

**THE LEGISLATIVE COUNCIL SELECT COMMITTEE ON CLYDE RIVER WATER MET IN THE MEETING ROOM, CENTRAL HIGHLANDS COUNCIL CHAMBERS, BOTHWELL, ON TUESDAY 10 AUGUST 2004.**

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**Mr ANTHONY ARCHER**, WAS CALLED, MADE THE STATUTORY DECLARATION AND WAS EXAMINED.

**CHAIR** (Mr Hall) - Anthony, we have substantial submission from you. I now give you the opportunity to make any comments you would like and then the committee might ask you some questions.

**Mr ARCHER** - Firstly, I would like to start by thanking you very much for the opportunity to address the committee. It is a very important issue to our family and business and the whole district, as you have probably picked up in the last few weeks. In regard to my status in addressing the committee, I put the submission in because it has such a tremendous potential impact on our business. As you can see from our submissions, we are basically an irrigation-based business. We have used, on average, 32 per cent of the water consumed by the trust over a 10-year period and a similar percentage figure over 20 years and although our usage has fluctuated up and down, we have been major contributors to the trust's financial affairs. We have contributed up to 50 per cent of the trust total income a year. Of the fund that were spent at Hamilton, the \$300 000, I think Norwood contributed 34 per cent and it is an important part of our business.

I would hope that I get the opportunity to whiz through the major points of the submission but I would try to put myself in the committee's shoes: how would I feel if this were my job? Frankly, I don't think I would take it on, but you have chosen to. I would wonder how I would address the fairness issue. I guess the points that I would really like to make are that in Norwood's case, we are not asking for any windfall gains. We are simply asking for the position that we were in in the past to continue. We are not asking for anything that we haven't enjoyed previously. But we are also asking that we not have it taken away from us. We don't believe that we can make a reasonable argument for people to have relied on the 1976 letters to be undergoing a loss if those letters were not observed. I do not intend to speak very much on the legal opinions; you have those before you. I have tabled them again on behalf of the trust. The trust, I think, has been very forthcoming in regard to the information it has provided to all of us.

I would briefly like to speak on behalf of the trust. Although I don't agree with the decision they have made on our own property's behalf, I believe their motives and methods were honourable and I do not believe there is any impropriety; I am not suggesting in any way that that is the case. I would really like to make it very clear that I think the trust have performed what they saw as their role.

In regard to the issues of how our business is treated, I would like to refer to the addendum 37 in the notes we've provided. Some of my peers today have spoken about the committee B formula, and this has been our major concern right from the start. We

believe that it does not show adequate weight to history of use, that it has very adversely affected our business.

If we take the three average figures, for instance, it can be seen that Norwood - and I will speak of Norwood and the associated properties which my partners and I manage - would receive only 26 per cent of its previous historical usage based on the committee B formula if it was adopted in total, whereas other people would receive up to 410 per cent of their previous historic allocation. I think in other examples, 300 per cent of the historic allocation, in other examples, 106 per cent, 228 per cent, 113 per cent. Can you see the examples that I am citing? I do not want to single people out, I just want to make it really clear what we are seeing is potentially, if this is adopted, a massive redistribution of water, and water is capital, as we have heard today already.

In other people's examples, they have received reductions of 70 per cent or allocations of 33 per cent of their normal use, but the other larger irrigators had positioned themselves well, like building storages which allows them to wear some of the buffer if there's a significant reduction. I do not believe they should be penalised for that, I think it's a commendable thing to do, but unfortunately we haven't been in that position. So the reductions that are proposed under the committee B formula, and also the committee C formula, have a much more adverse effect on our business than it does on any others and I do not believe that is fair or reasonable.

The other major point I guess I'd like to make in summary is that the Government should not be responsible, in my view, for windfall gains to some people who have not previously enjoyed a resource, so that they can turn around and sell that to people who have developed and used the resource on a regular basis. That would be the effect of implementing the committee B formula, and to a lesser degree but similarly to the committee C formula.

**CHAIR** - Anthony, you said that the other two major users have developed that private dam capacity. Are you saying that your terrain hasn't allowed you to develop that?

**Mr ARCHER** - It hasn't allowed us to do it at a reasonable cost. Our cost per megalitre is very high. The minimum cost that we've calculated so far is something like \$370 a megalitre which is not out of the question, but it's quite expensive. But what has become a larger problem for us is we have put an application in to attempt to build storages, and in the last six months I have received letters back from the Department of Primary Industries saying, 'I'm sorry, but we can't approve this because you have no approvals. Because the trust isn't in existence, we can't get you approvals'.

I feel as though we are being handicapped from many directions. One of them is, first of all, that there seems to be a strong environmental agenda within the Department of Primary Industries which is capping how much water we can get from the lake systems. First of all, it is saying, 'You can't fill the lakes up, fellows, you can't draw the lakes down', so it attempts to limit what has been the trust's lawful control of the lakes since the 1850 act and 1832, from what I am advised. It also attempts to limit how much water can be taken from the river in the summer and the winter, and I think it has really put a lot more pressure on this process because people feel threatened.

One of the major problems that I think we have and one of the most difficult things for the committee to overcome will be the fact that we have just gone through a period of drought, so people are quite aware that it is not just how much water they need to be allocated to make their businesses viable, but at what priority because they understand now the effect of a low-priority year, because we have just had two of them and we have only had 3 887 megalitres allocated to the river. This reduction in priority has an enormous effect on a business like ours where we have three centre-pivot irrigators, extensive channels, kilometres and kilometres of underground irrigation main, and we wouldn't be able to use it.

The other thing that has really made it very current to people, I guess, is the fact that they are realising we are having great difficulty in accessing water which we have traditionally been able to use in the lakes, and I do not think that is going to change without some assistance from the committee. I think that is going to put even more pressure on getting agreement in the system because people can see that the resources first of all are naturally overtaxed but more overtaxed because of these unnecessary environmental caps on the system.

**Mr WILKINSON** - I understand from your submission you are saying that the pre-1976 agreement, if we can call it that, or the water usage act of pre-1976, should not be the highest priority. I am just trying to work out what you are saying, in relation to our job, should be the biggest priority we should be looking at.

**Mr ARCHER** - The solicitors' advice to the trust - and I do not agree with the previous speaker - I think is quite clear. I don't think it could be more clear. I also think the advice that the trust provided to the solicitors is well reflected in a letter written by our solicitor in Sydney, Ms Mattila, where she refers to a barrister, Brett Walker, seeking advice, and it is very clear from her what the two questions are. She first of all asked the question, 'Are the 76 litres a reasonable basis for allocation and, if they are not, how should water be allocated?' And I can see no bias in those questions. To me that is quite clear, and I think they are the questions that she needed to have addressed.

**Mr WILKINSON** - They are not talking about minutes of meetings, are they? They are just talking about letters.

**Mr ARCHER** - Absolutely. I don't see there is a problem there. I am unaware of what documentation she was provided with by the trust. I am not a trust member, but the advice that I have had from other solicitors - and certainly both of them seem to agree that the advice provided to the trust are quite clear - is that certainly there is no reasonable basis for the 1976 priority to be adopted by the trust, that it will adversely affect the people who have been using the resource. Because of the capital amounts that they have put into the system, it is quite unreasonable that they should be expected to take significant reductions at the expense of other people who may have used the water or occasionally did.

The other thing that I find quite extraordinary is in regard to sleepers, that not only are they requesting water but they are requesting it first of all at priority and they are requesting it every year. Sleepers, by their very nature, intermittently use water. That is not the request that we have before us. What we are being asked is that they get priority

for that water and they get it every year, and I think that is quite different from what has been the position in the past.

**Mr WILKINSON** - So are you saying that pre-1976 has any bearing at all on the allocation of water?

**Mr ARCHER** - None whatsoever. If you look at the previous trust minutes, from 1951 onwards, the trust was - in my view we have to look at how the trust was conducted. It was conducted by people of good intent primarily to supply water to townships at Bothwell and Hamilton and to make sure they were not stressed, and to provide irrigation water to irrigators, and they were continually unaware of how much water was involved in the system. I have highlighted that in the documents that I have provided to the committee, where it points out quite clearly, in my view, that first of all on numerous occasions even the trustees themselves suspended - in 1969 document 15 - granting approvals because they were unsure whether there was water available or not. The same trustees 12 months later were granted extensions themselves to this scheme, and to me that makes it pretty clear that in their view there was no doubt that there was more water available, and that has been the case right through this whole discussion.

Joe Piscioneri, who moved the motion in the trust meeting in regard to 1976, made it quite clear in a letter to the trust, which I have tabled here as well - the motion by Mr Piscioneri is number 11, and the letter that he sent is document 4 - that the 1976 priority in his view was only there on a temporary basis. It was never meant to be ongoing. It has never been enforced by the trust. No-one has relied upon the 1976 decision in terms of their investment decisions, unlike post-1976 irrigators we have relied heavily upon the water which we have been using, and yet I think it is extraordinary. I actually suggested to committee B right at the beginning of this process that they needed to seek advice on how they should go about the allocation process, that they should also look at other letters, not the other minutes of meetings, not just 1976, but minutes in 1951 where the trust made it very clear that they were giving water to a Hamilton irrigator but they could not guarantee the water would be available every year. That is the nature of irrigation schemes in Australia. If water is available, generally it can be allocated up to varying degrees but if it is not available they cannot allocate it. That is exactly the same arrangement of the Clyde Water Trust and that was the way it was managed every year.

**Mr WILKINSON** - What about the argument - you may not have been here - where people from properties in years gone by were the ones who originally commenced the scheme by digging out the boulders to get the water running? Should they get any benefit of that at all and should that benefit be passed down through the ages? You are saying, 'No, they have had their benefit when they wanted the water however many years ago'. Is that your argument?

**Mr ARCHER** - If you are asking me should we be sharing the resource, I do not have a problem with that. What I do have a problem with is having the resource taken away from them and that is what is actually happening here. It is like going up to a fellow with a tin pot in the street asking for donations. You make a donation and then he comes along, which is what is happening to us, and demands 30 per cent of the rest of your resource. He says, 'I want a third of your lounge room, a third of your kitchen, a third of something else'.

I do not think anyone will disagree that we should be making reasonable amounts of water available to new participants but I really do not think we should be asked to give up over 30 per cent of the resource.

**Mr WILKINSON** - How do you say that the problem should be solved that we are sitting on now?

**Mr ARCHER** - I think it is quite clear. I have tabled it in the document. What I am suggesting is that first of all there should be an absolute priority given to history of use; I think it is the only lawful way that it can be done.

**Mr WILKINSON** - That's over the past 15 years then because I understand that is the only history of use that can be -

**Mr ARCHER** - No, you can chose three years, five years - I believe any more than five years is not reflecting the current position but I think the important thing we need to do is to be very aware that post 1999 there may have been changes to do with usage because the act had been passed and so at least prior to that but I see no problem at all with three years or five years prior to that as being the basis for allocation. Ten years if you like but my view is it needs to be within that five-year time frame. I have had advice from solicitors that that would be the norm in other areas. But in regard to how I feel it should be allocated, I've quoted the opinions to the trust in the documents.

**Mr WILKINSON** - Do you think we should be fettered by what we may or may not think the legal aspect is or alternatively come to a conclusion which we believe as a group is the fairest in all the circumstances?

**Mr ARCHER** - The question I ask is your definition of fairness because I do not believe it is reasonable to be fair to one group by being grossly unfair to another and I believe that there are very clear precedents about how this thing should be allocated.

As I have said in my submission here, we are selecting a form for the allocation of water and water licence which is consistent with and reflects the historic use and payment for use by irrigators. Those who have neither taken up their allocation of water or alternatively those who wish to claim water should perhaps be granted a secondary or subordinate right.

I am not saying they should not receive water but what I am saying is they certainly should not receive, as being proposed, water at priority. I think it is extraordinary; it is completely opposite to the way the thing should be handled. Further additions and restrictions of water resulting from environmental lobbying is going to increase the impact on historic users and we need to be very aware. I would like to see it handled within the committee process that it be recognised that the trust has had control of the water in those two lakes since 1832 and certainly rationalised since 1850 and that be endorsed as the ongoing policy of the Government.

**Mr WILKINSON** - Thank you.

**Mr FLETCHER** - Mr Archer, you suggest an abandonment of the past process in favour of the history-of-use process.

**Mr ARCHER** - Not at all, no, I think they are the same; I think the history of use demonstrates the past process.

**Mr FLETCHER** - Well, you are putting the argument that there is no contractual substance to the motions agreed to by the Clyde Water Trust over a period of time.

**Mr ARCHER** - I do not need to put that argument; it is put by the trust's own solicitors. But I certainly agree with it.

**Mr FLETCHER** - Yes. I am interested in your proposition, not the trust's solicitors' at this stage. Do you think there is any need, if we were starting again, to consider first of all the needs of an irrigator to meet the commercial needs of running the business as opposed to the needs or the rights of a party to have water for trading purposes?

**Mr ARCHER** - Absolutely.

**Mr FLETCHER** - So that would be your priority?

**Mr ARCHER** - What I am suggesting is that it should not be the committee's direction to be granting water to people to sell to other people. That is clearly unfair in my view. What you are doing is enriching someone who may have had a right to take water at the expense of someone who has had a right to take water and has continued to take water.

**Mr FLETCHER** - We have heard evidence earlier today of a letter that was received post 1976, that gave permission to take water from the scheme where the recipient of that letter stated quite categorically to the committee that there was no doubt that the letter, post 1976, introduced an element of priority, that that decision was a lesser priority than the decision prior to 1976. You disagree with that?

**Mr ARCHER** - Yes, I have tabled a letter, 17, where prior in the 1976 decision, the committee B chairman, in this case was given, in my view - this is just my interpretation; I am not a solicitor - similar guidelines. I highlighted that example but there are numerous others where the 1976 letters had been simply another reflection of the trust policy. I think they were concerned, as lay people, about being sued and so they said, 'We can't guarantee the water will always be there but subject to being available, okay. But be aware you may be rationed in years of shortage'. That was well in place prior to 1976 and I put that view to the committee B as it was being discussed and it was never taken up in its allocation table.

**Mr FLETCHER** - So you have provided us with a letter here which addressed from the trust to Mr Fowler.

**Mr ARCHER** - No, Mr Fowler's father - letter 17. But I have others at home if you would like me to provide them.

**Mr FLETCHER** - That's prior to 1976 and introduces the priority system?

**Mr ARCHER** - Absolutely. It is in 1976 but it is prior to this meeting when this priority system was discovered. For all intents and purposes, it simply reflects the policy of

previous letters that the trust sent out. If you could put yourself in the position of the trustees, they didn't want to be sued. They wanted to be fair and reasonable and I believe that is what they have done with these covering letters.

**Mr FLETCHER** - Can I ask you then to comment on the five points that have been made by committee B and, as succinctly as possible, state your objections. The first of the five points is that the priority policy implemented on 21 July 1976 establishing hierarchy be upheld. You oppose that for the following reasons?

**Mr ARCHER** - Yes, I have documented in the submission the reasons why I am opposed to it. Would you like me to read it?

**Mr FLETCHER** - Yes, if you could.

**Mr ARCHER** - Firstly, it has never been the ongoing policy of the trust. The trust has never implemented it nor has it insisted upon it. The 1976 decision as it is mooted has never in any circumstances been the way that the trust allocated water in times of shortage. It has not been the basis between then and now as how water should be allocated in any way whatsoever. It is not legally binding. It is labelled as a policy of the trust. A policy is not a contract. Let us be very clear about the legal terminology. A policy is not a contract. It is not the policy of the trusts because Joe Piscioneri who moved the motion states quite clearly it was not his intention.

**Mr FLETCHER** - The second proposition I want to put to you is that the minutes of the Clyde Water Trust be accepted as the true and accurate records of the trust business. Do you agree with that?

**Mr ARCHER** - Absolutely. I do not have a problem with that.

**Mr FLETCHER** - The next proposition I want to put to you is that all acres of water be converted to megalitres at the established benchmark of 1.5 megalitres an acre.

**Mr ARCHER** - There's a problem with that. That is quite valid if we had five dairy farms, all the same acres, all using the same amount of water. That is not the position in the Clyde Valley. In the Clyde Valley we have some people using spray irrigation, some people using flood irrigation, some of them with small acres and some of them with large acres and some people using irrigation intensively, some people using it as drought reserves. So it is not a valid basis for water allocation. It would be if they were all the same enterprise in the same area on the same site. But that is not the case. It may well be a reasonable basis to allocate water for sleeper/dozer allocations where there is no recorded history of use at lower priority. But it should not be the basis for major allocation. Because it is documented. We have the history-of-use figures. There is no argument. That is what they have been paid for. It would stand up in court. That is the way it is. People suggest that the figures have been played with. But where is the evidence? It is not the case. The cost per megalitre of water at \$1.50 a megalitre or \$2.50 or \$10 a megalitre is an issue that was being discussed earlier in the meeting today, and I would like the opportunity to mention that.

**Mr FLETCHER** - Yes, I'm going to raise that next so you will get an opportunity - or next after this.

The rights of sleepers and dozers be upheld and their full entitlement was a recommendation of committee B. You have some variation on that theme, I think, or do you ignore the rights of the sleepers and dozers totally?

**Mr ARCHER** - My view is that I certainly would ignore the right of sleepers altogether. I can see no advantage at all in sleepers being given water. They contribute nothing to the system, and I think a lot of the rights may be nefarious. I have no idea; I haven't examined it as an issue. Dozers, yes. My view is they should be given a second priority of right, they certainly should be allocated water when it's available, but they certainly should not be allocated water at priority over those who have developed and use the resource.

**Mr FLETCHER** - Okay. Can I then move on to the letter you received earlier this year, I think from the Rivers and Water Supply Commission, suggesting that there would be a commercial price attached to the water and that price would be, say, \$30 a megalitre initially, and 80 per cent of that would be a capital up-front charge. The \$6 per megalitre would be on the basis of water usage. Do you agree with that price mechanism as a basis for controlling the use of water?

**Mr ARCHER** - I disagree with the vast majority of the document altogether, to be honest. I am concerned, first of all, about statements made by the Chairman of the Rivers and Water Supply Commission, Mr Ashton-Jones, that there seems to be plenty of water to allocate. I don't believe that is the case, and the last two or three years have indicated that that's not the case. I am concerned with the way the tables are presented because what it shows is, if we look across the table in year one, for instance, we might be allocating 7 500 megs; with committee B, we might be allocating 9 000 megalitres; with another committee we are allocating, say, 6 000. They all need to be done on the same basis to give an accurate comparison.

One of the big problems we've had right through the process is - I'm not a statistician, I'm not a mathematician - I've had to go to seek advice, because that's how complicated some of these tables have been, to actually explain what is the effect on our business of this proposal. That is not good; I'm very concerned. This needs to be very clear and easy to understand. If you need to be going to other people for advice on the effect that it's going to have on you, I don't think that reflects well on how it's calculated. I think that's not a good thing.

I am concerned, first of all, that the figures at the base of that table vary. They need to be the same figure to get an accurate comparison, and they need to be expressed as percentages of historic views compared to committee B formula, committee C formula - any way you like. But it needs to be comparing apples with apples, and that table does not do that. I am also concerned by the suggestion that there would be a \$30 a megalitre fee in year one. In any business, it's important to stage capital works over a number of years. Why would you try to recoup the cost in five minutes? That has an unnecessary impact on all businesses. If it is to be recouped, it needs to be done over a reasonable period, and I would suggest no less than five years to allow people, first of all to adjust -

**Mr FLETCHER** - I don't think there's any suggestion in the letter that it's going to be recouped over the first year.



**Mr ARCHER** - Well, at \$30 a megalitre, I think it will go a long way towards it if 10 000 megalitres -

**Mr FLETCHER** - That might be your understanding of it, but that's not expressed in the letter.

**Mr ARCHER** - No, it's not expressed, but how else could you interpret such a high figure? To me it's extraordinary. We're going from, let's say, \$10 or \$12 a meglitre to \$30. You multiply that by 2 500 megalitres and we're talking about our own business contributing \$70 000 or \$80 000 a year, and that's a big change.

**Mr FLETCHER** - Yes. The point I'm interested in is not so much the quantum, but you've raised the issue of sleepers and say they should be denied their rights. But if sleepers were given rights, as they have now, but they were charged 80 per cent of \$30 a megalitre on an annual basis whether they take that water or not, that price mechanism would fix that problem up, don't you think?

**Mr ARCHER** - One of the problems we have is that sleepers, by their nature, as I said before, are intermittent in their usage. What we're talking about is not giving them the water intermittently, but giving it to them every year. So again, that's going to overtax the system. The system's already overtaxed, and it's going to just put more pressure on the system. What we are saying is, 'Sleepers, instead of coming in every now and then, fellows, we will give you that water every year, and if you look at committee B and some of the committee C formula, not only will we give it to you every year, but we'll give it to you at priority'. Unbelievable, but that's some of the proposals that were suggested.

**Mrs SMITH** - I'd like to get a clarification because we had some evidence given earlier that even sleepers made a contribution, and the Clyde Water Act actually gives the right of the trust to fix a rate for the use of water, and designates how that can be done. Can you clarify for me whether or not all users pay that rate, that can be assessed and gazetted, all those fronting the Clyde River, because you have made a statement that sleepers contribute nothing, and we have had evidence that sleepers do contribute, and I am just trying to clarify it.

**Mr ARCHER** - They may well have contributed a long time ago, but I do not know how long it has been since the trust - I can find out for you; I can get it clarified.

**Mrs SMITH** - We will ask the trust. I am just looking to try to get a clarification.

**Mr ARCHER** - It has been some time since the trust has rated properties. The trust was rating irrigators to provide the funds predominantly.

**Mrs SMITH** - Thank you.

**Mr FLETCHER** - The bone of contention seems to be in the interpretation of the trust position and the substance of the legal argument provided at a fee by Walker, Mattila and others, and I suppose we have little or no capacity to make judgments about that. The only place that can be settled is in a court in actual fact. You can mount an argument

about that, but if there is a legal argument, the court is the place to settle legal argument. Do you agree?

**Mr ARCHER** - What are the alternatives? Can we put this to arbitration, for instance? No, because we have completely opposing views. Arbitration is not an acceptable way to resolve those sorts of problems. Can we expect to get reasonable acceptance of the decision made by this committee without getting that issue determined? I have serious questions about that. My view is that for the committee's decision to stand - and that is what I would like to see; we need some certainty in this thing - that may be the only way that we can get the result. I think the major issues are first of all whether these pre-1976 letters stand or not, and then the priority of water allocation. It is not just volume, it is priority that is the issue. Certainly for our business it is the high allocation to the pre-1976 users over ourselves in years of shortage which is the major bone of contention, because it puts all our capital at risk.

**Mr FLETCHER** - It has been put to the committee that a couple of minor changes to existing legislation would clarify matters and put matters beyond doubt, a definition of what the agreements were in force at the time of the 1999 process. Have you a point of view with regard that?

**Mr ARCHER** - I think there is an act that the Government has already that is quite clear. It says the agreement is in force. The trust has been given advice that there are no agreements in force. I would be very concerned about a clarification that changed that position. If it suggested there are agreements in force, I couldn't support that at all. I think that would be a travesty, because it would be enriching people at the expense of others.

**CHAIR** - Thank you very much for your evidence.

**THE WITNESS WITHDREW.**