

# KELLEHERS

## AUSTRALIA

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### In-House Memorandum

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### **Water Bill – Liability Provisions**

The *Water Bill* Exposure Draft contains interesting and important codification of the liability of public authorities (Chapter 11). The Bill considers liabilities arising from taking or using water (s669) and those arising from unreasonable flow (s670-673). Civil liability for loss caused by water from a flow, or interference with a flow, will be entirely determined by the Act (s671(9), s672(9)). The legislation is said to contain all rights arising from water and, in respect of the liability of Councils and Water Authorities, contains important presumptions impacting causes of action.

#### **Taking and Using (Division 1)**

Liabilities may arise from unauthorised taking or using water (s669). This extends to taking water in an unauthorised manner or in unauthorised quantities, using water in an unauthorised manner or for an unauthorised purpose or polluting water (s669(2)).

To “pollute water” means to “alter (directly or indirectly) the physical, thermal, chemical, biological or radioactive properties of the water so as to make the water:

- (a) less fit for any purpose for which it is or may reasonably be expected to be used, or
- (b) harmful or potentially harmful to:
  - i. the health, welfare or safety of human beings; or
  - ii. animals, birds, wildlife, fish or other aquatic life; or
  - iii. plants or other vegetation; or
  - iv. other organisms.” (s669(7))

The Bill does not apply to the discharge of saline water in accordance with an authorisation issued under the Act (s669(4)). Liability for pollution may extend to water users who construct, maintain or operate unauthorised works (s669(2)(d)). The person who “does the act” is liable to pay damages (s669(3)), but no civil liability in respect of a flow of water arises in respect of Councils or Water Authorities (s669(6)).

#### **Flow of water (Division 2)**

A ‘flow of water’, under the legislation, includes one that “contains saline matter, sewage or trade waste” and “recycled water” (s670(1)). A “flow” is defined to include “discharge, release, escape, percolation, seepage and passage, and includes both surface and underground flow” (Dictionary, *Water Bill Exposure Draft*).

Liability arising out of **unreasonable flow** applies if there is a flow of water from the land of a person to any other land (including from tanks, sewers, drains, pipes, fittings or appliances of any kind on the land) (s671(1)(a)). It also applies where the flow is not reasonable and where the water, or anything contained in it, causes injury, property damage or any other economic loss (s671(1)(b)-(c)). The person who ‘caused the flow’ is liable to pay damages (s671(2)).

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Similarly, liability arising from **interference** with flow applies if a person who interferes with a reasonable flow of water to any land, or by negligent conduct, unreasonably interferes with a flow of water and as a result of the interference injury, property damage or economic loss occurs (S672(2)). The person who 'interfered with the flow' is liable to pay damages (s672(2)).

Where a flow or interference with a flow is caused by works before the current occupier, the current occupier is liable if it failed to take any steps reasonably available to prevent the cause of the flow and this liability extinguishes the causer's liability (s671 (5)-(7), s672 (5)-(7)).

Matters of most weight to the reasonableness of a flow include whether it was authorised and whether the conditions of its authorisation were met. Conformity with Ministerial guidelines regarding drainage is also relevant, together with whether account was taken of the likely impact of the flow having regard to information reasonably available about the cumulative effects on drainage of works and activities in the area. Whether works were maintained to a reasonable standard, the flow was natural and the land's contours are also high weight factors (s673(a)-(g)).

Other relevant matters, having less weight, are the use of the land and other land in the vicinity, whether the water was brought to the land, collected stored or concentrated on that land or extracted from the ground on that land and the purpose for which and degree of care. Also relevant is whether the flow was affected by works restricting flow and whether it was likely to damage any waterway, wetland or aquifer (s673(h)-(i)).

### Liability of Authorities

Liability of a Water Authority applies if water, or anything contained in it, causes injury, property damage or economic loss. The Authority is liable to pay damages (s675). The loss must arise from a flow occurring from an Authority's works as a result of intentional or negligent conduct by the Authority in the exercise of a relevant **function**, such function being water supply (including bulk water) and infrastructure, sewerage, irrigation, drainage, general waterway management, regional drainage and floodplain management and water management schemes (s675(3)).

A Council's liability is identical to that of a Water Authority, except that it is tied to '**circumstances**' not the exercise of a '**function**'. (s676). 'Circumstances' are:

- for a Council responsible for implementing a water management scheme approved under section 389, the flow is from any works identified in that scheme; or
- for a Council that has a function under the *Local Government Act 1989* or any other Act in relation to stormwater works vested in it or otherwise owned by it, the flow is from a sewer or drain, or from the vicinity of a blocked sewer or drain, that is part of those works (s676(3)).

Provisions applying to causes of action arising against a Council or Water Authority under section 675 or 676 are set out in s677. The legislation contains two significant presumptions.

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1. If flow is proved, there is a presumption that the flow occurred as a result of intentional or negligent conduct unless the Authority or Council proves, on the balance of probability, that it did not so occur (s677(1)); and
2. Where a flow was “designed or intended by the Authority or Council; or inevitably and without intervening cause resulted from the exercise of [its powers]”, there is a presumption that the flow of water is to be taken to have occurred as a result of intentional conduct (s677(2));

Further, in respect to actions in negligence, the legislation requires that regard must be had to all circumstances including any omission or failure (in planning, design, construction, maintenance or operation of works) to provide reasonable standards of capacity or efficiency or exercise reasonable care or skill having regard to **Matters** and **Principles** described in the legislation, s677(4):

- **Matters** are specified as being the state of scientific knowledge and knowledge of local conditions at any relevant time, the nature and situation of the works, the service to be provided by the works, and the circumstances and cost of the works, the maintenance and operation of the works, and the cost of works which would have been necessary to construct to avoid the occurrence of any relevant injury, damage or loss (s677(5)).
- **Principles** are specified as being (a) that functions required to be exercised by the Authority or Council are limited by the financial and other resources reasonably available to it for the purpose of exercising those functions; (b) that functions required to be exercised by the Authority or Council are to be determined by reference to the broad range of its activities, and not merely by reference to the matter to which the proceeding relates; (c) that the Authority or Council may rely on evidence of its compliance with the general procedures and applicable standards for the exercise of its functions as evidence of the proper exercise of its functions in the matter to which the proceeding relates (s677(6)).

The Bill appears to remove claims in nuisance against a Council or Water Authority.

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