

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 2 hearings

MEMORANDUM OF COUNSEL ON BEHALF OF MIRAKA LIMITED IN RELATION TO:

- 1) PANEL MINUTE OF 23 JULY 2019**
- and**
- 2) REQUEST FOR LEAVE TO FILE LATE EVIDENCE**

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MAY IT PLEASE THE COMMISSIONERS

1. INTRODUCTION

- 1.1 This memorandum responds to the Minute from the Hearing Panel, dated 23 July 2019, regarding *Miraka Limited's Block 3 evidence from Ms Addenbrooke; and whether parts of it are a Block 2 matter in relation to the concept of Land Use Capability as an allocation framework (Minute)*.
- 1.2 In summary, the Minute advised Miraka of the Panel's view that paragraphs 4.16 to 4.21 of Ms Addenbrooke's evidence should have been filed as part of the Block 2 hearings. On that basis Miraka will need to seek leave for this evidence to be filed late and heard in Block 3.
- 1.3 This memorandum:
- (a) Explains why Miraka considers it is appropriate and fair for the evidence to be heard in Block 3 and why the subject of the evidence is not solely a Block 2 matter; and
 - (b) In the event that the Panel still considers the evidence to be a Block 2 matter, seeks leave to file the evidence late and hear it in Block 3.

2. IMPORTANCE OF ALLOCATION TO MIRAKA

- 2.1 The issue of allocation of contaminants has been a central issue for Miraka throughout the Plan Change 1 (**PC1**) process. This was signalled in Mr Grant Jackson's Block 1 primary evidence for Miraka:
- 4.6 Miraka seeks changes to the methodologies proposed for achieving water quality improvements. This includes changes to certain policies in the Plan Change and the content of some rules. In particular it seeks:
 - (a) No pre-emptive statements or decisions are made during Stage 1 of Healthy Rivers (i.e. the first ten year) on the allocation of contaminant loss now or in the future;
 - ...
- 2.2 There is no set topic within the section 42A reports or the various Panel Minutes and Timetables that addressed "Allocation" and there has been no prior indication from the Panel that all submitter evidence on allocation frameworks should have been filed in Block 2 and in no other block.

- 2.3 Ms Addenbrooke sought advice from the Hearing Coordinator, Mr Rice, in January 2019 as to when the issue of allocation would be addressed, including Policy 7 and specifically the subject of 'future allocation'. Mr Rice advised her that Policy 7 would be dealt with in the miscellaneous part of Block 3. On the basis of this advice Miraka therefore resolved to cover all aspects of its position on future allocation in Block 3. This position encompassed all of the following matters:
- (a) opposition to pre-emption of future allocation through either Policy 7 or Nitrogen allocation by other means in Stage 1;
 - (b) opposition to the PC1 preferred future allocation framework (Land Suitability) as defined in PC1;
 - (c) critique of various future allocation methods (natural capital, land use capability, land use suitability, etc);
 - (d) Miraka principles of future allocation; and
 - (e) process for determining future allocation.
- 2.4 Following receipt of primary evidence from other submitters on Block 2, Miraka then sought legal advice from counsel regarding whether Block 2 rebuttal evidence to some submitters (such as Beef and Lamb New Zealand and the Director-General of Conservation) was required or whether Miraka's response to those submitters on allocation matters could be addressed in Block 3.
- 2.5 Our advice to Miraka, based on the above considerations, was that such evidence could be given in Block 3. We set out our reasons below.

3. EVIDENCE RELEVANT TO BLOCKS 2 AND 3

- 3.1 Miraka respectfully disagrees with the Panel's indication that paragraphs 4.16 to 4.21 of Ms Addenbrooke's evidence are relevant only to Block 2.
- 3.2 The issue of Land Use Capability (**LUC**) as an allocation framework is relevant to both Blocks 2 and 3. In the absence of an express indication to the contrary, Miraka could not have been expected to file all its expert evidence on this subject in Block 2 only.
- 3.3 The concepts and resource management issues relating to "allocation" are relevant to a number of different components of PC1, including diffuse discharge management and Policy 7. Other submitters sought a fundamental change to the diffuse discharge management provisions to implement an allocation regime such as LUC. It was

necessary for those submitters to present all their evidence about LUC in Block 2 in order to support their proposed changes to the diffuse discharge management regime.

- 3.4 The section 42A report for Block 2 discusses LUC on only a dozen occasions and provides no substantial analysis of its benefits or costs. The lack of definitive discussion on LUC in the section 42A report added to Miraka's understanding that the allocation topic was not fully resolved within the context of Block 2 and that further evidence could be filed in Block 3.
- 3.5 Further, the section 42A report for Block 2 excluded Policy 7 and there was a clear expectation that it would be considered in Block 3 as that was the only remaining opportunity to address that provision. Miraka understood from that it would have an appropriate opportunity to outline its full case in support of its position on allocation in Block 3.
- 3.6 LUC is one of a number of current and future allocation regimes that are available. The notified version of PC1 refers to a land suitability approach. Some submitters have sought to amend Policy 7 to expressly include a LUC approach.¹ Miraka lodged further submissions opposing those changes.² It should be allowed to present its evidence for why those amendments to Policy 7 are inappropriate.
- 3.7 The benefits and costs of a LUC based approach is therefore directly relevant to the potential wording of Policy 7 and amendments sought by various parties.
- 3.8 Overall, LUC is relevant to both Block 2 and 3. The issues are inter-related and it would be artificial to confine the issue to just Block 2 and expect all submitters to have filed all their expert evidence in Block 2 without having given express direction to that effect.
- 3.9 Ms Addenbrooke's evidence refers to evidence from Block 2 but that is for the purposes of efficiency and expediency. She sought to assist the Panel's deliberation by referring to material already before it where possible.

¹ See, for example, the primary evidence of Ms Kessick for the Director General of Conservation for Block 3, paragraph 69, where she states that the Director-General's submission on policy 7 sought that the current grand-parenting approach to allocation was replaced with a land-based approach to allocation, including aspects of LUC.

² Miraka lodged further submissions opposing the changes to Policy 7 sought by and Beef and Lamb New Zealand Limited (PC1-11491) and the Director General of Conservation (PC1-10667). These are outlined on pages 24 and 55 of Miraka's further submission.

3.10 Finally, Miraka's legal submissions for Block 2 specifically addressed the issue of when it would discuss the issue of allocation:³

Miraka is interested in all of PC1 but is particularly concerned about some matters that will arise in Hearing Block 3 including details of FEPs, future allocation and sub-catchment management approaches. These matters are not discussed in the Section 42A report for Block 2 but certain submitters have provided evidence and legal submissions on these matters already. Miraka will comprehensively address these issues in its evidence and legal submissions for Block 3.

3.11 The Panel did not express any concerns about this approach when counsel made these submissions.

4. REQUEST FOR LEAVE

4.1 If after consideration of the foregoing matters the Panel remains of the view that Ms Addenbrooke's evidence on allocation should have been filed in Block 2, Miraka hereby seeks leave to file late evidence and for it to be heard within Block 3.

4.2 It is necessary to provide this evidence now because:

- (a) As outlined above the evidence about a LUC approach is directly relevant to Policy 7 which is a Block 3 matter;
- (b) Miraka expects that other parties will also rely on their Block 2 evidence to support their amendments to Block 3, for example in relation to Policy 7 and associated methods; and
- (c) It provides additional expert opinion in relation to the appropriateness of including an LUC within PC1.

4.3 There is no prejudice to any other party because:

- (a) Miraka's position on allocation has been clearly signalled in its original submission,⁴ further submission,⁵ Block 1 evidence⁶ and Block 1 legal submissions.⁷ No party will be taken by surprise;
- (b) The proponents of adopting an LUC approach as part of Stage 1 had the opportunity to fully outline their expert evidence in their Block 2 evidence;

³ Section 5 of those submissions.

⁴ Miraka original submission point 15. Submission points PC1-8765 and PC1-8822.

⁵ See for example footnote 2 above. Miraka also lodged further submissions in relation to amendments to Policy 7 sought by Dairy NZ / Waikato Dairy Leaders Group (pp 40 and 115 of Miraka's further submission), Fertiliser Association. (p 67), Fonterra (p 77), Waikato & Waipa River Iwi (p 129) and Federated Farmers V1 (p 193).

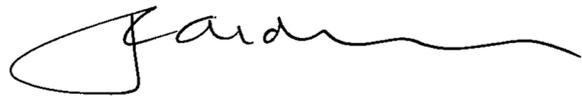
⁶ Primary evidence of Mr Grant Jackson, paragraph 4.3.

⁷ Legal Submissions for Block 1, paragraph 1.6.

- (c) The issue of LUC was addressed by other experts in Block 2 and many, but not all, of Ms Addenbrooke's points have already been addressed by other experts. As a result, no party will be taken by surprise by the nature of her evidence; and
- (d) All submitters had the opportunity to provide rebuttal evidence in Block 3 to respond to Ms Addenbrooke's primary evidence if they wished. They will have a further opportunity in their legal submissions.

4.4 By contrast Miraka could be prejudiced if leave is not granted. Counsel advised Miraka that allocation could be addressed in Block 3 for the reasons detailed in this memorandum. If that advice was incorrect then Miraka should not be prejudiced by having its evidence on LUC not heard by the Panel.

DATED this 26th day of July 2019



J Caldwell / M Gribben
Counsel for Miraka Limited