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*in the matter of:* the Resource Management Act 1991

*and*

*in the matter of:* a number of applications to take and use water from  
the Upper Waitaki catchment

Memorandum of counsel in relation to request for section 87D referral

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Dated: 21 January 2009

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**CHAPMAN  
TRIPP** 

## MEMORANDUM OF COUNSEL IN RELATION TO REQUEST FOR SECTION 87D REFERRAL

### Introduction

- 1 This memorandum has been prepared following the request under section 87D by Southdown Holdings Limited, Williamson Holdings Limited and Five Rivers Limited (the "*applicants*") to have various applications relating to effluent referred directly to the Environment Court.
- 2 Meridian Energy Limited (*Meridian*) has already called legal submissions and a number of experts witnesses as a part of the wider upper Waitaki hearing process. It is also a submitter on 3 of the applications associated with effluent in the upper Waitaki catchment.<sup>1</sup>

### Effluent applications

- 3 Meridian considers it important that the effluent applications continue to be determined as a part of the current process:
  - 3.1 whether the effluent applications are included or not will have a significant bearing on the overall activity status of the other applications already being heard (mainly the take, use and divert of water for irrigation purposes). In many instances it is likely that discretionary activities would, through the requirement to bundle applications, become non-complying through the various rules that only apply to the landuse and discharge associated with effluent. It would therefore be problematic and inappropriate to determine the other applications being heard without those associated with effluent;
  - 3.2 the Commissioners have already exercised their discretion under section 103 of the RMA to hear the various effluent applications. By way of minute dated 6 November 2009, the Commissioners noted that:

21 We are of the very firm view that **the effluent applications [...] are clearly and intimately related to the principal applications, such that it is necessary for us to hear**

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<sup>1</sup> **CRC100227** by Williamson Holdings Limited for a discharge permit to discharge solid effluent to land and up to 308,000 litres per day of diluted dairy effluent onto land

**CRC100787** by Five Rivers Limited for a discharge permit to discharge solid effluent onto land and up to 875,000 litres per day of diluted dairy effluent onto land

**CRC100224** by Southdown Holdings Limited for a discharge permit to discharge solid effluent onto land and up to 560,000 litres per day of diluted dairy effluent onto land

**and decide the applications together so that we can fully understand what is proposed and we can understand the effects of what is proposed on the environment after taking into account conditions to avoid, remedy or mitigate potential adverse effects.**

- 22 We do think that Mr Whata recognizes that point at his paragraph 23.
- 23 The linkage between the take and spray irrigation of water and spray irrigation of the effluent is, in our view, clearly made out when one considers that the mechanism to be used and process to be used to apply the liquid effluent is the same as that which will be used to apply the irrigation water on the same site. [Emphasis added]

Meridian agrees with the Commissioners' comments on this issue. Continuing with the processing of these applications in the current hearing process will ensure that cumulative effects on water quality are appropriately addressed. It will also ensure that any issue around priority in relation to the access to the remaining assimilative capacity can be considered.

For ease of reference a full copy of that minute is attached as Annexure 1 (refer para's 17 to 38);

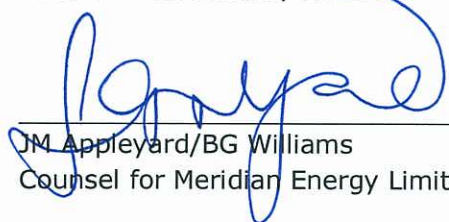
- 3.3 as noted above, Meridian and other submitters have already prepared and presented extensive legal submissions and expert evidence on the applications already heard. To date Meridian has assumed that it would not need to repeat its preparation and presentation of further evidence and legal submissions on the effluent applications as they would be a part of the current process (refer para 38 of Commissioners' minute). If the applications were heard separately then Meridian and other submitters would accrue considerable cost in also preparing for an Environment Court hearing;
- 3.4 the Commissioners appointed by Environment Canterbury are all experts in their own fields and are competent to determine the effluent applications. It is also submitted that it is much more appropriate that they, rather than the Environment Court, hear and consider any submitters wanting to be heard given the very large number of submissions (4300+) received on the applications;
- 3.5 the current process – where all applications relating to irrigation and associated landuse were heard together is that anticipated by the Resource Management (Waitaki

Catchment) Amendment Act 2004 (the "Waitaki Act"). It was expressly contemplated that all applications relating to irrigation in the catchment would be heard by the Regional Council. This includes a directive that the Regional Council publicly notify and go on to determine all resource consent applications.<sup>2</sup> Referring the effluent applications to the Environment Court would not be consistent with the process anticipated under the Waitaki Act;

**Jurisdiction**

- 4 Meridian refers to the various memoranda and minutes on the issue of jurisdiction that conclude with the memorandum of Mr Whata dated 14 January 2010.
- 5 Should the Commissioners hear from Mr Whata then Meridian also wishes to reserve its own right to be heard.
- 6 Although not wishing to provide comprehensive submissions on the on the issue at this point in time, to assist the Commissioners and other parties a brief summary of Meridian's tentative position on jurisdiction is set out in **Annexure 2**.

Dated: 21 January 2010



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JM Appleyard/BG Williams  
Counsel for Meridian Energy Limited

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<sup>2</sup> See for example Resource Management (Waitaki Catchment) Amendment Act 2004, section 33

**Annexure 1: Minute dated 6 November 2009**

## Annexure 2: Brief summary on jurisdiction

- 1 As the Commissioners have correctly observed, section 160 provides that applications lodged before the commencement of the Resource Management (Simplifying and Streamlining) Amendment Act 2009<sup>3</sup>

“...must be determined as if the amendments made by this Act had not been made.”

- 2 Meridian does not agree with the narrow reading of “*determination*” and has concerns over any comparison with the 2003 Amendment Act. This includes:

2.1 the need to have particular care when finding or recognising retrospective effect. To hold that the purpose of a transitional or saving section is to apply retrospectively would usually require express and unambiguous identification to overcome the presumption of sections 7 and 18 of the Interpretation Act 1999;<sup>4</sup>

2.2 the difficulty in making a comparison between the 2003 and 2009 Amendment Acts on the basis of the authorities cited by Mr Whata. It is submitted that although the *Matukituki* and *Nut Producers* cases provide an analysis of the meaning of “*continuation and completion*” under the 2003 Amendment Act, they do little to assist with understanding whether this is any different to the use of “*determination*” in the 2009 Amendment Act;

2.3 this is compounded by the apparent use of “*determination*” in the place of “*continuation and completion*” in the earlier cases. Judge Jackson in the *Nut Producers* (also cited by Justice Fogarty in *Matukituki*) case concludes:

“[33] I therefore hold that the guiding transitional provision for the applications for water permits which are the substantive objects of these proceedings is section 112(1) of the 2003 Amendment, and that the effect of subsection (1) is that the appeals under section 120 of the RMA should be **heard and determined** by the Court as if the 2003 Amendment had not been enacted.” [Emphasis added]

<sup>3</sup> Resource Management (Simplifying and Streamlining) Amendment Act 2009, section 160(3)

<sup>4</sup> See *New Zealand Nut Producers v Otago Regional Council* (Unreported Environment Court, C099/04, 16 July 2004) where Judge Jackson discussed this in the express context of section 112 of the Resource Management Amendment Act 2003;

If anything, this supports the Commissioners – it is submitted that it is very difficult to provide any real distinction between the two concepts (other than the fact they perhaps reflect the use of different but interchangeable words by different statutory drafters). This is an entirely reasonable and expected position given the urgent consideration and passing of the 2009 Amendment Act;

- 2.4 it is agreed that the 2009 Amendment Act was *inter alia* aimed at addressing many of the more historic applications currently being processed by Councils. However, it appears that the only way in which this would be achieved is through the express provisions around section 92 requests (under the principle Act) contained in section 159. Nowhere in the Amendment Act is there **explicit** reference to the new provisions and procedures applying to existing consents;
- 2.5 the practical outcome of the applicant's case would be that all of the Amendment Act's provisions – other than those that relate expressly to "*determination*" (whatever that might be) would apply to existing applications. This does not appear to have been the practice of Councils and other authorities to date. It would also imply that many of the Amendment Act's provision that apply, for example, to the timeframes in making a decision would also apply to the other applications already involved in the upper Waitaki process – something which has not been suggested by any party.