

Water Law – Client Alert

24 May 2010

LIABILITY OF WATER AUTHORITIES & OTHERS FOR DAMAGE RELATED TO THE FLOW OF WATER ONTO LAND

Two recent Supreme Court of Victoria decisions have made it clearer when a water authority or other person, including a council, can incur liability as a result of causing a flow of water or interfering with a flow of water that causes another to suffer injury, damage or loss.

Section 157 of the *Water Act 1989* imposes liability on statutory water corporations to pay damages, where as a result of the intentional or negligent conduct of the corporation in the exercise of a function of that water authority, a flow of water onto land occurs from the water authority's works and the water causes:

- (a) injury to any other person;
- (b) damage to the property (real or personal) of any other person; or
- (c) any other person to suffer economic loss.

Section 74 of the *Water Industry Act 1994* is in similar, if not entirely identical terms, applying to the Melbourne metropolitan water retailers.

Section 16 of the *Water Act* imposes liability on any person, including a council, to pay damages for water that causes injury, damage or loss, as a result of that person:

- (a) causing a flow of water onto another's land that is not reasonable; or
- (b) interfering with a reasonable flow of water, or by negligent conduct interfering with a flow of water that is not reasonable.

The decision in *MR Pumpa & Ors v Goulburn-Murray Rural Water Corporation* [2010] VSC 169 [Cavanough J, 28 April 2010]

In VCAT (Macnamara DP) had followed its earlier decisions and summarily dismissed a claim for restraining orders and damages brought by the owners of three separate farming properties arising from damage alleged to have been caused by Goulburn-Murray Rural Water by reason of:

- the escape of saline water into the groundwater from a nearby salinity mitigation system; and
- the escape of water in an irrigation channel into the groundwater on the claimants' lands.

Cause of the damage

The court, on appeal from VCAT, rejected the interpretation (previously adopted by VCAT) which required that the relevant damage must have been caused:

- by the flow of the water (as distinct from the water itself or its composition); and
- by reason of a surface flow of water "at least to some degree".

The court held that, in a claim under sections 157 or 16 of the *Water Act*:

- "...it is not a condition of success that the injury, damage or loss in question be caused, to any extent, by the *flow* of water as distinct from the water itself or as distinct from the chemical composition of the water" (at paragraph [39]).

In reaching this conclusion, Cavanough J stated that if the Parliament had intended that the flow of water be the relevant cause of the damage, those sections would not have been expressed as they presently are; ie in language which "...*focuses attention on the water, rather than the flow. In relation to the causation of damage*" (at [26]).

Accordingly, sections 157 and 16 of the *Water Act* contemplate damage, however caused by the water; whether by the force or impact of the movement of the water as it flows onto the land or simply by the effect of the presence of water itself, including by reason of the chemical composition of the water.

Flow onto any land

In VCAT, Macnamara DP had also maintained his view that the words “onto any land” in section 157 required that claimants must demonstrate that the flow of water had been, “at least to some degree”, a surface flow of water rather than entirely a subterranean flow. While not strictly necessary for the court to deal with this issue, Cavanough J strongly disagreed with such an interpretation. His Honour observed that this requirement was:

- “...With respect, an odd touchstone... It is difficult to understand why Parliament would have intended that a minor surface manifestation (at least) should be a necessary condition of liability for damage arising from an otherwise subterranean flow of water. It may be doubted whether liability was truly intended to turn on such a matter” (at [19]).

The effect of *Pumpa*

1. The decision in *Pumpa* makes clear that, in a claim under sections 16 or 157 of the *Water Act* or section 74 of the *Water Industry Act*, a water corporation, water retailer or any other person, including a council, may be found to be liable for any injury, damage or other economic loss incurred by any person where:
 - it is demonstrated that water has flowed onto that person’s land and that water, whether by the force or impact of the movement of the water as it flows onto the land or simply by the effect of the presence of the water itself, including by reason of the chemical composition of the water (eg contaminants in it) caused the injury, damage or loss alleged.
2. It is doubtful that the flow of water complained of needs necessarily to be, “at least to some degree”, a surface flow of water. Until such time that there is a decision of the Court of Appeal to the contrary, a defence to a claim based upon the absence of some manifestation of a surface flow is highly unlikely to be upheld in VCAT and, arguably, in any future appeal from VCAT.

The decision in *South East Water Ltd v Transpacific Cleanaway Pty Ltd* [2010] VSC 46 [Cavanough J, 24 February 2010]

The court, on appeal from VCAT, held that the references to “negligent conduct” in section 74 of the *Water Industry Act* do not imply that the common law duty of care in the tort of negligence applies, rather, the court held that a claim under section 74 of the *Water Industry Act*:

- “...is a freestanding, statutory cause of action, to be assessed according to the provisions of the... [Water Industry Act] and the provisions of any other applicable statute, not according to common law principles save to the extent that the legislation itself indicates otherwise” (Cavanough J at [45]).

The decision in *South East Water Ltd* means:

- ‘negligent conduct’ is not the same as common law negligence; rather
- liability for ‘negligent conduct’ in section 74 of the *Water Industry Act* or sections 16 and 157 of the *Water Act* is assessed in accordance with the elements necessary to prove liability that are contained in the legislation (see elements above), which is a different standard of liability to that which applies at common law.

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