

WATER SYMPOSIUM 2026 CROWN LIABILITY, GOOD FAITH AND ENVIRONMENTAL FLOWS

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Today

- Amendments to the WMA – environmental flows
- What are environmental flows and commencement of the LNS scheme
- Overview of existing statutory “immunities” for government
 - *Civil Liability Act 2002*
 - *Local Government Act 1993*
 - *Water Management Act 2000*
- Risks and uncertainties

2018 *Water Management Act 2000* amendments made alongside the LNS



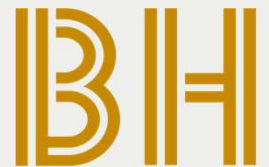
- The purpose of the s 398 amendment was to clarify that river operators can deliver releases of water for environmental purposes without the risk of civil liability where these releases are made in good faith.
- S 398 is in effect now for delivery of existing environmental flows across the state.
- Where there are new environmental flow arrangements, these cannot begin until after the conclusion of good faith negotiations under the LNS.
- The statutory protection provided under s 398 of the WM Act only applies where the NSW Government or Water NSW have acted in good faith.
- In general terms, good faith means:
 - adhering to all relevant legislation
 - adhering to policies and procedures, such as river operation procedures to ensure a risk-based approach to delivering flows
 - reliance on the latest data and modelling
 - ensuring appropriate approvals are obtained.
- Good faith has been part of the legislative framework under the WM Act since its inception and is commonly used in NSW legislation.

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*DCCEEW Information Webinar 15
July 2025*

Amendments to WMA for environmental flows

- June 2025 *Water Management Act 2000* amendments to facilitate water releases for environmental purposes (“environmental flows”):
 - *s399B & associated regulations provide a new statutory framework to regulate negotiations with landholders affected by proposed environmental water releases*
 - *s398(1)(c) extends the Crown immunity from liability (where it has acted in good faith) to claims arising from the release of water for environmental purposes*



Environmental flows and LNS

- Deliberate release of water intended to increase frequency and extent of flows in downstream wetlands and floodplains - release in knowledge that in a regulated system these releases will cause flooding/inundation/overtopping of river banks
- Environmental flows / Landholder Negotiation Scheme (**LNS**) package comprises
 - *Modelling (based on river height at a single location) to predict impacts*
 - *Declaration of proposed release and area of land likely to be affected*
 - *Negotiation with landholders identified as impacted – compensation and acquisition of “flow easements” and indemnity/release*
 - *Notification protocol*
 - *Water releases of held environmental water to meet targets (winter & spring)*
- LNS Negotiation Guidelines published in August 2025, sets out broad guidelines for the conduct of negotiations
- Declaration order made for Phase 1 negotiations to commence on the Murrumbidgee, between Darlington Point and Balranald
- Phase 2 anticipated to begin after December 2026

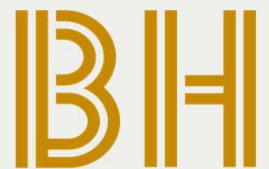


2025 Amendments to the WMA: Objectives

It is normal for government to have statutory protections to carry out the necessary functions of government. These protections generally operate to limit claims that can be brought against government when it has acted in good faith. The Act already contains a number of statutory protections in relation to the availability of water and the quantity and quality of water. As we explore ways to better manage environmental water, it has become clear that we need to address a potential gap in the statutory protections under the Act when releases of environmental water are made. Government needs to be able to exercise this important function without fear of recourse.

The Government recognises that this may impact on landholders who may be affected by environmental water releases. The Government wants to strike a balance in terms of managing these impacts. That is why we are putting in place a framework that will facilitate negotiations between affected landholders and government when making environmental water releases. The framework will provide a mechanism for landholders to raise issues and discuss mitigation of any impacts. The Government will consult with affected stakeholders in developing the framework.

Second Reading Speech 2018



WMA: s 398 *Exclusion of Crown liability*

(1) *Neither the Crown nor any other person is subject to any action, liability, claim or demand arising—*

(a) from the unavailability of water, or

(b) from any failure in the quantity or quality of water, or

(c) from the release of water for environmental purposes, [ADDED 1/6/25]

as a consequence of anything done or omitted to be done in good faith by the Minister, by a prescribed authority or by any person acting on behalf of the Minister or a prescribed authority, in the exercise of any functions under this Act or the [Water NSW Act 2014](#).

(2) *Neither the Crown nor any other person is subject to any action, liability, claim or demand arising as a consequence of—*

(a) the use in good faith of any water management work, or

(b) the release in good faith of water from any water management work,

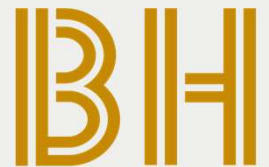
by the Minister, by a prescribed authority or by any person acting on behalf of the Minister or a prescribed authority, in the exercise of any functions under this Act or the [Water NSW Act 2014](#).

(3) *In this section, **prescribed authority** means—*

(a) the Ministerial Corporation, or

(b) a water supply authority, or

(c) Water NSW.



Equality before the law

- *S5(2) Crown Proceedings Act 1988 (NSW)*

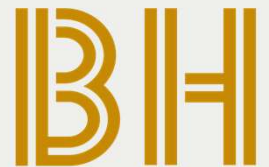
*Civil proceedings against the Crown shall be commenced in the same way, and the proceedings and rights of the parties in the case **shall as nearly as possible be the same**, and judgment and costs shall follow or may be awarded on either side, and shall bear interest, as in an ordinary case **between subject and subject**.*



Established immunities from liability:

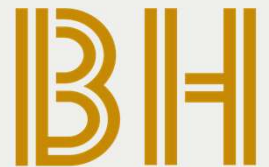
Part 5: *Civil Liability Act 2002*

- Largely uniform across jurisdictions
- Applies to a “public or other authority”
 - Similar provision under the counterpart statute in Qld applied to dam operator in relation to flooding of the Brisbane and Bremer Rivers in 2011 (Rodriguez & Sons cases)
 - Does not apply to MDBA or its delegates: *Doyle’s Farm Produce Pty Ltd v Murray Darling Basin Authority (No 2)* [2021] NSWCA 246
- **s42**: need to consider functions and resources of public authority when determining if there is a duty of care or that it has been breached
- **s43 and s43A** reduce the standard of care required to be exercised by the authority:
 - s43 : if relates to a breach of a statutory duty due to the exercise or failure to exercise a “function”– the act or omission must be so unreasonable that no authority having the functions of the authority in question could properly consider the act or omission to be a reasonable exercise of its functions.
 - s43A: if it relates to a “special statutory power” the act or omission must be so unreasonable that no authority having the functions of the authority in question could properly consider the act or omission to be a reasonable exercise of its power
- **s44**: no liability for failing to exercise a function to prohibit or regulate an activity unless the plaintiff could have compelled the authority to act
- **s45** - protection for roads authority - need to also establish actual knowledge of the particular risk



Established immunities from liability: NSW: *Local Government Act 1993*

- s733 – Protection in NSW for local councils. Exemption from liability re flood liable land, land subject to risk of bush fire and land in coastal zone
- A “council” does not incur any liability in relation to:
 - *Any advice furnished in good faith re likelihood of land being flooded, affected by coast hazards or subject to bush fire or re the nature or extent of that hazard;*
 - *anything done or omitted to be done in good faith by the council in so far as it relates to the likelihood of land being flooded, subject to coastal hazard or bushfire risk or the nature and extent of that hazard.*
- Listed actions inc: flood mitigation, coast hazard protection and bushfire hazard reduction works or failure to enforce removal of structures that cause coastal erosion
- Onus reversed (ie taken to have acted in good faith) if Council acted substantially in accordance with relevant NSW Gov manual



What is Good Faith? - Caselaw



Mid Density Developments Pty Ltd v Rockdale Municipal Council (1993) 44 FCR 290

- The Council issued s 149 planning certificates stating there was no flood risk, despite holding studies indicating potential flooding. Although the officer honestly believed the answers were correct, he failed to consult relevant records and the Council had no proper system for responding to such requests.
- The Full Federal Court held that **good faith is not satisfied by mere honesty or absence of bad motive**. In this context, good faith required a real and genuine attempt to answer the request by reference to available materials, using reasonable care and proper systems.



What is Good Faith? - Caselaw

Bankstown City Council v Alamo Holdings Pty Ltd (2005) 79 ALJR 1511

- Involved flooding caused by a stormwater drainage system constructed and operated by Bankstown City Council. Alamo Holdings sought an injunction, claiming the flooding amounted to a nuisance. The Council argued it was acting under statutory powers and in good faith.
- S 733(1) of the LGA: A council 'does not incur any liability' in respect of any advice, or anything done, in good faith relating to the likelihood of any land being flooded.
- The High Court allowed the Council's appeal and held that the Council had acted **in good faith** despite its inaction in funding works to alleviate the flooding pending the outcome of the proceedings, acknowledging that Council needed to consider the relative priority of all projects.

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What is Good Faith? - Caselaw



Gales Holdings Pty Limited v Tweed Shire Council [2013] NSWCA 382

- Gales owned 27ha of undeveloped land in Kingscliff. Action in nuisance against Council for the discharge and build up of stormwater onto its land over many years.
- The flooding and ponding also caused a colony of the Wallum Froglet, a threatened species, to move in.
- Gales sought injunction/damages to abate the additional stormwater. It also claimed the diminution in the value of the land inhabited by the frogs and the cost of treating the stormwater for the maintenance of the colony.
- Court determined that Council had not acted in “good faith” and that s733 **did not apply**.
- Council also did not have benefit of s43A of the CLA as its liability was not “based on” the exercise of a “special statutory power”.

Faith in Good Faith

- **Good faith is more than honesty** – Mere honesty or absence of bad motive is insufficient - actions must meet an **objective standard** (*Mid Density*).
- “The statutory concept of ‘good faith’ ... calls for more than honest ineptitude.” (*Mid Density* at 300)
- **Within statutory authority** – Actions must not exceed powers granted by statute (*Bankstown*).
- **Proper statutory purpose** – Powers must be exercised for the purpose intended by the statute (*Bankstown*).
- **Reasonable care and proper processes** – Authorities must consult relevant information, follow correct procedures, and take reasonable steps to ensure lawful outcomes (*Mid Density*).
- **No negligence or improper conduct** – Good faith requires absence of negligence, recklessness, or capricious behavior. Harm from lawful action does not breach good faith (*Bankstown*).



Existing “immunities” vs s398(1)(c)

■ Immunity against a deliberate tort:

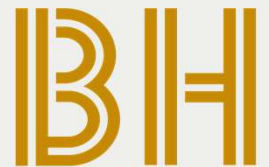
- S733 concerns acts of decision-making and the provision of information.
- Other immunities for Government action in response to acts of God / environmental risk
- Environmental flows involve conscious action to inundate private land.

■ Quasi-resumption of private proprietary right:

- Environmental flows are a direct interference of private proprietary rights.
- NSW Government committed through the LNS and Just Terms Act to acquire environmental flow easements.
- S398(1)(c) casts a shadow over such negotiations.

■ The Crown or “any other person”

- S398(1)(c) applies to immunise “any other person” in addition to the Crown. Presumably to cover private entities / consortiums / and individual officers that may be involved in water management.
- Significantly broader class of protected parties versus other more targeted clauses (e.g. Councils or roads authorities)



Water Management Amendment (Easements for Inundation Bill) 2025

- Not yet passed. Debate currently adjourned in the Legislative Council.
- Bill inserts administrative provisions that permit environmental flow easements to be transferred to Water NSW and created in favour of any “river operator”.

“River operator” means Water NSW or “a water authority prescribed by the regulations”

“Water authority” means the Crown or “a person prescribed by the regulations who has one or more similar functions to Water NSW” and not limited to NSW.

■ **Concerns**

- Wide scope for future expansion of “water authority” by regulation. No parliamentary oversight.
- Environmental flow easements may be created in favour of multiple “river operators”.
- Potential for easement to be relied on for multiple projects, each causing their own inundation.



Environmental flows: Who bears the risk?

- LNS is a set and forget system by invitation only
- Modelled inundation footprint (used to identify who is affected and extent of impact) relies on several assumptions:
 - *Performance of other “constraints” upstream*
 - *Actions of third parties (i.e. river operators)*
 - *Interactions with other water release programs or new works*
 - *Weather and soil conditions*
- Negotiations do not include:
 - *Input on the frequency of releases*
 - *Provisions to ensure the maintenance of third party works*
 - *Release volumes and frequency*
 - *Release protocols and extent and forms of notice*
 - *The airspace maintained in water storages for management of coincidental upstream flooding*
- Notification (travel time, intervening weather)
- Negotiation phase commence with furthest downstream
- Easement terms/deed intended to exclude future claims

