

**IN THE MATTER** of the Resource Management Act 1991

**AND**

**IN THE MATTER** of Applications for Resource Consent by The Central Plains Water Trust and a Notice of Requirement for the designation of land by Central Plains Water Limited associated with the construction and operation of the Central Plains Water Scheme

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**SUBMISSION ON BEHALF OF THE MALVERN HILLS  
PROTECTION SOCIETY INCORPORATED AND 84 OTHERS**

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**MAY IT PLEASE THE COMMISSIONERS:**

- [1] As indicated in the opening submission by Mr Burns on behalf of the Malvern Hills Protection Society Incorporated and 84 others given, I have been instructed on behalf of those clients to address the relationship between the Central Plains Water Trust (“CPWT” or “the Trust”), Central Plains Water Limited (“CPWL” or “the Company”) (and together “the applicants”) and Dairy Holdings Limited (“DHL”), Christchurch City Council and Selwyn District Council, and the relevance of those matters to your consideration.
- [2] This is pursuant to the Society’s submission on “Governance Issues” which raised concerns about the application and designation processes being used by the Trust, CPWL, and Ashburton Community Water Trust, and the connection between Selwyn District Council and Christchurch City Council with the applicants, their complex interrelationship, and that the final users of water from the Scheme at the farm level, shareholders in CPWL, would not be the holders of the land use consent. The submission also expressed concern about the monitoring and enforcement of any consent conditions, should consent be granted, given the web of interrelationships between these various bodies and the agreements between them.<sup>1</sup>

***The Trust and the Scheme***

- [3] The applications by the Trust are said to be for the purpose of what it describes in its applications as the ‘Central Plains Water Enhancement Scheme’, the Trust itself having evolved from the Central Plains Water Enhancement Steering Committee established by the Christchurch City

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<sup>1</sup> Submission by Malvern Hills Protection Society Inc to Selwyn District Council on Public Notice of Requirement of Land Use Consents for Central Plains Water Irrigation Scheme

Council (“CCC”) and the Selwyn District Council (“SDC”) and whose purpose:

*..... was to improve the security and prosperity of Central Canterbury through water management schemes that enhance ecological and recreational values while providing opportunity for agricultural and horticultural diversity.*

(AEE, 1.3, page 1-3)

- [4] The purpose, as expressed above, to an extent reflects the Objects of the Trust set out in the Declaration of Trust by the two Councils dated 4 April 2003 at Clause 4.1:

*The Settlers declare that the Trust is a Trust for charitable purposes for the benefit of the present and future inhabitants of the Regions and further declare and direct that the Trust Fund may be applied and used exclusively by the Trustees for the following general purposes within New Zealand (“the Objects”), namely:*

- (a) to encourage, support and facilitate sustainable development of the water resources of the Regions for the benefit of the inhabitants;*
- (b) to provide and facilitate opportunities for agricultural and horticultural diversity in the Region;*
- (c) to provide and facilitate education of the inhabitants of the Regions in relation to water issues affecting the Regions;*
- (d) to appropriately balance enhancement of economic benefits of the regions with enhancement of ecological social and recreational values for the Regions.*

(emphasis added)

- [5] Elsewhere, in relation to resource consent applications relating to the Central Plains Water Scheme in December 2001 (for water takes from the Rakaia and Waimakariri Rivers), it is stated that:

*Since lodging, the entities involved in these applications have changed. CPWE [Central Plains Water Enhancement Steering Committee] interests are now transferred to Central Plains Water Trust (CPWT), which will obtain the resource consents on behalf of Central Plains Water Ltd (CPWL), the entity that will exercise the consents.*

(emphasis added)

(AEE, page 1-5)

- [6] The Steering Committee referred to above is said at 2.3.2 of the AEE (page 2-6) to have been established in March 2002 by the two Councils and:

*Its purpose was to seek enduring ways to improve the prosperity of the Central Canterbury area through water management schemes that enhance ecological and recreational values while providing opportunity for agricultural and horticultural diversity.*

- [7] The emphasis referred to above in paragraphs [3] and [6] reflects that of the Objects of the Trust whereby provision of opportunity for agricultural and horticultural diversity in the Regions is not the dominant purpose. That dominant purpose appears to be enhancement of ecological and recreational values with the agricultural and horticultural outcomes being an opportunistic benefit of that purpose. In this connection see also the Objects of the Trust where the latter is only one of four apparently equal Objects.

- [8] However, the applicants have subtly changed that emphasis as follows:

*... The Trust has not been established purely to pursue commercial objectives, it being the intention that such commercial objectives will instead be pursued through Central Plains Water Ltd.*

(AEE, page 2-7)

[9] A plain reading of the Declaration of Trust, contrary to the implication in the above statement, indicates that the pursuit of commercial objectives is ancillary to protection of the region's scarce water resources and not even an overriding or equally eminent part of the Trust's Objects (which are expressly stated to be wholly charitable "*for the benefit of the present and future inhabitants of the Regions*").

[10] The Trust Fund under the Declaration of Trust is recorded as being:

*The resource and other statutory consents applied for and obtained by the Trustees and any money, investments and other property paid and given to or acquired by the Trustees after this Deed has been executed with the intention that it be held by the Trustees in accordance with the Trusts and other provisions of this Deed.*

[11] It should be noted, however, that the status of the Trust as charitable may cease on 1 July 2008 which is said to make more difficult accessing financial assistance and grants, and will make the Trust liable to tax/gift duty.<sup>2</sup>

### ***The Trust and the RMA***

[12] It could be said that, apart from the difference in emphases that come out of the above material, ostensibly the Trust and its Objects coincide with the

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<sup>2</sup> Central Plains Water Trust Report to Councils; Quarter Ending March 2008

purpose of the Resource Management Act 1991 under Section 5(2) in relation to managing the use, development and protection of natural and physical resources, as well as enabling the communities of the Christchurch City Council and Selwyn District Council regions to provide for their social, economic, and cultural well-being, among other things.

- [13] There is also significant resonance between the Trust's Objects with the provisions of Section 7 (aa) (the ethic of stewardship), (b) (efficient use and development of natural and physical resources), (c) (maintenance and enhancement of community values), and (f) (maintenance and enhancement of the quality of the environment).
- [14] It is the view of the Society that sub-section 7(aa) <sup>3</sup> should be given particular regard by this Commission in the sense of enquiring as to the managing of the current proposal given that it has been presented to you as one instigated by representatives, and for the benefit, of the communities of the Christchurch City Council and Selwyn District Council regions. This provision in Section 7 has not been the subject of any comprehensive judicial review, but it is submitted that where an application is predicated, as is the case here, on an appearance of stewardship of a natural and physical resource for people and communities, it is legitimate for the consent authority to consider and enquire into that issue, particularly where there may be questions about the ability of the authority and the potential consent holder to comply, monitor and generally manage the effects of the proposed activity.
- [15] However, as indicated in the opening submission for the applicants the Scheme is intended to only be available to shareholders in CPWL, described as a public company. The Trust is not a shareholder in the

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<sup>3</sup> "stewardship": Defined as ..... 2a Administration, supervision, or management (as) by a steward; "steward" .....6 an overseer, a foreman ..... 7a a person employed to manage the affairs of an estate.... – Shorter Oxford English Dictionary (Fifth Edition)

Company, which seems extraordinary in the circumstances. Why that is not so is not explained anywhere, given that the Applicants promote the Scheme as being for the benefit of the community as a whole.<sup>4</sup>

- [16] In addition, it is also notable that of the 376,002 shares which have been issued in Central Plains Water Limited only one share each has been allocated to the settlors of the Trust, the two Councils.
- [17] If the company is a public one, then those shares are freely tradable. There is also in the Constitution of the Company a provision relating to the sale of what are described as Minimum Holdings. A Minimum Holding means a particular parcel or number shares as may be prescribed by the Board from time to time. The Company has the power to sell the shares of a shareholder with less than a Minimum Holding, raising the spectre of the two settlors being removed from having any shareholding, and therefore direct control, in the company that is supposed to construct and operate the Scheme.
- [18] There is nothing in the Constitution of Central Plains Water Limited that requires any representation on its Board of the Trust Settlers or the Trust.
- [19] It is a basic tenet of company law that directors, among other things, must act in the best interests of the company, which in substance means to act in the shareholders' interests. CPWL has no mandate in its Constitution to act in the interests of the communities represented by the Settlers of the Trust.

### ***The Trust and CPWL***

- [20] You have previously been told about a Memorandum of Agreement of

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<sup>4</sup> See Opening Submission of Dr E D Wylie QC at paragraphs 49, 59 and 62.

2004 between the Trust and the Company<sup>5</sup> that, among other things, at Recital C. describes the Company as having been “*incorporated initially for the purpose of assisting the Water Trust to carry out the concept refinement of the Scheme and to conduct the application for the Resource Consents to be obtained in the name of the Water Trust.* (emphasis added).

[21] Notably this Memorandum records that the Company “*and/or its subsidiaries or companies otherwise related to or established by CPWL*” will be the permanent entity or entities which will finance, construct, commission and operate the Scheme. The width and ambiguity of that term is of concern when it comes to monitoring the performance of this vast proposal both during construction and its subsequent operation should consent be granted. The only possible guarantee of any control over the exercise of those functions will be contractual. This is of particular concern given that the Trust, the ostensible holder of the consents being applied for, has agreed to make them exclusively available to the Company (which must be taken to now include, probably, “*subsidiaries or companies otherwise relating to or established by CPWL*”).

[22] Under this structure it appears that the party which will implement the resource consents is not controlled by, nor may have any connection with, the public bodies that conceived the Trust, its Objects, and this Scheme, in the name of and on behalf of their constituencies. In this regard you are further referred to Clause 2.3 of the Memorandum which envisages a split of the functions of CPWL; quite apart from the obscurity of this from the public ownership point of view, the potential for these matters to no longer be subject to public scrutiny is of concern for the continuing assessment of the Scheme and its implementation, and raises the potential for conflict between the public interest (Section 5/Section 7 concerns) and the private interests of the owners of CPWL and its subsidiaries or related entities.

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<sup>5</sup> Attachment to evidence of Mr D J O'Rourke

There is nothing in the Memorandum that requires CPWL to act at all times, or even part of the time, in accordance with the Objects of the Trust, and indeed under company law may be precluded from doing so in deference to the interests of its members.

- [23] This is further emphasised in Part B of the Memorandum of Agreement that sets out the role of the Trust whose obligations, among other things *“shall not be detrimental to the commercial viability of CPWL’s operation”*.
- [24] Of interest in relation to administration of the resource consents are the obligations on the Trust, during stage 2 (as that is defined in the Memorandum of Agreement) in the Memorandum, but essentially after the resource consents have been granted, *“during which CPWL will finance, construct, commission and operate the Scheme”*. It is the Trust that is to monitor not only compliance with the resource consents, but also of what are called Water Use Agreements (*“being any agreement entered into by the company with a person who uses water of the scheme”*), advise the company of actual or suspected breach of such agreements, and defend the resource consents from any challenge that might threaten their suspension, while allowing the Company to manage and administer the resource consents. Those obligations, unrealistic as they appear, are to be contrasted with the role of the Company in Part C of the Memorandum whereby, although the Company is the exclusive user of the resource consents, its obligations do not include reporting on the use or operation of the consents, nor of the fact of or terms of Water Use Agreements, nor ensure compliance with those agreements in order to also ensure compliance with the resource consents.

- [25] This lack of substance to the obligations of the Company is however in accordance with the acknowledgement required of the Trust that the Company's directors:

*Owe their primary duties to CPWL and that as a general principle their duties to CPWL (and/or any other fiduciary and statutory duties which they may owe) will take precedence over any obligations to the Water Trust and that they may require to consider any direction received by CPWL from the Water Trust in that light;*

(Clause 9.2(a))

- [26] If those provisions were not concern enough in not being consistent with the Trust's Objects, Clause 12 contemplates a fundamental change in their relationship upon the completion of Stage 1 (essentially the time after obtaining the resource consents upon exhaustion of the relevant appeal periods), which change will include:

*(b) CPWL will be from that time acting as an independent party, at arms' length from the Water Trust, but subject at all times to the terms and conditions upon which CPWL and the Water Trust have agreed that the Resource Consents will be made available to CPWL; .....*

- [27] The Society also draws to your attention Clause 14 which describes the terms upon which the Trust makes the resource consents available to the Company; in consideration for the exclusive right to use of the resource consents and compliance therewith, CPWL will:

*(a) Adhere to and uphold best practice environmental standards of such type and to such levels of performance as shall be*

*agreed by the Parties. Such standards (both as to type and performance levels): .....*

- (ii) Must be financially viable to implement;*
  - (iii) Must not affect the financial viability of water users' use of water from the Scheme; .....*
- (d) Accommodate and/or facilitate any recreational, social, cultural or environmental benefit/s which can be added to the Scheme that either it or the Water Trust identifies and requires provided that the provision of such benefit does not adversely affect the financial viability of CPWL's operations.*

(emphasis added)

### ***CPWL Loan Agreements***

[28] More recently the Trust and CPWL have entered into Loan and Security Agreements with Dairy Holdings Limited (or "DHL"). The Loan Agreement is dated 27 November 2007 with the Company described as the borrower and Dairy Holdings Limited as the lender, with the Trust as a party to that agreement. Recital B records:

*B The resource consents for which the Borrower [CPWL] has applied include resource consents to take and use water from the Rakaia River (the **Resource Consents**) in the name of the Trust and, if granted, the Trust will grant the Borrower an exclusive licence to use the Resource Consents for the purposes of developing, constructing and operating the Scheme (the "**Head-Licence**")*

[29] The term “Head-Licence”, not used in any of the other documentation created prior to this relating to the Scheme, implies the grant of a sub-licence or sub-licenses; and indeed Clause 5 of the Loan Agreement provides for a grant of such sub-licence to the Borrower, Dairy Holdings Limited, at no charge in consideration of DHL entering into the Loan Agreement, to allow the it to irrigate the Lender’s Land. The Lender’s Land is defined as:

*“Lender’s Land” means the land owned or operated now or in the future by the Lender or subsidiaries of the Lender in or near the area to be serviced by the Scheme.*

[30] In connection with this, Recital E of the Loan Agreement records that DHL has a number of subsidiaries which are or will be owners of land “*in or near the area to be serviced by the Scheme*” and is investigating irrigation options for the irrigation of such land. Of course, there is nothing to preclude the lender obtaining more land within the scheme area (and shares in CPWL).

[31] It is noted that Resource Consents are defined in the Loan Agreement, referred to above, to mean the resource consents “*to be obtained by the Borrower in the name of the Trust (whether a alone or jointly) and subject to the Head Licence .....*”.

[32] Clause 6 relates to the conduct of the application for Resource Consents, and provides for the assignment of all of CPWL’s rights in respect of the conduct of the application to Dairy Holdings Limited if CPWL elects not to proceed or is unable to do so for a continuous period of six months or more, and sums have not been repaid in accordance with the agreement. Under that clause DHL would be entitled by agreement with the Trust to conduct the application in the name of the Trust, or to conduct the

application in its own name. In Clause 6.3(d) DHL may make changes to the resource consent application, subject to the approval of the Trust save in relation to a change in the location of take points relating to DHL's water take from its existing take points.

[33] Where this all leaves the Scheme, its administration and monitoring is a matter for some concern. My clients understand that the Canterbury Regional Council experienced difficulties in administering the Opuha Dam Scheme because of the plethora of parties involved in it. In this case while the Trust is the ostensible applicant for the resource consents, to a large extent the implementation lies with parties, some identified, and some not identified (and possibly not in existence), who are at arms' length from the Trust and which may well be under no obligation to the Trust. In addition, those parties have their own specific interests which may well not coincide with those of the Trust, which may be inevitable given the nature of the entities involved.

[34] The agreements in place are by their nature flexible and capable of change; for instance, the Memorandums of Agreements referred to above are somewhat less than a formal Deed, for instance, and therefore much more easily changed or enforced. The relative bargaining strength of those parties also may be in question. My clients have noted from public information the financial weakness of the Trust as indicated in the its most recent report<sup>6</sup> to its settlor Councils, and in a submission by one of its former trustees, and current director and shareholder of CPWL, to the effect that the Trust should be supported financially only by its two settlor Councils and identifying potential conflicts of interest arising from the Trust being currently funded by shareholders of CPWL.<sup>7</sup>

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<sup>6</sup> Central Plains Water Trust Report to Councils; Quarter Ending March 2008

<sup>7</sup> Submission by W J Palmer to Selwyn District Council Draft Annual Budget (Undated); supplemented by email from Mr Palmer to Selwyn District Council dated 15 May 2008

[35] I adopt the submission of Mr Wallace on behalf of Te Runanga o Ngai Tahu which drew to your attention some of the provisions I have referred to, but others which are relevant and do not require repetition (except by way of reference), which demonstrate the way the requirements of the Scheme may be diluted or subverted. My clients are particularly disturbed by a clause that appears in the Agreement between the Trust and CPWL attached to Mr O'Rourke's evidence which on the third page deals with the terms and conditions upon which the resource consents were being made available by the Trust to CPWL. It states as a fundamental principle that the Trust will:

- *As far as may be achievable seek to reduce the extent to which the terms and conditions of the resource consents will require 'heavy handed' monitoring by Ecan and Selwyn District Council and to optimise the concept of 'audited self-management' to ensure compliance with resource consent requirements and the environmental objectives of CPWT.*

[36] That any monitoring by the respective Councils is being characterised in that way at least implies an antipathy to such monitoring even if the terms and conditions of the resource consents require it.

[37] In a Scheme of this magnitude it is going to be as important to monitor the final activity of the scheme, if it occurs, as well as the steps taken to put it in place prior to its operation. And, given the vastness of the proposal, close monitoring (perhaps a better characterisation of the functions of Ecan and Selwyn District Council then 'heavy handed') is essential so that an outcome is achieved which responds to the concerns of the communities both as to their economic well being, but also their interest in preservation of amenity in their environment.

[38] All of the above matters demonstrate that the Applicants have structured this proposal in a way which is readily amenable to separation from the community based intent of the proposal at its inception, and implementation of any resulting resource consents by entities that will not be easily monitored by the consent authorities (if they are identifiable); nor will the conditions imposed on the consents to the Trust which might on the surface appear sufficient. It is the concern of my clients that in a project of this magnitude conditions will simply not be sufficient to ensure proper oversight, monitoring and compliance given that the structure, ostensibly for community purposes, is amenable to ready dismantling in favour of private commercial interests. Also, that the purported stewardship of the project on behalf of the communities of the Christchurch City Council and the Selwyn District Council is practically non-existent and those communities have no guarantee of the retention of those purposes.

[39] The matters above which my clients have wished to draw to the Commissioners' attention must necessarily be a cause for concern as to the possibility of, and intent to, implement the Scheme in accordance with any resource consents that might be granted and they ask that the Commissioners take them into consideration as an "other matter" under Section 104(i)(c).

Dated at Christchurch this 25th day of June 2008

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**Michael Parker**  
Counsel for Malvern Hills Protection Society  
Incorporated and 84 Others