



Government Inquiry into Havelock North Drinking Water

UNDER

THE INQUIRIES ACT 2013

IN THE MATTER OF

**GOVERNMENT INQUIRY INTO HAVELOCK NORTH
DRINKING WATER**

**DECISION OF THE INQUIRY PANEL ON APPLICATION FOR POSTPONEMENT
22 NOVEMBER 2016**

Plaza Level, AIG Building, 41 Shortland Street, Auckland

PO Box 796, Shortland Street, Auckland 1140

Email: HavelockNorth.Water@dia.govt.nz

Phone: 09 363 9537

Decision of the Inquiry on application for postponement

Introduction

- [1] On 21 November 2016 one of the core participants in the Inquiry, the Hastings District Council, made an application for postponement of the Inquiry until after the conclusion of prosecution action commenced by the Hawke's Bay Regional Council against it. The Inquiry Panel has convened urgently to consider the application. Its decision is set out below.

Background

- [2] The Inquiry was formally established by Gazette Notice dated 15 September 2016. Throughout September and October 2016 the Inquiry carried out extensive preliminary work and an initial hearing was held in Hastings on 27 October 2016. After hearing from all parties attending on 27 October 2016, the Inquiry resolved (without demur from any of the parties, including the core participants) to commence hearing evidence at public hearings on 28 November 2016. Further details of the course of the Inquiry to date and the procedural directions which have been given may be found in Minutes Nos. 1 to 3.¹
- [3] From the outset, we identified that an obvious level of urgency was required to address the Terms of Reference and to meet the reporting date. One of the bases upon which we determined to proceed in two stages was the need for an early report on the stage one issues. Our preliminary investigations, based on evidence received to date and documents reviewed to date, confirm that urgency is required.

Context of application for postponement

- [4] The Inquiry set out directions for the conduct of public hearings in its Minute No.2 issued on 28 October 2016. That Minute recorded the designation of nine persons as core participants. These included the Hastings District Council and the Hawke's Bay Regional Council. The Minute directed that all statements of evidence be filed with the Inquiry and served on the parties by 5pm

¹ These Minutes and other Inquiry documents may be found on the website: <https://www.dla.govt.nz/Government-Inquiry-Into-Havelock-North-Drinking-Water>.

18 November 2016. Parties and their advisors were asked to observe the timing strictly. The Minute confirmed that public hearings would commence on Monday 28 November 2016. After hearings in that week, the Inquiry was to reconvene on Monday 12 December 2016, with this further hearing period to conclude on or about 20 December 2016. The possibility of further hearing time in January 2017 was also signalled.

- [5] The above timetable was self-evidently very tight, with only one working week between the date for evidence (18 November 2016) and the commencement of the public hearings (28 November 2016). As explained by the Chair at the public hearing on 27 October 2016, such timing was unavoidable in view of the reporting date in the Terms of Reference, namely 31 March 2017. In addition, it was clearly of great public importance to determine the cause of the August 2016 contamination of the Havelock North drinking water supply as quickly as possible. On this basis all parties were requested, and urged, to apply all necessary resources and to prepare their evidence within a short timeframe.
- [6] As at the date of the present application for postponement, only four working days remained before the scheduled commencement of the public hearings. Substantial volumes of evidence were filed and served by 18 November 2016 and the Inquiry acknowledges and appreciates the extraordinary level of work and diligence which went into the production of that evidence and the exhibits. Some 15 briefs and expert reports have been filed. Exhibits and core bundle documents amounting to several thousand pages have also been indexed, served and in the case of the core documents, posted on the Inquiry website.
- [7] There have been some exceptions to the timely filing of the evidence. The earthquake event which struck on Monday 14 November 2016 has severely disrupted those parties based in Wellington, or with advisors in Wellington. In some cases, in the days before the evidence was due, parties or their advisors were unable to enter their workplaces. In the case of the Ministry of Health, staff who would otherwise have been working on evidence have been urgently deployed to the Kaikoura Region. The staff from the Ministry for the Environment have also been disrupted by the earthquake as have their legal representatives from the Crown Law office. The solicitors for the District Health Board are also based in Wellington. The Inquiry had indicated to those persons disrupted by the earthquake that their evidence could be filed later

than 18 November 2016 on the basis that the relevant witnesses would not be called before the week commencing 12 December 2016.

- [8] Notwithstanding the earthquake disruption, the Inquiry is ready and able to commence evidence hearings on 28 November 2016. As at 18 November 2016, all concerned were operating on the expectation that the hearings would commence, as scheduled, on 28 November 2016.

Prosecution by Hawke's Bay Regional Council

- [9] On the morning of 18 November 2016 the Hawke's Bay Regional Council served the Hastings District Council with two charges under the Resource Management Act 1991. The charging documents require the Hastings District Council to appear before the Hastings District Court on 28 November 2016, the same date scheduled for commencement of the Inquiry hearings.
- [10] The prosecution charges allege that the Hastings District Council took water from bores 1 and 2 in Brookvale Road in breach of a condition in the resource consent granted for the taking of the water. In essence, the summary of facts accompanying the charging documents alleges that the bore equipment was not maintained in a safe and serviceable standard, as required by condition 21 in the resource consent. The summary of alleged facts traverses a chain of events which the Hawke's Bay Regional Council alleges led to the entry of contaminated water into the aquifer below bores 1 and 2. We understand the Hastings District Council disputes the facts alleged and wishes to defend the charges.
- [11] Hastings District Council advised Counsel assisting the Inquiry on the morning of 18 November 2016 that it would be unable to file and serve its evidence that day and that it was unable to focus on any Inquiry matters on that day, given the consequences of having been served with the prosecution. The Hawke's Bay Regional Council elected to issue a media statement in the morning of 18 November 2016 advising of the taking of a prosecution (although Hastings District Council was not named, the likely identity of the defendant would have been obvious due to previous publicity by Hawke's Bay Regional Council). This media statement, and its consequences, led to a diversion of all available Hastings District Council resources on, and following, 18 November 2016.

[12] On 18 November 2016, counsel for the Hastings District Council raised with the Inquiry his concern that the laying of the prosecution charges at this stage in the Inquiry process could lead to prejudice to the Hastings District Council, and potentially, also to individuals employed by the Hastings District Council. On Sunday 20 November 2016, the Hastings District Council signalled that an application for postponement would be made and the application was filed with the Inquiry on Monday 21 November 2016.

[13] That application was based on s 16 Inquiries Act 2013 and was made on the basis that to continue the Inquiry would be likely to prejudice the Hastings District Council.

Applicable principles

[14] Section 16 of the Inquiries Act 2013 provides as follows:

16 Power to postpone or temporarily suspend inquiry

- (1) *An inquiry may, after consultation with the appropriate Minister or appointing Minister, as the case may be, postpone or temporarily suspend the inquiry if—*
- (a) *another investigation is being, or is likely to be, carried out into matters relating to the inquiry; and*
 - (b) *the inquiry is satisfied that to commence or continue the inquiry would be likely to prejudice—*
 - (i) *the investigation referred to in paragraph (a); or*
 - (ii) *any person interested in that investigation.*
- (2) *The inquiry must commence or continue when it is satisfied that to do so would no longer prejudice the other investigation or any person interested in it.*

[15] Section 16 is expressed to apply in cases where “another investigation” is being, or is likely to be, carried out into matters relating to the Inquiry. A preliminary issue arises as to whether s16 is engaged in the present circumstances. Although the Hawke’s Bay Regional Council did carry out an investigation as a precursor to laying the charges, that investigation has now finished. We take the view, without needing to decide the matter definitively, that s16 is engaged in the present circumstances. Although “investigation” is not defined in s4 of the Inquiries Act, we prefer that the view that, in the context of s16, an investigation must include any prosecution which follows from an investigation. The determination of the prosecution case will involve an “investigation” into the facts by the District Court seized of the matter and the possible prejudiced persons referred to in s16(1)(b)(ii) must include persons who are defendants in a prosecution action, here the Hastings District Council.

[16] This view is supported by the report of the Law Commission which led to the Inquiries Act². Paragraph 3.14 of that report states:

3.14 *The question of the extent to which an Inquiry can consider matters of impropriety and conduct needs to take into account whether it will prejudice ongoing or later prosecutions...*³

[17] Regardless of the position under s16, the Inquiry has wide power to regulate its own process and procedure under s14 of the Act. Section s14(2) requires the Inquiry, when making a decision as to procedure or conduct, to have regard to the need to avoid unnecessary delay or cost in relation to public funds, witnesses or other persons participating in the Inquiry. We have also consulted with the appointing Minister, as required by s16(1).

[18] The following is a summary of the principles which we have applied to the request for postponement. In our view, the same principles would apply regardless of whether s14 or s16 is engaged:

- (a) ensuring that the conduct of the inquiry does not interfere with the course of justice (*Fitzgerald v Commission of Inquiry into Marginal Lands Boards* [1980] 2 NZLR 3);
- (b) ensuring fair trial rights are protected (*Fitzgerald and Thompson v Commission of Inquiry into Administration of District Court at Wellington* [1983] NZLR 98);
- (c) complying with the principles of natural justice with respect to the interests of all persons (s14(2)(a));
- (d) considering the impact of the requested postponement on the public interest in the Inquiry progressing without unnecessary delay or cost (s14(2)(b));
- (e) implementing the practical measures available to the Inquiry to balance the competing interests (*Thompson*); and
- (f) accepting that the risk of prejudice must be serious and not overly speculative.

² Law Commission *A New Inquiries Act* (NZLC R102, 2008).

³ We refer also to paragraphs 3.15, 6.31 and 6.31 of the report.

Assessment of application

- [19] The Hastings District Council puts forward the following factors in support of its application for postponement: the Hastings District Council is a core participant in the Inquiry. As water supplier, its actions and responsibilities will be subject to close examination as part of the Inquiry's Terms of Reference. The particular allegations in the prosecution cover matters which the Inquiry will be examining, in particular the causes of the contamination incident and whether any person or organisation was at fault or failed to meet required standards. The summary of facts accompanying the charging documents alleges that contaminated water entered the bores via insecure cable ports and glands in the wellhead. The prosecution further alleges that, as a result, a significant number of Havelock North residents became ill.
- [20] The Hastings District Council further submits: the Inquiry is not subject to any particular standard of proof: it can compel evidence from the Hastings District Council which would compromise its right to silence in the prosecution. Reference is made to s25 New Zealand Bill of Rights Act 1990. The Hastings District Council cannot claim privilege (against self-incrimination) under s60 Evidence Act 2006. The evidence and other materials admitted by the Inquiry will be in public and could be prejudicial to the Hastings District Council. It is likely that such evidence would be widely reported. The findings of the Inquiry would be a matter of public interest and if any fault is found in relation to the Hastings District Council, this would be widely reported. The Hastings District Council has a right to elect trial by jury on the prosecution charges and prospective jurors are likely to be influenced by reporting of the Inquiry evidence and any adverse findings.
- [21] In addition, and separately, the Hastings District Council is prejudiced in relation to the Inquiry because the prosecution will constrain its ability to assist the Inquiry as fully and impartially as it wishes to do so. Further, the Hawke's Bay Regional Council, also a core participant, will be seeking to elicit evidence from witnesses for the purpose of supporting its prosecution case.
- [22] Memoranda in response have been received from the Hawke's Bay Regional Council and the Hawke's Bay District Health Board. Both state that they will abide the Inquiry's decision but raise matters which they say militate against a postponement. Crown Law on behalf of the Ministry of Health, Ministry for the

Environment, and the Department of Internal Affairs abides the decision of the Panel. Water New Zealand supports a postponement of the hearings.

[23] Hawke's Bay Regional Council has confirmed that it will not be bringing criminal or civil proceedings against any officer or staff member of Hastings District Council.

[24] Having reviewed those memoranda, and having considered the present situation in the round, we note the following factors which weigh against a postponement:

- (a) The Inquiries Act and the Terms of Reference prohibit the Inquiry from making any finding of criminal or civil liability.
- (b) The delay to the Inquiry resulting from a complete postponement would be substantial.
- (c) The issues in the prosecution are of narrow compass and represent only a small part of the broad scope of the Inquiry.
- (d) There must be a serious likelihood of prejudice and mere speculation is not sufficient.
- (e) The potential effect on a jury would be minimal given the warnings that juries must be given by the presiding Judge; in any event it is not yet clear that jury trial will be elected.
- (f) A postponement will mean that the reporting date cannot be met.

[25] We have closely examined the forms of prejudice claimed by the Hastings District Council. We have also given consideration to the requirement under s14(2)(b) Inquiries Act that we have regard to the need to avoid unnecessary delay or cost. We are not satisfied that the forms of prejudice relied on by the Hastings District Council are sufficiently certain or clear to justify a complete postponement of the Inquiry. Many of the grounds are speculative at best. We are not persuaded that continuing with public hearings would be likely to prejudice any person interested in the investigation to an extent, or in a way, which requires the Inquiry to be stopped until the completion of the prosecution.

[26] We consider that there are measures which could be put in place to manage the risk of prejudice and that, with careful attention to directions as to the giving

evidence, and other procedural directions aimed at safeguarding the Hastings District Council's interests, the hearings could proceed.

[27] We see a substantial public interest in proceeding with the Inquiry as soon as possible. The safety of drinking water is a matter of wide public interest and importance. We do not see it as viable or acceptable to defer the Inquiry's examination of the safety of drinking water for a lengthy period. We accept the following submissions made on behalf of the DHB:

- (a) *The DHB considers that the water contamination issues that have arisen in Hawke's Bay are very serious and that the Inquiry is a vital part of ascertaining what occurred and what needs to occur to prevent further serious public health issues arising in the future.*
- (b) *For these reasons the DHB considers that it is of significant public importance and overwhelmingly in the public interest that the Inquiry proceed and that the evidence be heard in an open forum.*
- (c) *The significant delay caused by an adjournment creates risk and considerable additional cost, all at the expense of Hawke's Bay residents*
- (d) *It says also that the public interest is best served by having the water contamination issues considered and assessed by the Inquiry as opposed to the narrow focus the issues will receive in a criminal process. A criminal process will not assist Hawke's Bay residents in that it will not focus on systemic issues and risk mitigation for the future.*

[28] In addition, there is a particular matter which relates to timing: we understand that the Hastings District Council as water supplier may intend to reactivate at least one of the bores in Brookvale Road over the coming summer period because the available capacity from the Hastings City bores (which are currently supplying Havelock North) may not be sufficient during the dry summer period. With this possibility, the Inquiry believes that it must address issue 8 as quickly as possible.⁴

Resolution of Application

[29] Although we have not been persuaded that a full postponement of the Inquiry is justified, we consider it would not be fair or appropriate to require the Hastings

⁴ Issue 8 is "What actions or further actions should be taken to ensure a safe supply of drinking water to Havelock North".

District Council to participate in public hearings commencing in (now) 3 working days' time on 28 November 2016. We accept that the Hastings District Council and its advisors have been diverted and disrupted by the service of the prosecution last Friday and by the consequences of the media statement issued by the Hawke's Bay Regional Council on the same morning. We further accept that the Hastings District Council needs time to assess the position of individuals as witnesses before the Inquiry and to consider the prosecutions properly in advance of the first call hearing next Monday 28 November 2016. We acknowledge that the Hastings District Council for these reasons will face difficulty in providing the Inquiry with all evidence and documents, and in preparing for the hearings to commence on 28 November 2016.


- [30] We are also conscious that a number of the other parties have been disrupted by the recent earthquake event (as described above) and that further time will enable those parties to complete and file their evidence without undue pressure.
- [31] We understand from the Registrar of the Hastings District Court that a firm fixture is available for the hearing of the Hawke's Bay Regional Council's prosecution commencing on 16 January 2017 (for either jury or Judge-alone trial).
- [32] Our expectation is that both the Hawke's Bay Regional Council and the Hastings District Council will accept that fixture and be ready to proceed. We note that the relevant facts and documents have been extensively reviewed by both parties (and reports prepared) since the August 2016 contamination event, and that Inquiry hearings were to have been commenced next week. We see it as highly desirable that the prosecution proceed on 16 January 2017.
- [33] In these circumstances, we have decided that the appropriate course is to adjourn the Inquiry evidence hearings until the week commencing 30 January 2017, and we so direct. This will also assist in particular those persons who have been disrupted by the recent earthquake. A Minute will be issued shortly setting out revised directions for that hearing and for processes preceding it.
- [34] We observe that it is regrettable for the Hawke's Bay Regional Council to have elected to serve the prosecution documents and issue a media statement on the same date as the briefs of evidence were due, being a date only 5 working

days before the evidence hearings were to commence. It is also regrettable that the first call date for the prosecutions coincided with the commencement date of the Inquiry. We are unaware of any necessity for those timings.

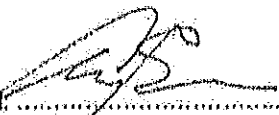
[35] We make it clear that we will be proceeding with hearings from 30 January 2017 regardless of the position regarding the prosecutions. If, for any reason, they have not been resolved by that date we will address the question of the precise measures which may be needed to reduce or remove any remaining prejudice to the Hastings District Council at that point. We would expect the Hastings District Council (in consultation with the Hawke's Bay Regional Council) to propose any measures that will be workable and enable the inquiry to proceed.

[36] We believe the public interest and the importance of the drinking water issues require us to commence and continue the Inquiry from 30 January 2017. While we are currently investigating arrangements, our current expectation is that the Inquiry will continue sitting in public hearings throughout February 2017 until the evidence is finished.

[37] If any party has concerns about the safety of the Havelock North drinking water supply over the coming months, we invite a submission to be made at any time on that matter. We may opt to convene a hearing at any time (including before 30 January 2017) on that specific issue, should we believe this is desirable. While the parties have been asked to cover Issue 8 in their evidence, under the changed circumstances we wish to address this further, and more quickly, and Minute No. 4 (to be issued shortly) will address the question of the water supply over the coming summer.

Signed: 
Hon Lynton Stevens QC

Signed: 
Dr Karen Poulasi CNZM

Signed: 
Anthony Wilson ED

