

Before an Independent Hearings Panel

The Proposed Waikato Regional Plan Change 1

IN THE MATTER OF the Resource Management Act 1991 (**RMA**)

IN THE MATTER OF the Proposed Waikato Regional Plan Change 1, Block 3 hearings

**OPENING LEGAL SUBMISSIONS FOR BLOCK 3
ON BEHALF OF MIRAKA LIMITED**

BUDDLE FINDLAY

NEW ZEALAND LAWYERS

Barristers and Solicitors

Auckland

Solicitor Acting: **Jennifer Caldwell / Mathew Gribben**

Email: jennifer.caldwell@buddlefindlay.com / mathew.gribben@buddlefindlay.com

Tel 64-9-358 2555 Fax 64-9-358 2055 PO Box 1433 DX CP24024 Auckland 1140

MAY IT PLEASE THE COMMISSIONERS

1. INTRODUCTION

- 1.1 The Panel will be familiar with Miraka Limited (**Miraka**) and its interests in Plan Change 1 from its evidence and appearances in Blocks 1 and 2. Miraka's overall position is generally aligned with that of other dairy industry parties but there is a higher level of alignment in relation to Block 3, largely driven by concerns over Regional Council-proposed changes to the activity status of farming with a Farm Environment Plan (**FEP**).
- 1.2 Mindful of the Panel's request at its Block 2 hearing to focus on potential solutions, rather than document positions, Miraka's evidence and these submissions focus on the following Block 3 issues:
- (a) The inter-related issues of FEPs – process and content (Schedule 1) and activity status for farming with a FEP under a Certified Industry (or Sector) Scheme (**CIS**);
 - (b) Concept of “Enterprise”;
 - (c) Sub-catchment management and planning, including links to FEPs;
 - (d) Allocation, including Policy 7; and
 - (e) Methods.

Evidence

- 1.3 For this Block 3 hearing, Miraka has filed the following evidence:
- (a) Grant Jackson, General Manager, Milk Supply for Miraka. Mr Jackson discusses the concept of Enterprise and in his rebuttal confirms Miraka's approach to Schedule 1 to support its preference for permitted activity status for farming under a CIS by reference to various approaches proposed in the evidence of other parties;
 - (b) Dr Gavin Sheath, Agricultural Systems Consultant and advisor to Miraka addresses sub-catchment planning and management (primary);
 - (c) Ms Jude Addenbrooke, Environmental Management Consultant, addresses allocation and Policy 7 (primary) and potential amendments to the FEP requirements in Schedule 1 (rebuttal). This includes the purpose of FEPs,

content, development, review and amendment. Ms Addenbrooke attaches a track changed Schedule 1 and Schedule 1A to her rebuttal; and

- (d) Ms Kim Hardy, Planner, provides a planning analysis of the proposed amendments to the policies and rules to implement Miraka's requested amendments to PC1 on Block 3 topics. Her evidence contains a track change version of relevant parts of the PC1 and (in rebuttal) commentary on the track changed schedules provided by Ms Addenbrooke. She also seeks the retention of Methods in PC1 that the Section 42A report recommends be deleted.

1.4 Miraka's evidence has been the subject of two Panel Minutes dated 23 July 2019 and 26 July 2019 specifically raising the following issues:

- (a) Whether paragraphs 4.16 to 4.21 of Ms Addenbrooke's primary evidence (on allocation) should have been filed in Block 2; and
- (b) Whether the rebuttal evidence of Mr Jackson, Ms Addenbrooke and Ms Hardy is in fact rebuttal or should have been filed as supplementary primary evidence.

1.5 Miraka has provided two separate memoranda of counsel in response and is prepared to address the Panel at the hearing in the event that decisions on the status of the evidence in question have not been made at that time. Without wishing to pre-empt the Panel's decisions, the balance of these submissions are prepared on the basis that the Panel will grant the leave applications or otherwise accept the relevant evidence. In the event that the leave applications are not granted, counsel will adjust the submissions accordingly at the hearing.

1.6 Miraka's preferred order of witnesses is:

- (a) Mr Jackson;
- (b) Dr Sheath;
- (c) Ms Addenbrooke on Allocation only;
- (d) Ms Hardy on Methods; and
- (e) Ms Hardy and Ms Addenbrooke on FEPs and the amendments proposed to Schedules 1 and 1A.

Outline of these submissions

- 1.7 The balance of these submissions will address the following matters:
- (a) FEPs, Schedule 1 and the activity status for farming;
 - (i) Legal principles regarding permitted activity rules;
 - (ii) Miraka's methodology for confirming its preferred approach and alternative approach;
 - (iii) Key features of each approach and how they meet the permitted activity principles;
 - (b) Policy 7 and future allocation regime; and
 - (c) Other matters: the concept and use of Enterprise, sub-catchment management and Methods.

2. FEPS, SCHEDULE 1 AND THE ACTIVITY STATUS FOR FARMING

- 2.1 Miraka's Block 2 case outlined its support for a permitted activity status for farming under a CIS. This status would apply to existing farming activities which did not increase their discharge of contaminants and, through FEPs, implement Good Farming Practices. Miraka and many other parties regard practice change as critical to ensuring achievement of the PC1 10 year objectives.
- 2.2 Various submitters, the Section 42A Report for Block 2, and the Panel itself in questions of various parties including Miraka, have raised concerns about whether a permitted activity status is capable of meeting the legal principles relevant to permitted activities and would be an effective means of implementing the objectives and policies of PC1. These issues are distinct but became blurred in the Block 2 Section 42A recommendations regarding CIS.¹
- 2.3 The report writers reached the view that the permitted activity rule 3.11.5.3 could not meet section 70 of the RMA and so farming under a CIS could only be provided for as a controlled activity. Since one of the main benefits of a CIS was to facilitate farming under a CIS as a permitted activity and without that rule in place CISs were (in the report writer's view) unlikely to be formed, the Section 42A Report recommended deleting the concept of CIS entirely. The Report then recommended a drafting solution to the Section 70 issue.

¹ Section C3.1.3.2 paragraphs 802 – 807.

- 2.4 The fundamental issue is whether the drafting of a permitted activity rule can be sufficiently clear and certain and whether the rule does not reserve undue or significant discretion to the Council or a third party.
- 2.5 The notified version of permitted activity Rule 3.11.5.3 sets out a number of conditions, one of which ((5)) is the existence of an FEP that is prepared in accordance with Schedule 1, has been approved by a Certified Planner and is provided to the WRC. On the face of it, the rule itself and its conditions are quite clear, including "prepared in accordance with Schedule 1". Once the FEP preparation process and the content are expressed with sufficient detail and clarity Schedule 1 will also meet the relevant tests.
- 2.6 Miraka's proposed permitted activity rule and amendments to Schedule 1 achieve both requirements. They do, however, give some discretion to Certified Farm Environment Planners (**Certified Planners**). That discretion is carefully constrained and is focused on identifying the appropriate mitigations and actions for each farm and monitoring the implementation of those mitigations and actions. Measures that limit the exercise of discretion by Certified Planners to an acceptable level include the certification process itself, oversight by a CIS, provision of information to the Regional Council and auditing of Certified Planners by the Regional Council.

Permitted activity - legal principles

- 2.7 Given the level of contention about this subject it is worth restating² the legal principles relevant to the validity of permitted activity rules that can be distilled through case law. In summary those principles are:
- (a) Permitted activities must be capable of objective ascertainment; on their face they must be clear and certain to plan users. A lack of certainty may render the rule invalid for inherent vagueness;
 - (b) A permitted activity rule cannot reserve significant discretion by subjective formulation; the council cannot reserve the right to decide for itself whether an activity satisfies the requirements of the rule; and
 - (c) A permitted activity rule is not automatically invalid simply because it calls for an element of judgment or evaluation; not all rules can be defined with scientific or mathematical certainty. Some degree of flexibility is permitted.

² Some of the relevant legal principles regarding the validity of a permitted activity were outlined in the opening legal submissions for Waikato Regional Council in Block 1, but that was primarily in the context of whether a permitted activity rule associated with a CIS was valid. The Regional Council's legal submissions stated the notified permitted activity rule could be legally valid with only a few changes but did not look into whether the rule inclusive of Schedule 1 was valid.

2.8 These principles are evident in the leading case under the RMA of *Twisted World Limited v Wellington City Council*,³ which relied on an extensive discussion in *McLeod v Countdown Properties*,⁴ a High Court judicial review case on predominant uses under the Town and Country Planning Act 1977. *Twisted World* related to a permitted activity rule in the Wellington District Plan about billboard signs and a condition of the rule requiring signs not to obscure windows or architectural features. The Court made the following observations:

[63] ...a district plan may not reserve by subjective formulation a discretion to decide whether an activity is a permitted activity. Permitted activities fall for objective assessment... We also accept that if a rule defining a class of activity incorporates an element that is so uncertain that the definition is not functional, the rule might be invalid for inherent vagueness.

[64] It is in the nature and purpose of district plans that some classifications and rules cannot be expressed in measurable units such as of height or area. Objectively phrased conditions of permitted activities are not necessarily ruled out merely because they require an exercise of judgment. But they are assessed for validity on their own degree of certainty or lack of it. So we accept the submissions of counsel for the appellants that we have to consider whether the condition in question is too wide or too vague to have the element of certainty by which a decision-making body could reach a conclusion after hearing evidence and weighing competing factors.

2.9 The Court found the words "obscure" and "architectural features" in the permitted activity condition to be understandable and functional, and not too wide or vague to be capable of certainty. It was acceptable that different experts could apply a permitted activity in different ways and therefore reach different conclusions as to whether an activity was a permitted activity or not.⁵

2.10 In subsequent decisions the Courts have confirmed that a permitted activity rule can allow for some judgement on the part of the council and experts:

(a) *Rawlings v Timaru District Council* (2014): A rule (regarding the construction of a dwelling as "accommodation for a dependent relative") that would rely on the exercise of significant discretionary judgment for its administration would be ultra vires;⁶

(b) *Friends of Pelorus Estuary Inc v Marlborough District Council* (2008): A permitted activity rule is not automatically invalid simply because it calls for evaluation. While evaluative conditions have practical disadvantages, a rule

³ W024/2002.

⁴ (1990) 14 NZPTA 362.

⁵ Paragraphs 65-67.

⁶ *Rawlings v Timaru District Council* [2014] NZEnvC 49, paragraph 22 and 37.

that left some scope for discretion by use of the words "significant" and "best practicable option" was held to be valid;⁷

- (c) *Bryant Holdings v Marlborough District Council* (2008): A permitted activity rule condition allowing scope to determine whether an activity would "adversely affect any land owned or occupied by another person" was held to be valid.⁸

Miraka's methodology

- 2.11 Mr Jackson's rebuttal evidence summarises the approach taken by Miraka to Schedule 1, in particular the detailed preparation process for and content of FEPs. That approach was signalled in Ms Hardy's primary evidence; the Miraka team knew that other dairy industry submitters were working on drafting amendments to Schedule 1 with a view to retaining permitted activity status and were shown early drafts of those amendments. A decision was made not to file a Miraka set of track changes to Schedule 1 in primary evidence, but rather to evaluate the versions of Schedule 1 filed by other parties and respond to them with commentary and further drafting amendments in rebuttal evidence.
- 2.12 As Mr Jackson explains, Miraka carefully considered which if any of the different approaches to Schedule 1, summarised below, aligned with Miraka's position and what further drafting might be required:
 - (a) One approach is that the content of FEPs be guided by the objectives and principles contained in the amended Schedule 1 attached to the Section 42A report. This approach provides some flexibility to deal with varying circumstances on different properties. However, this position is tied to a Controlled Activity or Restricted Discretionary status. This effectively means a two staged process of approval by a Certified Planner and consenting by a Waikato Regional Council officer, which would reduce the efficiency gains provided by a CIS and increases the regulatory burden;⁹
 - (b) A second approach is for objectives/principles to be outlined in Schedule 1 with a permitted activity status for farming within a CIS. That would give the best of both worlds by allowing flexibility for tailored FEPs to meet the

⁷ *Friends of Pelorus Estuary Incorporated v Marlborough District Council* Decision No C004/2008, paragraph 101-102.

⁸ *Bryant Holdings v Marlborough District Council*, HC BLE CRI-2008-406-3, 16 June 2008.

⁹ Rebuttal evidence of Mr Jackson, paragraph 4.5

individual circumstances of each farm while avoiding the demanding requirements of a full consenting regime;¹⁰

- (c) A third approach is for Schedule 1 to specify clear actions and minimum standards and to remove virtually all discretion from a Certified Planner to tailor plans and actions to farm-specific circumstances. Versions of this approach are contained in the evidence of Mr Willis¹¹ and Mr Eccles.¹² This approach would give certainty to many farmers through clear standards but could mean inappropriate or lower priority actions have to be undertaken.¹³ The solution is to include some flexibility for a Certified Planner to identify tailored actions to address significant risks.¹⁴

2.13 In light of Miraka's desire to retain a permitted activity status it has focused on the second and third options and has prepared two pathways to secure that permitted activity status. Similar to the evidence of other parties, Miraka's evidence refers to the two pathways as:

- (a) Schedule 1 – the objectives/principles approach; and
- (b) Schedule 1A – the minimum standards and requirements approach.

2.14 In preparing these two pathways Miraka drew on its own experience, expert advice, Mr Dagnet's report and principles (as outlined in the Section 42A report) and evidence of other dairy industry submitters. The key features of each pathway are outlined below.

Miraka's proposed Schedule 1 – objectives and principles approach

2.15 Miraka's objectives and principles approach was prepared using three main sources:

- (a) It is based on the version of Schedule 1 included in the Section 42A report. The objectives and principles are largely the same apart from the removal of Objective 1;
- (b) It incorporates proposed amendments from Mr Eccles version of Schedule 1, in particular in relation to the "Purpose of an FEP";

¹⁰ Ibid, paragraph 4.6. The evidence of Mr Eccles for Federated Farmers outlines one way this approach could be incorporated into PC1.

¹¹ Primary evidence of Mr Willis and referred to as Schedule 1A.

¹² Primary evidence of Mr Eccles for Federated Farmers and referred to as Schedule 1A.

¹³ Rebuttal evidence of Ms Addenbrooke, paragraph 5.3.

¹⁴ Rebuttal evidence of Mr Grant Jackson, paragraphs 4.7.

- (c) Finally, there are proposed changes to reflect Miraka's position (such as deletion of the 75th percentile and links to sub-catchment management), including incorporating some concepts from Mr Willis' evidence; and
 - (d) Proposed changes to improve the relevance and effectiveness of identified actions and to increase the rigour of the process.
- 2.16 Part A confirms that an FEP must be prepared by a Certified Planner and provided to Regional Council in one of the specified digital tools.
- 2.17 Part B outlines the purpose of an FEP and explains the need to assess each farm against good farming practice, adopt a risk based approach, recognise the bio-physical conditions of the property/enterprise and the resources of the farm. Part B is similar to Part B of Mr Eccles' version of Schedule 1. The water quality targets in the Plan are referred to in Part C.
- 2.18 Part C prescribes the content of the FEP. It must contain:
- (a) The details of the property or enterprise and maps of the various components and risk areas on each farm;
 - (b) The list of objectives and principles;
 - (c) An assessment of farming practices against the objectives and principles, including current practices that are consistent, those that are not consistent and what actions and practices are required to ensure the objectives and policies are met. This is consistent with the Section 42A version of Schedule 1.
 - (d) A requirement to identify the new actions and practices that need to be undertaken urgently, within 12 months, and those that will require a longer implementation period. This is a new step proposed by Miraka to ensure the key actions are identified and prioritised;
 - (e) A requirement for detailed and auditable records to be kept to demonstrate performance or progress towards achievement of the objectives and principles. Information is provided to the Regional Council on request. These are similar to the obligations in the Section 42A version of Schedule 1; and
 - (f) A description of how the FEP links to the water quality targets and community catchment plans. This reflects Miraka's views on the benefits of practice change and sub-catchment planning.

- 2.19 The Certified Planner identifies the relevant objectives and principles and then the relevant actions and mitigations to be implemented. This would be done in consultation with the farmer and in light of the conditions on the farm.
- 2.20 The Section 42A report records that the Regional Council intends to prepare non-statutory guidance to guide the identification of relevant actions, albeit in the context of preparing an FEP for a controlled activity application.¹⁵ The Certified Planner would be expected to consider and apply that guidance from the Regional Council. If they did not, they would likely lose their certification as the Regional Council would not recertify Planners that ignore the Council's guidance.
- 2.21 Part D of Miraka's proposed Schedule 1 relates to review, monitoring and reporting requirements. This includes review to check whether:
- (a) Any critical actions have been undertaken. These are actions the Certified Planner has identified that need to be undertaken within 12 months; and
 - (b) The farm continues to operate with Good Management Practices; and
 - (c) Adequate progress has been made towards implementing other actions and practices that require longer timeframes.
- 2.22 There is a need for robust review of FEPs to give confidence that the outcomes of the FEP, rather than simply the process of preparation, are being monitored to ensure they are effective in achieving the objectives of PC1 and that permitted activity status remains warranted. The actions become the focus of compliance and this improves the likelihood of practice change.
- 2.23 Farmers that are not implementing the required actions or making sufficient progress would lose their permitted activity status and would be required to seek a controlled activity consent. Ms Hardy's rebuttal evidence discusses the permitted activity triggers in the context of Schedule 1A,¹⁶ and included in the track change provisions a new Controlled Activity Rule in the same form as outlined by Mr Willis. On reflection, that same rule should be included in the Plan whether a Schedule 1 or 1A approach is adopted.
- 2.24 Finally, Part E involves the amendment of an FEP. Any amendments must be certified by a FEP and provided to the Regional Council as if it was a new FEP. Miraka has adopted the drafting proposed by Mr Willis, but the concepts and requirements are similar to the Section 42A version.

¹⁵ Section 42A report Block 3, paragraph 209.

¹⁶ Rebuttal evidence of Ms Hardy, paragraph 3.18.

Role of Certified Planners

- 2.25 The role of the Certified Planner is critical to all versions of Schedule 1, and it is this role that gives rise to much of the debate about discretion. Mr Willis's version of Schedule 1A attempts to minimise the discretion available to a Certified Planner in an effort to satisfy the permitted activity principles, but Miraka maintains that the Certified Planner must be able to apply expert judgement to select the combination, priority and timing of the appropriate actions and mitigations for each farm in light of the individual circumstances of each farm (including its own bio-physical and those of the wider sub catchment). This applies to both Schedule 1 and 1A.
- 2.26 From Miraka's perspective there is very good reason for retaining a level of discretion in this context. Certified Planners have the relevant skills and expertise as well as the relationships with farmers to achieve better farmer buy-in and greater practice change.
- 2.27 The Panel, and ultimately the Council, can have confidence in the performance of Certified Planners in exercising their judgment with defined parameters, for a number of reasons:
- (a) All Certified Planners need to demonstrate the necessary skills for approval by the Regional Council;
 - (b) Their performance is audited by the Regional Council;
 - (c) As Mr Jackson outlines in his evidence¹⁷ they will be incentivised and trusted to complete their tasks;
 - (d) Additional oversight of both farm performance and the Certified Planners is provided by the CIS;
 - (e) Information is provided to the Regional Council, either by farmers or by the CIS, to allow monitoring and enforcement by the Council as necessary; and
 - (f) In this way the Council also has the ability to confirm whether the entire farming operation is acting in accordance with the permitted activity standards, providing an extra level of rigour and oversight.

¹⁷ Rebuttal Evidence of Grant Jackson, section 5.

2.28 Miraka's proposed Schedule 1 meets the legal principles for permitted activity status because:

- (a) The permitted activity rule and related conditions are sufficiently clear and certain to plan users. The rules are detailed and arguably complex, but they provide clarity on what must be done; and
- (b) While there is a level of discretion or judgement exercised by Certified Planners, the extent of that discretion is clear and appropriately constrained.

Miraka's proposed Schedule 1A – minimum actions and standards

2.29 Miraka's minimum actions and standards approach was based on Schedule 1A contained in Mr Willis' primary evidence and then amended to reflect Miraka's position and expert views:

- (a) Part A is the same as Miraka's Schedule 1;
- (b) Part B outlines the content of an FEP. It is a combination of Mr Willis' Part B and amendments proposed by Miraka to ensure it addresses all the material from Parts B and C of Schedule 1;
- (c) It requires the Certified Planner to identify the relevant standards and requirements from Part C that apply to the farm and the "combination, priority and timing of implementation of the standards". As with Schedule 1, the critical actions to be completed within 12 months are to be identified;
- (d) Part C is the standards and requirements. These are based on Mr Willis' evidence with amendments arising from Miraka's case to date (for example on nitrogen surplus and removal of 75th percentile), its own experience and the views of its experts; and
- (e) Parts D and E are the same as Schedule 1.

2.30 The tailoring of an FEP to the conditions of each farm is critical to the efficient success of an FEP and achieving buy-in from farmers. Farmers that cannot or do not wish to comply with certain practices or actions recommended by the Certified Planner may apply for a controlled activity resource consent with specific conditions that relate to the implementation of that action.

2.31 The key difference between Schedule 1 and Schedule 1A is that Schedule 1A lists the minimum standards and requirements. This provides a slightly greater level of certainty about the potential actions on each farm.

- 2.32 By contrast, the Schedule 1 approach (and the Section 42A version) relies on non-statutory guidance prepared by the Regional Council. In any scenario the Certified Planner has to identify the relevant practices that apply to each farm. Schedule 1A is more transparent since it lists those actions and practices in the Plan.
- 2.33 Miraka's proposed Schedule 1A meets the legal principles for permitted activity status for similar reasons as Schedule 1:
- (a) The permitted activity rule and related conditions are sufficiently clear and certain to plan users. Listing the actions and practices in the plan provides increased certainty and transparency;
 - (b) There is still a level of judgement exercised by Certified Planner about which standard and requirement is relevant to each farm; and
 - (c) While the level of discretion may be greater than that discussed in the leading cases, it is not significant or undue discretion given the various limits discussed above. The discretion is further limited by having a set list of standards and requirements in the Plan.

Most appropriate provision

- 2.34 The Block 2 evidence of Mr Jackson and Ms Hardy outlined the benefits to the Regional Council and the farming community through permitted activity status for farming and the use of CISs. In Miraka's view, the reduction in the regulatory burden on the Council from the CIS scheme is a significant factor in demonstrating that it is part of a package which is the appropriate means to implement the objectives.
- 2.35 Ms Addenbrooke's rebuttal evidence for Block 3 outlines the additional benefits from allowing FEPs to be tailored to the specific issues and risks of each farm and to identify the most appropriate combination, priority and order of uptake of practices. The ability for the Certified Planner to identify the best actions and mitigations for each farm will improve the effectiveness of the FEP regime. Different farms may require quite different approaches and the ability to tailor an FEP allows this to happen and for time and resources to be spent on the most important and impactful measures. They may be measures that are not listed in the Plan.
- 2.36 For these reasons an objectives and principles approach are likely to be more effective than the minimum actions and standards.

Expert conferencing or Information Forum

- 2.37 Miraka's proposed provisions, along with many of the other dairy industry submitters, would benefit from expert conferencing, an Information Forum, or similar collaborative process. To some extent Miraka's provisions, and those of other submitters, are working examples that would benefit from further consideration by other experts and Regional Council's regulatory and enforcement teams.

3. ALLOCATION

- 3.1 Miraka's overall position on allocation has been outlined in its memorandum of counsel dated 26 July 2019. In summary, it considers that while Policy 7 was expressly listed as a Block 3 topic, broader allocation issues are both a Block 2 and Block 3 matter.
- 3.2 In relation to Policy 7, it seems that many submitters accept the recommendation to delete the policy made in the Block 3 Section 42A report. Ms Addenbrooke's evidence outlines her reasons for supporting the deletion of that policy.
- 3.3 From a legal perspective, the notified version of the Policy could not fetter the discretion of the Council in the future, so at best it would be a statement of intent. To avoid any confusion among plan users it is better that it is deleted in its entirety. In addition, freshwater policy is clearly in a state of flux at present and there seems a high likelihood of updated national guidance that would provide a direction to future planning processes. It would be premature to signal any future direction in those circumstances.
- 3.4 Some submitters in their original submissions sought that a natural capital or LUC approach be included within Policy 7.¹⁸ Without seeing the primary evidence of those parties for Block 3 Miraka submits that it was entitled to provide its evidence opposing a natural capital or LUC approach alongside its Policy 7 evidence. The potential problems of such an approach in the future also apply to its use within PC1; it therefore seemed logical for the Panel to consider those matters together in order to be fully informed of the issues.
- 3.5 As far as counsel can ascertain no party has submitted there is a legal precedent requiring the use of an LUC approach. The Environment Court in the Horizons One Plan appeals¹⁹ did approve an LUC approach but that cannot be seen as setting a precedent. In the absence of national guidance, each plan and each region should

¹⁸ For example the Director-General of Conservation, as outlined in Miraka's memorandum of counsel dated 26 July 2019.

¹⁹ *Day v Manawatu-Wanganui Regional Council* [2012] NZEnvC 182.

be able to determine an appropriate basis for allocation in light of the best available evidence at the time.

- 3.6 Beef and Lamb NZ has opposed Miraka's position that parts of Ms Addenbrooke's evidence on allocation is Block 3 material and opposed Miraka's request for leave to file late Block 2 evidence, on the basis that the Panel's directions were clear that allocation was a topic for Block 2 and that other parties conducted their cases accordingly. Beef and Lamb contends it is prejudiced because its witnesses were unavailable to provide any rebuttal evidence in Block 3.
- 3.7 In addition to the material in its memorandum of counsel Miraka submits in response to Beef and Lamb's memorandum that:
- (a) The Panel Directions were clear and counsel for Beef and Lamb has identified no documentation from the Panel to support its statement;
 - (b) Many of the points raised by Ms Addenbrooke were addressed by other parties in Block 2, for example by Federated Farmers. Beef and Lamb had an opportunity to comment on them in rebuttal evidence, in legal submissions and at the hearing by way of witness commentary and responses to questions; and
 - (c) In these circumstances, the availability of Beef and Lamb's witnesses should not be a reason why Miraka's evidence is not accepted.

4. OTHER MATTERS

Sub-catchment management

- 4.1 In Block 1 Miraka outlined:
- (a) The importance of practice change to the successful implementation of PC1; and
 - (b) Proposed amendments to the Freshwater Management Units and Sub-catchment to form combined units, including how those changes would assist with practice change.
- 4.2 The remaining aspects of sub-catchment planning and management are addressed now in Block 3 in the evidence of Dr Sheath and Ms Hardy.
- 4.3 Miraka supports sub-catchment planning and management including:
- (a) Preparing (non-statutory) plans and strategies that are targeted to the issues of the particular sub-catchment;

- (b) The retention of provisions within PC1, especially Policy 9, that ensures any sub-catchment planning can be appropriately taken into account on individual resource consent applications and FEPs;
- (c) The creation of information by the Regional Council about the issues in each sub-catchments, such as sub-catchment profiles, and the provision of information to farmers; and
- (d) Amendments to Schedule 1 and 1A to provide a clear link between sub-catchment characteristics and issues and individual FEPs.

4.4 Miraka seeks that the Regional Council take a more active role in facilitating sub-catchment planning and commit resources to that task. The commitment of council resources is usually undertaken through local government processes, such as the annual plan or long term plan, rather than through a resource management plan. It seems the best PC1 can do is signal such a commitment through Methods, and on that basis Ms Hardy proposes their retention.

Enterprise

- 4.5 The evidence of Mr Jackson and Ms Hardy outline Miraka's preference for the retention of the concept of Enterprise within parts of PC1. This is on the basis that including reference to enterprises better reflects the reality of some parts of the farming community and should assist with improved land management and management of discharges.
- 4.6 Mr Jackson and Ms Hardy will address the issue in their hearing presentations but we consider it is important to clarify that:
- (a) NRPs should only be assigned to a Property;
 - (b) Enterprises can hold a resource consent or have a single FEP (perhaps with multiple NRPs); and
 - (c) Management of contaminants and reduction in discharges can occur across an Enterprise (as outlined in an FEP or a resource consent).

Methods

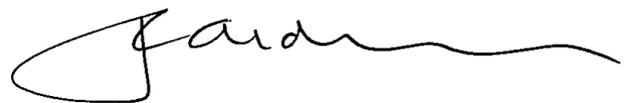
4.7 There is no legal requirement for a plan to include methods. Section 67(2) Contents of a Regional Plan says that a regional plan *may* include "methods, other than rules, for implementing the policies for the region".

- 4.8 However, given the complexities and scope of PC 1 it is appropriate that the Methods are retained, and amended in the manner outlined in Ms Hardy's evidence to reflect Miraka's preferred relief.
- 4.9 The retention of the Methods gives flexibility for the concepts and ideas behind the provisions to be explained without the restrictions of being worded as policy. Counsel understands that some parties have criticised the wording of the notified objectives and policies on the basis that they are more akin to methods and not helpful to assessing a consent application.²⁰ The use of methods to express these concepts avoids this criticism.
- 4.10 Methods also clearly outline the broader regulatory framework that the Regional Council will put in place to support and implement the PC1. These are the basis on which the rules and provisions have been prepared and it is preferable they are retained. Practice change is critical to effective implementation of PC1 and a number of components of practice change are outlined in the Methods, rather than in the rules.

5. CONCLUSION

- 5.1 On behalf of Miraka we thank for the Panel for its time and careful consideration of Miraka's evidence and submissions and wishes it well in its deliberations.

DATED this 6th day of August 2019



J Caldwell / M Gribben
Counsel for Miraka Limited

²⁰ Evidence of Chris Scarfton for Block 1 on behalf of Watercare, at 8.14.