

IN THE MATTER OF the Resource Management Act 1991
AND

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

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

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

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

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

AND

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

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

LEGAL SUBMISSIONS ON BEHALF OF SYNLAIT LIMITED

Section 96 Resource Management Act 1991

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SYNLAIT LIMITED – OUTLINE OF SUBMISSIONS

1. Synlait Group

- Synlait is a substantial independent dairy farming and processing group “Cow to Customer”.
- Synlait operates dairy farms in the areas to the north and south of the Rakaia River, both within and downstream of the CPW area, and in the Ashburton area.
- Synlait’s Dunsandel processing plant (milk powder) is commencing production in August 2008. It has an initial 200 million litre capacity, already currently 85% committed.
- Synlait owns its own farms, co-ventures or manages others, and has supply and other agreements with additional farms.
- Synlait irrigates extensively on its owned and managed farms, principally from groundwater and in some cases races.
- Individual Synlait farms within the CPWT area are in general also shareholders in CPWL.

2. Existing consents

- Synlait Group hold existing water consents for current takes, plus a take from the Rakaia for irrigation (Bands 2 and 3 water which is subservient to other rights and currently subject to an appeal to the Environment Court) and has an application for further rights pending hearing.
- Synlait and associated farms within the CPW area now comprise about 5% of the CPW area by land area, and probably more in terms of potential water demand. Factory supply agreements and other expansion will increase this to at least 15%.

- CPW scheme if it is consented and proceeds will need Synlait's participation, which Synlait favours in principle depending on cost, timing and other factors, but is not committed at this time.

3. Legal decisions

- There are two High Court decisions in respect of litigation over the priority status of the Synlait water consent applications, and the status of the applications now before Commissioners.
- In *Synlait Ltd v CPWT and others* 11 March 2008, Chisholm J held that:
 - The 2001 "take" application by ACWT and the Councils for irrigation purposes (subsequently assigned to CPWT) and the subsequent applications for use is a single joint application.
 - It had to be complete in all respects before it was notifiable.
 - Amendments made by CPWT in 2006 did not make the 2001 application a "new" application.
 - The single joint application was not notifiable until ACWT lodged use applications in 2007.
 - In consequence, the Synlait applications had priority over the CPWT/ACWT application.
- The first finding has not been appealed and is operative.
- CPWT/ACWT has applied to the Court of Appeal for special leave to appeal and have cited issues of law relating to elements of the second issues. That leave has not yet been granted.

- If leave is granted the outcome of that appeal will not affect the present applications in practical terms as the 2007 applications by ACWT were a major amendment to the 2001 joint application and the effect of that amendment is that the relevant date (on any view of the law) for priority is the 2007 date.
- Synlait applied for leave to obtain a finding of the Court of Appeal confirming that this was correct in law but leave was refused by Chisholm J in the same proceeding on 29 May 2008, Chisholm J stating:

“The underlying proposition that Synlait seeks to have determined would seem to be self-evident. An application that is ready for notification must surely lose its priority if there are later changes to the application which effectively render it a new application.”
- The present application is therefore to be considered in the context of the existing Synlait consents and the pending and prior application.

4. The 2001 “take” application

- The CPWT/ACWT Application to take water (CRC021091) was lodged on 6 December 2001. CPW and ACWT is, in terms of the RMA, the “applicant”.
- The Application is for the following:
 - A take up to 40m³/s of water from the Rakaia River at or about map reference NZMS 260 K36:050-393, for irrigation, and water enhancement;
 - A take up to 40m³/s of water from the Rakaia River at or about map reference NZMS 260 K36:072-391, for irrigation, and water enhancement;
 - The Rakaia takes are made by CPW and ACWT jointly;

- A take up to 40m³/s of water from the Waimakariri River at or about map reference NZMS 260 L35:331-604, for irrigation, and water enhancement;
- The Waimakariri take is made under the scheme by CPW.
- The Assessment of Environmental Effects for Waimakariri and Rakaia Rivers Water Takes dated 6 December 2001 ("the AEE") lodged with the joint application is a single document in respect of all parts of the scheme and states:

"The application is a joint application and that "[i]t has been determined that there is sufficient water in the Rakaia and Waimakariri Rivers, in conjunction with storage, to meet the objectives established by all parties in a sustainable manner" (p1-1).

"CPW [T] and ACWT would share equal priority for the water abstraction, up to a combined maximum of 40m³/s This would allow water not required by one scheme to be made available to the other for use. This provides added benefit to both sides of the Rakaia River." (p1-1).

"The takes applied for will not be exercised until all resource studies have been completed, and the other necessary consents related to the construction and use of the intakes, diversion canals, settling basins, storage basins and conveyance canals and for the USE [sic] and discharge of the water necessary for the operation of either the respective schemes to the north or south of the Rakaia River, have been obtained (p1-1)

"The Central Plains area is that which lies between the Rakaia and Waimakariri Rivers, the foothills to the Main Divide to the west and the coast to the east. Within this total area, an area of 84,000.00 ha has been identified as potentially suitable for a community irrigation scheme.... The Ashburton Community Water Trust ...report...identifies options for water harvesting and storage opportunities for supplementing run-of-the-river and groundwater sources, and

concludes that there is potential to extend irrigation to 153,000 ha within Ashburton District, while at the same time enhancing flows in the Ashburton River and catering for the District's social, recreational and environmental water needs."(p1-3)

- The Canterbury Regional Council twice advised CPWT/ACWT (21 December 2001, 16 June 2005) that their joint "take" application was deferred under s.91 RMA. Whether there were one or two such decisions, neither notification was complied with by ACWT/CPWT until lodgement of the ACWT "use" applications on 2 March 2007.
- It is not presently clear (but it is a matter for the Commissioners rather than Synlait) how ACWT can contend that it has a "take" application for hydro which can be the basis for its "use" applications. The only possibilities are:
 - ACWT has no "take" application on which to base its "use" applications and in consequence the applications filed are incomplete.
 - The 2001 joint take application has been amended (by implication rather than expressly) from 2 March 2007 to include hydro as a consequence of the filing of the "use" applications.
- In *Darroch v Whangarei District Council* A18/93 1 March 1993 the Court held that:

*"It is the original application and any documents incorporated in it by reference which defines the scope of the consent authority's jurisdiction. In appropriate cases where **consistent with fairness** (emphasis added), amendments to design and other details of an Application may be made up to the close of a hearing. However, they are only permissible if they are within the scope defined by the original application. If they go beyond that scope by increasing the scale or intensity of the activity or proposed building or by significantly altering the **character or effects** (emphasis added) of the proposal they cannot be permitted as an amendment to the original application. A fresh application would be required."*

- The language of both the 2001 "take" application and the accompanying AEE (already discussed) plainly on its face cannot include hydro. In particular, the

application itself was explicitly for “irrigation and water enhancement” and the water was to be taken from the Rakaia by CPWT and ACWT “jointly” which requires a common purpose and use.

5. Evidence

- Evidence for Synlait will be given by:
 - Andrew Barton, Environmental Manager, Synlait Ltd
 - David William Stewart, independent hydrological expert
- Mr Barton will provide background information on Synlait, and will discuss issues arising from its current consents and applications (including definition of water volumes) and the way in which hydraulically connected groundwater should be dealt with in any consents.
- Mr Stewart will present a hydrological analysis of water take for irrigation use and the impact on that usage pattern of a hydro take. This evidence confirms the submission made by Synlait that the ACWT applications for use materially amend the joint take application and alter the character and scope of the consent applied for.

Hugh Rennie QC/ Ewan Chapman

24 June 2008