Water Inquiry
– legal personhood & urban development authorities

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There has been a flurry of activities these past few months spanning both formal inquiries to legislation developments and proposals.

In this article we summarise the key findings of the Havelock North Water Inquiry Stage 1 Report and outline the issues to be considered in Stage 2.

We provide a brief overview of new Whanganui River Claims Settlement Act 2017, as well as summarise the recent urban development authorities' proposal which we noted (but did not discuss) in our earlier article. We hope you enjoy the read!

HAVELOCK NORTH WATER INQUIRY

The outbreak of gastroenteritis in Havelock North in August 2016 resulted in approximately 5500 of the town's 14,000 residents becoming ill with campylobacteriosis. Forty-five people were hospitalised and the outbreak contributed to three deaths.

The campylobacter outbreak was traced to the Brookvale 1 and 2 bores on the outskirts of Havelock North. A similar incident occurred in the same area in 1998, suggesting that appropriate lessons had not been learned.

The Stage 1 Inquiry Report into the outbreak found that several of the organisations responsible for the drinking water supply of Havelock North, (in particular the Hastings District Council [District Council], Drinking Water Assessors [DWAs] and Hawke's Bay Regional Council [Regional Council]) failed to meet the standard of care and diligence necessary to protect public health. These failings have raised serious questions about the state of New Zealand's multidisciplinary system for the provision of safe and secure drinking water.

Key findings of Stage 1 Report

The Inquiry made a number of key findings in the Stage 1 Report in relation to both the cause of the outbreak and the failures of the organisations involved.

In general terms the Inquiry found that:

- It is highly likely that heavy rain on neighbouring paddocks caused water contaminated with sheep faeces to flow into a pond about 90 metres from Brookvale Road bore 1.
- Water in the pond entered the aquifer and flowed across to Brookvale Road bore 1 where the bore pump drew contaminated water through the bore and into the reticulation system.
- Another possible source of contamination (but much less likely) was water from paddocks entering roadside drains adjacent to the Brookvale Road bores and then entering the bore chambers. If enough water entered the chambers, it would overtop the bore head cable holes and, because the cable seals were loose, travel down the cables into the water supply.
- Protection of the water source, in this case the aquifer, was the first and a critical step in the multi-barrier approach to ensuring safe drinking water.

In terms of the three organisations responsible for the drinking water supply, the Inquiry held that:

- There was a critical lack of collaboration and liaison between the Regional Council and the District Council which resulted in a number of missed opportunities that may have prevented the outbreak.
- The Regional Council failed to meet its responsibilities under the Resource Management Act 1991, to act as guardian of the aquifers under the Heretaunga Plains. In particular, the Regional Council:
  - Lacked necessary knowledge and awareness of aquifer and catchment contamination risks near Brookvale Road.
  - Failed to take specific and effective steps to assess the risks of contamination to the Te Mata aquifer near Brookvale Road and the attendant risks to drinking water safety.
  - Imposed a generic condition on the water take permits it granted to the District Council and failed adequately to monitor compliance with the conditions of the permits.
- The District Council:
  - Did not apply the high standard of care required of a drinking-water supplier – particularly in light of the similar outbreak in 1998, and a significant history of positive E.coli test results in the District.
  - Made key omissions in its assessment of risks to the drinking water supply, and breached the Drinking-water Standards.
  - Mid-level managers delegated tasks but did not adequately supervise or ensure their implementation – causing unacceptable delays to the preparation of a Water Safety Plan.
  - Did not properly manage the maintenance of plant equipment or keep records of that work.
  - Had no Contingency Plan/Emergency Response Plan, and no draft boil water notices, or communications plans at the ready.

Although the failings of the District Council and Regional Council did not directly cause the outbreak, a different outcome may have occurred in their absence.

- The DWAs:
  - Were too hands-off in applying the Drinking-water Standards. They should have been stricter in ensuring the District Council complied with its responsibilities, such as having an Emergency Response Plan and meeting the responsibilities of its Water Safety Plans.
  - Failed to press the District Council sufficiently about the lack of risk assessment, analysis of key aquifer catchment risks, and a meaningful working relationship between it and the Regional Council. They also failed to require a deeper and more holistic investigation into the unusually high rate of transgressions in the Havelock North and Hastings reticulation systems.

Matters for consideration in Stage 2

The focus on the Inquiry now turns to the future of New Zealand's drinking water system. In this regard, the Inquiry's terms of reference require recommendations on the following matters:

- Any legal or regulatory changes or additions necessary and desirable to prevent or minimise similar incidents;
- Any changes or additions to operational practices for:
  - monitoring, testing, reporting on and management of drinking water supplies;
  - implementation of drinking water standards;
  - contingency planning;
  - responses by local and central government, to address the lessons from this incident; and
  - Any other matter which the Inquiry believes may promote the safety of drinking-water and/or prevent the recurrence of similar incidents.

The Inquiry has produced a detailed list of issues for consideration in relation to these matters. It is likely that the outcome of Stage 2 of the Inquiry will significantly influence the shape of New Zealand's drinking water system going forward.

WHANGANUI RIVER

The Government recently passed the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 (the Act)[1], which declares the Whanganui River to be a legal person with all the rights, powers, duties and liabilities that attach to such status.[2] This is not the first time legal status has been granted to a natural resource – in 2014 Te Urewera Mountain Range was also granted legal personhood.[3] However, it is the first time such status has been applied to a river.

Purpose and scope

The purpose of the Te Awa Tupua status is to recognise the mana of the Whanganui River in a manner consistent with Whanganui iwi's view of the river as a single indivisible and living entity.[4] Accordingly, the river is holistically defined as:

"Te Awa Tupua is an indivisible and living whole, comprising the Whanganui River from the mountains to the sea, incorporating all its physical and metaphysical elements."

The Act endows the river with the ability to take legal action on its own behalf. This could include both positive initiatives designed to remediate or enhance the river – eg, fencing the river off from stock – as well as enforcement actions against those who pollute or degrade the river without authorisation.

The Act does not however affect existing rights. Existing public access is maintained as are all private and public property rights, resource consents, and the statutory functions, powers and duties of the relevant local authorities.[5]

Potential liabilities

One matter which the Act presently does not expressly address is the issue of potential liabilities. For example:

- Is Te Awa Tupua likely to be liable for damages arising from flooding?
- Could criminal charges be brought against Te Awa Tupua if its actions – such as flooding – resulted in loss of life or damage to property?

Precedent for other natural resources?

The Act is a positive step forward in recognising the importance of natural features and the relationship that iwi, the crown and the wider community have with these features. However, there are still some uncertainties to be worked through before the full impact of the Act can be determined. With claims over other natural features currently being considered in a number of legislative contexts (including the recent Maori Council claim for customary marine title under the Marine and Coastal Area [Takutai Moana] Act 2011), assigning legal personhood to nature, is a mechanism we may see used more widely.

URBAN DEVELOPMENT AUTHORITIES PROPOSAL

Earlier this year the Government released a Discussion Document which proposed the creation of Urban Development Authorities (UDAs). UDAs are ad hoc bodies that would be established to support and fast-track urban development projects. The proposal would allow UDAs to be endowed with a variety of planning, compulsory acquisition and funding powers. The UDAs proposal has the potential to significantly alter the legal landscape for landowners, developers, territorial authorities, infrastructure providers and planners.

1. The Act gained royal assent on 20 March 2017.
2. Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 Subpart 2 – Te Awa Tupua s12 Te Awa Tupua recognition.
3. Te Urewera Act 2014 s11 states "Te Urewera is a legal entity, and has all the rights, powers, duties, and liabilities of a legal person."
4. Record of Understanding in relation to Whanganui River Settlement dated 13 October 2011.
5. Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 s46 Certain Matters not affected by vesting.

Why UDAs?

UDAs are part of the Government's response to Auckland's growth pressures over housing and infrastructure. However, UDAs are also proposed to be an enduring part of the regulatory landscape and to apply to New Zealand generally. UDAs were first suggested by the Productivity Commission in its 2015 "Using land for Housing" report as institutions that can:

- amalgamate land parcels to make large-scale development economic;
- coordinate the provision of infrastructure; and
- remove or ease planning barriers to the provision of innovative and lower-cost housing.

Building and Construction Minister the Hon Dr Nick Smith has said UDAs would enable major redevelopment projects like those proposed or under way in areas such as Hobsonville, Tamaki, Three Kings and Northcote to occur three to five years faster.

"The international experience in cities like London, Melbourne, Sydney, Toronto and Singapore is that UDAs can create vibrant, new suburbs, with greater gains for housing, jobs and amenities than through usual incremental, piecemeal redevelopment."

The legislation is intended to cover complex and strategically important developments including residential, commercial and associated infrastructure projects. Dr Smith considers the key to the success of UDAs is in how they interact with councils and businesses.

It is proposed that Central Government and territorial authorities work together to identify and assess opportunities for the establishment of UDAs. Areas may be viable for UDAs due to a proportion of the land being in public ownership, land being underdeveloped, or a lack of adequate modern infrastructure in an area. Both Central Government and territorial authorities must agree to proceed before the proposal is subject to public consultation. The UDA is then established by Order in Council specifying:

1. the development project;
2. the development area;
3. the strategic objectives;
4. any conditions;
5. the development powers available to the UDA; and
6. the organisational structure of the UDA – publicly controlled with certain allocated development powers.

Development plans

UDAs will have responsibility for producing a development plan that accords with the UDA's strategic objectives. Development plans would address:

1. how each of the development powers are proposed to be exercised (eg, the nature of any new land use rules, the location of infrastructure);
2. how the development powers will contribute to delivering the strategic objectives;
3. an assessment of effects on the environment;
4. any infrastructure levies of development contributions anticipated; and
5. any further development powers that the UDA intends to seek.

Development plans will be subject to a process of public consultation, objections from affected persons, and a hearing before independent commissioners in relation to objections. The Minister will make the final decision as to the form of the development plan, taking into account any recommendations from commissioners.

Stage of process

The UDAs proposal was released in February 2017 and submissions closed on 19 May 2017. The Ministry for Business, Innovation and Employment is currently considering the submissions with a response likely later this year. **WNZ**