update
Water

Maddocks

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IN THIS ISSUE

ENVIRONMENT

SEWERAGE, SWIMMERS AND SHELLFISH – DEVELOPMENTS IN WATER POLLUTION REGULATION

Consequences of waterway contamination for water authorities

Contamination of waterways through sewerage spills have long been a reality for water authorities. Sewage spills occur after heavy rains, when excess stormwater overloads sewerage systems and the water overflows into waterways. Despite best practice technology and management, sewerage spills continue to occur around the country. Recently, sewerage spills have caused the National Capital Authority to partially close Lake Burley Griffin to swimmers and the Tasmanian Government to respond to concerns about contamination of the famed Georges Bay shellfish.

After the immediate clean-up and media concern, water authorities are left to respond to environmental agencies. Where the spill has caused pollution that is in breach of an environmental licence or approval, or which has caused environmental harm, the authority is likely to face criminal prosecution. Where successful, an environmental regulator will commonly seek a criminal conviction with a financial penalty. In some jurisdictions, this might be coupled with alternative sentencing, such as publication orders, restoration or prevention orders, payment of costs or compensation, environmental service orders, or environmental audit orders, requiring an audit of the activities of the person or organisation at fault. Even where an authority pleads guilty, a criminal conviction will be recorded and there is likely to be a lengthy criminal proceeding to determine an appropriate sentence, with cost implications for the authority.

Enforceable undertakings in Victoria

In Victoria, a novel approach has recently been taken by the Environment Protection Authority (**EPA**) in addressing sewerage spills, being an administrative sanction to provide restitution for the pollution known as an enforceable undertaking.

Enforceable undertakings are a relatively recent tool made available to the EPA under section 67D of the *Environment Protection Act* 1970 (Vic) (**EP Act**). An enforceable undertaking is similar in many respects to a suspended sentence imposed by a Magistrate, except that it is an undertaking to the EPA rather than to the Court.

The primary benefit of an enforceable undertaking is that, if the undertaking is complied with, no further legal proceedings can be brought for an offence in respect of the alleged contravention which gave rise to the undertaking.

The legislation provides that, if the obligations under the undertaking are not met, the EPA may prosecute for breach of the undertaking.

The EPA's statutory guidelines set out the purpose and intent of the enforceable undertaking provisions of the EP Act. The stated purpose of an enforceable undertaking is 'to implement systemic change within a business to prevent future breaches of the law'. The EPA's Enforcement and Compliance Policy (June 2011) states that the EPA will accept an undertaking where 'the person takes active responsibility for the offence and its impacts, and it is the most appropriate form of enforcement response and will achieve a more effective and long term environmental outcome than prosecution'.

Enforceable undertakings are in use in other areas of the law, having been used by ASIC since 1993 and the ACCC since 1998. They provide a regulator with a useful alternative to prosecution, in circumstances where a person or organisation accepts it is at fault and is willing to voluntarily undertake actions to rectify the statutory breach.

In general terms, the undertakings that have been entered into provide for the person at fault to:

- engage an independent expert to review its system of work
- implement the recommendations of the expert

- incorporate best practice standards into work practices
- develop and implement record keeping procedures and staff training
- report to the EPA on the implementation of the above procedures
- advise persons affected by the incident and relevant authorities of the undertaking.

Process to obtain an enforceable undertaking

There is a relatively lengthy process for finalising an enforceable undertaking involving the following steps:

1. Person at fault registers interest in enforceable undertaking with the EPA's Manager, Major Investigations

2. Review by EPA Enforcement Review Panel and decision as to whether an enforceable undertaking is, in principle, appropriate

3. Person submits a "*Scope of Enforcement Undertaking*" outlining the offence and rectification measures proposed

4. EPA assessment and negotiation as to scope of undertaking

5. "*Enforceable Undertaking Offer*" made by person at fault

6. Offer assessed by EPA's Enforceable Undertakings Panel

7. Feedback given and revised offer may be submitted

8. Assessment of Offer by EPA Enforcement Review Panel and recommendation made to EPA's CEO

9. Enforceable undertaking executed by both EPA and person

Whether the Authority is willing to make such an offer and whether the EPA will accept such an undertaking, is ultimately a matter of discretion. It will depend on the demeanour and readiness of the EPA to prosecute and the willingness of the person at fault to submit to an undertaking in terms acceptable to the EPA.

The EPA will not consider enforceable undertakings appropriate for instance where:

- there is a serious breach of the EP Act involving high or serious levels of culpability
- there are multiple serious breaches or systemic failures
- the incident(s) is significant and has attracted considerable public interest requiring a transparent hearing in court
- applicant has been the subject of previous prosecutions of a serious nature
- the EPA cannot be satisfied of ongoing compliance.

In these circumstances, it is not surprising to find that the EPA has entered into only seven such undertakings.

Reliance on enforceable undertakings by water authorities

For a water authority faced with a sewage spill or other water pollution event, the enforceable undertaking is likely to be an attractive option to explore with the EPA as an alternative to prosecution. It is particularly a tool of benefit to organisations looking to maintain a good environmental and criminal record with the EPA and the community, and in circumstances where the authority is already looking to remediate and rectify the pollution. One of the benefits of the enforceable undertaking is the level of control the offender has over what it may or may not be willing to undertake. It has proved a popular tool in trade practices disputes, and is likely to become an increasingly utilised tool in Victoria in environmental offences.

If successful in Victoria, it is probable that regulators in other jurisdictions will look to implementing a similar enforceable undertaking regime. The development of this system in Victoria will be worth watching for both regulators and water authorities across the country, as an alternative to prosecution for water pollution events causing environmental harm.

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WATER-SENSITIVE URBAN DESIGN

INITIATIVES TO ADVANCE WATER-SENSITIVE URBAN DESIGN IN VICTORIA

What is Water-Sensitive Urban Design?

Water-sensitive urban design (**WSUD**) is an approach to the urban design and planning process which incorporates consideration of water resources and the broader water environment to help ensure more sustainable use of water and healthy ecosystems and to enhance liveability.

WSUD can involve the spectrum of water sources – namely, drinking water, stormwater, wastewater and recycled water. The objectives underlying WSUD include:

- reducing potable water demand through the use of more water-efficient appliances, rainwater and grey water reuse
- minimising wastewater generation and treatment of wastewater to a standard suitable for effluent reuse opportunities and/or release to receiving water
- harvesting urban stormwater and treating it for reuse and/or discharge to surface waters
- improving the environment of urban rivers, creeks and waterways
- using water and vegetation for ecosystem services, such as reducing the urban heat island effect.

In practical terms, WSUD can be incorporated into urban design and planning through a range of options, such as:

- capture and use of stormwater as an alternative source of water to conserve potable water
- use of vegetation for filtering purposes
- water-efficient landscaping
- localised water harvesting for various uses
- localised wastewater treatment systems

An important question arises as to whether or not the framework regulating urban planning can accommodate these options.

WSUD in the Victorian planning system

As yet, WSUD is not entrenched in all Australian planning systems. However, the Victorian planning regime is an example where it has. The Victorian Planning Provisions (**VPPs**), which sets out the framework for planning throughout the State of Victoria, state that:

> 'Planning is to assist in the conservation and wise use of natural resources including … water'.

Alternative water source projects are specifically anticipated and, arguably, encouraged under Victoria's planning regime. In particular, clause 14.02-3 of the VPPs, which is entitled 'Water Conservation', refers to the need to 'encourage the use of alternative water sources such as rainwater tanks, stormwater and recycled water'. Furthermore, clause 56.07 of the VPPs, entitled 'Integrated Water Management', specifically provides for the substitution of drinking water for non-drinking purposes with reused and recycled water. This clause aims at managing water more responsibly and sustainably.

However, pursuant to clause 56.07-2 (Reused and Recycled Water), the institution of recycled water systems is not mandatory unless this has been required by the local water authority. In these cases, the reused and recycled water supply systems must be designed, constructed and managed in Clause 56 in accordance with the requirements and to the satisfaction of the relevant water authority, the Environment Protection Authority and Department of Human Services. Furthermore, the relevant aspects of clause 56.07 only apply to residential subdivision proposals in urban zones, including subdivision of buildings. In addition, clause 56.07 only supports the use of recycled water for nondrinking purposes, not for drinking purposes.

Finally, while clause 56.07 also refers to wastewater and stormwater, the relevant provisions deal more with the management of risks rather than encouraging their use as alternative water sources. Specifically, clause 56.07-4 focuses on minimising damage to properties and inconvenience to residents from urban run-off and to protect the environmental values and physical characteristics of receiving waters from degradation by urban run-off. Pursuant to clause 56.07-4, urban stormwater management systems must be designed and managed to the requirements of the relevant drainage authority. In Melbourne, this is either Melbourne Water (the relevant water authority) or the local council where a catchment is 60 hectares or less.

WSUD and the Living Melbourne, Living Victoria Plan for Water

It is possible that Victoria's planning system to facilitate WSUD will be reformed to address the limitations associated with the current framework.

Appointed in January 2011 as part of the Victorian Government's Living Melbourne, Living Victoria Plan for Water, the Living Victoria Ministerial Advisory Council (**MAC**) released a high-level strategy 'roadmap' in March 2011, and a more detailed implementation plan in February 2012 aimed at changing the way in which water is managed and used in Victoria.

Among other things, the MAC found that water considerations are not well integrated into the urban planning process, which leads to lost opportunities to use alternative water sources and reduced environmental health, suburban amenity and flood protection. Accordingly, the MAC recommended that the VPPs be amended to ensure that water and urban planning decisions are aligned to the recommended vision and objectives for Melbourne's water system.

In response, the Victorian Government indicated that the recently established Office of Living Victoria (**OLV**) would work with the Department of Planning and Community Development to amend the VPPs so that performance requirements for stormwater management are applied more broadly. The OLV would also prepare a regulatory impact statement for building controls to improve the water performance of new buildings.

WSUD initiatives in the City of Melbourne

Separate from the process to facilitate WSUD at the State level, a number of councils have also taken action at the local level in an effort to advance WSUD. This article considers some of the initiatives taken by the City of Melbourne by way of example.

Policy documents

The City of Melbourne's strategic policy to foster WSUD is outlined in a number of key documents, including:

- 'Total Watermark – City as a Catchment', which was initially adopted by Council in 2002, outlines the City of Melbourne's goal to become a water sensitive city. Among other things, the policy seeks to support the creation of a water-sensitive city through the reduction of water demand and consideration of rainwater harvesting, stormwater harvesting and water recycling.
- 'City of Melbourne WSUD Guidelines' inform Council staff, developers and residents on how to apply WSUD principles to urban developments or local water reuse and treatment projects.
- 'Energy Water and Waste Efficiency Planning Controls Review 2011' provides an overview of the process and supporting studies that have led to the development of a new planning policy for energy, water and waste efficiency for the City of Melbourne.

Proposed amendments to the planning scheme for the City of Melbourne

To implement these policies, the City of Melbourne has proposed a number of amendments to its planning scheme

- Amendment C142 – Stormwater Management (Water Sensitive Urban Design) Policy.

  This proposed policy requires that developments adopt a best practice performance approach to stormwater management in accordance with the Urban Stormwater Best Practice Environmental Management Guidelines. In addition, applications must be accompanied by a Water Sensitive Urban Design Response including a report outlining compliance with the best practice performance objectives. The proposed policy applies to all planning-permit applications for new buildings, extensions to existing buildings which are 50 square metres in floor area or greater and subdivision in a business zone. However, the proposed policy does not apply to an application for a subdivision of an existing building.
- Amendment C162 – New Municipal Strategic Statement.

  The new Municipal Strategic Statement (**MSS**) MSS guides Melbourne's urban design and planning principles for the decades ahead. Among other things, the new MSS incorporates a new objective 'to make the built environment resilient to heatwaves, water shortages, extreme storm events and sea level rise'. It also includes the following new strategy, which will help to advance WSUD:

  "Ensure that all new development adopts water sensitive urban design principles including stormwater harvesting, water recycling and reuse, and attenuating stormwater flow."
- Amendment C187 – Energy Water And Waste Efficiency

  This proposed policy seeks to incorporate the new Energy Waste and Water Efficiency policy into the Melbourne Planning Scheme. It will apply to buildings used for office, retail, education/research and accommodation purposes. Amongst other things, the proposed policy seeks to improve water efficiency of buildings and encourage the reuse of mains water. It also proposes specific standards for energy, water and waste efficiency depending on use and the size of the proposed building.

Amendments C142 and C162 are awaiting approval from the Minister. Amendment C187 is currently the subject of consideration by Planning Panels Victoria.

The future for WSUD in Victoria

The future for WSUD in Victoria will depend, at least in part, on the existence of a facilitative planning framework. It is clear that the VPPs as they currently stand could limit the uptake of WSUD. However, efforts are underway to address these limitations at the State government level through the OLV and also at the local government level through municipal-specific amendments.

Dariel De Sousa, Consultant, Regulation & Administrative Law

CONSTRUCTION

INSOLVENT CONTRACTORS – ARE YOU PROTECTED?

What happens when a construction contractor's ability to adequately complete the works is affected by issues relating to cash flow and solvency? This could be an important issue in the context of the construction of water and wastewater infrastructure.

A contractor who enters into external administration and fails to complete a project can leave an Authority with the difficult task of appointing others to complete, and often having no better alternative but to pay key subcontractors who were unpaid by the insolvent head contractor. The likelihood of incurring significant extra costs in the process is significant.

The recent spate of insolvencies in the construction industry highlights the need for Authorities to consider whether their construction agreements provide adequate rights of recourse to a contractor's performance security.

Performance security in the construction industry is typically provided in one of two forms:

- retention moneys deducted from progress payments
- bank guarantees, known as 'unconditional undertakings'.

Many factors combine to determine which form of security is most appropriate for a project. In general terms, larger contractors prefer bank guarantees because retention monies stifle cash flow and they have the capacity to establish security facilities with their banks. Smaller contractors often do not have that capacity, and prefer to provide security by way of retention.

Bank guarantees provide an Authority with the full value of performance security up front, whereas retention money accounts need to be built up over the course of several progress payment cycles.

Bank guarantees put the authority in the position of a secured creditor, in the sense that, where the contractor becomes insolvent (and depending on underlying contractual rights) the guaranteed amount must be paid by the bank on demand.

The particular wording of the bank guarantee is critical to properly protecting the interests of the Authority. The guarantee should be irrevocable, unconditional and payable on demand. Bank guarantees that are truly 'unconditional' should not contain expiry dates. Authorities should consider carefully each guarantee when it is provided. Authorities should seek advice if a guarantee is soon to expire in circumstances where a contractor's obligations have not been fully performed and there is some concern as to its solvency.

Retention monies held by an Authority may be a registrable security interest under the *Personal Property Securities Act* 2009 (Cth), and advice should be obtained in this regard. Registration may mean the difference between the Authority being able to enforce its interest in respect of the retention monies as a priority over the interests of third parties in the same retention monies, and being subject to the interests of these third parties.

An Authority may be restrained from having recourse to security where there are contractual pre-conditions to recourse that have not been satisfied. Pre-conditions, such as the giving of advance, written notice to the contractor of the Authority's intention to have recourse, exist in Standards Australia's pro forma construction contracts. Also, contracts often require an Authority first to demonstrate that there is an unpaid debt owed by the Contractor before recourse to security can be had.

In the current climate, Authorities should consider carefully whether to broaden their rights to have recourse to security, so that proving the existence of a debt or even of a breach of contract is no pre-condition to recourse to security. This can mean the difference between the Authority having the right to call on the security immediately where an insolvency event occurs, and having to wait until it has actually incurred the cost of completing the works itself.

Paul Woods, Partner and Tara Chandler-Scott, Special Counsel, Construction & Development

THE MURRAY-DARLING BASIN

ADOPTION OF THE MURRAY-DARLING BASIN PLAN

The Murray-Darling Basin Plan (**Basin Plan**), which is strategic plan for the integrated and sustainable management of water resources in the Basin prepared by the Murray-Darling Basin Authority (**MDBA**), has been a long time in the making and the subject of much consultation as well as controversy.

- *Basin Guide*: The first Basin Plan was due to be released for consultation in July 2010. However, it was preceded by the Guide to the Proposed Murray-Darling Basin Plan (**Basin Guide**), which was issued in October 2010. The Guide was met with outcry, particularly from irrigators and rural communities located in the Basin, who believed that the reduction in diversions for consumptive use identified in the Guide would cause significant social and economic hardship.
- *Draft Basin Plan*: The draft Basin Plan (**Draft Plan**) was finally released in late November 2011 with input from a range of scientific organisations, including the CSIRO and the Bureau of Meteorology, state governments and a parliamentary inquiry into the Basin Plan led by the independent parliamentary member, Tony Windsor. The Draft Plan proposed a significant reduction on the additional surface water needed for the environment compared to the Basin Guide. However, the Draft Plan still maintained a proposal that 2,750 gigalitres (**GL**) of water would need to be transferred to the environment each year to maintain environmental health of the Basin. The Draft Plan was the subject of extensive consultations.
- *Revised Draft Basin Plan*: On 28th May 2012, the MDBA released a revised draft of the Basin Plan. This revised draft was delivered to each member of the Murray-Darling Basin Ministerial Council (**Ministerial Council**), namely the Commonwealth Minister for Water and water ministers from Queensland, New South Wales, Victoria, South Australia and the ACT for comment.
- *Altered Draft Basin Plan*: A further altered draft of the Basin Plan was delivered to the Ministerial Council on 6 August 2012, which reflected the MDBA's consideration of issues raised by the Ministerial Council in relation to the revised draft of the Basin Plan.

On 26 October 2012, Minister Burke confirmed the Government's support for a Basin Plan with a benchmark of 2750 GL of water to be recovered for the environment. However, the Minister also notified the MDBA of the Government's commitment to use the mechanism within the Plan to provide for an additional 450 GL for the environment, raising the total amount of water to be returned to the environment to 3200 GL. This additional water for the environment is to be recovered through environmental works (e.g. addressing river constraints) and on-farm efficiencies. In addition, the Minister's suggestions included:

- **Sustainable Diversion Limits**: An adjustment mechanism, which will allow the upwards and downwards adjustment of the surface and groundwater sustainable diversion limits, has been included.
- **Climate Change**: A new provision has been incorporated into the Basin Plan that emphasises the importance of taking climate change impacts into account.
- **Water trading**: The water trading rules will not apply in limited circumstances in relation to trades for the delivery of environmental water.

The Minister submitted his changes to the Basin Plan, including an additional 450 GL for the environment, to the MDBA pursuant to section 44(1) of the *Water Act* 2007 (Cth). On 21 November 2012, the MDBA presented the final Basin Plan to the Minister for him to consider for adoption. The MDBA incorporated all of the Minister's suggested changes in this version of the Basin Plan.

On 22 November 2012, the Basin Plan was formerly adopted by the Minister and was signed into law. This signifies a new and important chapter in the management of water resources across the Basin. Time will tell whether the Plan will be effective in ensuring that the aims and objectives underlying the regulatory regime can be achieved in practice.

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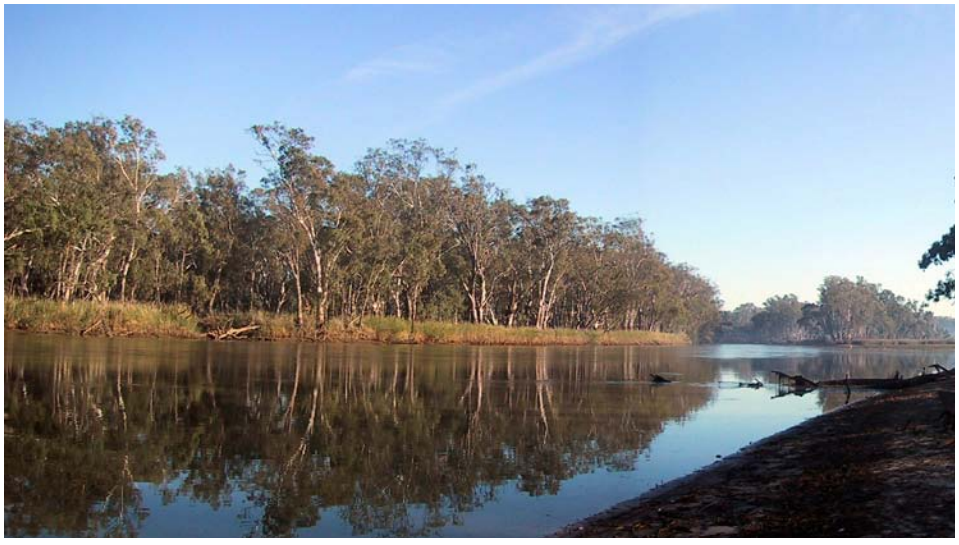

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