The year that was and 2017 – The year that will be

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INTRODUCTION

They say that change is as good as a holiday, and as this year draws to a close there is both change and a holiday on the horizon!

Indeed, 2016 has been a year of change with local government and resource management reforms progressed and further reforms signalled. In this article we provide a brief update on the progress of the current local government and resource management bills as well as the Havelock North Water Inquiry.

The remainder of this article is dedicated to a case law update, profiling three recent, but very different cases of interest involving a Christchurch dam proposal; a water consent lapse date; and the latest instalment in the fluoridation litigation.

Also, as this is our last article for 2016 and while it seems a tad early to mention the word "Christmas" yet, we would like to take this opportunity to wish you all the very best for the upcoming festive period and holidays.

LOCAL GOVERNMENT BILL

The Local Government Amendment Bill[1] has proved to be hugely controversial with a large number of councils and other submitters coming out in opposition to what they see as the death of local democracy.

Over 200 submissions were received on the Bill and while the Select Committee hearings have now concluded the Minister of Local Government Peseta Sam Lotu-liga has suggested that further time be allowed to enable policy consideration and drafting changes to the Bill.

The original report back date for the Select Committee was 28 October 2016 and the suggested new report back date is 31 March 2017. At the time of writing, the Select Committee had not yet confirmed whether it would extend the report back date.

RESOURCE LEGISLATION AMENDMENT BILL

As we noted in earlier articles, submissions on the Resource Legislation Amendment Bill 2015 (RLAB) closed in March this year and the Select Committee report was originally due to be issued in early September.

However, the Committee applied for and was granted an extension to 7 November 2016. As we will not receive that report in time to comment on it in this article, we will do so in our first article of next year.

For now, we simply note that given the number of concerns raised by a range of submitters, we expect there will be some significant amendments should the Select Committee recommend that the Bill be passed.

HAVELOCK NORTH WATER INQUIRY

As we noted in our last article, in August 2016, the Government announced an inquiry into the Havelock North contaminated water incident. In mid-September the Government released further details about the inquiry as well as the names of the panel that will conduct the inquiry.

Inquiry Details

The inquiry will focus on finding the answers to the following key questions:

- how the Havelock North water supply system became contaminated;
- how this was subsequently addressed;
- how local and central government agencies responded to the public health outbreak that occurred as a result of the contamination; and how to reduce the risk of outbreaks of this nature recurring.

The Panel

The panel will be chaired by retired Court of Appeal judge, the Honourable Lyn Stevens QC. The other members of the panel are Dr Karen Poutasi CNZM, the current NZQA CEO and former Director-General of Health; and Anthony Wilson, chief engineer of Wellington City Council and former Water NZ president.

The panel is required to report back by 31 March 2017.

CASE LAW UPDATE

Three cases aroused our interest in the past couple of months. The first, another large scale dam proposal looking to provide greater security for water supply in Canterbury; the second a case which discussed the rather vexed issue of when a (water) consent can be said to have lapsed; and the third is the latest (but not necessarily final) instalment in the water fluoridation debate.

1 Local Government Amendment Act 2002 Amendment Bill (No 2) 2016

Eyre Community Environmental Safety Society Incorporated v Christchurch Regional Council 2016 NZEnvC 178

Access to water, particularly in times of drought, can be the difference between livestock and crops surviving or perishing. Since, as yet, no one has been able to control (or even that accurately predict!) the weather, efforts to ensure security of supply, have shifted to other avenues.

One of these, which was the subject of this case, was a proposal for large-scale water storage. In this case, Waimakariri Irrigation Limited sought a number of consents to enable the construction of two large storage ponds holding 8.2 million cubic metres of water, covering approximately 120 hectares, and located above an existing community.

The prime issue in this case was safety – and in particular the risk to those who might be in the flow path if there was a catastrophic breach of the embankments of the ponds.

The Court reiterated that while the RMA is not a "no effects" statute, due to the definition of "effect" in section 3, there was a need to consider effects of low probability but high potential impact, (such as a breach of the ponds), and the ability of the community (or not) to protect itself.

The parties agreed, and the Court accepted that the NZSOLD Dam Safety Guidelines 2015 were an appropriate standard against which the proposal should be judged. The Court however indicated that it did not have sufficient information on a number of matters to determine that the design for the project was "suitably conservative" to ensure safety.

All other effects were accepted to generally be no more than minor, and the proposal was found to be generally consistent with the relevant planning documents (with the exception of the risk of dam failure).

The Court made orders for further information and evidence to be provided on key safety-related issues, including: engineering design of the ponds; quality control of the geomembrane liner for the ponds; the proposed dam management safety plan; and emergency action and emergency evacuation plans.

While the decision provided guidance about the matters that conditions would need to include if consents were subsequently granted, the Court reserved its position in relation to whether consent would in fact be granted:

[217]... The question of whether or not we shall be able to grant consent will be informed by whether or not we are satisfied with the responses. The question of whether consent can issue in this case is by no means answered at this stage. Other parties shall have the opportunity to lodge evidence and make submissions on the responses as well.

So for now, it is a case of watch this space, to see whether the proposal can ultimately gain consent.

Koha Trust Holdings Limited v Marlborough District Council [2016] NZEnvC 152

Water as we all know is crucial for growers and water consents, particularly in over allocated areas, are highly sought after and often hotly contested.

This case was no exception. Here, the Council had granted water take and use consents to Mr Woolley in February 2010. The consents included a couple of "implementation" type conditions which required that certain steps be taken (in particular the installation and inspection of water meters and reporting) before water could be taken.

Further, as the catchment was over-allocated, the consents were made subject to a two-year lapse date. Mr Woolley took and used the water, but did not comply with the implementation conditions. After the two-year period had elapsed, Mr Woolley leased his land and transferred the water permits to a third party (Constellation Brands).

In the meantime, the Council had however received an application to take and use water from Koha Trust Holdings Limited (Koha) on the basis that the Woolley consents had lapsed. This was actively disputed by both Mr Woolley and Constellation Brands.

In an effort to gain clarity around the issue, Koha applied to the Environment Court for a declaration that the consents had lapsed and agreed to its consent application being placed on hold while the Environment Court proceedings were worked through.

The Environment Court found (in line with earlier High Court authority)[2] that whether a consent had been given effect to was an issue of degree and would vary from case to case depending on the facts of the case, the nature of the work authorised by the consent, what had been done and the reasons why it had not been completed.[3]

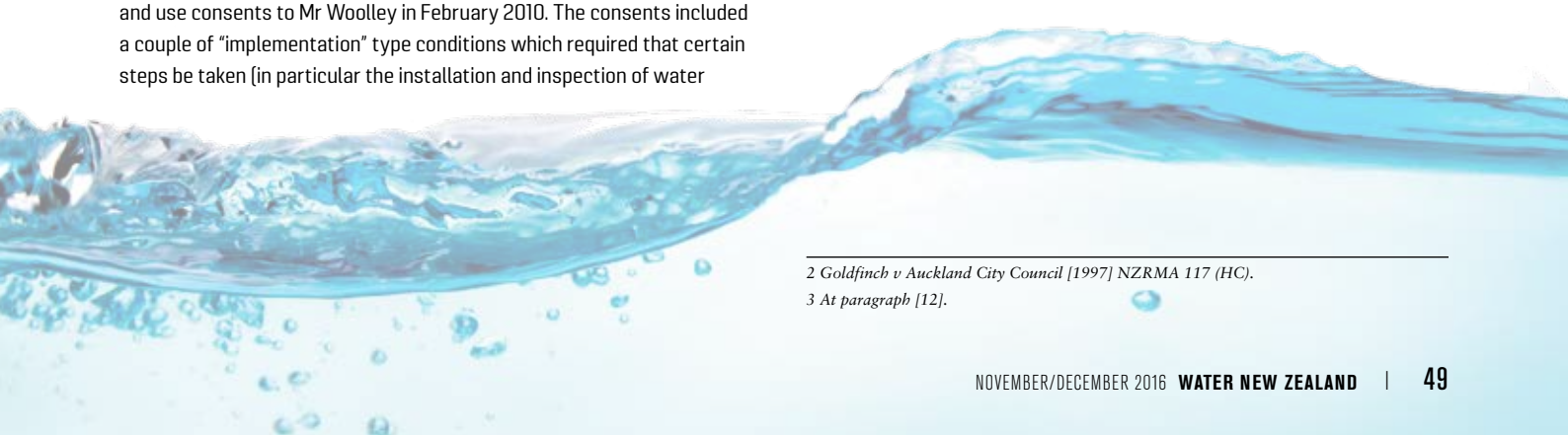
Here, the Court agreed that the condition requiring the installation and inspection of meters was an "implementation" or "establishment" condition that had to be complied with before water could be taken:

[62] Whether the factual matrix in any given case is straightforward such as in GUS and Goldfinch, or more complex such as in Biodiversity, the possibility may remain that some conditions can be identified as implementation or establishment conditions, and others as continuing conditions. It is possible that conditions of the latter type might generally be more amenable to enforcement than to operation of the lapse provisions in s 125. Conditions of the former type, particularly where they involve a prohibition against operation of the consent until the required steps are completed, are likely, if those steps are not carried out before the end of the lapse period, be amenable to testing against the standard in s 125(1A)(a) "the consent is given effect to". We find that this is one of those cases, and hold accordingly.

Interestingly though, while the Court made this finding, it then refused to issue the declaration sought, finding it would be unfair to the innocent third party, Constellation Brands. Quite where this leaves things for the Council is unclear. Probably not the outcome that Koha or indeed the Council expected!

New Health New Zealand Incorporated v South Taranaki District Council [2016] NZCA 462

The debate around fluoridation, and in particular whether a Council could and/or should fluoridate its water supplies has been raging for many years, with parties on either side of the debate investing significant time and effort into advocating their positions. The latest instalment in this debate is a decision from the Court of Appeal which considered appeals from three related proceedings brought by New Health New Zealand Inc (New Health) challenging the lawfulness of fluoridating water supplies.



2 Goldfinch v Auckland City Council [1997] NZRMA 117 (HC).

3 At paragraph [12].

The three proceedings were:

- An unsuccessful judicial review action challenging the decision of the South Taranaki District Council to fluoridate its water supplies (Council appeal);
- Another unsuccessful judicial review action challenging the validity of regulations which were introduced to clarify that the two fluoridation compounds were not medicines (Regulations appeal); and
- The refusal of an application for declaration that two fluoridation compounds added to water were medicines in terms of the Medicines Act 1981 (Medicines appeal).

Council appeal

In terms of the Council appeal, the Court noted at the outset that it was only concerned with the lawfulness of the process of fluoridation – the merits of the process were not relevant except at a broad level in relation to Bill of Rights grounds.[4]

The two key issues in the Council appeal were:

- whether it was lawful to fluoridate water supplies; and
- whether such fluoridation breached s 11 of the New Zealand Bill of Rights Act 1990 (NZBORA).

The Court found that the Local Government Act 2002 and the Health Act 1951 authorised the fluoridation of water supplies:

4 Refer paragraph [12].

[58] ...In summary, within the prescribed New Zealand Standards the Lower Hutt City case established the lawful authority to fluoridate water in 1965 under the Municipal Corporations Act 1954. That authority continued under similar legislation at least until the passage of LGA 2002. In providing under the LGA 2002 that local government organisations were, required to continue provide water services, Parliament must be taken to have been aware of the Lower Hutt City case and to have authorised the continuation of the practice of fluoridating water, which by that time had been established for almost 50 years.

[59] The matter was put beyond any doubt by the introduction in 2008 of pt 2A of the Health Act. During the Select Committee's consideration of this measure, the issue of fluoridation water was raised. Concerns that local authorities might construe pt 2A as requiring the fluoridation of water supplies led to introduction of s 690(3)(c) to clarify that point. The absence of any provision prohibiting the use of fluoride in drinking water is a powerful indicator that Parliament intended to authorise local authorities to fluoridate water supplies if they wished do so. It follows that by necessary implication Parliament clearly authorised but did not compel the fluoridation of drinking water...

In terms of the second issue, the Court found that the power to fluoridate did not infringe against the right under s 11 of the NZBORA to refuse to undergo medical treatment:

[87] ...the right guaranteed by s 11 to refuse to undergo medical treatment does not extend to public health measures such as the

Ruataniwha dam project hurdle

The Ruataniwha dam project is based on the Department of Conservation (DOC) and the council-owned Hawke's Bay Regional Investment Company exchanging 22 hectares of Ruahine Forest Park land for 170 hectares of nearby farmland known as the Smedley Block.

To create a reservoir behind the dam for irrigation some 22 hectares of DOC land needs to be flooded.

The scheme hit a serious hurdle when the Court of Appeal ruled the process of acquiring the protected conservation land for the $900 million irrigation scheme unlawful and ordered the Director-General of Conservation to reconsider his decision on the land swap.

That hearing took place after Forest & Bird appealed a High Court decision upholding the land swap deal.

Now the Hawke's Bay Regional Council has joined DOC in seeking an appeal to the Supreme Court over the decision.

Forest & Bird acting chief executive Mike Kotlyar says if the land swap goes ahead it will "set a precedent for up to one million hectares of specially protected conservation land, creating the possibility that these areas can be reclassified and destroyed".

Forest & Bird says the land that would be swapped would include mature forest that was home to threatened wildlife, including long-tailed bats and falcons.

The Court of Appeal made its decision in a 2:1 split, with Justices Rhys Harrison and Helen Winklemann in favour, while Justice Ellen France would have dismissed the Forest & Bird appeal.

The Court said the land was part of a conservation park held for recreational purposes under the Conservation Act and, under this Act, the Director-General would have had to be convinced in his assessment that the intrinsic values of the land in question were no longer worth permanent protection.

The Appeal Court ruled that the Director-General was not entitled, as the High Court had ruled, to base his decision on a broad assessment of the merits of the proposed land swap for the conservation estate as a whole.

Its decision overturned Justice Matthew Palmer's decision earlier this year to decline Forest & Bird's application for judicial review on the basis that the Director-General acted lawfully by reference to "broad conservation purposes".

The Court of Appeal said that central to the case was identifying the purpose or purposes for which the Act had conferred the powers to declare and revoke special protection.

"In the case of conservation parks, account must be taken of the purpose of special protection – to permanently maintain its intrinsic values, provide for its appreciation and recreational enjoyment by the public, and safeguard the options of future generations – as well as the emphasis on recreation which distinguishes conservation parks from other specially protected areas," says the Court.

While the Labour and Green parties rejoiced over the decision, those in favour of the scheme see it as just another hurdle.

Hawke's Bay's Federated Farmers president Will Foley says: "It's obviously a little bit disappointing to come up against another hurdle, but at this stage we've seen plenty of these hurdles. This is just another bit of a roadblock – but I don't see it stopping the overall project.

"It's just going to add delay which is what we've become used to." **WNZ**

fluoridation of drinking water intended to benefit the public at large. As the judge said, it would be a significant step to extend the s 11 right beyond its application to medical treatment in a therapeutic relationship. To take such a step is not justified for three reasons: the language of the provision itself; the common law as it stood at the time the NZBORA was enacted; and the human rights values underlying s 11.

The Court also noted that if it was wrong in its conclusion that the fluoridation of water was not a medical treatment, then it considered that fluoridation was a justifiable limitation prescribed by law and recognised under s 5 of the NZBORA.[5]

Regulations appeal

In terms of the Regulations appeal, two grounds were advanced: that the regulations were based on an error of law; and that the Regulations were made for an improper purpose.

In relation to the first ground, the Court found that it was unnecessary to determine whether the two compounds were medicines under the Medicines Act 1981 as the regulation making power expressly authorises the Governor General to specify that substances "are, or are not" medicines. If this occurs, then the substances are removed from the definition of medicines:

[190] ...The power to specify that substances are not medicines **exist** regardless of whether the substance would otherwise have been a medicine within the relevant definition. Whether the substance was, or was not, a medicine as defined in the Medicine Act prior to the making of the regulations is therefore immaterial.

In relation to the second ground the Court held that there was nothing improper in passing regulations to give certainty to those using the compounds for water fluoridation that such use was legal or to protect against collateral legal challenges.[6] The fact that this action impaired New Health's right of appeal was not unlawful.

Medicines appeal

As a result of the Court's findings on the other actions, the question of whether the two compounds were medicines under the Medicines Act was rendered moot. The Court held there was no need to make a ruling on the issue as the "Regulations has settled the controversy for the future and we see no utility in determining the issue for the period prior to 30 January 2015".

The appellant was ordered to pay costs to the respondent for all three proceedings.

This may however, not be the end of the story, as New Health can apply for leave to appeal to the Supreme Court. Only time will tell if that is all she wrote. **WNZ**

5 Refer paragraphs [108], [152] and [158], [161] and [165].
6 Refer paragraph [195].