IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2015-485-265
[2015] NZHC 2138

UNDER THE	Judicature Amendment Act 1972 and the Declaratory Judgments Act 1908
BETWEEN	NEW HEALTH NEW ZEALAND INC Plaintiff
AND	ATTORNEY-GENERAL Defendant

Hearing:	30 July 2015
Counsel:	L M Hansen for Plaintiff D N Soper and K Stone for Defendant
Judgment:	4 September 2015

JUDGMENT OF THE HON JUSTICE KÓS

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[1] Amending regulations have been made specifying that fluoridating agents used for the fluoridation of drinking water are not medicines for the purposes of the Medicines Act 1981.[1] The regulations reinforce a conclusion reached by this Court last year in construing the Act.

[2] Are these regulations lawfully made?

Background

[3] The plaintiff ("New Health") opposes the fluoridation of public water supplies. New Health and similar organisations have in recent years pursued a range of strategies in opposition to the fluoridation of public water supplies. Litigation is one of these strategies.

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[1] Herein "the Act". The regulations are the Medicines Amendment Regulations 2015 (herein "the regulations").

[4] In 2013 New Health brought judicial review proceedings against the South Taranaki District Council, challenging its decision to fluoridate its water supplies. Hansen J dismissed that claim.[2]

[5] In 2014 it issued further judicial review proceedings, this time against the Attorney-General, seeking declarations that two fluoridating agents were medicines for the purposes of the Act.[3]

[6] Collins J dismissed New Health's claim.[4] In short, he held that the compounds were not medicines for the purposes of the Act. Introduction of the compounds into public water supplies did involve their administration to consumers, and for therapeutic purposes. But diluted to a maximum of 1.5 mg/l they fell below a 10 mg/l threshold required to constitute a medicine.

[7] Collins J suggested however that the Ministry of Health consider promoting regulations to further clarify the status of the compounds:[5]

> While I am confident my conclusion is correct, the Ministry may wish to consider recommending a regulation that exempts HFA and SSF from the definition of "medicine" when those compounds are used to fluoridate water.

[8] New Health filed an appeal on 28 October 2014. It applied for the appeal to be fast tracked.

[9] The Crown resisted the plaintiff's fast track application. Crown counsel advised that the Ministry intended to recommend regulations to confirm the status of the compounds. This would take at least three months. That would mean "this appeal may become moot".

[10] The Court of Appeal declined to fast track the appeal. Instead in a minute dated 11 November 2014 it allocated a fixture date of 12 March 2015. It reserved leave to the Crown to seek vacation of the fixture if, by 6 February, "the Crown is in

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2 *New Health New Zealand Inc v South Taranaki District Council* [2014] NZHC 395.

3 Herein "the compounds". The compounds are hydrofluorosilicic acid (HFA) and sodium silicofluoride (SSF).

4 *New Health New Zealand Inc v Attorney-General* [2014] NZHC 2487 (herein "the *Medicines Act* proceeding" and "the *Medicines Act* appeal").

5 At [51].

a position to satisfy the Court that the proposed regulations will be implemented and that they will have the effect of rendering the appeal moot".

[11] On 20 November 2014 the Minister received a report from officials recommending regulation. The report muddled which proceeding brought by New Health was being heard by the Court of Appeal on 12 March 2015. It said that was the *South Taranaki* appeal. But it went on to summarise the *Medicines Act* proceeding correctly. It noted that the Court of Appeal had adjourned the appeal pending the Crown being able to satisfy the Court by 6 February 2015 that the "regulation change will be implemented". Vacation of the appeal would "save considerable legal costs for the Crown and free up valuable Court time for other fixtures". Crown Law had evidently recommended urgent amendment to "provide legal clarity that fluoride when added to public drinking water is not a medicine". Processes were available to have the regulations in place by the end of February 2015. Consultation would be necessary, but five weeks would be an adequate period. The Ministry would consult with local bodies and "with the lawyers representing the parties to the recent litigation". The proposed amendment was "technically simple" and did not "involve a change in policy in view of the recent High Court decisions".

[12] The Minister accepted his officials' recommendation on 24 November 2014.

[13] A consultation document was then posted on the Medsafe website on 25 November 2014. It noted that proposed amendment would "provide legal clarity that the fluoride substances used to treat drinking water are not medicines." It referred to the *Medicines Act* proceedings, but not explicitly to the appeal. It noted benefits of regulation as the preservation of the status quo and the provision of legal clarity. It asked potential submitters whether they supported the amendment. And it asked whether there were other fluoride-containing compounds that ought to be included in the regulations.

[14] By email the same day Crown Law informed counsel for New Health of the process. It sent her a link to the Medsafe page and the document. Three weeks later, on 17 December 2014 counsel for New Health emailed back. She expressed her

client's concern at the consultation timeframe. She requested that the submission period be extended to 12 February 2015. The following day Crown Law responded, declining extension. In part because it took the view the proposed regulations were not a change in policy. A further request for more time was made by counsel for New Health the next day. No response seems to have been given, presumably because of the proximity of Christmas.

[15] The consultation period ran over the Christmas and New Year period, closing on 9 January 2015. Six weeks and three days, although a good part of that was across the Christmas break. Despite that fact, a total of 1411 submissions were received. These included New Health's submission, which was substantial and sent in on 24 December 2014. Of these 1411 submissions, 1339 were opposed. Seven complained about the timeframe for consultation.

[16] A draft Cabinet paper was put before the Minister on 16 January 2015.

[17] Officials' advice to the Minister accompanying the draft Cabinet paper canvassed the submissions briefly. It noted that many simply restated the arguments made unsuccessfully by New Health before Collins J or made claims not supported by an eminent 2014 scientific review of the safety and efficacy of fluoride undertaken jointly by the Royal Society of New Zealand and the Prime Minister's Chief Science Adviser, Sir Peter Gluckman. After close examination of the scientific evidence that review had concluded that fluoridation was safe, effective, beneficial and the most appropriate means of promoting public dental health. It had no disbenefits of any significance.

[18] The officials' advice went on to recommended regulation be progressed promptly so that it would take effect before 6 February, observing that the Court of Appeal had "advised this would render the pending appeal by *New Health* moot." That, of course, was incorrect. It had not done so.

[19] The Cabinet paper explained the background to the regulations. It recorded that Crown Law had recommended, "as a matter of good public administration and to remove the basis for any further litigation on the matter, fast-tracking the making

of the regulation to put the issue beyond doubt." A crisp summary of the consultation was given in similar tones to the preceding officials' advice. It recommended Cabinet agree to waive the normal 28 day rule in the interests of expediency. In its final sentence it asks Cabinet to:

> **Authorise** the submission to the Executive Council of the Medicines Amendment Regulations 2015 for consideration at its first meeting of 2015 to remove the basis for further litigation.

[20] Cabinet did so on 27 January 2015. The Order-in-Council is dated the same day. The amended regulations came into force on 30 January 2015.

[21] On 5 February 2015 the Crown then filed a memorandum before the Court of Appeal noting that the regulations had taken effect and asserting that the appeal was now moot.

[22] On 31 March 2015 New Health initiated these proceedings.

[23] On 29 April 2015, and after hearing argument, the Court of Appeal issued a further minute in the *Medicines Act* appeal. It recorded that "assuming the amending regulations were validly made, this appeal would be moot." The *Medicines Act* appeal was therefore adjourned, pending this Court's decision.

A res judicata?

[24] The plaintiff also sought to challenge before me the correctness of the *Medicines Act* judgment on the basis that Collins J was wrong to find the compounds not to be medicines under the Act. This particularly affects the fourth issue considered in this judgment. [6] But it underlay the whole of New Health's case and formed the major part of Ms Hansen's written submissions.

[25] There is here an identity of parties, a perfected judgment and an extant appeal. I made clear to Ms Hansen that I was not prepared to revisit the ratio of

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6 See [76] below.

Collins J's judgment, which is to be found at [47]:[7]

> When viewed in the context of the maximum allowable concentrations of fluoride in domestic water, and the concentrations of fluorides that are classified as medicines in Schedule 1 of the Regulations, I am drawn to the conclusion that the definition of "medicine" in the Act cannot include fluoride when it is added to domestic water supplies to produce a concentration of no more than 1.5 mg/l.

The regulating power

[26] The regulating power provided by the Act and exercised by the Crown is found in s 105 of the Act:

> **105 Regulations**
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> (1) The Governor-General may from time to time, by Order in Council made on the advice of the Minister tendered after consultation with such organisations or bodies as appear to the Minister to be representative of persons likely to be substantially affected by the regulations, make regulations for all or any of the following purposes:
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> …
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> (i) specifying, by name or description, substances or articles, or kinds or classes of substances or articles, that are, or are not, medicines or medical devices for the purposes of this Act:
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> …

Notably, the power is both inclusive and exclusive: "are, or are not".

Issues

[27] The plaintiff challenged the making of the regulations on six grounds. These give rise to the following six issues:

(a) Issue One: Were the regulations made for an improper purpose?

(b) Issue Two: Was decision to promote the regulations inconsistent with s 27(2) of the New Zealand Bill of Rights Act 1990?

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[7] See *Watt v Ahsan* [2007] UKHL 51, [2008] 1 AC 696 at [31] per Lord Hoffmann, and *Shiels v Blakeley* [1986] 2 NZLR 262 at 266 (CA) at 266, cited with approval in *Beattie v Premier Events Group Ltd* [2014] NZCA 184 at [42].

(c) Issue Three: Was there a failure to consult adequately?

(d) Issue Four: Was there an error of law?

(e) Issue Five: Was the decision to regulate irrational?

(f) Issue Six: Was there a failure to take into account relevant considerations?

[28] Ms Hansen's written and oral submissions emphasised Issues Two, Three and Six. My approach to Collins J's judgment effectively eliminated Issue Four, at least before me.[8]

Issue One: Were the regulations made for an improper purpose?

[29] In an amended statement of claim filed immediately before trial, and received with leave, New Health pleaded:

> 80 The intended purpose of the proposal was to render the plaintiff's appeal in *New Health NZ Inc v Attorney-General* moot.
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> 81 Exercising the power under s 105(1)(i) of the Medicines Act for this purpose is improper and unlawful.

[30] This ground was not emphasised by Ms Hansen. Indeed it was omitted altogether from the substantive grounds in her written materials, and pressed only modestly in oral argument.

[31] Ms Hansen submitted that new subordinate legislation should not pre-empt matters currently before the courts or deprive successful litigants the benefit of any Court decision in their favour. Legislative Advisory Committee guidelines provide that new legislation should not pre-empt matters currently before the Courts or deprive successful litigants of the benefit of any Court decision in their favour. This principle rests in part on the principle of the separation of powers: executive and legislative branches should not interfere with the judicial process.[9]

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8 See [24] to [25] above.

9 Legislation Advisory Committee *Guidelines on Process and Content of Legislation* (October 2014) 44–45.

Analysis

[32] I am not persuaded that the regulations have been made for an improper purpose, or that (had they been) the consequence must be invalidation.

[33] The status of the fluoridating compounds in issue may be determined by legislative, executive or (based on the foregoing) judicial, declaration. There are, in effect, two streams:

(a) The legislative declaratory stream: the Act defines "medicine" in s 3. Collins J's judgment in the *Medicines Act* proceeding evaluated whether the compounds were medicines under that provision.

(b) The executive declaratory stream: a "medicine" does not include "any substance or article of a kind or belonging to a class that is declared by regulations not to be a medicine for the purposes of this Act."[10] The legislature has thereby conferred a broad discretion upon the executive to declare whether a substance or article is or is not a medicine.

As to judicial declaration, while Courts may declare whether substances are medicines, they have no independent function in doing so. Their task is simply to construe the products of the other streams, find facts and determine whether executive action is lawfully exercised. In that sense the judicial task is parasitic only. The first and second streams are in effect parallel but connected courses.

[34] Legislation provides a framework governing distribution and the use of chemical substances, including medicines. Relevant legislation includes the Hazardous Substances and New Organisms Act 1996, the Health Act 1956 (and the subordinate Drinking Water Standards made pursuant to it) and the Misuse of Drugs Act 1975. At a more detailed level, there are the Medicines Act 1981, Medicines Regulations 1984, the Food Act 1981, the Dietary Supplements Regulations 1985, and the Agricultural Compounds and Veterinary Medicines Act 1997. The

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[10] Medicines Act 1981, s 3(1)(c)(vi). See also s 3(1)(b)(ii). The regulatory power is s 105(1)(i): above at [26].

Medicines Act identifies and controls "medicines", "medical devices", related products and some cosmetics. The underlying purpose of the controls is the protection of public safety in the case of the use of such products.

[35] Fluoride in dose form, intended for direct human consumption for a therapeutic purpose, qualifies as a medicine under the Act. It is listed in the First Schedule to the Medicines Regulations and depending on concentration may be classified as prescription, restricted or pharmacy only medicine.

[36] The policy position taken as to dilute dosages is different. It is that dilute fluoride within a concentration range of 0.7 to 1.5 parts per million (0.7 to 1.5 mg/l) does not constitute a "medicine". Such dosages are instead regulated separately, by the Health Act and its attendant Drinking Water Standards. That has been the Ministry's stance throughout the existence of the Act.[11] And Collins J agreed that the Ministry's interpretation conformed to the Act.

[37] The amending regulations, made within the executive declaratory stream, therefore confirmed a pre-existing policy position. They also confirmed a recent judicial declaration as to status created by the legislative declaratory stream. They did not seek to reverse either policy position or judicial declaration. Or even alter them in any way whatever.

[38] So why regulate? After all, that course has simply presented a new flank for New Health and like-minded activists to attack. Whether it "preserves the status quo" now independently depends upon the validity of the regulations.

[39] Taxed on this point Mr Soper said that the sub-texts to the declared intent to "preserve the status quo and provide legal clarity" were three-fold:

(a) To give certainty to those distributing and using the compounds for the purpose of water fluoridation that those activities would continue to be subject to controls under the Health Act and Drinking Water

[11] Evidenced in an affidavit by its Acting Director of Public Health, Dr Stuart Jessamine, who has been with the Ministry for 22 years.

Standards and would not instead be governed by the Medicines Act (and hitherto potentially in breach of it).

(b) To avert collateral challenges in the High Court to Collins J's judgment. Indeed just such a collateral challenge was advanced in this proceeding.

(c) To reinforce the conclusion in that judgment, including by rendering the appeal partially moot (at least prospectively for the period from 30 January 2015). Mr Soper accepted that the regulations were not retrospective, and so could not render the appeal wholly moot. Whether New Health would still want to pursue it was, of course, another question.

[40] Neither the first nor second purposes is improper, in the sense of being inconsistent with, or beyond the ambit of, the power conferred by s 105.[12] The first in particular is entirely consistent with it. Had this step been taken otherwise than in the context of litigation, it could hardly have been complained about. No complaint is made about either those purposes by New Health.

[41] Is the third purpose improper? It is true that in *R (Reilly) v Secretary of State for Work and Pensions (No 2)* Lang J said that the power to legislate to overrule judgments should not as a matter of constitutional propriety be used retrospectively to "favour the executive in ongoing litigation in the courts brought against it by one of its citizens", absent compelling reasons.[13] But to the extent this executive action is (1) undertaken in a parallel executive declaratory stream, (2) is wholly consistent with, and merely reinforcing of, a judicial declaration arising from the parallel legislative stream, and (3) has prospective effect only, I do not consider the purpose improper.

[42] In the present context, I do not think the executive is not bound to stand idly by on the bank when a judicial contest about the legislative stream is being

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12 See generally Ross Carter, Jason McHerron and Ryan Malone *Subordinate Legislation in New Zealand* (LexisNexis, Wellington, 2013) 261–263.

13 *R (Reilly) v Secretary of State for Work and Pensions (No 2)* [2015] 2 WLR 309 (QBD) at [82].

undertaken. The advent of such litigation does not render the legislative stream suddenly exclusive. Or dry up the otherwise available executive stream.

[43] The formulation of public policy is pre-eminently a legislative and executive act. Statutory power was conferred on the executive to determine status of these compounds altogether apart from s 3 of the Act. Two streams, not one. The legislature has already declared the status of these compounds to a degree, but in a manner admitting argument. The executive is entitled to speak still. And certainly in a manner that is wholly prospective in effect.

[44] The Legislation Advisory Committee guidelines cited by Ms Hansen confirm that entitlement:[14]

> The separation of powers and the independence of the judiciary require that the executive and legislative branches of government do not interfere with the judicial process. However, in some cases ongoing or prospective litigation may identify an area of the law that requires amendment or new legislation, and it would be inappropriate for the Government to await the outcome of the litigation before taking action.
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> In these cases it is important that any new legislation is explicit that the new law will not apply to any cases currently before the court or act to deprive those parties (or previously successful parties) from any benefit they have gained or might gain from a decision of the court. This is sometimes called preserving the "fruits" of the litigation.
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> If the new legislation is intended to do either of the above, the legislation must contain clear words setting out this intention.

As this passage makes clear, the convention is that an existing judicial process is not interfered with, except (on rare occasions) by legislative intervention. As Sir Geoffrey Palmer and Dr Mathew Palmer observe:[15]

> Court decisions are not infrequently altered or reversed by Parliament in legislation. Frequently there can be no objection. New policies are made and require new law, or court decisions disclose policy defects of which no one was previously aware. But it is most unusual to legislate retrospectively to deprive litigants of the fruits of their successful litigation, and it is a most undesirable precedent.

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[14] Legislation Advisory Committee *Guidelines on Process and Content of Legislation* (October 2014) 44–45.

[15] Sir Geoffrey Palmer and Matthew Palmer *Bridled Power* (Oxford University Press, Melbourne, 2004) at 315. They go on to cite the Legislation Advisory Committee *Guidelines* just referred to.

The focus here of course is (1) retrospectivity and (2) deprival of the fruits of victory. It is clear that for that to be done, legislative rather than executive intervention is almost certainly required.[16]

[45] In *Canterbury Regional Council v Independent Fisheries Ltd* the Court of Appeal considered provisions of the Canterbury Earthquake Recovery Act 2011 that effectively allowed a Minister's decision to extinguish extant appeals to the Environment Court by revoking a regional policy statement.[17] The Court said that:

> [145] Mr Joseph submitted that while it would be lawful for rights of appeal to the Environment Court to be extinguished as a consequence of the exercise of the [statutory] power for a legitimate purpose, it was not lawful for the Minister to exercise his powers for the purpose of extinguishing appeals to the Environment Court as he had done here. In particular, he could not exercise his powers to bring the appeals to an end in favour of one side.
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> [146] We have already decided that insofar as the Minister's decisions promoted planning certainty and allowed Council officers to focus on recovery, they were within the purposes of the Act. The ending of the appeals was therefore simply the consequence of the legitimate exercise of the Minister's powers and was not unlawful.

[46] In the present case the challenged action in the executive stream does not extinguish an appeal. It impairs the practical utility of one arising from the parallel legislative stream. That action the executive would have been at liberty to take in the absence of litigation. It is consistent with prior policy, consistent with the High Court's conclusion as to legislative action (so does not thwart it) and it is prospective only. It does not preclude continued challenge to action taken prior to 30 January 2015. It does not involve the "unjust abrogation of existing rights".[18] It is not in my view an improper purpose.

[47] If that view is wrong, however, the existence of an improper purpose is not determinative. A decision will be tainted by an improper purpose among proper

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16 Ross Carter, Jason McHerron and Ryan Malone *Subordinate Legislation in New Zealand* n 12 at 34.

17 *Canterbury Regional Council v Independent Fisheries Ltd* [2012] NZCA 601, [2013] 2 NZLR 57.

18 *Foodstuffs (Auckland) Ltd v Commerce Commission* [2002] 1 NZLR 353 (CA) at [52].

purposes if, but for the improper purpose, it would not have been made.[19] In *Unison Networks Ltd v Commerce Commission* McGrath J put it this way:[20]

> A power granted for a particular purpose must be used for that purpose but the pursuit of other purposes does not necessarily invalidate the exercise of public power. There will not be invalidity if the statutory purpose is being pursued and the statutory policy is not compromised by the other purpose.

[48] In the present case the Minister had three motives.[21] It is likely that even if the plaintiff had not filed the appeal, the regulations would likely still have been made. There have been a number of proceedings related to fluoridation. The issue has generated considerable public controversy. The process leading to the regulations discloses general legal certainty beyond the dispute between the present parties to be the primary motivation. It may have been that the Minister would have moved with less alacrity. But legal certainty through regulation would likely have been pursued in any event.

[49] In terms of *Unison*, the third purpose identified at [39] is hardly a subversion of the first two. Rather it is a more specific implementation of the primary purpose. As Mr Soper put it: a consequence. Even if the tertiary purpose were improper, the Minister's decision would not be tainted by it.

Conclusion

[50] It was not an improper purpose to use executive power to confirm the legal status of the compounds. And even if it were improper, it does not taint the decision because of the existence of other, primary proper purposes.

Issue Two: Was decision to promote the regulations inconsistent with s 27(2) of the New Zealand Bill of Rights Act 1990?

[51] Section 27(2) and (3) of the New Zealand Bill of Rights Act 1990 provides:[22]

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19 *Poananga v State Services Commission* [1985] 2 NZLR 385 (CA) at 394.
20 *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42 at [53].
21 See [39] above.
22 Herein "the NZBORA".

> **27 Right to justice**
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> …
>
> (2) Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.
>
> (3) Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.

[52] New Health pleads:

> 84 The intended purpose of the proposal was to render the plaintiff's appeal in *New Health NZ Inc v Attorney-General* moot.
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> 85 To the extent that the Medicines Amendment Regulations have this consequence (denied) they are inconsistent with ss 27(2) and/or (3) of the NZBORA.

[53] Ms Hansen submitted that s 105(1)(i) of the Act must, so far as possible, be given a meaning consistent with the rights contained in the NZBORA and it therefore does not authorise regulations inconsistent with those rights, unless demonstrably justifiable in a free and democratic society.[23] If the exercise of the regulatory power was inconsistent with a guarantee of the NZBORA the regulations may be ultra vires and accordingly invalid.

[54] Ms Hansen's focus was on s 27(2). She submitted that the regulations were inconsistent with s 27(2) in abrogating extant litigation rights. Her argument focused on that provision. The regulations deprived New Health of the fruits of the litigation, uncertain as they were, and allowed the Minister to immunise the Ministry from an adverse finding on appeal.

Analysis

[55] I do not accept that the regulations here are inconsistent with s 27(2).

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[23] NZBORA, s 5.

[56] As I have found, the mere fact of litigation does not preclude the executive from exercising its s 105(1)(i) power to declare the status of the compounds for the purposes of the Act. It cannot sensibly be doubted that it could have done so had proceedings not been instituted. Likewise if proceedings were threatened only. I agree with Mr Soper's submission that rights expressed in s 27 do not immunise parties in litigation from future changes in the law.

[57] Support for that perspective is found in the limited decisions to date on s 27(2) and associated academic analysis. The White Paper discussion of what is now s 27, as the Drs Butler point out, was focused on it enhancing the constitutional right to challenge the legality of government action. In particular as a check to the use of privative clauses.[24] There is no evident suggestion that the provision was intended to act as an assurance of continuity of the substantive law. Indeed the words "in accordance with law" suggest the contrary.

[58] There is no suggestion in the careful analysis of s 27(2) in the recently revised commentary by the Drs Butler that s 27(2) provides assurance of continuity of substantive law in the context of litigation.[25] The rather older commentary by Paul Rishworth (et al) suggests that neither s 27(2) nor (3) precludes alteration to substantive law.[26] Indeed the authors of the latter work are critical of a suggestion once made by Sir Geoffrey Palmer (in 1992) that it would be inconsistent with s 27(3) for Parliament to legislate to overturn the result of a judicial decision. As they put it trenchantly, "this cannot be right".[27]

[59] Neither s 27(2) nor s 27(3) give New Health the right either to have the compounds declared to be medicines for the purposes of the Act, or for the status of those compounds to be determined by reference only to the Act itself without the passage of subordinate regulation. In other words, within the legislative stream only. In *Westco Lagan Ltd v Attorney-General*, McGechan J held that s 27(3):[28]

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24 Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at 1496.

25 At 1492-1497.

26 Paul Rishworth, Grant Huscroft, Scott Optican and Richard Mahoney *The New Zealand Bill of Rights* (Oxford University Press, Auckland, 2003) at 767.

27 At 768.

28 *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40 (HC) at [63].

> … is aimed at procedures which govern the assertion or denial of rights in the course of Court or equivalent proceedings; and is not aimed at the creation of other rights in themselves … It cannot restrict the power of the legislature to determine what substantive rights the Crown is to have. Section 27(3) merely directs that the Crown should have no procedural advantage in the proceeding to enforce rights if such rights exist.

[60] A related issue arose in *Commerce Commission v Air New Zealand Ltd* in the Court of Appeal.[29] That was a judicial review challenging non-disclosure orders made under s 100 of the Commerce Act 1986. These prohibited interviewees in a cartel investigation from disclosing to the employer or any other person anything said at the interview. In the High Court Andrews J had ruled that non-disclosure orders could not be maintained (and therefore lapsed) on the date of commencement of proceedings arising from the investigation. The Court of Appeal disagreed. It held, in particular, that s 27(3) did not mean that the s 100 powers could not be exercised or maintained after commencement of proceedings. The Court of Appeal said:[30]

> As to s 27(3), it was noted in the White Paper that the underlying aim of s 27(3) of the Bill of Rights is that the Crown is not to enjoy any procedural or jurisdictional privileges in litigation. Contrary to the findings of Andrews J, fulfilment of this objective does not require that a State litigant is to refrain from exercising its statutory powers related to s 100 once proceedings have been issued, although any such powers will be exercised with restraint and be subject to the supervisory jurisdiction of the Court. As noted above, the Commission must keep the imposition of s 100 orders under review and the High Court has the power to vary any s 100 orders that may result in any unfairness in the proceedings.

[61] It is unnecessary for me to decide in this case whether the rights conferred in ss 27(2) and (3) are wholly procedural, as McGechan J seemed to suggest in *Westco Lagan*. I should not necessarily be taken to accept that that is so. Nor is it necessary for me to decide whether executive action of this kind *inconsistent* with a judgment of this Court would be inconsistent with s 27. In this case a proper purpose existed for the making of the regulations, and the regulations were entirely consistent with the determination of Collins J construing the statute.

[62] I agree with Mr Soper's submission that there is no suggestion that s 27 prevents legislative or administrative steps being taken to prevent threatened

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29 *Commerce Commission v Air New Zealand Ltd* [2011] NZCA 64, [2011] 2 NZLR 194.
30 At [114].

litigation (or to affect the potential outcome of that litigation). Nor that s 27 prevents steps being taken after proceedings have been determined, including potentially where those steps reverse the result of the litigation (although that is not the case here). As the Court of Appeal said in *Canterbury Regional Council v Independent Fisheries Ltd*:[31]

> … it makes no sense to suggest that the s 27 [of the Canterbury Earthquake Recovery Act 2011] power may be exercised after the conclusion of an appeal to the Environment Court, in a manner that would reverse the result of the appeal, but not while the appeal is on foot. There is no warrant in the statutory language or scheme for such a limit. On the contrary, in the context of this Act an interpretation which results in an outcome that avoids the pursuit of unnecessary appeals makes sense.

In that case the relevant Minister had statutory power to revoke a proposed regional policy statement, which might be subject to appeal to the Environment Court. In that respect I refer to the passage from the judgment cited at [45] above.

[63] The position here is different also from that in *Mangawhai Ratepayers and Residents' Association Inc v Kaipara District Council*.[32] In that decision the Kaipara District Council (Validation of Rates and Other Matters) Act 2013 was found by this Court to be inconsistent with s 27(2) of the Bill of Rights. The Act, passed in the midst of judicial review proceedings, had the effect of denying the possibility of remedy for extant judicial review proceedings in relation to rates charges imposed by the Kaipara District Council. Despite that, Heath J held this exclusion of the right to pursue judicial review was a justified limitation for the purposes of s 5 of NZBORA.

[64] Validation Acts of the kind used in that case remove the right to have a wrong corrected. Such Acts may have the effect of immunising the state from liability it had accrued under the law as it stood at the time. The executive action here complained of is not of that kind. The alteration made to the substantive law was done pursuant to a distinct power, and is prospective only. It does not offend constitutional convention by robbing New Health of its, thus far non-existent, fruits of victory before the Courts.

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[31] *Canterbury Regional Council v Independent Fisheries Ltd* [2012] NZCA 601, [2013] 2 NZLR 57 at [149].

[32] *Mangawhai Ratepayers and Residents' Association Inc v Kaipara District Council* [2014] NZHC 1147, [2014] 3 NZLR 85. An appeal in that decision was heard in the Court of Appeal a few days ago.

Conclusion

[65] I find the decision to regulate was not inconsistent with s 27(2) of the Bill of Rights.

Issue Three: Was there a failure to consult adequately?

[66] Section 105(1)(i) of the Act explicitly requires consultation with such organisations or bodies as appear to the Minister to be representative of people likely to be substantially affected by the regulations.

[67] New Health pleads:

> 87 Prior to recommending an Order in Council the Minister was required to:
>
> 87.1 Consult with the plaintiff and to take its submission into account.
>
> 87.2 Provide sufficient time for consultation.
>
> 87.3 Provide sufficient information about the proposal, including that the intended purpose was to render the Medicines Act appeal moot.
>
> 87.4 Consult with the plaintiff and others about whether drinking water containing fluoridating agents is a medicine.
>
> 88 The Minister did not comply with the requirements set out in paragraph 87.

[68] New Health says that the consultation that was undertaken was too brief, did not adequately inform prospective submitters, in particular about the effect of the regulations on the *Medicine Act* appeal, and did not include it (other than as one of a number of members of the public).

[69] Ms Hansen submitted that the consultation process made no reference to the existence of the extant appeal. This was significant information and may have affected what consulted parties would think of the decision to regulate. Submitters did not therefore have the information necessary to engage with the consultation.

Analysis

[70] I do not accept New Health's complaints about the adequacy of consultation.

[71] First the demands of consultation may be shaped by context.[33] Contexts differ: adequate consultation may be one phone call or years of formal meetings.[34] The best evidence of the adequacy of the consultation period here is the volume of submissions. Despite the supposedly too brief six week window, New Health managed to submit in time. So too did the authors of the other 1410 submissions received.

[72] Secondly the consultation was on the question of whether the regulatory power ought to be exercised, not whether consultees supported New Health's litigation efforts to have the compounds declared a medicine for the purposes of the Act. I do not consider fair consultation on this question necessarily required reference to the impending *Medicines Act* appeal. The impact of the regulations on the appeal is by no means certain, even now. The consultation document referred to the regulations "preserving the status quo", so that some impact on the appeal was at least predictable. A number of submitters were aware of and submitted on the existence of the appeal. Certainly New Health and its counsel were well aware the regulations might affect the appeal. The point was front and centre of representations counsel made to the Crown on 19 and 24 December (the latter being its formal submissions). The potential significance of the regulations for the appeal was a matter before the Minister in making his decision.

[73] Thirdly, New Health was consulted. It made a detailed submission in response to the questions. The first question asked whether a submitter supported the amendment, and to provide if they so chose their reasons. New Health opposed the regulations on various grounds. I do not find it had any entitlement to more direct or personal consultation than other submitters. A legitimate interest in consultation on matters that affect its interests did not here extend to being heard in person. Written consultation may, depending of course on the circumstances, be

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33 *Nicholls v Registrar of the Court of Appeal* [1998] 2 NZLR 385 (CA) at 429.

34 *Air New Zealand Ltd v Wellington International Airport Ltd* HC Wellington CP403/91, 6 January 1992 at 9, cited with approval in *Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671 (CA) at 675.

entirely adequate. It was here. Moreover, New Health has not demonstrated any matter that would have been better communicated by in-person submission, or where it has been materially disadvantaged by the absence of it.

[74] Finally, I was presented with two bundles of the submissions from consultation. The Minister could have been left in no doubt why the plaintiff and other submitters object to fluoridation of public water supplies. There can be no suggestion he was left wanting for the plaintiff's side of the story.

Conclusion

[75] The Minister undertook adequate consultation.

Issue Four: Was there an error of law?

[76] New Health pleads:

> 90 The Order in council is premised on a mistake of law, namely that the legal status of HFA and SSF was not being changed.

[77] Under this head of review, and as I have said already, Ms Hansen sought to challenge the correctness of the decision of Collins J. As Ms Hansen put it, "the plaintiff says the High Court was wrong about the status of HFA and SSF and that the Amendment Regulations have been passed under an error of law".

[78] I concluded at the hearing that that matter was res judicata.[35] Ms Hansen did not pursue this ground further before me.

Issue 5: Was the decision to regulate irrational?

[79] New Health pleaded:

> 92 The purpose of s 105(1)(i) of the Medicines Act is to exempt substances that are or are likely to be medicines from being medicines under the Act.
>
> 93 The power in s 105(1)(i) has been exercised in respect of substances that the High Court has held are not medicines.

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[35] See above at [25]–[26].

94 The exercise of the exemption power in those circumstances is both unnecessary and unlawful.

[80] New Health's written submissions merely repeated that pleading. Ms Hansen did not enlarge further on the point in her oral submissions.

Analysis

[81] I can be similarly brief. I agree with Mr Soper's submission that there is nothing the plain wording of s 105(1)(i) of the Act supporting an interpretation that the power to make regulations under that provision may be exercised only when the legal status of the relevant substance has been changed, or has not previously been declared by a Court or legislative instrument. No such qualification is apparent or necessary.

[82] I also accept the submission made that where the wider statutory and regulatory framework already ensures a substance (or the use of a substance) is subject to controls calculated to minimise risk for the community, it is an appropriate and rational use of the regulatory power to clarify that it is not also subject to controls under the Act.

Conclusion

[83] The use of the regulatory power in this instance was not irrational.

Issue 6: Was there a failure to take into account relevant considerations?

[84] New Health pleaded:

98 The Minister and governor General were required to consider an exemption on the basis that HFA and SSF were medicines.

99 The Minister and Governor General were required to consider:

99.1 Why these therapeutic substances which are used as a substitute for pharmacy-only fluoride tablets, should be permitted to be supplied contaminated with arsenic, mercury and lead; and why they should not be subject to the quality, safety, or efficacy controls of the Medicines Act.

> 99.2 Why it is appropriate for informed consent to be overridden in the delivery of these medicines, when informed consent is a fundamental tenet in the delivery of all other medicines.
>
> 99.3 Why it is permissible for HFA and SSF to be delivered in uncontrolled doses to entire populations when pharmacy only fluoride tablets are strictly controlled in terms of dose and are not advised for pregnant women and children under 3.

[85] Ms Hansen summarised the plaintiff's argument on this ground as being that the possibility of a successful appeal was not adequately contemplated when the regulations were made. This ground was obviously in tension with the prior argument that the purpose of the regulations was to render New Health's appeal moot.

Analysis

[86] I can be brief here also.

[87] First, the Minister had consideration to the 2014 Royal Society/Sir Peter Gluckman review of the scientific evidence. Some submissions supported that review, although the great majority did not. The considerations to which Ms Hansen referred were canvassed in detail in those opposing submissions. There is no evidential basis for a suggestion that relevant considerations were not before the Minister, and overlooked. The reality is just that, unsurprisingly (and consistently with past policy) he preferred the Royal Society/Gluckman analysis.

[88] Secondly, the Minister was entitled to reinforce that analysis by use of the executive stream, as I have called it. If the outcome of the legislative/judicial streams in combination were the setting aside of Collins J's judgment at a later stage, that does not mean, prospectively at least, the Minister was precluded from implementing his own view, particularly when consistent with prior policy. This conclusion was reached earlier and it is unnecessary to repeat it further.

[89] Thirdly, I agree with Mr Soper's submission that the key consideration for the Minister here was whether, if the compounds were exempted from the Act's controls,

they would nonetheless be controlled effectively through the wider statutory framework. And the Minister was entitled to conclude that they would.

Conclusion

[90] The Minister did not fail to take into account relevant considerations.

Result

[91] Application for judicial review dismissed.

[92] Costs must follow the event. If not agreed, brief memoranda may be submitted.

Stephen Kós J

Solicitors:
Wynn Williams Lawyers, Christchurch for Plaintiff
Crown Law, Wellington for Defendant