

Ike Kleynbos

From: Anderson, Kerry <kerry.anderson@dlapiper.com>
Sent: Wednesday, 27 September 2017 5:46 p.m.
To: Ike Kleynbos
Cc: 'James Beban'; Brett Osborne; Helen Ellams; Angela Bell
Subject: RE: PC42 - Commissioner legal questions

Hi Ike

Effectively Mr Jeffries is saying that riverbeds are controlled under section 13 and not section 9 and therefore, UHCC has no jurisdiction over those riverbeds.

The submission provided by Mr Jeffries does not change the advice set out in our letter of 4 July 2017. While he is correct that Regional Council's have jurisdiction over riverbeds under section 13 of the RMA, he has simply not considered that UHCC can *also* have jurisdiction over riverbeds under section 9 of the RMA (as long as the controls imposed relate to one of UHCC's function in section 31 of the RMA). In other words, the Regional Council having jurisdiction does not exclude UHCC *also* having jurisdiction (as can be seen from the descriptions of the functions of the different Council's under section 30 and 31 of the RMA) but it is likely that because of the slightly different functions of UHCC (versus the Regional Council), that the controls on riverbeds will be aimed at slightly different issues. The fact that section 13 matters and section 9 matters may 'cross over' is explicitly recognised in section 13(4) of the RMA – 'nothing in this section limits section 9'.

The case provided by Mr Jeffries also does not change the advice provided. This is because:

- The *Woolley* case referred to in the 4 July advice that we relied on is a Court of Appeal case. It takes precedence over the High Court decision Mr Jeffries relies on. The *Woolley* case is also later in time than Mr Jeffries case (May 2014 versus May 2013).
- The *Jeffries* case was a Regional Council enforcement case where abatement notices were issued for breach of section 13 of the RMA. It is not a direct finding on whether territorial authorities can make rules relating to riverbeds, but rather, a finding that a previous land use consent issued by UHCC did not authorise the dumping of fill into a riverbed. I accept that as part of that finding the Court makes the statement 'UHCC has no jurisdiction over riverbed matters. They belong to Regional Councils under section 13 of the RMA'. However, this comment is obiter and made in quite a different context. We do not know whether (for example) this is simply a comment that UHCC *at that time* had no jurisdiction because it had no rules addressing riverbeds (and or whether it is a broader comment than that). There is also no indication whether the issue (of section 9 jurisdiction) was even raised for the Court to comment on because it was not relevant to the issues at hand in that case. It does note that even if a consent was granted by UHCC Mr Jeffries would have still been in breach of section 13, unless he had consent from the Regional Council. It could be argued that this reflects the fact that both Councils may have a role in granting consents for works affecting riverbeds, but in that case only consent from UHCC was held and nothing from the Regional Council. This means section 13 would be breached.
- In my view, little weight can be placed on the comment in para 59 of the *Jeffries* case due to its factual differences to the issues in this Plan Change and the fact there is a higher authority from the Court of Appeal that specifically states '...on the face of it, section 9(3) can apply to the use of a riverbed. The question is whether s13...overrides that in some way' and then 'section 13 does not purpose to restrict the application to section 9(3) to riverbeds'.

Please let me know if you need anything further.

Regards

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From: Ike Kleynbos [<mailto:Ike.Kleynbos@uhcc.govt.nz>]
Sent: Wednesday, 27 September 2017 2:55 p.m.
To: Anderson, Kerry; Yardley, Megan
Cc: 'James Beban'; Brett Osborne; Helen Ellams; Angela Bell
Subject: RE: PC42 - Commissioner legal questions
Importance: High

Hi Kerry,

Thank you for confirmation and for taking the time to respond.

There has been a further request made by the Commissioner regarding Mr Jefferies submission (#23) and the legal advice provided by DLA regarding s13 and Council's jurisdiction over river beds. This advice has reference #1413289 and was received on 4 July 2017 (a copy is attached).

The Commissioner has asked: Does the following change the advice provided by DLA on Council's jurisdiction regarding earthworks in river beds?

- The evidence and assertions made by Mr Jefferies on Submission Point 3 (para 8-25); and
- The High Court Case NZHC 1059 (2013) - the judgement made by Justice Williams.

Please find attached a copy of Mr Jefferies submission and also Appendix 5 of this, the Williams decision.

As is before, unfortunately this is a live case and **a response to this is appreciated by tomorrow afternoon**, if possible.

It would be great if you are able to confirm whether this is possible, once you are able.

Kind regards,

Ike Kleynbos
Policy Planner

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From: Anderson, Kerry [<mailto:kerry.anderson@dlapiper.com>]
Sent: Wednesday, 27 September 2017 1:22 p.m.
To: Ike Kleynbos
Subject: Re: RLAA transitional provisions - PC42