BUDDLE FINDLAY

Legal alert - Decision released on Council's power to fluoridate water

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In what has been described as a landmark decision, the South Taranaki District Council (the Council) has won a case that challenged the legal right of councils to add fluoride to drinking water. The outcome of the case should provide re-assurance to councils and District Health Boards around the country about the role of councils in making decisions about fluoridation. A number of councils, including the Hamilton City Council, were waiting for the decision to be released before making their own decisions about fluoridation.

The anti-fluoridation group New Health New Zealand brought the judicial review case against the Council last year. The case concerned the Council's decision to put fluoride into water supplies at Patea and Waverley. The Council decided to fluoridate the water supplies in December 2012, following a thorough consultation process. This process included the Council holding two public information evenings, inviting people to submit on the proposal (and receiving over 500 submissions at a result), and holding a public hearing. Council Officers then released a report that analysed the submissions and made a "neutral recommendation", meaning that the Officers chose not to make a recommendation one way or the other because of the controversial nature of the fluoride debate, and the lack of public consensus. At a special meeting on 10 December 2012, the Council voted 10-3 in favour of fluoridation.

New Health New Zealand challenged the decision on the grounds that:

- The Council does not have the legal power to add fluoride to its water for therapeutic purposes
- Even if the Council does have the power to add fluoride to the water, the Council breached the right of persons to refuse medical treatment as set out in the New Zealand Bill of Rights Act 1990 when it exercised that power
- In deciding to add fluoride to the water supplies, the Council failed to take into account a number of mandatory relevant considerations.

In a judgment released on 7 March 2014, Justice Hansen rejected all of New Health New Zealand's grounds of challenge.

The Court ruled that the Council does have the legal power to fluoridate the water because there is an implied power to fluoridate in the Local Government Act 2002, just as there was in the Municipal Corporations Act 1954 and the Local Government Act 1974. The Judge's reasoning was that although the terminology in the current Act is different to that in earlier Acts, the current Act requires local bodies (which had previously been supplying fluoridated water) to maintain water services. Therefore Parliament must have intended to empower those local bodies to fluoridate the water supply.

Justice Hansen supported his reasoning by reference to the Health Act, which confirms that fluoride may be added to drinking water in accordance with drinking water standards issued under that Act. Although section 69(O)(3)(c) of the Health Act stipulates that drinking water standards must not require fluoride to be added to drinking water, Justice Hansen interpreted this as being consistent with local government having the power to make decisions about fluoridation. In other words, if it was not intended that fluoride could be added, section 69(O)(3)(c) would be redundant.

Justice Hansen dismissed New Health New Zealand's argument that fluoridation is akin to a regulatory function and therefore requires express authorisation. The argument was that the power of general competence conferred on local authorities by the Local Government Act 2002 does not extend to regulatory functions. However, the Judge relied on the dictionary definition of "regulatory" in ruling that fluoridation of water does not involve the exercise of a regulatory power. In addition, Justice Hansen stated that decisions to fluoridate do not require the consent of the Minister of Health under the Medicines Act, as water is not a food for the purposes of that Act.

Addressing the plaintiffs' second ground for challenge, Justice Hansen concluded that fluoridation is not medical treatment for the purposes of the Bill of Rights Act, saying that medical treatment does not extend to public health interventions delivered to the inhabitants of a particular locality or the population at large. By way of analogy, salt manufacturers adding iodine to salt to prevent goitre is not medical treatment, even though iodine has a medical purpose. In any event, the Judge ruled that even if fluoridation is medical treatment, the power to fluoridate is a justified limitation of the right to refuse medical treatment under section 5 of the Bill of Rights Act.

Finally, Justice Hansen ruled that, when coming to its decision, the Council was not required to take into account the facts relied on by New Health New Zealand (facts described in the judgment as "controversial"). The Judge stated that there was "a plenitude of evidence" showing that the Council had considered the decision very carefully.

It has been confirmed that the High Court's decision will be appealed. In the meantime, Hamilton City Council will decide whether to re-introduce fluoride to the city's water supply. Hamilton City Council announced very shortly after the Court's decision was released that it will vote on the fluoridation issue at its 27 March 2014 meeting.

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