can foresee implementation issues?

A. **MS MCINTYRE:** Yes.

THE COURT: JUDGE BORTHWICK TO MS MCINTYRE

Q. Yep, because you know because we've got to this state in this country because we declare everything to be no more than minor on an incremental basis.

A. Accumulatively as well.

Q. Accum – yeah, and Mr Farrell's nodding at that and you won't disagree with that? So the languages of – will be minor, no more than minor, not very helpful on a case by case basis. No one disagree? No one disagreeing, okay. Right.

A. **MS DICEY:** I mean, if I may add something to that, I think that problem with no more minor is added to by the fact that there is no reference in the policies or rules that are in the regional plan dealing with taking use and water that there is no reference to cumulative effects in the regional plan and water at all.

THE COURT: JUDGE BORTHWICK

Q. Yeah. Okay. Well those are my questions. Commissioner have you got any questions?

QUESTIONS FROM THE COURT: COMMISSIONER MAW – NIL

QUESTIONS ARISING – NIL

WITNESS EXCUSED

THE COURT: JUDGE BORTHWICK

Golly, that's hard, but you know, we're quite liked. I did actually quite like some of the drafting and I thought, well that's you know quite elegant actually, I thought, the first objective. I thought, "Well done, well done you", yeah, so thank you. That gives us a lot of food for thought in terms of how to proceed but thank you very much. Now I said I had a suggestion which is not as elegant as the first objective but anyway perhaps a way through the priorities questions. So do you want to release witnesses and I can put it up, people have got to come back to us, I think, anyway.

UNIDENFITIED SPEAKER:

We've still got the stranded assets part to deal with.

THE COURT: JUDGE BORTHWICK TO UNIDENTIFIED SPEAKER

Q. That's okay, so just for those people, Mr Ensor and I think Mr Hodgkins who are disappearing, the Court's going to be putting some words up, and going to be inviting your response. So you don't – you can disappear now but just to know that we have, I think we do have to find a way through that, the problem of deem permits expiring and the impact on flows and on users, so we'll be inviting responses from planners as to that, but it's put up with the view that you'll shoot it down or at least you'll point out where the holes are and if you shoot the whole lot down, then you know, again, we're just going to have to go back to the drawing board and think up other solutions. Yep, mmm.

A. Shall we do that now whilst they're all here or is that what you have in mind or?

Q. No, well – I just think Mr Ensor, I've had enough of your time on the stand, Hodgkins as well.

A. Hodgson.

Q. And we can move on.

A. We can release them?

Q. Yeah.

A. Yes.

Q. Shall we take a break though?

MS MCINTYRE:

Sorry, we do, can I ask whether you need me for any discussion or whether I can go my mediation?

THE COURT: JUDGE BORTHWICK TO MS MCINTYRE

Q. No, you go because you don't – you're not interested in stranded assets? Well you're interested –

A. I – I've involved and I'm not a major player in it, so there are no specific questions from me.

Q. No, not at all. I – you were of the view though that an objective was important for the stranded asset policy or not? Something new was…

A. I think you've got it in the – I am of the view that it's appropriate to address it in the policies and I'm –

Q. Oh, no, but did the policies require that? A parenting? As such by an objective?

A. I –

Q. You see I didn't see it as being obvious to me but, yeah.

A. I don't think there is a need to specifically provide for it in the objective. I think the objectives are broad enough.

Q. Okay.

A. You know, this is one of the circumstances.

Q. To, yep.

A. I think it can be specified in the policy but not needing to.

Q. Okay.

A. I don't think you need to flag everything in the objective.

Q. No, you see and that was my sense of it, so I was – but you know, I'm taking on board other views which are, well we've got to parent that objective, that policy, sorry, but my initial sense was actually we didn't need to parent it, yeah, in a specific way, but okay, Mr Farrell, you're cool. Do you want to go? Yep, good, all right, very good. Thank you.

UNIDENTIFIED SPEAKER:

That'll do, Your Honour, thank you. I just joined the departure list.

THE COURT: JUDGE BORTHWICK TO MR BRASS

Q. Good, thank you and I'm sorry I've imposed but some of you are particularly busy with other events but it is just what it is and we've got to crack on because we just do, yep, thank you. All right anybody, so who's – we're gonna take a break, 15 minutes. We'll get into stranded assets, hopefully finish that. Yep.

A. I seek to be excused

Q. Yes, if you've no interests in stranded assets, away you go.

A. (inaudible 12:02:56)

Q. Pardon? You're gone. Right. All right, very good. Anyone going to remain?

THE COURT: JUDGE BORTHWICK TO MS PERKINS

Q. You're going to remain, Ms Perkins?

A. Yes, I'm remaining. I have an interest in stranded assets.

Q. Okay, good, all right, very good.

COURT ADJOURNS: 12.03 PM

COURT RESUMES: 12.20 PM

CROSS-EXAMINATION CONTINUES: MR MAW

Q. So, I'm working through the joint witness statement, and I move onto the topic of stranded assets which commences at paragraph 18 on page 7. Now, some suggested drafted has been included at paragraph 20, including some drafting for the policy and also some policy for the restricted discretionary activity rule. The first matter that I wish to discuss was the narrowing down of the application of the stranded asset provisions to viticulture and orchids, and the joint witness statement records that the evidence that has been given only related to those topics. Now, that may well have been the case up until we heard from Southern Lakes Holdings on yesterday, Monday, where there was some suggest that extra mainlines have been installed with respect to pasture, but as I also read the joint witness statement, there was also a comment made about a lack of evidence in relation to the effects associated with activities other than viticulture and horticulture. So, my first question is, does the recommendation change in light of evidence that was given by Southern Lakes Holdings Limited on Monday with respect to the recommendation? And I appreciate that it may only be Mr De Pelsemaeker and possible Ms King who heard that evidence.

A. **MR DE PELSEMAEKER:** Yeah, I'm just going to speak for myself now, and my colleagues may disagree with me. Despite having heard yesterday's evidence, there's still – I know it doesn't seem actually for orchids and viticulture's, we don't know what the demand is or what the uptake is. We also heard some evidence previously about there is a difference between potential impacts between horticulture, viticulture on one side, and pasture as well. Pasture as having a higher risk potentially for sediment E. coli nutrient leeching. So, with that in mind, I am tempted to stay with the recommendation in terms of the rule. I did wonder about whether it would be appropriate to perhaps change the amendment to the policy, because the policy – the proposed amendment to the policy 10A21 sets out two tests. One related to land use, you have to be horticulture or viticulture – sorry, orchids or viticulture, and the second one is around

infostructure being in place at a certain time. So, if you remove one test, that would allow for consents to be granted to expand the area under irrigation for pasture under a non-complying framework. As currently proposed or recommended the policy is almost like an insurmountable hurdle. The non-complying framework also gives you better opportunity to look at the environmental effects which I think are warranted, given that there is a high risk there. That's my preliminary response to that.

Q. Now I may have lost the thread there. So you're recommending in light of the evidence, you are not recommending any further changes to the rule and no changes to the policy? So you are...

A. **MR DE PELSEMAEKER:** No, remove one test. So remove the restriction to land use. That is, potentially one way we can address it. Yes, remove the reference to "orchards and viticulture".

Q. In the policy?

A. **MR DE PELSEMAEKER:** In the policy but leave it in the rule. So the RDAs constrain to only apply to viticulture and orchards, pasture could come in under a non-complying and have a reasonable chance of being a consent. That's my preliminary thinking on that.

THE COURT: JUDGE BORTHWICK

Q. Sorry, so remove the reference to "orchard and viticulture" in the policy.

A. **MR DE PELSEMAEKER:** Yes.

Q. Leave it in the rule, the RDA rule.

A. **MR DE PELSEMAEKER:** Yes.

Q. Pasture come in, if it wants to come in as a non-complying activity. Yes?

A. **MR DE PELSEMAEKER:** Yes. And like I said, the reason behind it is because there is a high risk potentially. Yes.

CROSS-EXAMINATION CONTINUES: MR MAW

Q. Against which objectives and policies would (inaudible 12:26:55) such an application and its effects fall to be assessed?

A. **MR DE PELSEMAEKER:** That would be on the amended or the newly proposed objective 10A1.1.3, I think. On the version B.

Q. So, they're not compromising the future implementation?

A. **MR DE PELSEMAEKER:** Yes, correct. Because in my view that includes the whole spectrum, duration as well as looking at the effects. And then obviously also under policy 10A2.1 and policy 10A2.3, on duration.

Q. Ms King is there sufficient policy and I include objective in that guidance for you to consider how an application to increase the area of pastoral land under irrigation might be assessed? So if the policy was broadened such that a non-complying application for increased irrigated pasture was to be lodged, is there sufficient guidance for you to know how to go about processing that?

A. **MS KING:** I think, are you saying in terms if it was consistent with all policies?

Q. Mr De Pelsemaeker's preliminary recommendation is that the policy should be broader, such that it's not orchard and viticulture land that's being enabled in a sense. So if an application came in for pastoral land to be – a further area of pastoral land to be irrigated as a non-complying activity, where would you look for for guidance on how to process that application in terms of the other objectives and policies in the plan change 7?

A. **MS KING:** I think the information in there is quite light. I think, considering the orchard and viticulture can be assessed under the RDA and you've got your list of matters of discretion to look to. On non-complying there's not a lot of support in there in terms of what to be assessing.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. Isn't that the point of a non-complying activity? You don't usually expect policy guidance or am I'm being too glib?

A. **MR MAW:** In terms of the, how you might actually come back to assess the effects, so the guidance on what might be appropriate from an effects' perspective when considering on a non-complying activity there. In my submission, there often is guidance to be found in the objectives and policies of plan. More so the case where you have a complete plan with the full suite, whereas given the procedural nature of plan change seven, it seems to be a policy vacuum for how you might actually go back

considering on it's merit and on complying activity, and that may or may not be a problem, I'm just interested to know how in practice if that type of application was to be lodge it would be considered.

THE COURT: JUDGE BORTHWICK

Q. All right. So, how would you consider the effects of the expansion of the irrigation area where irrigation structure is already in in situ, which is the Southern Lakes example yesterday. So, how would you go about looking at effects and determining effects? The acceptability of facts or otherwise.

A. **MS KING:** Yes, well, as I was saying, it is quite light in terms of guidance in the plan change seven. So, you look to high order documents to potentially provide guidance on there to be looking. I can't think of anything specifically, currently, but that's what I would do.

CROSS-EXAMINATION CONTINUES: MR MAW

Q. Ms Dicey, Ms Perkins?

A. **MS DICEY:** So, going back to your original question. I mean, through this conferencing and with the additional option that we've kind of added in terms of specifying orchids and viticulture and then hearing from Southern Lakes yesterday, I mean, one option that has been playing on my mind was whether by specifying and limited a pathway to orchids and viticulture, it would be possible to make that a controlled activity pathway and then anything else, so pastural farming could go through an RDA pathway, and acknowledging also that behind the scenes is the NES limiting dairy and dairy support expansion with out a consent, so that's an added layer that would be on top of any dairy activity that would be expanding. So, it really just leaves sheep and beef under the RDA without any other mechanisms providing some oversight over that, and we did discuss that briefly during the conferencing and I think one of the concerns with that was again as Mr De Pelsemaeker said, we haven't got a sense of the kind of uptake that there might be of this, just how many pastural farming systems might want go down that pathway, and then I guess as well, it comes back to that same issue that even if it is just sheep

and beef operators, there really isn't a broader framework to assess effects that might result from the expansion, and so that's why we've thought it might be okay for orchid and viticulture because of the evidence that they're typically lesser effects to be managed.

Q. So, in light of the evidence that has been given about the risk associated with irrigated pastural systems, it wouldn't be appropriate to provide an RDA pathway in light of the lack of understanding of potential use of that pathway?

A. **MS DICEY:** Possibly, I'm still actually a little bit on the fence about whether actually it's going to be such a confined issue because we've actually only heard from one party. So, I would thought we would have heard from other parties, but they may not have turned their mind to it. So, I'm a still a little bit on the fence, but still probably err on the side of where we landed on the conferencing.

Q. Ms Perkins?

A. **MS PERKINS:** Yeah, look, I don't disagree with what Ms Dicey has said at all really. I think where we landed was on erring on that side of caution, going, well, you know, acknowledging the concerns that have been raised, one through evidence, and two through some of the questions from the Court with regards to the potential calmative and scale of effects and I think we just don't have enough before us to determine how widespread the pastural side of things could be. So, it could a bigger uptake than we might have thought. Bearing in mind it is still a six-year term, so people are limited to that term, so the risk is still on them for that uptake of area over a short term, no knowing the outcome of the longer-term planning framework, but I would probably err to the direction we've landed in terms of limiting it to the orchids and viticulture.

Q. Thank you, and Mr de Pelsemaeker?

A. **MR DE PELSEMAEKER:** Just one thing that I've thought about, I'm a little bit cautious to rely on the NES Regulations. It's kind of a safety net. They apply a threshold of 10 hectares, but also I don't actually think that they apply to dairy support because it's only, I think dairy farmland which excludes dairy support, so – yeah. Just wanted to add that.

Q. And the second point I wanted to understand a little further is the question of whether the stranded assets pathway is only available through the RDA circumstances where there – the consent holder would be limited to the historical rates and volumes of take. I understood that that was the case from the presentation this morning, so have I understood that that is the intention?

A. **MS PERKINS:** Yes – Claire Perkins here – I'll just note that that, from the way we drafted it, was the intention, that there's no increase in rate or take, but the drafting we provided allows for where people haven't got a perfect measuring records and they can still add to the additional information requirement if their measuring record's not ideal, but it is still limited to the historic rate of taking.

A. **MR DE PELSEMAEKER:** It is not limited to what is calculated under the schedule, but still the amount of water that is granted in the new consent should be in accordance with historical use. It is – the RDA just gives you more – largely to calculate or determine historic use through different avenues.

Q. I'm sure my friend Mr Reid may ask you some questions about this, but thinking about the McArthur Ridge situation where irrigation mainlines had been installed for quite some time, but the last few blocks of grapes hadn't been added, I am left wondering whether the solution here actually accommodates that factual situation because the water necessary to irrigate those last few blocks wouldn't perhaps historically have been taken.

A. **MS PERKINS:** I'll just note, my understanding of the McArthur Ridge situation was that there wouldn't be an increase in historic rate and volume from my discussions with Mr Davoren on that initially. Mr Reid might be able to confirm that, but that was my understanding.

Q. I'll leave that to Mr Reid to pursue, but if that's the case that factual situation which we do understand would be covered then by the drafting that has been put forward?

A. **MS PERKINS:** Yes that would be correct.

Q. And the final question I have relates to the new manner of discretion, subparagraph C – well I'm looking at the joint witness statement –

paragraph 20 subparagraph C, and then there's reference to a new matter of discretion suggested as follows, and this is the matter of discretion which enables consideration of good management practices. Now, I'll ask Ms King perhaps to see whether she can assist in terms of how you might consider an application, what re the types of good management practices you'd expect to see for viticulture and orchards in this context?

A. **MS KING:** This was a discussion point during the conferencing and Ms Perkins and Ms Dicey were able to direct me that both orchard and viticulture have well known documents that outline good management practices for those purposes, so you'd be referring to those when assessing the application under that matter, and I'd just like to note that that's only for the additional areas rather than any current areas.

1240

Q. Perhaps Ms Dicey or Ms Perkins could assist in terms of sharing their understanding of the state of knowledge in terms of good management practices and the documents that perhaps have been discussed. Yes, Ms Perkins.

A. **MS PERKINS:** So my understanding, which is assisted by the input from Mr Hobson at the time, so there is a number of good management practices that are out in the public from the industry bodies, so for example Horticulture New Zealand has – you know, they've produced documents with regards to what are good agricultural practices, and I understand that's to be the case for across the range of bodies, so dairy (inaudible 12:40:21) and the likes, but obviously we're just looking at horticultural – well, orchard and viticultural practices here, but there are industry standards available to represent that, and I know it's similar in other regions around the country as well, reference to good management practices.

Q. Perhaps the reason for my question is there have been many days spent arguing about what good management practices actually might be, and the use of the phrase caught my attention, but it may well be, given the confined nature within which it is being used in this context, there is

sufficient information out there to assist with informing a decision to be made.

A. **MS PERKINS:** Look – and I think I do take your point and we did discuss this at some length amongst ourselves, but as you point out we came back to the fact that this was quite limited to probably a small number of parties only on the additional irrigation areas and that there is a reasonably good understanding of some standard sort of practices in relation to things like fertiliser use and the likes that that would be in place here, and this is not the full land and water plan with a full breadth of good management practices across every type of land use.

THE COURT: COMMISSIONER EDMONDS

Q. So it's not a defined term in the water plan at all?

THE COURT: JUDGE BORTHWICK

Not yet. Sorry, (inaudible 12:41:41), can you take that down until I say? Thank you. That's to come.

MR MAW:

I don't understand it to be defined in the operative regional –

THE COURT: COMMISSIONER EDMONDS

Q. Well, I just asked because it is in a lot of documents nowadays, and hence to define what it actually is, so I just wanted to check that.

A. **MS PERKINS:** No I don't understand it to be defined anywhere in the current planning framework.

EXAMINATION CONTINUES: MR MAW

Q. I loathe to suggest it be defined in this context without perhaps having seen the underlying documents, but in terms of – and perhaps it might assist – in terms of adding this matter of discretion what was it you were seeking to achieve by adding it?

A. **MS PERKINS:** The main intention was to minimise any potential increase in respects of water quality countered with the evidence we received or

heard with regards to the effects from these particular land uses being lower risk, and it was just to effectively ensure that there was some form of mitigational consideration of how water was used and how the land was used if you were to include a slightly increased area.

Q. The final question I had related to paragraph 25, but it relates to a comment that Ms McIntyre made about drawing a distinction between sunk and unsunk investment. I wasn't fully following where she might have been going. She has abandoned the good ship at PC7 so I'm not sure whether anyone else can assist with what distinction she was drawing in terms of paragraph 25.

A. **MR DE PELSEMAEKER:** I hope I've got this to get right, but I believe that she basically – because one of the things that we tried to achieve under Plan Change 7 is to protect people from making any investments that are going to be redundant or – yeah, due to new land and water plan, so her concern is that are we actually providing a pathway for these situations, are we actually encouraging to make further investment to complete the irrigation – that is my interpretation.

Q. That makes sense.

CROSS-EXAMINATION: MR REID

Q. So witnesses, I don't want to fly ahead on this issue about whether stranded assets should be dealt with by control activity exception or a discretionary exception but I just wanted to ask a few questions about the reasons for your electing to deal with it via a restricted discretionary pathway. So I just wanted to perhaps just stand back for a moment and look at the way that you are proposing to deal with it, the exception, whether it's dealt with as a controlled activity for a restricted discretionary activity and my proposition is that the way that this is proposed to be dealt with is already very restrictive and very precautionary. And so I'll just ask you to comment on that but the things that I would point to in that regard and this is to answer Mr Maw's point, the way that this has been put forward at least by Strath Clyde is that there would not – it would be within the existing historical water use that this was being – that this exception was being considered. So the limitation on historical water use would

continue to apply. There's obviously a limit on the date by which infrastructure has to be established and there's now a limit on activity type which I would suggest is very, very limited. And overall the evidence that has been put forward by the submitters that have raised this concern, at least on the horticulture and viticulture side covers a number of tens of hectares, that's the sort of scale of what we're talking about. So my overall proposition which I'd ask you to comment on, is that this is a very limited and precautionary approach in relation to a very limited problem that is being considered and in that context, does it need to be restricted discretionary?

A. **MR DE PELSEMAEKER:** I'll start off. First of all the RDA pathway as we see it as well, it's not a huge hurdle to jump but what it does do is that it provides a little – it gives more discretion to the consent authority. They can decline it. I acknowledge that in the case of McArthur Ridge we're dealing with yes, limited amount of hectares that are going to be added but as I said before we don't know really what the uptake is going to be across the region so therefore it's kind of hard to have any certainty around the cumulative impacts of that. Also another consideration is like the controlled activity rule as it is now is quite – it's quite tight, by lumping in more activities potentially you increase the information requirements or the matters of control and they would apply to people that would just seek to rollover their consent without an expansion of the irrigated area.

THE COURT: JUDGE BORTHWICK

Q. Sorry what was that point you said there – the last point also?

A. **MR DE PELSEMAEKER:** Well there are number of matters of discretion in the proposed RDA that give consent authorities some leverage in terms of managing potential effects. If we would widen the controlled activity pathway as it is now, we would potentially end up bringing over those matters of discretion which makes the rule a little bit more complex. Gives council more discretion when considering applications just for a simple rollover, if I can use that term of resource consents and it creates uncertainty for the applicants. So it's just to the keep the controlled activity rule a little bit more tight in that sense. That is not the major

consideration, but it is also something, a thing that we should keep in mind.

1250

A. **MS PERKINS:** Look, in my mind, it wasn't so much about the complexity of any rule, but rather that just the degree of risk, which is something that we were toying which. I sat very much on the fence very close to the controlled activity pathway being the appropriate way forward in this situation, but it really just came down to the fact that if we know it was just probably those three that we've heard from, I don't think I'd have a problem with it there, it's just that slight increase in risk of a potential larger number of people, larger land areas, falling into this, that that kind of combined risk of all of them was sort of a bit unknown, hence the slightly more cautionary approach of putting it in the RD pathway.

Q. But would you agree with me that, if there were larger scale applicants in this position, in the stranded asset situation, that the Court would have likely heard from them?

A. **MS PERKINS:** Ideally, yes, although I know from a number of clients in the pastoral side of farming things that the costs and process of being part of something like this is just something they're not willing to go down, recognising it's their own risk and cost of a rule framework being put in place that they haven't been able to contribute to, but it's just too hard to know, there hasn't been a survey done of the wider Otago region, knowing who may fall into this category or not.

Q. All right. So my second question is just in relation to the matters over which you're proposing that the consent authority should have its discretion restricted, and they are in paragraph 20, as I understand it, the maximum size of the additional area irrigated, and good management practice. My friend, Mr Maw, has already covered good management practice, but in relation to the first of those two matters, maximum size of the area to be irrigated, against what criteria would that matter be assessed?

A. **MS PERKINS:** Ms King may be able to comment on this more, but really, the matter of control is there just so a limit can be put on the area, rather than determining whether or not that are was sufficient or not. It's more

to enable a condition to the effect of limiting that makes the maximum irrigation area.

Q. So that's not really a matter of discretion, is it, in that case? Am I right in thinking?

A. **MS PERKINS:** Yeah, you're probably right there, but it was do we need to have something there that allows the consent officers to put a condition limiting the area on there? Someone else may have more thoughts on that.

A. **MS KING:** I agree with Ms Perkins in terms of my understanding as to why that was put in was to allow consents officers to impose a consent condition relating to the maximum area.

Q. So just so we're clear, it's not contemplated that there should be some sort of maximum area to which this rule applies?

A. **MS KING:** From my understanding, no.

Q. Yes, thank you.

THE COURT: COMMISSIONER EDMONDS

Q. In terms of the council being able to decline it, what situation might you decline it in?

A. **MR DE PELSEMAEKER:** Perhaps if the additional irrigated area would go against best management practices, yeah.

Q. So, it would be that good management practices if –

A. **MR DE PELSEMAEKER:** Yeah.

Q. – some accommodation couldn't be reached with the application in terms of what those good management practices were, you might say no.

A. **MR DE PELSEMAEKER:** Yeah, I think you have link to back to the matters of discretion. So, that would be possible you – yeah, your only consideration in that regard.

Q. So, if these applicants came along and signed up to various things in terms of these good management practices in their documents that were sort of capable of being converted to clear and enforceable conditions, that would probably be enough in terms of the Council to actually grant this?

A. **MS KING:** Yes, from my understand, that's correct.

Q. Okay. Thank you.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. As I indicated, I have a proposal for policy wording in relation to the deemed permit. Do you want me to flick it up and distribute it? I have tried to take out what are the essential elements which proposed by the planners, so, this is hopefully what's been reflected here. So, it's your elements, and I have kind of approached this a bit like a criminal lawyer, where you're looking for the essential elements to be reflected in policy and the conditions, so that's how the drafting has been approached. I don't mind that it doesn't work. It's a bit – you know, if it doesn't work then it's just an avenue close, so I'm learning something, that there has to be yet a different tool, because I think the tool we had yesterday was problematic for a number of reasons. So, it's okay for everyone to say that it doesn't work, and we'll just look for another tool if we can. You'll see that when it comes up on the screen, there is three words of phrases shaded. They're only shaded because here I have some query within my mind to whether I'm using terms correctly. So, I think this is a new policy where the application to replaced a deemed water permit, that as of the 18th of March 2020, was subject to a right of priority, the residual flow, because I think that's what you're talking about, it's the flow past a subservient consent holder. The residual flow at or below the point of take will be sufficient to supply an upstream permit holder. So, upstream comes from Mr Cummings evidence. He thought maybe that would be useful. Entry conditions, so when that policy applies, the applicant proposes a condition to cease taking water when given notice. When - that can be better worded, when – there's probably notice in written that's given by an upstream permit holder, reservation of control, discretion, any condition to cease taking water when notice in written is given by an upstream permit holder. You'll need to define some terms. Deemed permit, right of priority is going to be as per section 413. Upstream permit holder probably needs to be linked back to the deemed permits, and the list of linked permits in terms of linked permits and notice, it's your notice of 72 hours, that's what notice means, notice in writing, 72 hours. So,

that's the broad proposition. So, and it's subject to any vires challenges as well. So, I'll print that off and invite everyone to chew on that as I said. The words added below, I think you've got your own jargon for this plan, I just don't know what it is, whether it's at or whether it's below, but really, quite like that idea of the 18th March 2020, if there is a problem, and certainly Dr Sommerville's saying there is a problem come 1 October, so I like that idea. It doesn't get around Dr Somerville's problem in terms of the risk to farmers going forward, or other deemed permit holders going forward, but it does – it's helpful I though. So deemed permits as of that date had a right of priority. I don't know whether – I think residual flow is what you're talking about. I think it has to be at the point of take, and there's something to do with sufficiency to supply another person, and I've got sufficiency straight out of the section 13 of the Water and Soil Amendment Act and I couldn't think of a better word to use, also cognisant, Ms Dicey, of your explanation yesterday, well actually, famers are is pretty familiar with these terms, "sufficiency." I don't know if that's front and foremost of their mind, but they're familiar in principle with these terms. This would apply on receding flows through natural reasons but whether it's – but what it is trying to do is ensure that the permit which has a superior right is left water in the river, which I thought is what the rights of priority were doing. So it is – you know, to use your language, it's trying to mimic, or not entirely replicating, it's trying to echo those flow sharing arrangements but bringing it into RMM – RMA language for RMA purpose. So that's my offering this morning, and we'll print that off, see what you think about it. If it doesn't lie that's fine, we'll look for another solution.

A. Just one question of clarification if I might. I'm just looking at the proposed policy and the very last part of that, to supply any upstream permit holder and –

Q. Maybe "any" is wrong.

A. Yes, just contemplating why "an" or "or." It's an upstream permit holder that had the right of priority as opposed to each and every RMA permit held –

Q. No, you're quite right, and then although you might pick that up in the definition, you see upstream permit holder is a permit holder who had a right of priority. So, you know, I just didn't want to stick too many things in the policy, but then you're sort of relying on the good definition driving it, but you're right, and not any – yes, it's not any upstream permit holder by any means. It's those who are holding rights.

A. That follows. That's helpful. We'll chew that over and explore it.

Q. Okay, so Rachel is going to print that off for you and then we can – but you know, you all do need to come back to us about what to do with those priorities because I think what's been proposed is problematic, and so then where do we go.

THE COURT: JUDGE BORTHWICK TO MR PAGE

A. May I ask a question of clarification Ma'am. I wonder whether we've got our upstreams and our downstreams around the wrong way?

Q. You are probably right. And I had actually thought about that myself this morning, thinking "Yikes," yes.

A. I think in the policy and in the reservation control it should be the other way around.

Q. Should be writtens given by the downstream permit holder to – yes probably, yes. I tell you what, I'll amend that so I won't embarrass myself in front of those planners. Yes you're right, it is, but you know – yes.

A. We understand.

Q. I'm not trying to do something totally novel.

THE COURT: COMMISSIONER EDMONDS

(Inaudible 13:03:52)

THE COURT: JUDGE BORTHWICK

Yes, I tell you what, I'll change the, and then I'll change the – yeah, okay.

THE COURT: COMMISSIONER EDMONDS

(inaudible 13:03:56)

THE COURT: JUDGE BORTHWICK

I'll make the amendments. There we go, losing the "Y". I'll make the amendments and then we'll distribute it, but are looking for, really do need to get some feedback in terms of, well what's going to happen in light of the, you know, cross-examination panel yesterday is this offering something worthwhile being explored? Well if it's not, that's fine, where do you want to go? We've got to land it because if we don't land it then it seems to me you can reject Plan Change 7, but that's a risk assessment in terms of who is exposed and the significance of the exposure and can reject it. You can go with perhaps the Ms Dicey approach which is long-term consents, because we know that should secure a minimum flow which should supplant the regime. So reject it, go with the discretionary consent, or put in a policy that might work – seems to be the options to me – or Government. That'll be the third time I've said it, but you know, Government need not step in if we can make this work, and I think the other thing that worries me, possibly – and again I'm just not close enough, and Ms King you'll be far closer than I – so Ms Dicey has proposed a fully discretionary activity which hopefully is going to give a minimum flow, and residual flows – all the good stuff that that will be replacing permits. While I know that – because Ms Dicey has proposed it, therefore it should be true for Ms Dicey's clients, I don't know that it's true for every applicant in Otago, and that's what I'm worried about. It's like if we go with that solution we've still potentially got a bunch of folk out there who's going to be caught out, and Ms Dicey you'll agree, there'll be a bunch of folk out there caught out. Okay. So it seems to me a bit null. Unless Government steps in we have no option. We actually have to be providing a solution here, and so this is why I've offered it. How does that sound? Okay, and you agree with Ms Dicey, look beyond Ms Dicey's clients there are people who are not going to avail themselves of Ms Dicey's solution, not least because they don't have galaxiids living in their waterway, but because it just simply hasn't been proposed the way that Ms Dicey – their applications haven't been formulated the way Ms Dicey concedes them which is, you know, a whole of catchment, sub-catchment with a few imperilled galaxiids in locality, and that's not every application, so we've got – there are risks about which we – yes, you agree with Ms Dicey on that. Yes,

okay. I'll do the edits before we show the planners, and we'll see where we go. And you'll talk to your friends about where to go on this –

MR MAW:

Yes, about what we might do from a process perspective. Yes, we'll start that discussion over the lunch break.

THE COURT: JUDGE BORTHWICK

Very good, all right, thank you, and I'll get back to you shortly in the next five minutes. I'll just take it away and do it in the chambers. So we're adjourned through to quarter past 2. Actually, I won't do it in chambers, I'll do it here because it's more convenient than bouncing up and down. All right, so we're adjourned and just ignore me doing my work.

COURT ADJOURNS: 1.08 PM

COURT RESUMES: 2.16 PM

LEGAL DISCUSSION – COURT AS CHAMBERS

COURT RESUMES: 3.29 PM

COURT RESUMES: 3.44 PM

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. We'll move on to your submission but there is actually something that we did need to reflect further on in chambers, but we can do that at the end of the day.

A. Thank you, your Honour. So I'd like to proceed first with the legal submissions there were filed on the 15th of June in relation to the expiry of deemed permits and rights of priority and prior to commencing with the submissions I do want to make an oral submission in relation to the relevance of the section 124 issue with respect to plan change 7 and the submission I wish to make in that regard is one of submission that the Court need not make a finding in relation to section 124. It's not necessary to make that finding in order to address the issues that are live with respect to plan change 7. And that submission relates to all of the options that are currently before the Court in terms of what might happen to plan change 7. Now in terms of the issues that have been addressed by Dr Sommerville and responded to in the written submissions, there were three questions that were asked. We are in agreement with Dr Sommerville in relation to questions, 1 and 3. The point of departure relates to question 2. So what I propose to do is to address the Court with respect to question 2 only and if the Court's content to take the submissions on the other two questions as read, I'd be content with that.

Q. Yes.

A. So, in relation to the second question, what I propose to do is to take the Court through the summary in relation to the submissions that are set out at paragraph 3 of the written submissions. It is noted the council does take a different view in relation to section 124 and considers that a deemed permit including the right of priority can continue to be exercised in accordance with section 124 of the Act. Until a decision is made, either granting or refusing consent and I set out the reasons for that submission. The first of which is that mining privileges are deemed to be a water permit or discharge permit under section 4131. Under section 4131 and sub-section (2), such permits are deemed to include, as conditions of the

permit, such are the provisions of the Water and Soil Conservation Amendment Act of '71, as applied to the mining privilege. A right of priority is provided for under section 11 of that Act, therefore a mining privilege with a right of priority is deemed to be a water permit or discharge permit including a right or priority as a condition.

Q. Just pause there a second. So you're saying under section 11, sorry I'm just slowly getting into the databases, so might go to hard copy. So, section 11 –

A. Actually, set it out in my paragraph 25 but yes, section 11.

Q. So you're saying section 11 creates a, yes what are you saying about section 11?

A. A water permit with a right of priority as a condition of that permit.

Q. And I wanted to look at that so, there you are saying the relevant section is 11 not 13, for the purpose of your argument? Correct?

A. Yes.

1550

Q. And I'm just about there. Now, I'm just wondering if that's right because sections 11, the title is, titled section 11 that is retention of right of priority and then it goes on to say, "Every holder of the current mining privilege who holds a right that was conferred by the Mining Act or any former Mining Act was in force at the commencement of this party act, entitling him to exercise the privilege with priority by reading of the user shall retain that right", so it's talking about the retention of rights, not the creation of permits.

A. That then needs to be read in the context of s 413(1) and (2) of the RMA.

Q. So the holder of privileges subject to a right?

A. Yes.

Q. Yep.

A. Then the deemed permit resulting shall be deemed to include as conditions of the permit and it says such are the provisions of sections 4 to 11, 13, 14, 16, as applied to the privilege.

Q. So as I understand this provision and you may have a different view, that firstly, the first question is, is there a current mining privilege or a right that is granted? Yes, there is. Is that privilege in this case, the mining privilege

subject to a right? Yes, it is, and so both the mining privilege becomes a deemed permit and the right becomes the deemed condition? So, that section 11 of the Water and Soil Conservation Act is not creating a privilege per se nor a water permit per se? Yes.

A. It, yes, at section 413, that's having an effect.

Q. That – a fact, yeah.

A. Yes. Now back to paragraph 3, subsection (c) and section 413 (1) provides that the provisions of the Act other than sections 1 to 8 to 133 shall apply to a deemed permit and my submission is that Parliament has explicitly excluded provisions of the RMA from applying to deemed permits, and relevantly is has not excluded the application of section 154 and therefore, I submit that section 124 applies to a deemed permit except as otherwise provided in section 4132 to 10. There is nothing in section 413, that's in paragraph 2 to 10, to suggest that section 124 should not apply. Section 4133 provides that every deemed permit is deemed to have a condition to the effect that it finally expires on 1 October 2021. Section 1243 applies when a resource consent is due to expire and allows a holder of, a holder to continue to operate under the consent which includes the conditions of the consent. Section 4137 provides that a deemed permit holder may apply at any time under part 6 for another permit in respect of the activity to which the deemed permit relates. At section 124 is located in part 6 of the RMA. The continued exercise of a deemed permit under section 124, while an application is being determined, is consistent with the legislative purpose of section 4133 to ensure that mining privileges are phased out completely by 1 October 2021. The operation of section 124 ensures that deemed permits are phased out but that permit holders are not disadvantaged if the council does not determine their application before the 1st of October 2021. And finally, section 124 itself, explicitly excludes specific resource consent applications from relying on section 124. This does not include deemed permits. Parliament had intended that section 124 was not to apply to deemed permits, I submit it would have said so explicitly.

Q. Is that reference to the coastal permit?

A. Yes.

Q. Okay. 165ZH.

A. Now those – that's a summary of the key points of the submissions on the second question. I do wish to address briefly in response to the submissions that have been filed in response by Dr Sommerville. The first point that I'd like to respond to is paragraph 8 of Dr Sommerville's submissions, and in that paragraph, he makes the submission that section 124 is a procedural tool to manage the transition between expired deemed permits and applications for replacements. Now, as I read Dr Sommerville's opinion, he seems to be suggesting that section 124 applies during the period of time between when the application to replace the permit is lodged, and the 1st of October 2021.

Q. Sorry, just pause there a second. I was just making a note of the paragraph that you're responding to. Sorry, so, you read that. you think the submission is addressing the period…

A. Between the lodgement of an application and the 1st of October 2021.

Q. Just let me read that with that in mind. Mhm.

A. Now, my submission that section 124 would have no effect during that period of time because the holder of the permit being replaced can simply rely on that permit up until the 1st of October 2021. So, section 124 has no relevance or no application and no effect during that period of time.

Q. Mhm.

A. To touch briefly on the use of the phrase "finally expire," and Dr Sommerville places some weight on the word "finally" in contrast to the description of other permits such as the coastal permits referred to section 168.

Q. Sorry, just before we move on, is that what he's actually talking about, though, at paragraph 8. So, you've got this section 124 is a procedural tool to manage the transition between the expired deemed permits. So, it's from the 1st of October, and the applications for replacement. So, it's not from filing your application six months ago to the 1st October, it's actually from the 1st of October, forward, until there's a decision, hopefully.

A. If that was what the opinion was saying then, yes, I would agree with that.

Q. You would agree with? Okay.

A. But it seems to be that Dr Sommerville's saying that in the context of these deemed permits, section 124 has no relevance after the 1st of October. I read in isolation –

Q. Unless of course he's saying that 124 applies to the taking of water but it doesn't apply to the priority, and if that's what he's saying then you would still disagree with him, but…

A. Yes, and just in terms of the location of that paragraph and the two preceding paragraphs and his conclusion that section 124 can apply in the intervening period up until the expiry, and the issue I take with that, is it has no application. In so far of – in terms of reading paragraph 8 in isolation, I would agree it is a procedural tool to manage that to transition between the expired permit application – permits and I would go further, it's just not applications, it determination of applications and replacements.

1600

Q. All right. Your next point.

A. Some weight is placed to the phrase, "finally expiry".

Q. Yes which paragraph?

A. Paragraph 9. In contrast to the coastal permits referred in section 165ZH.

Q. Mhm.

A. The submission I make is that there's no difference between something finally expiring and expiring. There's no moment in relation – or the addition of the word, "finally" doesn't add anything to something expiring. Now my friend Ms Williams will address you further on the relevance of the phrase, "finally expire" in the context of the deemed permits in so far as that phrase is used with respect to the compensation provisions. Paragraph 11, Dr Sommerville refers to a deemed water permit being a creature of statute. It concludes that paragraph by noting that it has a statutory expiry date after which it no longer exists in law. And that raises the question of whether a water permit or any other permit issued under the RMA for that matter is any different in the context of those permits and authorities also being a creature of statue. They're simply a creature of a different statue in this context.

Q. So what's your point, you've agreed that deemed permits are a creature of statue and you're saying that there is no – so what is your point?

A. There's no distinction to be drawn between...

Q. No distinction between a deemed permit and a resource consent?

A. Yes.

Q. All right. And how do you get there?

A. Resource consents are also creatures of statue in that the Resource Management Act sets in place a regime to apply for a permit, the permit is issued under that legislation and thus is itself, a creature of statue.

Q. Is that he's using the phrase though, "a creature of statue"? I mean isn't he using that in relation to the deeming provision? The deeming provision deems mining privileges to be something that they're not which is a resource consent, in this case, a particular resource consent, a water permit. Whereas resource consents that are the result of an application under the RMA are resource consents. And so, you're quantitatively looking at quite different things and that's how he was using "creature of statue".

A. Yes, if that's the case my submission is that nothing rests on that distinction given that the language used with respect to permits issued the Resource Management Act also uses language such as "expiring as permit" and section 124 operates in response to the expiry of the permit.

Q. Mhm.

A. In paragraph 13, Dr Sommerville submits that there is no longer an existing consent under which the holder may operate after the date of expiry. My submission, there's no difference between the situation that exists with respect to all other water permits or permits under the Resource Management Act 1991 that are – I'll use the word – protected by section 124. Those permits too have expired by that time. The phrase existing consent in that context is referring to the consent that was the subject of the application to replace it which engages section 124 and that is engaged at a time when the permit is still a current permit. Two more points to address, the next one is paragraph 29 where Dr Sommerville notes that there is an interpretive presumption that Parliament intends to legislate in a way that produces a practical, workable, and sensible result.

Now, in my submission, a reading of the relevant provisions in a way that results in section 124 applying in the context of deemed permits does produce a practicable, workable, and sensible result. I make that submission because, not on the basis that there will not be a gap between when applicants have lodged applications to replace their permits, and the Council determining, and any subsequent appeals being finally determined with respect of those applications. In the absence of that occurring, consent applicants would need to somehow predict how long the Council might take and appeals might need to be resolved and thus lodge their applications sufficiently early to avoid there being a gap after the expiry date, and the final point relates to paragraph 30. This was a point in response to the OWRUG interpretation, and if the submission is read literately, the legal consequence of OWRUG's would mean that deemed permits might never expire which would make it very difficult to address applications for resource consent by non-deemed permit holders. Now, I'm sure my friend will address you further on that, but in my submission, section 124 does not operate in such a way that protects in perpetuity applications that have been lodged prior to expiry, because there is still an overriding duty in the Resource Management Act to avoid unreasonable delay, and that would require the processing of applications.

1610

Q. So, with that in mind. What is the duty that applies to the processing of these applications? And I say that if some applicants or all applicants in terms of where the Court's decision goes need to amend their applications to take advantage of the control of RDA rule, and so the proposition is that obviously the Court's got to make a decision and then there will be time needed to do exactly that and then time needed for processing. Is it possible for an applicant to simply place their application on hold, so that's the first proposition or (b), not progress it in a timely fashion, such that the benefits are or intended outcome for the region is not secure. In other words consent holders just simply continue to take water under their existing permits expanding their area of irrigation, increasing irrigation efficiencies and not adhering to historical use.

A. Yes.

Q. And so that's your risk?

A. Yes, not the…

Q. So how do you address that? How will…

A. The submission in response and it perhaps starts with the question of, "can an applicant for consent lodge an application and then the next day write to the council saying, "can I please put my application on hold?"" which used to happen a lot. The legislation has subsequently changed in relation to the period of time within which applications must be processed and the Act is now far more prescriptive about the timeframes within which both applications need to be processed and also requests for further information need to be responded to because that was another point at which the process was delayed. So…

Q. That being the case, I understand that there are hundreds of applications which are being put on hold. How long can that – is there a statutory time limit determining how long an application can be put on hold? And it may well suit all parties in the room that that's the case but beyond that, is there a statutory time limit that fixes how long an application can remain on hold?

A. I'd have to go back and track through the specific provisions within the Act. My recollection is that provisions have been tightened up with specific periods of time specified of course there is the ability to extend timeframes under 37A, I think it is but that only enables I think a doubling of that period of time without taking in to account a range of other factors such as effects on third parties.

Q. So I would actually like advice on that because that seems to me to be an issue here, is how long applications, (a), remain on hold, post Court's determination and then the impact on the attainment of the objective.

A. Yes, is that something that we could address in our reply or do you want to have a response to that…

Q. No, a reply's fine.

A. Okay. Yes, no, we'll certainly track through the provisions.

Q. Mhm.

A. And I think the second part of that is the (inaudible 16:12:59) duty to avoid unreasonable delay but I'll pick up that in the context of those other provisions which have more clearly defined time limits. So those are the submissions I wish to make in relation to the priority question. Do you wish me to address you now on the vires?

Q. Yes.

A. Right. I have actually prepared some written submissions on this issue and I'll hand those out. Now I should note that these submissions were prepared in response to the provisions that the – so these were prepared in response to the provisions that the planners had put forward. Now the world has moved on a little with the provisions circulated today but there will still be some matters I can distil from the submissions that will equally apply to the provisions that have been put forward. So I'm just need to work through carefully to make sure that those points come through. So in terms of the submissions lodged or in terms of what council's directed to respond to. Firstly, the vires of the amendments proposed by the planners that seek to replicate the effect of existing rights of priority, and secondly, to comment on whether a condition restricting a third party would be valid if the third party gives their approval prior to the condition being imposed on the consent. Now, it may well have been that what your Honour had in mind was this issue of the written approvals that was discussed yesterday with the witnesses, but things appear to have moved on from that point.

Q. You may still need that. I've just put up something which I think would work through, but as I said, I didn't look at the definitions, didn't look at what a condition could look like. It may be that that overcomes the written approvals. Maybe, but maybe not.

A. Yes.

Q. Yeah, I thought it was a bit more streamlined than what was being proposed, but I don't know. It was all I could do at 7 o'clock in the morning.

MR MAW:

So in terms of the written submissions, at paragraph 6, I addressed the entry condition into the controlled activity rule, and that, I noted, had been replicated in the restricted discretionary activity, so same rule, and I think in terms of where things are perhaps heading, if a solution is to be found, it will apply both to the controlled and the RDA by way of entry condition, and in my submission, the entry condition component is important. It would be insufficient simply to have a tick box on the application form because the bringing down of the priority is a fundamental element of the controlled activity rule, and thus to qualify for consideration under that rule, an entry condition needs to be crafted.

In terms of whether that rule would be a relevant rule to include in a regional plan, I've addressed the functions of the council and note that the functions include the control of the taking, use, damming and diversion of water. In my submission, a rule dealing with the use of water would fit squarely within those functions, and I say at para 12 that the proposed amendments as they then were considered to be consistent with the requirements under section 68. I will perhaps expand on that submission once we hear back from the planners on the final set of provisions being recommended as part of our reply submissions.

I then turn, perhaps, to the more critical issue at hand of whether proposed conditions meet the requirements of valued resource consent conditions, and this is picking up on this third-party approval point. The vires of the amendments is directly affected by the ability of the rules to establish valid and enforceable resource consent conditions. The provisions must lead to the establishment of lawful resource consent conditions in this regard.

I've set out at paragraph 14 the requirements for valid resource consent conditions under section 108AA. I don't propose to take you through those. At para 15, I make the submission that condition is directly connected to a regional rule, so if the rule is valid and within the functions of the council, then a condition responding to that rule fits squarely within section 108AA, and then the final point I make in this section is at paragraph 16, in that if the applicant chooses the controlled activity or restricted discretionary pathway, they will be agreeing

to the condition by virtue of proposing the condition in the application to meet the requirements of the entry condition.

I then touch on some case law which addresses the requirements for consent conditions, and I've set out the relevant matters at paragraph 18. At 19, I have set out, perhaps, the corollary in terms of conditions that have been found or held to be invalid, and he categories there is if they are so unreasonable that Parliament clearly could not have intended that it should be imposed; second, ultra vires the powers of the local authority; a third, involving a delegation of the local authority's duties; or are simply uncertain. A condition may also be considered unreasonable or unlawful it is unenforceable.

Relevant to that context is whether reliance on compliance by third parties or third party approvals arises in this context. So a condition that relies on compliance by third parties has in the past been considered unenforceable. However, this was in the context of a condition stating that reversing and turning right from a site was prohibited, as the consent holder could not control the actions of those who came to visit the premises.

THE COURT: JUDGE BORTHWICK

So just pause there a second, I want to read that. Yeah, okay, mhm.

MR MAW:

The law on third party approvals was recently summarised in the High Court decision *Lysaght*, a decision of Justice Whata. This case noted the previous case law on the matter suggesting that a condition on a resource consent which requires the agreement of a third party is ultra vires, or that a condition imposed on a new consent cannot negate the resource consent of a third party. The conditions in this context do not rely on compliance by third parties nor the approval of a third party. There is no additional approval or action outside of the terms of the consent required as the consents will have been granted on the basis that the conditions are imposed.

Conditions will be placed on both the dominant and the subservient permits. I say that there is no requirement for the dominant permit holder to exercise the option of serving notice on the subservient permit holder to cease taking. However, if that action is taken, then the condition on the subservient permit requires the subservient permit holder to stop taking on receipt of the notice. The imposition of the condition on the dominant permit does not require an agreement of the subservient permit holder, or, I submit, vice versa. If an applicant does not propose to include a condition replicating the effect of the exercise of the right of priority expressed on the expiring permit being replaced, then that application will fall to be a non-complying activity.

In *Lysaght*, the Court also noted the case law suggesting that there can be a distinction between conditions that require an applicant to bring about a result which is not within the applicant's power (i.e. to construct a new roundabout), and a condition that stipulates development should not proceed until an event has occurred (i.e. after the roundabout is constructed). Now, in my submission, in this context, the requirement to cease taking upon receipt of written notice is more akin to the latter. The event that has occurred is the receipt of notice.

THE COURT: JUDGE BORTHWICK

Just pause there a second – and Justice Whata had no difficulty with the second proposition?

MR MAW:

Correct.

THE COURT: JUDGE BORTHWICK

I take it that, not that you hardly ever find any cases that are directly on all fours, but is *Lysaght* dealing with a similar or quite dissimilar actual and condition, including the proposed conditions there?

MR MAW:

Quite dissimilar.

THE COURT: JUDGE BORTHWICK

Quite dissimilar, okay.

MR MAW:

But there is the case of *Hampton v Canterbury Regional Council* in the Court of Appeal that I will come to, which appears to be more closely aligned. It's a case in the water context, so I get to that shortly.

I touch next on the delegation of local authority duties or reserving discretion to a future date. It is submitted that the conditions proposed do not amount to an unlawful delegation of functions or a situation where the council is reserving a discretion to a future date. The relevant decision is being made at the time the consent is granted. The decision to impose the condition on the subservient permit will be made on the basis that the subservient permit holder has proposed the condition and therefore is agreeing to the grant of its consent in the knowledge that there may be times when they cannot take, i.e. when they have received notice from the dominant permit holder because the dominant permit holder is not able to abstract their maximum authorised rate of take.

In terms of derogation from grant, the council does not consider that this creates any issues in terms of derogation, and that this is on the basis that the condition would be imposed on the subservient permit at the outset, so that permit is granted on that condition. This is different to situations where conditions have been found to be unlawful in the past, where they have negated the resource consent of a third party, as the condition is part of the rights that are conferred on the subservient permit holder when the consent is granted. The imposition of the condition does not affect resource consents that are already in existence.

THE COURT: JUDGE BORTHWICK

Just pause there a second, I just want to reread what you've said.

MR MAW:

Further, this is not a situation where the Council is reserving its discretion to a future date. The relevant decision is being made at the time of the consent

being granted. That is, if the dominant permit holder cannot take its full allocation under its permit, then it can serve notice on the subservient permit holder to cease taking. Upon receipt of that notice, the subservient permit holder must cease taking.

I now address the example in *Hampton v Canterbury Regional Council*. Now, whilst the factual scenario was somewhat different, the Court of Appeal decision in that case did involve a scenario where a condition provided that a consent could not be utilised while another consent was being utilised, and I have set out condition 5 of that resource consent at para 31.

THE COURT: JUDGE BORTHWICK

Pause there a second. Yeah, mhm.

MR MAW:

In this case, the Court of Appeal did not appear to be troubled by the concept, although I should say that the decision ultimately was dealing with other conceptual issues, but it is an example of –

THE COURT: JUDGE BORTHWICK

What are the conceptual issues? I've read the case, what conception issues are you getting at?

MR MAW:

Now, Hampton was dealing with the –

THE COURT: JUDGE BORTHWICK

Right to transfer.

MR MAW:

It was a transfer between the two brothers Hampton, and whether the permit could have been transferred without notifying the other brother, from memory.

THE COURT: JUDGE BORTHWICK

Just pause there a second – and with *Hampton*, and I know it's referred to by others, ours wasn't quite clear what its relevance was to this case, but with *Hampton*, there, there was an application, as I understand it, a first application to transfer part of a water permit that is expressly subject to a cousin or a brother being able to utilise the right. Application was granted subject to condition 5, transfer was made to the third party, and then Hampton wanted to transfer his brother's share, and that's what that case revolved around, and it was like, well, heck, I thought the Court of Appeal said that's not the basis of your application and you're going to be stuck with it, you know, you're stuck with the basis of the application.

MR MAW:

Stuck with the condition.

THE COURT: JUDGE BORTHWICK

Yeah.

MR MAW:

Correct.

THE COURT: JUDGE BORTHWICK

Yeah.

MR MAW:

And the reason for highlighting it in this context was simply the condition within that case that referred to the party ceasing taking if another permit was being exercised.

THE COURT: JUDGE BORTHWICK

Okay, right, okay, so I understand now why it's being referred to. Okay.

MR MAW:

I note that the Court of Appeal in *Hampton* also referred to the decision in *Aoraki,* where the High Court held that a consent authority exercises its statutory functions of regulating or managing the allocation or use of a resource through its power to grant permits, and the High Court *Aoraki* noted that the RMA effectively prescribed a licencing system. The relevant, in terms of that submission, in this context, is that these conditions that are seeking to recognise that others have, I will call it, a right of priority over them is essentially an allocation mechanism under the Act.

Now, in terms of where I go next in these submissions, I am addressing the question or the issue of the condition is actually being volunteered by the applicant in choosing to go through the RDA or the controlled activity pathway. My submission is, notwithstanding that the condition is being volunteered by the applicant, the condition could validly be imposed by the council without necessarily relying on essentially on OGA condition, but in any event, I say that, because the condition is being volunteered by the applicant, it provides a further backstop in terms of the legality or the vires of the approach, and I will step through that approach now.

In this case, the Council submits that the proposed consent conditions meet all relevant requirements in order to be considered intra vires. However, for completeness, a condition that may otherwise be considered invalid may be able to be imposed if a consent applicant volunteers it. This is covered both by section 108AA(1)(a) and is the principle established in Augier. I have set out the passage from *Frasers Papamoa*, where the High Court held that the Augier principle is a narrow one, not to be extended beyond its proper role, and I will leave you to read that.

Now, in my submission, these requirements would be met by an applicant proposing a condition in an application to meet the entry condition. Now, I should note, when reading through the list in terms of para 34 from *Frasers Papamoa*, the application form itself does not use the language of an undertaking being given in terms of the condition. In my submission, the effect

of volunteering a condition in this context would have that effect, but if there was a concern about that and the reliance was on the OGA principle, the application form could easily be amended to require that condition to be given on the basis of an undertaking.

THE COURT: JUDGE BORTHWICK

The applicant's undertaking?

MR MAW:

Yes. I submit that the grant of the consent would be issued in reliance on that undertaking. The imposition of the condition would be broadly encompassing that undertaking, and that there would be detriment to, in this context, other parties if the undertaking is not complied with, and so, in conclusion, the council submits that on the basis of this case law, and the council's statutory functions, the regulation of access to freshwater as between water users is a legitimate resource management issue that can be controlled through regional plans and that the proposed amendments to PC7 are lawful, and I would make that submission in the context of the direction of travel in the reframed or revised provisions circulated today, and lead to resource consent conditions that, in my submission, are valid. Those are my submissions.

THE COURT: JUDGE BORTHWICK

Thank you. I suppose, for my part, what we have proposed is more clearly (inaudible 16:35:12) like than perhaps what the planners are proposing, but hopefully more simple in terms of the mechanisms to perfect it, both in terms of the form and material to be accompanying an application for resource consent, but we will see when they work it through, but anyway, the important point is that there is nothing that the Court has proposed in principle that offends your submissions.

MR MAW:

No.

THE COURT: JUDGE BORTHWICK

No. All right. Thank you.

MR MAW:

As your Honour pleases.

THE COURT: JUDGE BORTHWICK

Got any questions?

THE COURT: COMMISSIONER BUNTING

No, I don't.

THE COURT: COMMISSIONER EDMONDS:

They're very clear, thank you.

THE COURT: JUDGE BORTHWICK

Who next? Ms Williams.

MS WILLIAMS:

I believe it's me, your Honour. I might start with the vires issue, your Honour, and, with respect, I adopt Mr Maw's submissions.

THE COURT: JUDGE BORTHWICK

Okay, well, that's easy.

MS WILLIAMS:

And the only additional point that I would like to make, your Honour, in terms of vires is about the gap, if I put it that way. Sorry, no, sorry, vires, your Honour, is simply, again, to emphasise s 108AA(1)(a), which, in my submission, puts into statutory form the OGA principle, and, in fact, it doesn't refer to an undertaking, it simply refers to an agreement, so, in my submission, on the basis of 108AA(1)(a), actually an agreement is sufficient, it doesn't need to be specifically expressed as an undertaking.

THE COURT: JUDGE BORTHWICK

All right, okay, so, in principle, also, what the Court has proposed –

MS WILLIAMS:

Absolutely.

THE COURT: JUDGE BORTHWICK

Flows with Mr Maw's submissions, which you adopt, and does it resolve the drafting issues which we discussed yesterday with the planners?

MS WILLIAMS:

In my submission, they would, your Honour, and actually, again, I was reasonably comfortable that where the planners had landed was going to be intra vires, and certainly, the Court's version takes that further, so I'm comfortable with that.

THE COURT: JUDGE BORTHWICK

Vires aside, I think we had drafting issues in general, that was all.

MS WILLIAMS:

Yes.

THE COURT: JUDGE BORTHWICK

All right, okay, thank you.

MS WILLIAMS:

Then, your Honour, turning to my submissions in reply – and actually, sorry, your Honour, I note that the front page doesn't say that they are dated the 15th of June, but they are dated the 15th of June, and, your Honour, again, just in respect of question 2, there are probably three points, your Honour, which I would like to highlight in my submissions. In my submissions, your Honour, you will see that my heading to my discussion of question 2 on page 5 is I've thereabout a qualifying application to replace a deemed permit, and that, in my

submission, your Honour, is important, because this is actually coming back to s 124.

THE COURT: JUDGE BORTHWICK

Sorry, which paragraph are you at?

MS WILLIAMS:

So I'm on page 5, and it's actually the header to my section dealing with question 2.

THE COURT: JUDGE BORTHWICK

Okay, I just don't have this on page. I haven't got your right submissions. No, I don't, sorry.

MS WILLIAMS:

That's all right, your Honour.

THE COURT: JUDGE BORTHWICK

Page 5?

MS WILLIAMS:

Yes, page 5.

THE COURT: JUDGE BORTHWICK

Nearly there. Okay, page 5, and the heading question 2. Yeah.

MS WILLIAMS:

So question 2, where I say I disagree with Dr Somerville and I say I consider, on a qualifying application to replace a deemed permit, so that's important, your Honour, because the qualification actually refers to s 124, and the requirement under s 124 that an application is made at least six months beforehand or, otherwise, at least three months beforehand, and then, with council's agreement, in a sense, in essence, rather, to allow the permit to continue. So those are the two factors which make it a qualifying application, and the

qualifying application is also tied to the expiry date, so it's tied to the expiry date of 1 October, so that's why there was this rush to get applications in before 1 April, by 31 March, or before tomorrow, 30th of June, and before 1 July, because those are the two dates that make for a qualifying application and which would allow s 124 to apply. I agree with my friend, Mr Maw, that the gap which is being addressed is the gap between when the permit expires and when the application is processed and a replacement new permit is issued. So that's the gap that s 124 addresses, and, in a sift statutory context, your Honour, there was an amendment to the Conservation Act in 2012 to address a similar gap between the expiry of concessions when applications had been made for replacement concessions.

THE COURT: JUDGE BORTHWICK

Which section?

MS WILLIAMS:

And that section is s 17ZAA, and I think 17ZAAB deals with a similar situation, but in essence, your Honour, my point is that there is, and it's acknowledged that there can be a gap between a permit or a concession expiring and the processing of a new application being completed for a new permit to be issued, and that gap is what s 124 is intended to address, and in my submission, your Honour, I agree, again, with Mr Maw that s 124 cannot apply until the current permit has expired, whether it be a deemed permit or a resource consent, however it is granted under the RMA.

So that's my first point, your Honour. My second point, your Honour, is actually in relation to the nature of deemed permits and the conditions that are carried over, deemed to be carried over by s 413, and so in my submission, your Honour, s 413(1) is very clear, in combination with s 366, that mining privileges have stopped. They are ended as of when the RMA came into force on the 1st of October 1991, and what had happened is that we have a new deemed permit which is created by the operation of s 413 as of the 1st of October 1991. So this is an RMA permit, it is not something else.

THE COURT: JUDGE BORTHWICK

It's a deemed permit, it's not a resource consent which is granted under this Act.

MS WILLIAMS:

Well, I'm actually going to take you –

THE COURT: JUDGE BORTHWICK

Okay.

MS WILLIAMS:

– and I think that's done by some of my colleagues as well, but the definition of resource consent refers to s 87 of the Act. Section 87 of the Act then sets out the various types of resource consent that could be granted, and that includes a water permit under s 14 of the Act, and a discharge permit under s 15 of the Act. The effect of s 413(1)(c) and (d) are that deems permits that are a water permit and a discharge permit under those relevant provisions of the Act, and so, in my submission, your Honour, they are captured within the definition of resource consent, which is what s 124 refers to.

Then, your Honour, we have the application by s 413(2) of the various provisions in the Water and Soil Conservation Amendment Act 1971, and there's the reference to sections 4 to 11, 13, 14, 16, et cetera, and, of course, the priority right entitlement is continued by the operation of s 11 and then the ability to exercise under s 13 and I think 14, but that's not the entire story, because we also have, and I've set out in summary at para 33 of my submissions some of these other deemed conditions which are reflected from the Water and Soil Conservation Amendment Act 1971, so section 4 is the entitlement to construct and maintain water races and to divert and use the water in a water race, and then section 5 is the entitlement to excavate, construct and maintain and use a dam, section 10 is the entitlement to occupy land forming the course of the race or site of the dam. So those matters are also, if we are going to say that rights of priority are deemed conditions, then

equally, these must be deemed conditions which are continued by the operation of s 413(2).

THE COURT: JUDGE BORTHWICK

Just pause there a second whilst I dial up the section.

MS WILLIAMS:

In my submission, your Honour, it just cannot make sense for those conditions, which are also deemed conditions, to finally expire on the 1st of October 2021 where there has been a qualifying application made under s 124. That would not lead to, in Dr Somerville's words at para 29, a practicable, workable, and sensible result.

Your Honour, the other thrust of my submissions in relation to question 2 was actually looking more broadly at the purpose of sections 413 to 417, and in my submission, in effect, there, they're almost a mini-code. They're not a code because a code would exclude the application of the rest of the RMA, and they don't do that, but they certainly are a specific set of provisions dealing with what are described for the purposes of those sections deemed permits, and in my submission, your Honour – and this is why, again, in my submissions, I referred back to the decision of Judge Smith and the Environment Court in 2002, the 28/2002 case where the Court summarised both the provisions of the RMA and the Water and Soil Conservation Amendment Act 1971, and, in essence, your Honour, the 1971 Amendment Act tried to – in the context of the 1967 Water and Soil Conservation Act, and also the Mining Act, which was fresh legislation as of 1971 – it attempted to deal with mining privileges and bring them into line with the Water and Soil Conservation Act, and the way it did that, your Honour, was by actually saying that there was no longer a perpetual right of renewal, which had been one of the key factors of mining privileges under the previous Mining Act.

However, what the 1971 amendment did do was it said that if an application to renew was declined by a consent authority – I'll call it that, because I think at the time, it might have been a catchment board, but whoever it was – that

compensation had to be paid, and so the effect of requiring that compensation had to be paid if a replacement was not granted was that, in effect, they were continued, even though the perpetuity right ceased as of the 1971 amendment. By contrast, your Honour, what the RMA did in 1991 was it actually provided for the 30-year transition phase-out period for deemed permits, but also provided that no compensation is payable, and that is in s 416, and in my submission, your Honour, that's where the final expiry date is actually relating to. It's about not only do you not have an automatic right of renewal, but you no longer have a right to compensation, and that is the key distinction between the RMA reform as opposed to the consolidation which might have occurred under the earlier statutes. Sorry, your Honour, I do just have one more point on vires, just to return to that briefly.

THE COURT: JUDGE BORTHWICK

Sure, okay.

MS WILLIAMS:

This is actually s 413(9).

THE COURT: JUDGE BORTHWICK

This is on vires?

MS WILLIAMS:

This is on vires. This is in relation to, I guess, imposition of priorities, your Honour. Section 413(9) deals with the situation where, for an existing deemed permit, there is an application to transfer, and in particular, paragraph A is talking about – that refers to s 136(2)(b)(i), which is where there is an application to transfer a point within a catchment, but which is authorised under a regional rule, and it actually says that, despite that, you still have to treat it as if it was an application under s 136(4). It then goes on to deal with some other matters, makes it clear that they no longer will be property rights, they are now subject to s 122.

They're also now subject to the review provisions, which are otherwise excluded, and, importantly, your Honour, para (c) says that in addition to the matters which are set out in s 136(4)(b), and considering an application to transfer the whole or part of a deemed permit to another site, the regional council shall have regard to the effect such a transfer would have on the relative priority and entitlement to water in the catchment and may modify the priority or other conditions of the transferred deemed permit. In my submission, your Honour, that certainly puts in statutory form the thinking that dealing with priorities, which would have to be as between respective consents, is something that the council has the authority and the power to do, and to carry that further, your Honour, presumably, the council has the power to impose conditions.

THE COURT: JUDGE BORTHWICK

So you say this in order to support, in principle, the council can make objectives, policies, and rules pertaining to these priorities?

MS WILLIAMS:

Yes.

THE COURT: JUDGE BORTHWICK

Yeah, so sort of a general submission, yeah.

MS WILLIAMS:

Yeah, so I'm not saying anything specific, although it may be, your Honour, that this addresses the question of how did a new resource consent end up with a priority condition, and it may be that it was actually through the application of this provision.

THE COURT: JUDGE BORTHWICK

That's Smallburn.

MS WILLIAMS:

Yes.

THE COURT: JUDGE BORTHWICK

All right. No, that's fine.

MS WILLIAMS:

Unless you have any questions for me, your Honour that is all I have to say.

THE COURT: JUDGE BORTHWICK

I do not. No, that's fine.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. Just while we're hanging about, it's more a question for Mr Maw. Sub section 6 413, that's dealing with enforcement procedures and the application by the regional Council under 316, which is why I was thinking, this is High Court Business.

A. The submission that I have made in the context of the High Court business was the ability to enforce directly as between consent holders.

Q. Okay. All right. That, if you want to do that, it's got to go somewhere else.

A. Yes.

Q. Yeah, and the Court of confident jurisdiction then be…

A. High Court.

Q. At a High Court. Actually, it's probably a question for both of you because we'll call it at five. I know, I've talked to both of you about this, what about enforcement. You know, whether it's what the Court's suggested or what the planners have suggested. Is that giving you any anxiety? No, don't shake your head, cause we just got to get a solution and then get the heck out of here. It's a serious question, does it give you any anxiety? Okay. Firstly OGA conditions, so it's what the Court's proposing, it's maybe what the planners were proposing, OGA condition is directly enforceable, but just under the normal mechanisms I would have thought through 316.

A. Yes. 312 in my head.

Q. You might be right, yeah.

A. Anyway, there about there.

Q. Yeah, about there. So that's just enforceable in the ordinary way.

A. Yes.

Q. And it'll be subject to proof, et cetera. Prosecutions, well, no, Regional Council, can Regional Council enforce an OGA type condition?

A. My understanding is yes it can.

Q. Yeah.

A. Once it's a valid condition on the permit.

Q. Yeah.

A. It's a condition that can then be enforced.

Q. Yeah.

A. Because the breach of the Act authorised by the permit, if you're not complying with the conditions of the permit so you'd be in breach of the Act, so the offence is breaching the Act without complying with the permit.

Q. Vacant notices?

A. Same again.

Q. Enforceable by the Council, but action can't be taken or can it be taken by a neighbour? An individual.

A. Not in the context of an abatement notice.

Q. No.

A. The action that could directly be taken by a consent holder would be application for an enforcement order or alternatively, presumably a private prosecution.

Q. Yeah, yeah, and so prosecution, and again, I think it's the other thing giving me anxiety, and in some ways it's a silly thing to be anxious about, because no one's ever asked Council to enforce these things and there effect, I suspect, isn't because they replicate the Act, but because they replicate – they promote good behaviour or a continuation of certain behaviour.

A. Yes, and like lots of, say, new conditions or conditions touching on new subject matter, circumstances where they haven't been forced before, there's always a level of anxiety as to how it might play it out, but what one can do is work through those conditions and make those conditions as robust as possible, and that really is the exercise to be undertaken. I think it's fair to say that the compliance team did have some anxiety in

terms of the conditions and that would have come through fairly loudly, clearly in the evidence, and that, I should say, was a helpful exercise, both for, perhaps the Court and also for the Council, but in the end we come back to the question of are the conditions and the types of condition being referred to here, do they fit within the framework of conditions that have previously been found to be valid in terms of sufficient level of certainly for a valid purpose, et cetera. The submission that I've made is that, yes, they do, and therefore they are capable of enforcement, albeit there may be, as there always are, some practical challenges associated with enforcement, but those challenges exist with respect to enforceability of not just these types of conditions, I submit that the same issues might arise in terms of dealing with minimum flows or residual flow type conditions.

Q. So, to the extent – I just was thinking about that, a case of Sutton and Canterbury Regional Council.

A. Sutton. Which one was that?

Q. Oh, 2015 High Court decision. I think it's Justice Kendall, and about the Council's duties in terms of getting its records right. Getting its house in order. To the extent that Ms King and Mr Cummings are talking about issues about the Council's house not being in order, well, you've got to put it in order.

A. Quite.

Q. And I think you accepted the duty.

A. Yes.

Q. On behalf of ECAN.

A. Yes.

Q. Yeah, and on that decision, and so, it seemed to me, a lot of the anxiety was anxiety around its own records, but its also anxiety as to, this is probably one thing that does bother me, activities which have occurred, say, the shifting of the point of take, which have not have been regularised as it should have been regularised under section 413, and so, what to do about that?

A. Yes, I was listening with some interest, and in mind, I was trying to work out who's problem is that. Is it the Council's or the consent holder? Reality is it's both.

Q. It's both, and so, if you do come across that and I know the answer – somebody's sent to say, oh, well, you know, if they've done and it's been right, she'll be right for the last 10 years, she'll be right for the next five or six or however long. Is that – how would you approach that? Where you have got – and again, I remember from my days as a practitioner in Canterbury, a lot of irregularities with the records which was both, clients were providing records again and hoping that were loaded correctly onto the database.

A. Yes, I would have thought as part of the consent replacement process, those issues will need to be resolved and or clarified, so, if you've got a situation where a point of take has moved, say unlawfully if they have followed the process under section 136, it may well be that upon consideration of that application, the Council will require a section 136 application to deal with the point of take.

Q. And it may require neighbours' approvals. In that case, two regularise.

A. Yes, particularly in circumstances if the point of take is moving or leapfrogging another permit. So, that will need to be considered. So, I anticipate that the applications will come, the point of take will be specified, there will be reference to the permit being replaced, if there's a mismatch at that point, it will become obvious, and will need to be regularised.

Q. So, I think what you're saying, despite the lack of transparency, if you like at the present moment as to how permits are currently being exercised, that is not causing you any anxiety in terms of what has been proposed to overcome the priority gap.

A. No, because the mechanism exists to deal with that issue.

Q. Yeah.

A. So, I'm comforted by the existence of section 136 to allow the transfer at the point of take, if that has in fact occurred.

Q. Okay, all right.

A. And, at –

Q. In saying all that, Ms King's and Mr Cummings' evidence is in fact extraordinary – I would have thought extraordinary helpful in terms of the exercise ahead.

A. Quite.

Q. Yeah.

A. And it's focused some attention on what the future may look like.

THE COURT: JUDGE BORTHWICK TO MS WILLIAMS

Q. Yeah, and the effort to get people in to regularise what those activities are. Okay, so, Ms Williams, you've been nodding away.

A. I have.

Q. And so, knowing there's no particular anxiety around enforcement.

A. Well, Your Honour, I mean, again, so, the department as I have already referred to concessions, so, we have from time to time have concessioners who breach conditions of concessions, and sometimes the conditions are not expressed in a particularly helpful way, and so we often have to make a call between, do we deal with this as a concession condition issue or sometimes it has gone further than that it and it has to be dealt with as a prosecution, and we have prosecuted concessioners where they have undertaken activities which are not within, we consider the terms of their conditions, and we have lost. So, you know, so, I'm very familiar with the issues that were set through by Mr Cummings because those are matters that also the department has to rest its own regulatory function, and again, your Honour, I guess I don't see those issues as being insurmountable in terms of meeting a criminal standard of proof. What I guess I also took some heart from is that actually what the compliance plan attached to Mr Cummings' evidence indicated is that that is very much the Council's final option, and that there are a number of other steps that it will go through before it gets there, and again, as Mr Maw points out, there is certainly the ability for the third party, the superior permit holder to apply for an enforcement order or to take a private prosecution, and if they were to do that then they are going to be subject to that same standard of proof.

Q. Yeah.

A. So, that's, so, again, they will have to be certain of their ground to take that action.

Q. Okay, and so in terms of what the Court has proposed, no red flags?

A. No.

Q. No, okay. All right, well, we'll take a break and come back on Thursday, unless people have to travel, so, which might be Mr Welsh.

THE COURT: JUDGE BORTHWICK TO MR MAW

A. You'd flagged you wanted to see us in chambers at the end of the day.

Q. Oh, no, I've actually covered the matter that I wanted to see you in chambers about.

A. Very good.

Q. You've addressed it. I don't want to – yeah, I'm just conscious of the fact you've got to travel. Ms Dickson's got to travel.

THE COURT: JUDGE BORTHWICK TO UNKNOWN MALE

Q. Oh no, are you going to be back Thursday?

A. I made strange travel bookings, and so I am leaving tonight.

Q. Oh, okay.

A. And back Thursday, and I have my closing on Friday, which, somehow between travelling I have to write.

THE COURT: JUDGE BORTHWICK TO UNKNOWN MALE

Q. You've got to be back, because you've got cross-examination for Mr De Pelsemaeker.

A. Yeah, I do.

Q. No, that's okay.

A. Because there's certain statements that –

Q. No, that's okay, that's fine.

A. - Mr De Pelsemaeker does make.

Q. Did you want to – oh, so, do you want to address this now? Should we go on and hear what anything, whether there's anything in addition that you need to say to…

A. well, your Honour are you going hear from other counsel that are in the room? Ms Dickson and Mr Page.

Q. Yeah, well it just depends if whether counsel are traveling or do we just roll it over for Thursday.

A. I'm happy to roll it over

Q. You're happy? Okay.

A. Yeah, well, I am back on Thursday. That's… I'm flying back tomorrow night.

Q. Okay. All right. Thank you.

THE COURT: JUDGE BORTHWICK TO MS DICKSON

Q. Ms Dickson, do you want to…

A. I'm staying, your Honour, so I can do it on Thursday.

Q. You're staying, so there's no difference to you. Okay, very good.

THE COURT: JUDGE BORTHWICK TO UNKNOWN MALE

Q. And you're local, so you don't get a choice.

A. No, no, no, we'll just do as we're told.

Q. Oh, I've noticed that about you. Okay, so, no, that's fine, so we'll adjourn and I need to issue a minute, which I will do, just circulating that stuff about deemed priorities, this time noting that we want a definition for downstream permit holder, not upstream permit holder. I'm sure that was a deliberate mistake. Okay, so, on that basis we're adjourned

COURT ADJOURNS: 5:08 PM

MINISTRY OF JUSTICE
Tāhū o te Ture

Notes of Evidence Legend

National Transcription Service

Indicator	Explanation
Long dash –	Indicates interruption: Q. I think you were – (*Interrupted by A.*) A. I was – (*Interrupted by Q.*) Q. – just saying that – (*First dash indicates continuation of counsel's question.*) A. – about to say (*First dash indicates continuation of witness' answer.*) This format could also indicate talking over by one or both parties.
Long dash (within text)	Long dash within text indicates a change of direction, either in Q or A: Q. Did you use the same tools – well first, did you see him in the car? A. I saw him through – I went over to the window and noticed him.
Long dash (part spoken word)	Long dash can indicate a part spoken word by witness: A. Yes I definitely saw a blu – red car go past.
Ellipses … (in evidence)	Indicates speaker has trailed off: A. I suppose I was just… *(Generally witness has trailed off during the sentence and does not finish.)* Q. Okay well let's go back to the 11th.
Ellipses … (in reading of briefs)	Indicates the witness has been asked to pause in the reading of the brief: A. "…went back home." The resumption of reading is noted by the next three words, with the ellipses repeated to signify reading continues until the end of the brief when the last three words are noted. A. "At the time…called me over."
Bold text (in evidence)	If an interpreter is present and answering for a witness, text in bold refers on all occasions to the interpreter speaking, with the *first* instance only of the interpreter speaking headed up with the word "Interpreter": Q. How many were in the car? A. **Interpreter: There were six.** Q. So six altogether? A. **Yes six** – no only five – **sorry, only five.** *(**Interpreter speaking** – witness speaking – **interpreter speaking**.)*
Bold text in square brackets (in evidence)	If an interpreter is present and answering for a witness, to distinguish between the interpreter's translation and the interpreter's "aside" comments, bold text is contained within square brackets: Q. So you say you were having an argument? A. Not argue, I think it is negotiation, ah, re – sorry. **Negotiation, bartering. [I think that's what he meant]** Yeah not argue.