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Water – we all need it, we all want it, but how we best protect it, value it, and safeguard it, are open to debate. And debate we do!

In this article, we provide an overview of some of the water issues making headlines of late. We start with an update on the Havelock North Drinking Inquiry where the current focus is on learning from past mistakes to ensure better systems are in place in future.

We then move on to discuss the key water policies of the two major political parties – National and Labour. This includes an overview of the changes to the National Policy Statement for Freshwater Management (NPSFM) as well as Labour's controversial proposed water tax. Finally, we close out this article with a brief overview of the Supreme Court's decision on the Ruataniwha dam and explain the reasons behind the decision as well as the possibility for amendment legislation in the near future. We hope you enjoy the read!

Havelock North drinking water inquiry update

The Havelock North Drinking Water Inquiry continues to move through the Stage 2 submission and hearings process. Stage 2 concerns the lessons to be learned from the Havelock North outbreak and what reforms to the system may be needed to ensure the safe provision of drinking water.

Initial Stage 2 hearing

An initial hearing for Stage 2 was held on 27-29 June 2017. The key matters considered at that hearing were the steps being taken to ensure safe drinking water is provided to the community of Havelock North, as well as drinking water partnerships and collaboration.

The issue of partnerships and collaboration arose due to the formation of a Joint Working Group (JWG) following the outbreak. This JWG is comprised of members representing Hawke's Bay District Health Board, the local authorities (Hastings District, Napier District, and Hawke's Bay Regional Council), as well as technical consultants.

The Inquiry was interested in the extent to which collaboration is occurring elsewhere in the water industry and whether JWGs should be utilised more.

Further Stage 2 submissions – July 2017

Throughout July 2017 the parties to the Inquiry filed submissions concerning the remaining issues which relate to the functioning of New Zealand's drinking water system and areas of potential reform. The matters falling in these categories are wide ranging and include:

- Drinking-water safety and compliance levels in New Zealand;
- The 2005 Drinking Water Standards for New Zealand and whether the "secure" category in DWSNZ 4.5 and definitions should remain;
- Drinking water guidelines;
- Whether all drinking water should be treated;
- Drinking water suppliers, including whether there should be a dedicated drinking water supply entity or entities;
- The National Environmental Standard for Drinking Water (NES);
- Consenting by Regional Councils under the NES;
- Regional Councils' approach to first barrier protection for drinking water – other than under the NES;

- Drinking water assessors;
- Water safety plans;
- Monitoring and testing;
- Laboratories;
- Protozoa risk;
- Bore works and casings;
- Potential reforms to the Health Act 1956;
- Emergency response plans; and
- Communications during outbreaks.

Detailed submissions on these matters have been lodged by the participants to the Inquiry, including Water New Zealand. Water New Zealand's submission was collated through a collaborative process involving a cross section of members including water suppliers, consultants and industry experts.

In summary, Water New Zealand's overarching position in relation to Stage 2 of the Inquiry is that:

- Changes need to be made to the legal and operational framework for drinking water so that there are clear and enforceable minimum standards for safe drinking water, and all the personnel and agencies involved in the sector have clearly defined roles and accountabilities.
- From a public health perspective all drinking water should be treated.
- The Drinking Water Standards require review and this review should be undertaken by an expert working group outside the Inquiry process.
- There is a pressing need for those working in the drinking water supply sector to be properly qualified and trained to do the task they are commissioned to do. There should be a mandatory system of training, qualifications, ongoing professional development, and certification to be held by all persons operating, supervising and managing drinking water treatment plants and reticulation systems in New Zealand.
- The question of whether there should there be a dedicated drinking water supply entity, or entities, is not necessarily a question of scale, but rather about the legal and regulatory framework and the competency of those involved in the delivery of drinking water services.

The full submissions of Water New Zealand and other participants can be located on the Inquiry's website www.dia.govt.nz/Stage-2-Submissions.

Further Stage 2 hearing – August 2017

A hearing in relation to the above issues was held on 7-11 August 2017. Evidence was heard from panels of witnesses with expertise in relation to the matters under consideration. The Inquiry will now produce a further report to the Government containing recommendations for reform of New Zealand's drinking water system.

The report is likely to be finalised after the general election on 23 September 2017. What happens to those recommendations will accordingly depend on the views of the post-election Government – whoever that may be!

Water policy – the hot button election issue

Water has emerged as the hot button election issue with various parties releasing their water policies and proposed changes ahead of the election.

In this section we look at the policies and proposals put forward by the two major parties – National and Labour.

National party – key changes are to NPSFM and irrigation funding

For National, its water policy is a continuation of the freshwater reform proposals that it has introduced over the past few years. It is continuing to work on finalising the proposed new national stock exclusion regulations, on developing a policy for the allocation and pricing of freshwater and on best practice management guidance for various sectors.

The most significant new developments are the announcement of further funding for irrigation (some $400 million), and the introduction of changes to the NPSFM.

In terms of the NPSFM, the Government, following a consultation

process earlier this year, announced in August, that it had made changes to the NPSFM in order to ensure that freshwater quality improves over time. The changes:[1]

- Support the Government's target of making 90 percent of the nation's lakes and rivers swimmable by 2040. These include requirements on Regional Councils to improve water quality, to set regional targets, and to report on how they are tracking with achieving regional targets every five years;
- Impose new monitoring requirements using macroinvertebrates, indigenous flora and fauna and matauranga Maori, require the establishment of methods for responding to monitoring, and that monitoring information be made publicly available;
- Impose new requirements – including setting the target nutrient level – for managing nutrients such as nitrogen and phosphorus in rivers;
- Clarify the meaning of Te Mana o te Wai;
- Require regional councils to consider the economic well-being of communities when setting environmental limits;
- Provide clarity about the meaning of requirement to maintain or improve "overall" water quality;
- Clarify the exceptions to national bottom lines in the case of significant infrastructure;
- Clarify how the requirements apply to coastal lakes and lagoons.

The amendments came into force on September 6, 2017. National has also signalled that further work is proposed on the NPSFM next year starting with consultation on what infrastructure is to be included in Appendix 3.

Labour's water policy

Labour shares the same goal of restoring rivers and lakes to a clean swimmable state and has proposed a ready for work programme to get young people involved in fencing waterways, riparian planting and other improvement works.

However, Labour's key water policy which has grabbed all the headlines is its proposal to impose a royalty on the commercial consumption of water to assist with the cost of keeping water clean. Such a royalty would apply to bottled water and irrigation but would not apply to households or councils.

The amount of any such royalty is not specified and is proposed to be determined after consultation with stakeholders and to be flexible to reflect the different regions' water abundance and quality.

Reactions to the policy have been strident from both supporters and opponents. Key concerns are around the application and the levels of such royalties.

In terms of application, it is not clear if the policy is intended to apply to all commercial uses or just those (being irrigation and water bottling) which have been singled out.

As Water New Zealand CEO John Pfahlert noted in a recent media article: "It is important there is a consistent approach to any policy on water and water pricing and not a knee-jerk response to opinion polls."[2]

It is also not clear whether there are proposed to be exceptions for small takes – such as those applying to small hobby lifestyle blocks.

In relation to royalties, because no levels have been specified, there is considerable uncertainty as to effects any such royalties will have on the profitability or indeed continuing viability of a commercial operation. The flow-on effects of increased costs of production and the end cost to the consumer are also unknown.

Indeed, at the extreme, NZ First leader Rt Hon Winston Peters estimated that the price of a cabbage could treble to $18. While other commentators have disputed that, it is certainly food for thought!

No 'Dam' Way – Supreme Court says no to land swap for Ruataniwha Dam

In July 2017 the Supreme Court released its decision dismissing appeals which sought to validate the proposed Ruataniwha Dam land swap.

At issue was the Director-General's decision to revoke the conservation park status of 22 hectares of the Ruahine Forest Park so that the land could be exchanged for other land provided by the proposed dam developer, Hawkes Bay Regional Investment Company. The reason for the exchange was that it would be inundated by the dam that the company was proposing to build on the Makaroro River.

The Director-General's decision was upheld in the High Court but overturned on appeal by a majority in the Court of Appeal. The key issues considered by the Supreme Court were whether:

1. Refer to the Ministry for the Environment's website at www.mfe.govt.nz/fresh-water/national-policy-statement-freshwater-management/2017-changes for further details.

2. www.scoop.co.nz/stories/PO1708/S00178/labours-water-policy-raises-many-questions.htm

- it was lawful to revoke the conservation park status in order to allow it to be exchanged as stewardship land; and
- revocation decisions can be taken on the basis that the exchange will enhance the conservation values of land managed by the Department and promote the purposes of the Act.

There were also a number of subsidiary issues relating to consistency with other statutory planning instruments and the creation of marginal strips. In a split decision (3:2) the majority of the Supreme Court found:

> [127] In summary, we agree with Harrison and Winkelmann JJ that the revocation decision was unlawful because the Director-General was driven by the s 16A test for exchange. It was acknowledged throughout that revocation of the special protected status of the 22 hectares was justified only on the basis of the proposed exchange. The conflation of the two steps circumvented the statutory prohibition on exchange of other than stewardship land. There was no assessment of whether the intrinsic qualities of the land warranted its special protection, despite the scientific reports which showed it had significant conservation values. There was no consideration of whether continuation of protected status was inappropriate or indeed whether the additional protection of ecological area should have been applied to the 22 hectares following the identification of ecological values in the scientific report. Nor is there any discussion of how the values in the unprotected Smedley land might have been protected without the exchange. As the majority in the Court of Appeal remarked, the Department was not concerned with the correct level of protection. The distinct steps were in fact all driven by the proposed exchange. [Our emphasis, footnotes omitted].

Interestingly, the minority judgment claimed that the majority approach required reading words into section 18(7) so that the revocation decision was subject to an express limitation regarding the intrinsic values of the land no longer warranting it being held as conservation park.

The minority found that no hint of such limitation was found in the language of that section – unlike s 24(3) of the Reserves Act which expressly contained such a limitation. The minority found that if Parliament had intended the Minister's revocation decisions to be constrained in that way the provision would have said so.

While some guidance on the principles and processes that should be used for conservation benefit was subsequently provided by the New Zealand Conservation Authority in May 2016, such guidance does not overcome the statutory interpretation issues.

Given the differing opinions between members of the superior court, and the importance of this issue to future revocation decisions, we consider this is an area where further legislative guidance would be helpful and indeed is likely once the outcome of the election is known. **WNZ**