

Changes to the stormwater regime for councils

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Statutory right to stormwater

The draft Water Bill proposes to give the statutory right to the “use, flow and control” of water in stormwater works to the Crown, unlike the current Water Act, which only gives the Crown the rights to water in a waterway and groundwater.

In turn, water corporations and Councils will have the right to “take and use” water in their own stormwater works. Stormwater works are defined as “works constructed to collect or transport water run-off that are owned by a water corporation and used to collect or transport water in or through an urban area or vested in a Council under section 198 of the *Local Government Act 1989*”.

Designation of local stormwater areas

The intent behind enshrining the rights to stormwater, particularly for Councils, is to encourage a greater take up of stormwater harvesting schemes.

To this end, where there is current or expected demand for using water within stormwater works, the Minister will have the power to declare a local stormwater area through a water resource management order (WRMO). WRMO's are a new tool which are intended to consolidate existing water management arrangements such as bulk entitlements, environmental water, rules for water shares and take and use licences, and other statutory rights into the one instrument.

Take and use licensing regime will apply

It is proposed to extend the “take and use licence” regime to water contained in stormwater works which are covered by a WRMO such that if a third party wishes to use this water, it will need to obtain a licence from the Minister. In practice, the same arrangements as currently exist for “take and use licences” will continue to apply, whereby such licences are administered by the relevant water corporation. The maximum terms for take and use licences, whether for stormwater or other water resources, will be extended from 15 to 20 years.

For water in stormwater works which are outside of a WRMO, the Council will have discretion as to whether it will allow the use and will be able to enter into commercial

arrangements in the event it is happy to supply stormwater to a third party. There is no discussion within the Explanatory Guide to the draft Water Bill about how these commercial arrangements may operate.

Stormwater offences

As a consequence of the above, there will be two new offences (which are set out in section 60 of the draft Water Bill) relating to taking water from stormwater works belonging to Councils. If the stormwater works are covered by a WRMO, it will be an offence to take water unless the person holds a take and use licence for this purpose (with a maximum penalty of \$17,323.20). In other areas, the person must have the consent of the Council to take water and the maximum penalty for this offence is \$8,661.60.

These offences are strict liability offences, which means that the intent of the party taking the water is irrelevant to whether an offence has been committed. Further, if proceedings for such an offence are instituted, evidence that water from the stormwater works of a Council has been diverted onto or used on land is proof that either the owner or occupier of that land or a person authorised to take or use water on that land took the water.

It is worth noting that the draft Water Bill includes a definition of “take water from” which deals with water in a waterway, aquifer or dam, but does not deal with water in stormwater works. Given that the section 60 offences specifically use the expression “take water from” and that the offence is a ‘strict liability’ offence, there may be merit in providing greater clarity about what this concept means in the context of stormwater.

It is also worth noting that these offences are intended to be enforced by the relevant water corporations, not the relevant Council, with the draft Water Bill providing that only authorised water officers appointed by water corporations or catchment management authorities will be able to inspect and investigate compliance with the new Act or regulations.