CURRENT LEGAL ISSUES FACING NETWORKED SUPPLIERS OF WATER

P M S McNamara and W M Bangma – Simpson Grierson

ABSTRACT

This presentation will examine two current and controversial legal issues facing networked suppliers of water:

Fluoridation: Less than half of New Zealand's population currently live in communities with water fluoridation programmes, and its use has remained controversial. The High Court recently rejected a challenge to South Taranaki District Council's water fluoridation programme, confirming that councils do have a statutory power to add fluoride to water, and that fluoridation is not a breach of the right to refuse medical treatment under the New Zealand Bill of Rights Act. This presentation will consider the High Court's decision and its wider implications.

Ability to restrict supply: Disconnecting consumers from essential utilities is very much on the Government's radar in 2014. In the case of water supply, suppliers are prohibited by law from completely disconnecting domestic consumers for non-payment of charges or a failure to fix water leaks. However, suppliers may restrict the supply of water, provided an adequate supply is maintained. This presentation will consider the constraints on restricting supply under the Health Act 1956 and Local Government Act 2002.

KEYWORDS

Water supply, Fluoridation, Lawfulness, Bill of Rights, right to refuse medical treatment

Restricting Water Supply, non payment of charges for water, Health Act 1956, Local Government Act 2002, Watercare Restrictions Policy

FLUORIDATION OF WATER: UNLAWFUL AND A BREACH OF THE BILL OF RIGHTS?

1 INTRODUCTION

Calcium fluoride occurs naturally as a trace element in water throughout the world, but at widely varying levels. In New Zealand, natural levels of calcium found in water are low (typically below 0.3 ppm). Fluoridation is the process of increasing the level of fluoride in the water supply to between 0.7 ppm and 1.0 ppm, by the addition of a fluoride-releasing compound.

Fluoride was first added to public drinking water supplies in this way in Grand Rapids Michigan in 1945. It was first added to public water supply in New Zealand in Hastings in 1954. The purpose of fluoridation of water is to promote dental health by reducing the incidence of tooth decay. Fluoridation of water in New Zealand is supported by the New Zealand Dental Association. However, nearly 70 years on, the fluoridation of water supplies remains a controversial issue. Currently only 48% of New Zealand's population live in communities with water fluoridation programmes. Fluoridation of water remains opposed by a number of community groups.

When the South Taranaki District Council (**Council**) voted in December 2012 to add fluoride to the water supplies of Patea and Waverley a community group called New Health (an organisation with the stated aim of

"advancing and protecting the best interests and health freedom of consumers") challenged this decision in the High Court. The proceedings alleged that the Council did not have the power to add fluoride to water, that fluoridation of water was a breach of the right to refuse medical treatment under the New Zealand Bill of rights, and that the Council had failed to take into account relevant information regarding fluoridation when it made its decision. The proceedings sought that the decision be quashed (or set aside) by the High Court. In his decision in CIV-2013-443-107 [2014] NZHC 395: *New Health New Zealand Inc v South Taranaki District Council* Justice Hansen dismissed New Health's proceedings, and upheld the Council's ability to fluoridate water. This presentation considers the reasoning behind the High Court's decision, and its wider implications for Councils and CCOs involved in water supply, as well as consumers.

2 THE GROUNDS OF CHALLENGE

New Health argued that the Council's decision to fluoridate the water supply should be quashed (set aside) on the grounds that:

- The Council did not have the legal power to add fluoride to water supply;
- Adding fluoride to water supply for therapeutic purposes (to prevent dental decay) was a breach of the right to refuse to undergo medical treatment under section 11 of the New Zealand Bill of Rights Act 1990 (**NZBORA**); and
- In deciding to add fluoride to the water supplies, the Council had failed to take into account a number of mandatory relevant considerations (that adding fluoride to water was potentially harmful, and there was no evidence that it reduced tooth decay).[1]

The High Court's findings on each of these arguments are discussed under the headings below.

3 THE LEGAL POWER TO FLUORIDATE

The High Court noted that the power of Councils in New Zealand to fluoridate water was considered by New Zealand's then highest court (the Privy Council) in *Attorney-General v Lower Hutt City* [1965] NZLR 116 (PC) in 1965. At that time section 240 of the Health Act 1954 empowered local authorities to supply "pure water". The Privy Council found that "pure water" should be given a "fair large and liberal" construction and could be equated with "wholesome" water. Accordingly, although fluoridation involved adding something (an impurity) to water that had already been "purified", the Privy Council found that it could: "…*see no reason why fluoride should not be added to the water so purified in order to improve the dental health of the inhabitants*".[2] The Privy Council found that fluoridation of water was lawful.

New Health argued that there had been changes to the relevant legislation since the Privy Council's decision, which meant that the decision was no longer applicable.[3]

The High Court noted the following legislative changes:

- The Local Government Act 2002 now refers to "drinking water" (rather than "pure water).
- Drinking water is defined under section 69G of the Health Act as "water that is potable".
- "Potable" is defined as water that does not exceed maximum acceptable values specified in drinking water standards.
- In terms of fluoride, the Drinking Water Standard specifies a maximum acceptable level of fluoride as 1.5ppm (a higher level than the Council was proposing).

1 Paragraph 2-3 of the Decision.
2 Paragraph 15 of the Decision.
3 Paragraph 16 of the Decision.

The level of fluoridation proposed by the Council was less than the maximum under the Drinking Water Standards. So, the Court found that it came within the definition of "drinking water", and complied with the Drinking Water Standards.[4]

In terms of the effect of the legislative changes made since the Privy Council's decision, the High Court found:

"There is no obvious reason why the implied power to fluoridate found to exist in the 1956 and 1974 Acts should not also be implied in the 2002 Act. On the contrary, by requiring local bodies who had been supplying (in some cases) fluoridated water to maintain water services, Parliament must be taken to have intended to empower them accordingly."[5]

The High Court went on to find that :

"*The Health Act does not expressly authorise the addition of fluoride to drinking water but it plainly contemplates that it maybe*."[6]

The Council argued that its power to fluoridate water did not need to be expressly authorised. It was something that the Council could do under the Local Government Act 2002 as part of its "general power of competence" (the ability to do what any other legal person can do) under section 12 of the Act and was consistent with its obligation to promote public health under section 23 of the Health Act.[7]

The High Court agreed, rejecting an argument by New Health that the Council adding fluoride to water was "ultra vires" (or outside the Council's powers) because it was in fact a regulatory decision (rather than something that could be done under its power of general competence). It found that:

"*The fluoridation of water is a physical act that takes place in the course of a local authority exercising one of its core services. It does not involve the exercise of a regulatory power. To the extent that a regulatory power exists in relation to the fluoridation of water, it is conferred on the Ministry of Health under the Health Act to set drinking water standards.*"[8]

Overall, the High Court found that the Council did have a legal power to fluoridate water (and its decision to do so was not ultra vires).

4 WHETHER FLUORIDATION OF WATER IS A BREACH OF THE NEW ZEALAND BILL OF RIGHTS ACT 1990

The High Court then considered New Health's next argument that fluoridation of drinking water was a breach of the right, under the Bill of Rights Act, to refuse medical treatment.

The High Court rejected this argument and found:

- Medical treatment requires a "therapeutic purpose". The addition of fluoride to water has a therapeutic objective (reducing the incidence of tooth decay). However, the Court found that, in the context of section 11 of the Bill of Rights Act, "undergoing" medical treatment requires something more than simply drinking fluoridated water (which could not really be regarded as receiving medical treatment).

4 Paragraph 35 of the Decision.
5 Paragraph 25 of the Decision.
6 Paragraph 36 of the Decision.
7 Paragraph 9 of the Decision.
8 Paragraph 43 of the Decision.

The right to refuse to medical treatment was only engaged where the treatment takes place in the context of a therapeutic relationship in which medical services are provided to an individual.[9]

- The process of adding fluoride to water could not be distinguished from other public health initiatives such as adding chlorine to water, iodine to salt, and folic acid to bread, and the pasteurisation of milk. These were valid public health initiatives. The Court found that if the definition of "medical treatment" was extended too broadly (and applied to these initiatives – simply on the basis that they had a therapeutic purpose), it would cut across the ability of the state to provide such initiatives.[10]

5 FAILING TO TAKE INTO ACCOUNT RELEVANT CONSIDERATIONS

Finally, New Health argued that in making its decision to add fluoride to drinking water, the Council failed to take into account various "relevant considerations". By the time of the hearing, these relevant considerations had been refined to three matters, as follows:

> "*(a) that the fluoride added to water supplies is sourced from industrial by-products and contains contaminants that are potentially harmful to health.*
>
> *(b) that there is a body of credible scientific evidence that shows that adding fluoride to water supplies to achieve the level of 0.721 ppm fluoride is potentially harmful to health; and*
>
> *(c) that there is no credible scientific research to show how drinking fluoridated water at between 0.7 and 1 ppm fluoride can reduce tooth decay.*"

The High Court rejected this argument. It found that the Council's power to add fluoride to water was based on provisions in the LGA 2002 and in the Health Act. The High Court found that nothing in those acts required the Council to consider the above matters (and accordingly they were not relevant considerations that had to be taken into account before a decision could be made).

Nonetheless, the Court found that the prior to the Council's decision to fluoridate water being made, there was a lengthy public submission process. The Court found that, on the facts, there was nothing to suggest that the Council was not aware of these issues, and had not taken them into account.[11]

The Court's decision should not be seen as a decision on the merits of fluoridation (one way or the other). The decision expressly states:

"...this judgement is not required to pronounce on the merits of fluoridation. The issues I am required to address concern the power of a local body to fluoridate drinking water supply. That is a legal question which does not require me to canvass or express a view on the arguments for and against fluoridation."[12]

6 IMPLICATIONS

Councils and CCOs having the freedom to add fluoride to water have at least two implications:

First and foremost at least half of the population of New Zealand is currently deprived of the benefits of fluoridated water supply. This would not be the case if fluoridation of water supply was mandatory due to an Act of Parliament.

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9 Paragraph 84 of the Decision.

10 Paragraphs 80 and 81 of the Decision.

11 Paragraph 113 of the Decision.

12 Paragraph 5 of the Decision.

Second, when councils or CCOs around the country decide to either confirm or change their policy relating to the fluoridation of water, this is a contentious process. Strongly held and deeply divisive views are often expressed by members of the community on this issue, and there is a real risk of a council or CCO decision relating to fluoridation of water supply being the subject of a legal challenge. In order to minimise this risk, councils and CCOs need to ensure that they undertake thorough public consultation, and have a robust decision making process.

Given these two factors, there is a strong case for central government to make it mandatory for local authorities to fluoridate water. However, to date, the government has shown no interest in making fluoridation mandatory. However, given that fluoridation of water is essentially a public health issue (based on scientific evidence) there is no particular reason why this decision should be left to local communities around the country. The case for fluoridating water will be the same across New Zealand, meaning there is no particular need for decisions on this to be made at a local level.

ABILITY TO RESTRICT SUPPLY

1 INTRODUCTION

Disconnecting consumers from essential utilities such as electricity and water due to non-payment of charges has always been a controversial issue, and is very much on the Government's radar in 2014. In the case of water supply, suppliers are prohibited by law from completely disconnecting domestic consumers for non-payment of charges or a failure to fix water leaks. However, suppliers may restrict the supply of water, provided an adequate supply is maintained. This presentation will consider the constraints on restricting supply under the Health Act 1956 and Local Government Act 2002, and discuss how suppliers can meet their legal obligations.

2 LEGISLATIVE REQUIREMENTS AROUND RESTRICTING SUPPLY

The supply of water is an essential service. The supply of potable water is essential for life. Networked suppliers of water inevitably on occasion will need to restrict supply to undertake works. They may also wish to cease or at least restrict supply where water charges have not been paid. However, given the potentially serious public health consequences of ceasing or restricting supply, powers to do so are limited under the Local Government Act 2002 and Health Act 1956 as follows:

"Local Government Act 2002

193 Power to restrict water supply

(1) The water supply to a person's land or building may be restricted by a local government organisation in any manner it thinks fit if the person—

(a) commits an offence against this subpart; or

(b) fails or refuses to do anything required by this Part in respect of water, water pipes, waterworks, or water races; or

(ba) fails to comply with any bylaw of a local authority that relates-

(i) to water, water pipes, waterworks, water races, or water supply; and
(ii) to the person's land or building; or

(c) fails or refuses to do anything that he or she has undertaken or agreed to do in respect of the water supply to his or her land or building; or

(d) refuses entry to, or obstructs, an enforcement officer under section 182.

(2) Restriction of the water supply under subsection (1) must not create unsanitary conditions in, or associated with, the land or building.

(3) Restriction of the water supply under subsection (1) is subject to. Section 69S of the Health Act 1956."

"Health Act 1956

69S Duty of suppliers in relation to provision of drinking water

(1) Every networked supplier, bulk supplier, and water carrier must take all practicable steps to ensure that an adequate supply of drinking water is provided to each point of supply to which that supplier supplies drinking water.

(2) Subsection (1) does not—

(a) require a networked supplier or a bulk supplier to ensure the uninterrupted provision of drinking water to all points of supply at all times; or
(b) prevent a networked supplier or a bulk supplier restricting or interrupting the provision of drinking water to any point of supply, if, in the opinion of the supplier, such action is necessary for the purposes-
(i) of planned maintenance or improvement; or
(ii) of emergency repairs.

(3) Any restriction or interruption of the provision of drinking water by a networked supplier or a bulk supplier in reliance on subsection (2)(a) must not exceed 8 hours on any one occasion unless,—

(a) in the event of planned works,—

(i) approval has been given by the medical officer of health; and
(ii) the supplier has taken all practicable steps to warn the affected persons before the restriction or interruption of the provision of water occurs; or
(b) in the event of an emergency,

(i) the supplier notifies the medical officer of health of the reasons for the interruption or as soon as practicable and, in any event, not later than 24 hours after the commencement of the interruption or restriction; and
(ii) the supplier has taken all practicable steps to advise the affected persons of the restriction to or interruption of the provision of water.

(4) A networked supplier or bulk supplier

(a) may restrict supply to a point of supply if the relevant customer has unpaid accounts for any previous supply of drinking water or has failed to remedy water leaks that the customer is obliged to remedy; but
(b) must, despite any non-payment or failure referred to in paragraph (a), continue to provide an adequate supply of drinking water.

(5) This section is subject to section 69T and to any contrary provisions in the Civil Defence Emergency Management Act 2002."

The ability to restrict water under section 193 of the Local Government Act 2002 (**LGA**) is limited to where a person has:

- Committed an offence;
- Failed to comply with a bylaw;
- Refuses to allow entry of an enforcement officer;
- Failed to do something they have agreed to do (this includes payment for use of water).

The networked water supplier can only "restrict" supply (it cannot cut it off entirely). It is obliged under section 193(2) of the LGA to continue to provide sufficient water so as to avoid "unsanitary conditions".

In addition, restrictions under section 193 of the LGA must comply with section 69S of the Health Act 1956.

Section 69S(4) of the Health Act provides that where a networked supplier of water supplies drinking water, it must continue to provide an "adequate supply".

Section 69G of the Health Act defines adequate supply as being "*the minimum quantity of drinking water that is required by occupants of a property, on an ongoing basis, for their ordinary domestic and food preparation use and sanitary needs*".

Under section 69S of the Health Act supply of drinking water may be restricted for:

- Planned maintenance or improvement works; or
- Emergency repairs.

For planned works, the restriction must not exceed 8 hours in any one occasion, unless it has been approved by a medical health officer, and the supplier has taken all practicable steps to notify affected persons.

In emergency works, the restriction must also not exceed 8 hours, unless the supplier notifies the medical health officer as soon as practicable, and no later than within 24 hours of the restriction.

3 WATERCARE'S RESTRICTIONS POLICY

Restriction of supply of utility services such as water or electricity, particularly over unpaid debts, has been a controversial issue over recent years, and has received considerable media attention.

In order to carefully manage the risks associated with restricting supply and ensure that a consistent approach is applied in all cases, some networked suppliers of water have developed detailed policies regarding how the ability to restrict supply will be applied and enforced.

One such example is by Watercare, Auckland's integrated water and wastewater services provider.

Its restrictions policy:

- Records that a restriction (over non-payment of debt) can only be imposed 61 days after the invoice date (at the earliest);
- A Restriction will not be imposed where a property has children under the age of five, residents over the age of 65, residents (of any age) with serious health concerns, a shared meter, or the household is registered with the Water Utility Consumer Assistance Trust (a Trust set up by Watercare in October 2011 to provide support to domestic customers who could not afford to pay their bills).
- Verbal communications must be made with a customer before a restriction is imposed;

- All restrictions must be approved by the Chief Financial Officer, Chief Services Officer, and the Chief Executive;
- No restrictions will be imposed in the 10 days leading up to Christmas (this also allows Watercare time to remove any existing restrictions by Christmas Day); and
- Watercare operates an "if in doubt, do not restrict policy".
- Watecare sends all customers a reminder letter 24 days after payment is due. Where the amount due is more than $150 this notice includes a statement "Restriction Notice – your water supply may be restricted if your account remains unpaid".
- For a restriction to be authorised, there must be confirmation that:
    - The customer has received a first reminder notice and Restriction reminder notice;
    - Confirmation that the customer has been called or emailed;
    - Confirmation that Watercare has issued a final 48 hour warning card (the warning card warns that water supply may be restricted in 48 hours' time due to an unpaid bill, and urges the customer to contact Watercare immediately);
    - Confirmation that the property to be restricted does not qualify for any exemptions from restriction;
    - Confirmation of the number of people residing at the property to ensure "adequate water" will be supplied to each person at the address after the restriction is actioned ("Adequate" water supply is defined by the World Health Organisation as between 50 to 100 litres per day per person).
    - The restriction will comply with the relevant sections of the Local Government Act and Health Act (this part of the Policy was added in response to the review by the Office of the Auditor-General – discussed below).

- Watercare then decides what action will be taken. Possible steps include:
    - Further communication with the customer to obtain further information or negotiate a payment plan. This may include a site visit by 2 members of the Watercare credit staff to discuss the account in person (with direct communication required with the customer);
    - Referring the customer to a hardship advisor;
    - Referring the customer to a collection agency or legal action;
    - Proceeding with a water restriction.
- Where a restriction is imposed, Watercare will still provide a customer with a daily flow of 1440 litres (noting that World Health Guidelines provide that a supply of between 50 and 100 litres per person is an adequate one day supply, so Watercare's daily supply is usually considerably above these minimum requirements – depending on the number of occupants at a property). However, Watercare staff always enquire as to the number of people residing at a property (before a restriction is imposed) to ensure that World Health Guidelines are met.

o Since 1 November 2010, under this policy, Watercare has only applied 54 restrictions (24 domestic, and 30 non domestic);

4 REVIEW OF WATERCARE'S RESTRICTIONS POLICY BY THE AUDITOR-GENERAL

Watercare, and the services it provides, were recently reviewed by the office of the Auditor-General. The review was undertaken pursuant to section 104 of the Local Government (Auckland Council) Act 2009 which provides that the Auditor-General must "from time to time review the service performance of the Council and each of its council controlled organisations."

For other networked suppliers of water who are also subject to the requirements in the Local Government Act 2002, and Health Act, but who do not yet have a restrictions policy, Watercare's policy and the findings of the Auditor General (following a recent review of the policy) will be of assistance.

Watercare's Policy Restrictions Policy scores fairly well overall, with the Auditor-General's review finding that:

- Watercare's operational staff (as a result of the policy) get an "excellent understanding of a customer's situation before recommending a water restriction"; and
- Few water restrictions are applied.

In terms of some room for improvement the report notes that:

- Watercare's restrictions approval form, signed by managers, should be amended to record that the requirements of the Local Government and Health Acts have been met; and

- Watecare's practice of sending a warning letter to all customers with more than $150 unpaid after 24 days, means that reminder letters are also sent to customers where supply would not be restricted, as they come within an exemption under Watercare's policy (e.g. elderly customers and customers with children under 5).

Overall, this lack of adverse comment may be taken as an indication that Watercare's policy is an appropriate means of complying with the statutory requirements in the Local Government and Health Acts.

Watercare has responded to the two comments in the review by:

- Amending the restrictions approval form that is signed by its managers to now record that the requirements of the Local Government and Health Acts have been met.

- Indicating that it is not practical for it to respond to the second recommendation in the report. This recommendation was that Watercare amend its processes so that letters sent to customers owing more than $150 for 24 days, which include a note that water supply may be restricted due to non-payment, not be sent to customers who came within the exemptions under Watercare's restrictions policy. Watercare has indicated that although few restrictions are ultimately imposed, thousands of letters regarding non-payment are sent. Vetting all of those letters to see which customers would come within the exemptions would require systems and resources to be put in place that Watercare currently does not have.

Overall, this lack of adverse comment may be taken as an indication that Watercare's policy is an appropriate means of complying with the statutory requirements in the Local Government and Health Acts.