

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

SUPPLEMENTARY LEGAL SUBMISSIONS

FEDERATED FARMERS OF NEW ZEALAND

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INTRODUCTION

- 1 These are legal submissions which are supplementary to the legal submissions made by Federated Farmers at the hearing on the water provisions of the Proposed One-Plan, on 17 February 2010.
- 2 At the hearing on 17 February, copies of those primary submissions were circulated to the Hearing Commissioners and to interested parties some two or three hours before they were formally presented.
- 3 Subsequently, but prior to my formally presenting the Federated Farmers' submissions, Mr Maassen had handed me a sheet of paper which he indicated was a print out from the electronic version of a more recent edition of the *Laws NZ – Water Volume* than the one to which I referred in the submissions.¹
- 4 Later, in the course of delivering the submissions, I interpolated part way through reading paragraph 22 of those submissions and read out the part of the material Mr Maassen had handed me, which stated as follows:²

Under the Resource Management Act 1991, domestic water must now be for “individuals”, and the animals for which water may be taken or owned must be owned by “individuals”. Animals owned by farm companies therefore do not seem to be covered.

I also stated that a contention in the material, that “Animals owned by farm companies therefore do not seem to be covered”, appeared to be in direct conflict with the extract from the *Laws NZ – Water Volume* to which I had just been referring in my submissions, and which seemed to be a summary of the state of the relevant law as it had developed over several decades. I also noted that the part of Mr Maassen's material which I had read out did not refer to any authority.
- 5 For completeness, I restate the extract I quoted in my submissions, which was taken from the *Laws NZ – Water Volume*:³

¹ At the time I was prepared to accept what Mr Maassen said. Various constraints meant that the only version of *Laws NZ* to which I had access at the time I was researching the submissions was that in the Auckland City public library. I presumed, erroneously as it transpired, that the library had allowed its copy of *Laws NZ* to become out of date.

² *Laws NZ – Environment* Para 67, fn 3.

³ *Laws NZ – Water* Para 41, fn 4.

The phrase “an individual’s animals” in s 14(3)(b)(ii) (in apparent contradistinction⁴ 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*).

- 6 The purpose of these supplementary submissions is to clarify the apparent contradictions in the sources of information provide to the Hearing Commissioners. Mr Maassen has provided some assistance to me in this regard.

THE VARIOUS *LAWS NZ* CONTENTIONS

- 7 Resource Management Act s 14(3)(b) is referred to in at least three volumes of *Laws NZ*. The material Mr Maassen handed me was in fact a copy of paragraph 67 of the *Laws NZ – Environment* Volume. The provision is also referred to in paragraph 36 of the *Laws NZ – Resource Management* Volume and paragraph 41 of the *Laws NZ – Water* Volume.

- 8 The relevant extracts from *Laws NZ – Environment* and *Laws NZ – Water* are set out above.⁵ The relevant part of *Laws NZ – Resource Management* states:⁶

The domestic exceptions provide for the taking of fresh water for reasonable domestic needs, or to meet the needs of animals for drinking.

- 9 The *Laws NZ – Environment* volume was published in 2000. Paragraph 67 was updated by Service 53, which was applied to the printed editions to which I have referred in preparing these supplementary submissions, in January 2010. The relevant footnote, 3, has not been changed.
- 10 The *Laws NZ – Resource Management* volume was published in 1995. Paragraph 36 was updated by Service 53 in January 2010. The relevant section now reads:

With certain exemptions, no person may take, use, dam, or divert water other than open coastal water; heat or energy from water other than open coastal water; or heat or energy from the material surrounding geothermal water.

⁴ I erroneously copied the word “contradistinction” as “contradiction” in the primary submissions.

⁵ In paras 4 & 5 respectively.

⁶ *Laws NZ – Resource Management* para 36. Note that this has been updated – see para 10 below.

The exemptions are:

...

- In the case of fresh water, the water, heat, or energy is required to be taken for an individual's reasonable domestic needs, or the reasonable needs of an individual's animals for drinking water, and the taking does not, or is not likely to, have an adverse effect on the environment;

...

There is no reference to the meaning of the word "individual" being in contention.

- 11 The *Laws NZ – Water* volume was published in 1997. Some of the footnotes to paragraph 41 were updated by Service 53, which was applied in January 2010. The footnote that is relevant to this discussion, footnote 4, has been amended, but the relevant extract from the footnote, as quoted above,⁷ is unchanged.

OTHER SOURCES

- 12 In the course of preparing these supplementary submissions, I reviewed a number of other sources:

Environmental and Resource Management Law⁸

DSL Environmental Handbook⁹

Handbook of Environmental Law¹⁰

Environmental Law of New Zealand¹¹

With the exception of Environmental and Resource Management Law, none of these publications place any particular significance on the use of the word "individual" in s 14(3)(b).

- 13 In Environmental and Resource Management Law, the statement is made that:¹²

The High Court ruled in *Hall v Malvern County Council*¹³ that to come within the exception created by the second proviso to s 21(1) [of the

⁷ In para 5.

⁸ Berry & Matheson, "Water" in Nolan (ed) *Environmental and Resource Management Law* (3rd Ed, LexisNexus, Wellington, 2005).

⁹ Sartoris (ed) *DSL Environmental Handbook* (Brookers, Wellington, 2007), especially section WM4.

¹⁰ Deans, "Freshwater Values: Duties and responsibilities under the RMA in Harris (ed) *Handbook of Environmental Law* (Royal Forest and Bird Protection Society, Wellington, 2004).

¹¹ Reeves *Environmental Law of New Zealand* (2nd Ed, Kluwer Law International, The Hague, 2002).

¹² *Ibid*, para 8.26.

¹³ *Hall v Malvern County Council* (High Court, Christchurch, A29/84, 21 February 1986, Cooke J).

Water and Soil Conservation Act 1967] the taking of water which is ultimately used for domestic needs or the needs of animals must be by the person actually using the water for these purposes, not by some intermediary person. ... This requirement is now clearly embodied in the terminology of the RMA where specific reference is made to “an individual”.¹⁴

- 14 This analysis appears to be consistent with the submissions I made at paras 19 and 32 - 35 of my primary submissions, to the effect 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 Water and Soil Conservation Act was introduced, but only by reducing the ability of a person to supply other persons with water under the “exception”.

CONCLUSION

- 15 It is submitted that the word “individual” in s 14(3)(b) is broad in meaning, extending to all persons covered by the definition of “person” in the Resource Management Act. The use of the word “individual” is intended to do no more than codify a restriction on the ability of a person to supply other persons with water under the provision, which was seemingly established by way of case law under earlier legislation.

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¹⁴ The authors go on to point out that “... there still remains some doubt as to whether the ‘domestic needs’ exception allows for ‘off-site’ domestic use”. Presumably, the same doubt applies to the ‘needs of animals’ exception.