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| <b>ITEM 15.1 LEGAL ADVICE ON FLUORIDATING KEMPSEY SHIRE COUNCIL WATER SUPPLIES</b> |                |
| Contact Person: Leo Hauville – Councillor  | File: F12/1787 |

**PURPOSE**

I intend to move the following motion at the ordinary meeting to be held Tuesday, 20 February 2018.

**MOVED**

*Moved: Cl. Hauville  
Seconded: Cl. Morris*

**That Kempsey Shire Council;**

- 1 obtain a written opinion of a Senior Counsel of the Sydney Bar experienced in constitutional and administrative laws, in relation to the following questions:**
  - a) Does artificially fluoridated drinking water constitute “therapeutic goods” for the purposes of the Therapeutic Goods Act 1989 (“CTH”) (“TG Act”)?**
  - b) Supposing that the Council were to add fluorine to a public water supply under its control pursuant to an approval purportedly granted, or direction purportedly made, under the Fluoridation of Public Water Supplies Act 1957 (NSW) (“FPWS Act”), would the Council, for the purposes of that activity, be required to comply with the provisions of the TG Act?**
  - c) In the circumstances described at (b), above, would the Council, or Councillors of the Council, or members of the Council’s staff, commit an offence against the TG Act?**

In answering Question (c), the following matters are to be assumed

- i) no dosage form or dosage model of fluoridated drinking water is registered in the Australian Register of Therapeutic Goods;**
  - ii) neither the Council, nor any Councillor of the Council, nor any member of the Council’s staff holds a manufacturing licence granted under Part 3 3 of the TG Act;**
- 2 prior to seeking Senior Counsel’s opinion on the abovementioned questions, first shall approach the Mayor of Port Macquarie Hastings Council to inquire whether that Council would agree to seeking Senior Counsel’s opinion jointly in respect of Question (a), above; and**
- 3 carefully shall preserve its client lawyer privilege in relation to Counsel’s.**

The MOTION was PUT to the Meeting and was LOST.

Councillors Hauville and Saul recorded their votes for the foregoing Motion.

2018.15 **RESOLVED**

*Moved: Cl. Morris*  
*Seconded: Cl. Williams*

**That this matter be forwarded to Local Government NSW for consideration and if necessary be considered for a Motion at the Local Government Conference in 2018.**

#### **ISSUES**

The legal issues are complex and require learned legal advice on best actions Council should take. Penalty costs to Council could be towards \$1 million in fines and removal of existing equipment at South West Rocks if this legal challenge proceeds.

#### **BACKGROUND**

Kempsey Shire Council was directed by the then Director-General of the Health Department to provide fluoridated water in 2004 and it was to be operational according to this direction by 30th November 2005.

Many delays have occurred. South West Rocks has had fluorine in its water supply for three years. The improvements to Crescent Head water supply include fluoridation equipment and construction is planned to be commenced by the end of 2018.

Kempsey water fluoridation awaits NSW Health Department funding.

The Therapeutic Goods Act 1989 is a Federal Act to regulate drugs and physical items (such as massage devices) to aid people's health and health improvement. The Commonwealth Government departments ruling that fluoridated water is not a therapeutic good is under legal challenge. If it is found to be a therapeutic good then it must be licenced to be manufactured, have batch numbers and many more requirements.

There may be conflict between this Act and the State's Fluoridation of Public Water Supplies Act of 1957. Whenever there is an inconsistency between a Commonwealth Act and a State Act, the inconsistency in the State Act is invalid.

Extract from NSW Government Gazette 6th August 2004 Number 131

#### **FLUORIDATION OF PUBLIC WATER SUPPLIES ACT 1957**

##### **Direction to Add Fluorine to a Public Water Supply**

I, ROBYN KRUK, Director-General of the Department of Health, with the advice of the Fluoridation of Public Water Supplies Advisory Committee, and pursuant to section 6A of the Fluoridation of Public Water Supplies Act 1957, do hereby direct the Kempsey Shire Council to add fluorine to the Kempsey, South West Rocks and Crescent Head water supplies under its management and control.

This direction is subject to the following terms and conditions:

1. The Kempsey Shire Council may only add fluorine to the Kempsey, South West Rocks and Crescent Head water supplies in accordance with any provisions, directions or approvals made under the Fluoridation of Public Water Supplies Act 1957, the Code of Practice for the Fluoridation of Public Water Supplies made under that Act as amended from time to time, and the Fluoridation of Public Water Supplies Regulation 2002.

2. The Kempsey Shire Council shall maintain the content of fluorine in the Kempsey, South West Rocks and Crescent Head water supplies at a target concentration level of 1.0 mg/L with an overall accuracy of +/- 5% and within an operating range of not more than 1.5 mg/L and not less than 0.9 mg/L and generally in accordance with the provisions of Part 10 of the Code of Practice for the Fluoridation of Public Water Supplies.

3. The Kempsey Shire Council shall have commenced the upward adjustment of fluorine in the Kempsey, South West Rocks and Crescent Head water supplies by no later than 30 November 2005, unless otherwise approved by the Chief Dental Officer of the Department of Health or that officer's approved representative.

Signed at Sydney this 30th day of July 2004.

ROBYN KRUK,

Director-General

***General Manager's Comment:***

*It would be premature to seek legal advice at this stage when there is an existing challenge to Federal Legislation in place. It would only be after the legal challenge has been heard and a judgement made that the NSW State Government would need to consider its position. At this time the Council could then consider a legal opinion. Currently Council is acting in line with all legislation relevant to this matter.*