BEFORE THE HEARING COMMISSIONERS
HORIZONS REGIONAL COUNCIL

UNDER the Resource Management Act 1991

IN THE MATTER of the Hearing of Submissions on Chapters 6, 13, 15 & 16 of the Proposed One-Plan

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LEGAL SUBMISSIONS

FEDERATED FARMERS OF NEW ZEALAND

Federated Farmers of New Zealand
159 Khyber Pass
Private Bag 92-066
AUCKLAND
Phone (09) 379-0057
Fax: (09) 379-0782
Contact Person: P R Gardner

INTRODUCTION

1 These are legal submissions on two broad aspects of the water provisions of the Proposed One-Plan.

2 Submissions are made on

- the right to take water under s 14(3)(b) of the Resource Management Act ("the RMA" or "the Act"), and
- the rules regarding discharges to land and water and the relationship between permitted activities and activities that require resource consent.

RMA SECTION 14(3)(b)

3 There are references to RMA s 14(3)(b) in a number of rules in the One-Plan, in particular in Rule 15-1. The Rule appears to limit the amount of water that can be taken under s 14(3)(b). In my view the Council is not empowered to regulate anything to do with the water that can be taken under this provision, and can become involved only if there are, or are likely to be, adverse environmental effects arising from those takes.

4 Section 14(2) of the Act states that no person may take, use, dam, or divert any water, unless the taking, using, damming, or diverting is allowed by section14(3)(b), which states:

> A person is not prohibited by subsection (2) from taking, using, damming, or diverting any water, heat, or energy if—
> (a) the taking, using, damming, or diverting is expressly allowed by a national environmental standard, a rule in a regional plan as well as a rule in a proposed regional plan for the same region (if there is one), or a resource consent; or
> (b) in the case of fresh water, the water, heat, or energy is required to be taken or used for—
> (i) an individual's reasonable domestic needs; or
> (ii) the reasonable needs of an individual's animals for drinking water,—
> and the taking or use does not, or is not likely to, have an adverse effect on the environment; or
> ...

In other words, water can only ever be taken either under the authority of the Council, or for a use that is protected by s 14(3)(b). One of those "protected

uses"[1] is "the reasonable needs of an individual's animals for drinking water", provided "the taking or use does not, or is not likely to, have an adverse effect on the environment".

Council's Role

5 It would seem that the Council has no role to play in managing water that is taken for a protected use. If such a taking is, or is likely to have an adverse effect on the environment, then there is no authority given to take water by s 14(3)(b), and any such take would need to be authorised under s 14(3)(a).

6 Nevertheless, in my submission, it is not unreasonable for the Council to indicate in the Plan those locations where a water take does have, or is likely to have, an adverse effect on the environment.[2] It is understood that there are no such provisions in the One-Plan.

Origins of "Protected Uses"

7 It is noted that the "protected uses" have their origins in the common law. Professor Brookfield describes the situation as follows:[3]

> At common law the riparian owner had the right to take water from a natural watercourse for all ordinary, including domestic, purposes connected with the riparian land, such as drinking and culinary purposes, cleaning and washing, and feeding and supplying the ordinary quantity of cattle on that land. If the taking of water for ordinary or domestic purposes exhausted the water in the watercourse altogether the lower riparian owners had no complaint.
>
> The substance of the common law riparian rights for domestic use has in effect been preserved in the domestic exemptions from the restrictions relating to water generally, whether or not in a natural stream, imposed by the Resource Management Act 1991.

8 By way of the Water and Soil Conservation Act 1967 ("the WSC Act"), the Crown took most rights in water from 1 April 1968, but made an exception for

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[1] The phrase "protected uses" is my own expression, used for convenience, and intended to convey the sentiment that the uses are protected from regulation by local authorities by the RMA itself. In *Laws NZ* - Water, Para 41, Professor Brookfield uses the expression "domestic exceptions", as does Professor Palmer in *Laws NZ* - Resource Management, Para 36.

[2] This appears to be the approach taken by the Auckland Regional Council in its Auckland Regional Air, Land and Water Plan. Backed by a robust "section 32" analysis, certain areas a re declared to be "high use streams" and "high use aquifers", and the Plan makes it clear that resource consents should be sought for all water takes in those areas.

[3] *Laws NZ* – Water Para 53.

some the common law rights, including that of stock water. Again I rely on Professor Brookfield to describe the situation:[4]

> Since I April 1968, the use of water has been comprehensively governed by legislation. The Water and Soil Conservation Act 1967 left intact the general common law principle that the water itself is, until appropriated, not the subject of property. But with certain exceptions, that Act vested the sole right to dam any river or stream, or to divert, take, or use "natural water" (among certain other rights in respect of natural water) in the Crown. There were provisos, one of which authorised any person to take or use natural water reasonably required for the person's domestic needs, needs of animals for which he or she had any responsibility, or for fire-fighting.

9 The exceptions were prescribed by way of provisos in s 21(1) of the WSC Act 1967, the second of which was as follows:

> ...
> Provided also that it shall be lawful for any person to take or use any natural water that is reasonably required for his domestic needs and the needs of animals for which he has any responsibility and for or in connection with fire-fighting purposes:
> ...

10 The relevant provision in the WSC Act was, of course, replaced by s 14(3)(b) of the RMA on 1 October 1991.

Water under the WSC Act

11 The position under the WSC Act is well described in the New Zealand Law Society Seminar Paper, presented in September – October 1991, entitled Resource Management Act 1991.[5] The seminar was designed to introduce the then new Resource Management Act to law practitioners. After noting that "the change to the more detailed purposes and principles of the Act is nowhere more plainly apparent than in relation to the existing regime for water rights", the authors go on to say:

> In the absence of any clear guidelines provided by the Water and Soil Conservation Act, the Courts developed the broad principle that any use of water must be a beneficial use and that the loss which might follow from taking the water should be weighed against the benefit which will result from its use (Keam v Minister of Works & Development (1982) 1 NZLR 318).

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[4] *Laws NZ* – Water Para 40.
[5] Joan Allin, Rob Fisher, Tony Randerson *Resource Management Act 1991* (New Zealand Law Society, Wellington, 1991) p 5.

It is notable that the authors make no mention of there being any change to the "protected uses" regime.

12 It is apparent that the Courts interpreted the proviso in the WSC Act, which protected domestic and stock watering needs, broadly. In *Glenmark Homestead Ltd v North Canterbury Catchment Board*, the High Court said:[6]

> The second provisio to s 21(1) preserves one of the major common law rights of riparian owners ... that is, use of natural water for domestic needs and the needs of animals.

13 However, in *Clark v Duckworth*, the Court noted that in *Glenmark* the significance of the proviso did not seem to have any direct bearing on the matters requiring determination in the case, and proceeded to expanded on the interpretation given in that case when it said:[7]

> ... I believe one can put to one side such complexities of the common law as the distinction between riparian and non-riparian water supplies, or between ordinary and normal uses of riparian water, and recognise the proviso simply as a legislative endeavour to ensure that the law should not hinder the fulfilment of such essential needs for natural water as its provision in reasonable quantities to the home and for the watering of livestock ...

14 In the process of coming to its conclusion in *Clark*, the Court refers to an article by Professor Brookfield, in which he states that:[8]

> The authority given by the proviso is however not limited to riparian water but extends to *any* natural water. This tends to suggest that "any person" mentioned in the proviso is also to be taken widely, to include not only any owner seeking to use natural water on his own land but anyone (for example a neighbour) to whom he gives an easement to convey the water (*emphasis in original*).

15 Thus it would seem that the proviso excepting domestic and animal needs for water from the controls placed on the use of water by the WSC Act, expanded considerably on the rights that existed at common law.

Legislative History

16 When the Resource Management Bill was introduced to Parliament in 1989, what is now s 14(3)(b) read as follows:

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[6] *Glenmark Homestead Ltd v North Canterbury Catchment Board*, [1975] 2 NZLR 71 at 87, per Macarthur J.
[7] *Clark v Duckworth* [1984] 2 NZLR 58 at 63, per Thorp J.
[8] Prof F M Brookfield *The Conveyancer, Water Rights and the Environment* [1975] NZLJ 645 at 648.

(3) A person is not prohibited by subsection (1) from taking or using water, heat or energy if—

...

(c) in the case of fresh water, the water, heat, or energy is required for—

(i) reasonable domestic needs; or

(ii) the reasonable needs of animals—

and the taking or use does not have an adverse effect on the environment; or

...

17 The Explanatory Note to the Bill stated that "... the special nature of some aspects of water management has been recognised", and "This Bill carries over existing water management mechanisms ...

18 The Select Committee which considered the Bill changed the provision to the form in which it is to be found today. In other words, the word "individual" was added by the Select Committee. I have not been able to find any explanation as to why the change was made. The Explanatory Note to the Bill was left unchanged.

19 It is submitted that the legislative history suggests that what Parliament intended in the RMA was to leave the "protected uses" proviso generally intact, but also to tighten somewhat the generous regime that was introduced by the WSC Act, as described by Professor Brookfield and confirmed in *Clark*.

THE MEANING OF THE WORD "INDIVIDUAL" IN RMA S 14(3)(b)

20 I understand that the Hearings Panel has asked for assistance on the meaning of the word "individual" as it is used on s 14(3)(b). I have read the opinion provided by John Maassen of Cooper Radley. The introduction notes that the panel has asked at least two questions:

- Does "individual" mean something different from "person"?
- Does an individual's animals include a dairy herd?

I wish to expand on some of the points in the opinion provided by John Maassen.

The Law

21 In my submission, the answer to both questions posed by the Hearings Panel flows from the wording used to describe the "protected uses" in s 21(1) of the WSC Act, that it is:

> lawful for any person to take or use any natural water that is reasonably required for … the needs of animals for which he has any responsibility

22 This seems to be supported by Professor Brookfield, who says of RMA s 14(3)(b), that:[9]

> The phrase "an individual's animals" in s 14(3)(b)(ii) (in apparent contradiction to "no person") is presumably *not* meant to indicate that the animals must be owned by an individual and not a limited company or other corporate body (*my emphasis*).

As already discussed, it seems he distinguishes this from the position at common law, which (as discussed earlier) he describes as follows:[10]

> At common law the riparian owner had the right to take water from a natural watercourse for all ordinary, including domestic, purposes connected with the riparian land, such as …feeding and supplying the ordinary quantity of cattle on that land.

23 As Mr Maassen notes, "person" is defined in the Interpretation Act as follows:

> Person includes a corporation sole, a body corporate, and an unincorporated body.

24 It is submitted that both of the positions described by Professor Brookfield in para 22, (ie either that the ownership of the stock is not a relevant consideration, or that it is the stock ordinarily on the land that is the relevant consideration), are consistent with animal welfare considerations. For example, the Animal Welfare Act 1999 imparts an "[o]bligation in relation to physical, health, and behavioural needs of animals":[11]

> The owner of an animal, and every person in charge of an animal, must ensure that the physical, health, and behavioural needs of the animal are met in a manner that is in accordance with both—
> (a) good practice; and
> (b) scientific knowledge.

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[9] *Laws NZ* – Water Para 41, fn 4.
[10] *Laws NZ* – Water Para 53.
[11] Section 10.

25 It is worth noting that, ultimately, no matter what the ownership of a group of animals might be, there will always be a natural person who is in charge of and responsible for those animals at any one time.

26 Further, it is submitted that, in determining who is entitled to the "protected uses", a broad interpretation is consistent with good environmental practice. If there was no protection of the right to take water for stock drinking purposes in particular cases, then in those cases, people might be obliged to allow the stock they are responsible for to have access directly to natural water to fulfil the stock's natural need to drink.

The Dictionary Definition

27 The Shorter Oxford English Dictionary defines the noun "individual" as follows:

> 1 A single thing or group of things regarded as a unit; a single member of a class or group. A thing which is determined by properties peculiar to itself and cannot be subdivided into others of the same kind. An organism regarded as having a separate existence; a single member of a species, or of a colonial or compound organism.
> 2 A single human being, as opp. to a group. A human being, a person.
> 3 One's individual person, self.

28 Interestingly, the Shorter Oxford English Dictionary, in defining "individual" in its adjectival sense, makes reference to a passage from Thomas Hardy's novel "Tess of the D'Urbervilles". The second sentence of Chapter 27 reads:

> Immediately he began to descend from the upland to the fat alluvial soil below, the atmosphere grew heavier; the languid perfume of the summer fruits, the mists, the hay, the flowers, formed therein a vast pool of odour which at this hour seemed to make the animals, the very bees and butterflies drowsy. Clare was now so familiar with the spot that he knew the individual cows by their names when, a long distance off, he saw them dotted about the meads.

29 I note that there is no entry in the NZ Law Dictionary for "individual". Both the legal dictionaries *Words and Phrases Legally Defined* and *Strouds Judicial Dictionary of Words and Phrases* refer to the late 19th century case *Great Northern Railway Co v Great Central Railway Co*, where it is stated:[12]

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[12] *Great Northern Railway Co v Great Central Railway Co* (1899) 10 Ry & Can Tr Cas 266 at 275 per Wright J.

> It seems to me that the word "individual" must be construed as extending, not merely to what is commonly called an individual person, but to a company or corporation. ... Individual seems to me to be any legal person who is not the general public.

30 However it is acknowledged that there are cases, one of which is referred to by Mr Maassen, where the context appears to confine the meaning of the word "individual" to natural persons.

31 Nevertheless, it would seem that the preferred meaning of "individual" favours, where possible, the word being given a broad interpretation to describe a particular member of a variety of classes, rather than having a narrow interpretation as a particular member of just the single class, the human race.

Discussion

32 It would seem that Parliament intended "individual" to have a different meaning from "person" when it used those two words in RMA s 14(3)(b). It is submitted that what is intended is that "individual" should be read as being a slightly broader meaning of "person". So, in s 14(3)(b)(i), "an individual's reasonable domestic needs" would include providing for the needs of the person taking the water, as well as the needs of other persons in the same domestic type situation. In a commercial situation, a body corporate might take water in order to provide for the needs of natural persons on its staff, but it could not take water for any "commercial" use.[13]

33 Likewise, in s 14(3)(b)(ii), "the needs of an individual's animals for drinking water" means that the animals may belong to, or be the responsibility of, a different person than the person taking the water,[14] but the person taking the water could not supply the needs of the animals of more than a single individual, no matter what class that individual might belong to.

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[13] Note the use of the word "domestic" in the Consumer Guarantees Act1993. In s 2 "consumer" is defined as follows:
Consumer means a person who—
(a) Acquires from a supplier goods or services of a kind ordinarily acquired for personal, domestic, or household use or consumption; and
...
Subsection (b) clarifies that goods acquired in trade, or for use in manufacturing other goods, are not goods acquired by a "consumer".
In *Nesbit v Porter* [2000] 2 NZLR 465, it was held that the definition of "consumer" contemplated that some goods could be acquired for commercial use. The Court cited by way of example a sofa purchased for the reception area of a business, and concluded that the buyer of such a sofa would be a "consumer".

[14] I use the word "person" in its broad sense in both instances.

34 This explanation is consistent with the submission made in para 19, that in introducing the word "individual" into s 14(3)(b), Parliament was wishing to reduce the expansion of the common law that had taken place when the WSC Act was introduced.

35 In conclusion to this discussion, it is submitted that, if Parliament had intended to take away the "protected use" rights derived from the common law and written into the WSC Act, it would have used clear language to do so. No such clear language is apparent on the face of the provision.

Ramifications

36 It is submitted that the consequence of concluding that water can only be taken under s 14(3)(b)(ii) where the person taking the water is "natural person" who is taking the water for animals he or she personally owns, which is the conclusion drawn by Mr Maassen in his paragraph 9, would be that the restrictive presumption on taking water prescribed in RMA s 14 applies, so probably almost all such water takes on farms throughout New Zealand would be currently unauthorised, and would remain so until such time as they are expressly permitted in all regional plans, or the relevant water permits obtained. Furthermore, any protection that might be afforded by RMA s 20A is not available, having long since expired. It is submitted that none of these are consequences that Parliament could have intended.

37 Further, it is submitted that the ramifications of Mr Maassen's conclusions are so widespread that it cannot be the sort of matter that should be dealt with by a council, or indeed submitted to the Environment Court or higher courts on appeal. It is submitted that it is a matter that should be dealt with, if it is to be dealt with at all, by Parliament through reconsideration of the express provisions of the legislation.

Conclusions

38 It follows from the discussion above that an "individual" does mean something different from a "person", but I differ from Mr Maassen in that I conclude that the meaning of the word is not limited to natural persons.

39 I agree with Mr Maassen where he states in para 10 that there is no limitation on the number of animals that qualify for what he calls the "exemption" under s 14(3)(b). Thus, an individual's animals can include a dairy herd.

THE RULES REFERRING TO S 14(3)(b)

40 In para 3, I stated that Rule 15-1 appears to limit the amount of water that can be taken under s 14(3)(b), and that in my view the Council is not empowered to restrict that amount of water that can be taken under this provision, which applies unless there are, or are likely to be, adverse environmental effects.

41 The conditions on Rule 15-1 state that:

> (a) The rate of take shall not exceed:
>
> (i) 30 m^3/d per property where the water is required for an individual's reasonable domestic needs and/or the reasonable needs of an individual's animals for drinking water;
>
> (ii) 15 m^3/d per property where the water is for any other use.
>
> The rates of take allowed under (i) and (ii) cannot be added: the maximum allowable rate of take under this rule is 30 m^3/d per property.
>
> (b) The rate of take shall not exceed 2.0 l/s.
>
> (c) An intake screen with a mesh aperture size not exceeding 3 mm in diameter shall be used and the intake velocity shall not exceed 0.3 m/s.
>
> (d) The take shall not be from any wetland that is a rare habitat or threatened habitat.
>
> (e) The water shall be used on the subject property.
>
> The Regional Council shall be notified in writing of the location of the take, the maximum instantaneous rate of take and the intended use of water.

42 Case law has established that conditions on permitted activity rules should:

> Be clear and certain;
> Be capable of consistent interpretation and implementation by lay people;
> Not contain subjective terms;
> Not reserve a discretion to the council.

43 In my submission, Condition (a)(i) does not make it clear how much water can be taken under the rule. As discussed above, the Council has no role to play in the taking of water authorised by s 14(3)(b), so it is unclear as to whether the reference to "30 m^3/d" in the Condition is intended to limit the amount of water

that can be taken under s 14(3)(b) (which would be ultra vires) or is intended to be in addition to the right to take water under s 14(3)(b) (which is meaningless, as the "reasonable" takes provided for in the Rule are already provided for by s 14(3)(b)).

44 In my submission, there is an additional problem with the Rule in that it is uncertain how much water is provided can be taken under Condition (a)(ii). The maximum allowable rate of take of 30 m^3/d per property is likely to provide for the drinking needs of fewer than 300 cows in certain conditions, which is less than the size of an average dairy farm. This means that the Rule could be taken to mean that no water can actually be taken for uses other than domestic or stock drinking water needs, which defeats the purpose of there being a permitted activity rule.

45 Other people speaking on behalf of Federated Farmers will outline how the Rule might be made more workable.

DISCHARGES TO LAND AND WATER

46 There is no doubt that regional councils are empowered to, and indeed they should, regulate discharges to land and water.[15] The question is not whether councils should or shouldn't regulate, rather the question is, how much regulation councils should impose.

47 Ultimately, the regulatory regime that the Council chooses should be the regime that best promotes the purpose of the Act, the sustainable management of the natural and physical resources of the Region.

48 As you will hear from other speakers on behalf of Federated Farmers, the Federation favours the Discharges to Land and Water Chapter being based on a light handed regulatory regime. It is submitted that such a regime would best meet the purpose of the Act in terms of managing the use, development, and protection of natural and physical resources in a way that would enable the people and communities of the Region to provide for their social, economic, and cultural wellbeing and for their health and safety.

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[15] RMA section 15 prescribes that no person may discharge any contaminant unless the discharge is expressly allowed by a rule, a resource consent, or regulations.

49 For my part, in this final part of the submission, I turn to discuss briefly the relationship between permitted activities and activities that require resource consent. I conclude that councils should not make an activity the subject of a resource consent requirement when the activity could be adequate regulated by way of a permitted activity rule.

The Relationship between Permitted Activities and Activities that require Resource Consent

50 There appears to be a misunderstanding widespread in the community that permitted activities are somehow "unregulated". For example, people often call for an activity to be "unregulated" or be the subject of a set of guidelines, when actually what they are calling for is a light-handed regulatory regime, as opposed to a heavy handed one.

51 For example, in Rule 13-2 which concerns fertiliser use, fertiliser spreading being carried out as a permitted activity is, of course, required to comply with the relevant permitted activity rule conditions such as the condition prohibiting the discharge of the fertiliser direct to water.

52 But in my observation, the misunderstanding is deeper than that. It is my submission that the only "unregulated" activities are those that are not provided for in a district plan, but which take place in terms of s 9 of the Resource Management Act:

> **9 Restrictions on use of land**
> (1) No person may use any land in a manner that contravenes a rule in a district plan or proposed district plan unless the activity is—
> (a) expressly allowed by a resource consent granted by the territorial authority responsible for the plan;
> ...

53 Many district plans, particularly the more recent ones, prescribe somewhere that any activity not otherwise provided for in the plan is a non-complying activity. This means that there are no activities in the particular district that can take place "as of right" by dint of s 9 of the Resource Management Act.

54 It is my submission that the regulatory powers that local authorities have in respect of permitted activities can be just as great as the regulatory powers that they have in the case of activities that are described in such as way as to

require resource consent. This is particularly so in the case of controlled activities.

55 Section 76 of the RMA[16] provides territorial local authorities with the power to make rules to carry out their functions, including that of controlling the effects of the use, development or protection of land.[17]

56 Section 77A of the Act provides local authorities with the power to make rules describing types of activity:

> **77A Power to include rules in plans**
> (1) A local authority may make rules describing an activity as an activity in section 77B.
> (2) When an activity in a plan or proposed plan is described as an activity in section 77B, the requirements, restrictions, permissions, and prohibitions specified for that type of activity apply to that activity in that plan or proposed plan.
> (3) The power to specify conditions in a plan or proposed plan is limited to conditions for the matters in section 108 or section 220.

57 Section 77B describes the various types of activities, including "permitted activity" and "controlled activity":

> **77B Types of activities**
> (1) If an activity is described in this Act, regulations, or a plan or proposed plan as a permitted activity, a resource consent is not required for the activity if it complies with the standards, terms, or conditions, if any, specified in the plan or proposed plan.
> (2) If an activity is described in this Act, regulations, or a plan or proposed plan as a controlled activity,—
> (a) a resource consent is required for the activity; and
> (aa) the consent authority must grant the resource consent, unless it has insufficient information to determine whether or not the activity is a controlled activity; and
> (b) the consent authority must specify in the plan or proposed plan matters over which it has reserved control; and
> (c) the consent authority's power to impose conditions on the resource consent is restricted to the matters that have been specified under paragraph (b); and
> (d) the activity must comply with the standards, terms, or conditions, if any, specified in the plan or proposed plan.
> ...

58 It is particularly noted that a consent authority does not have any more power to require an activity to comply with any different "standards, terms or

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[16] I refer throughout this section to the RMA as it was before the 2009 amendments. There does not appear to be any material difference made by the relevant 2009 amendments.
[17] Section 68 of the Act provides regional councils with their rule making powers.

conditions" in the case of a controlled activity than it does in the case of a permitted activity. In both cases, the power to specify conditions is also limited, by s 77A, to conditions relevant to the matters in s 108 and s 220.

59 "Conditions" is defined in s 2 of the RMA:

> Conditions, in relation to plans and resource consents, includes terms, standards, restrictions and prohibitions.

60 Some case law has developed around what is required of "conditions", including: *Wood v Selwyn DC*;[18] *Bitumix v Mt Wellington BC*; [19] *Pioneer Developments v Waitemata CC*;[20] *Riley v Golden Bay County*;[21] *Stop CRA Pollution (SCRAP) Inc v NZ Refining Co Ltd.*[22]

61 Sections 104A, 104B and 104C describe how conditions may be imposed on resource consents. For example, Section 104A states that a local authority's powers in considering resource consent applications for controlled activities are confined to imposing conditions under s 108, over matters which it has reserved control in the Plan:

> **104A Determination of applications for controlled activities**
> After considering an application for a resource consent for a controlled activity, a consent authority—
> (a) must grant the resource consent, unless it has insufficient information to determine whether or not the activity is a controlled activity; and
> (b) may impose conditions on the consent under section 108 for matters over which it has reserved control in its plan or proposed plan.

62 Thus, it is submitted that the only practical difference between a controlled activity and a permitted activity is that, in the case of a controlled activity, a local authority is able to reserve control over certain matters, which must be specified in the plan, for which conditions may be specified at the time the consent is granted.[23] On the other hand, in the case of a permitted activity all the conditions must be specified on the permitted activity rule.

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18 Environment Court decision C035/94.
19 [1979] 2 NZLR 57.
20 M627/78, Supreme Court, Auckland, 16 February 1979, Moller J.
21 Planning Tribunal decision A4748 (1977).
22 (1993) 2 NZRMA 586.
23 Leaving to one side, for the moment, that a resource consent is required for a controlled activity.

63 There is one matter that could arguably be raised as reasons why an activity should be a controlled activity rather than a permitted activity, that of notification. A condition which requires the prior notification to council of information relating to an activity before that activity takes place is sometimes included on resource consents.

64 In the case of such a condition, it had been thought in some quarters that such conditions might be ultra vires on permitted activity rules. However, the case *Bryant v Marlborough District Council*[24] has made it clear that such conditions are valid.

65 It is submitted that it follows from the consideration of the law on conditions discussed above, that the conditions that might be applied to a rule that regulates an activity are as equally applicable to a permitted activity rule that regulates the activity as they are to an equivalent controlled activity rule.

66 Thus, in my submission, unless there is some situation which is likely to give rise to differing conditions depending on the location of the activity, in other words a site specific consideration, there is no benefit in describing an activity as a controlled activity when all the relevant conditions could be specified by way of a permitted activity rule.

67 It is noted that it is only at the time that a consent authority issues a consent that it has control over the conditions on any controlled activity resource consent. Once the consent is granted, the conditions cannot readily be modified,[25] and they assume the same status as the conditions on the rule in the Plan that the particular activity is subject to.

68 Thus, it is submitted that, if there is no likelihood of there being any difference between the circumstances of any of the individual controlled activity resource consent applications required under the provisions of a controlled activity rule, then there are no matters over which the Council can justify reserving control. Accordingly, it is submitted that in such circumstances activities should be provided for by way of a permitted activity rule. Councils should regulate by way of as light handed a regulatory regime as possible.

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[24] CRI-2008-406-3, High Court Blenheim, 16 June 2008, Clifford J.

[25] Other than by way of a review of the consent conditions through the RMA s 129 process.

69 I said earlier that the Federation favours the Discharges to Land and Water Chapter being based on a light handed regulatory regime. Other speakers on behalf of Federated Farmers have stated that they prefer Rule 13-1 to be a permitted activity rule rather than a controlled activity rule. In my view, Council can achieve everything it wants to in terms of regulating farming activity by way of a permitted activity rule.

70 Accordingly, in my submission, Rule 13-1 should be cast as a permitted activity rule with an appropriate set of conditions.

CONCLUSION

71 To summarise briefly:

- a regional council is not empowered to make any regulations regarding the water that can be taken under s 14(3)(b). If there are, or are likely to be, adverse environmental effects caused by a particular take, then it is not provided for under that provision;
- the word "individual" in s 14(3)(b) is broad in meaning;
- where councils are required to regulate activities, they should endeavour to provide for activities by way of as light handed a regulatory regime as possible.

Richard Gardner
In-house Lawyer
Senior Policy Advisor
Federated Farmers of New Zealand