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Can the Crown intentionally cause harm in 'good faith'?



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Snapshot

June 2025 amendments to the *Water Management Act 2000* expanded statutory immunity from civil liability.

Immunity now extends to loss intentionally caused, provided the conduct is undertaken in 'good faith'.

The changes expose a tension between intentional harm and the limits of good faith protections.

Crown immunity and 'good faith' protections

In NSW, the *Crown Proceedings Act 1988* entitles the Crown to bring proceedings against any person and specifies that, in civil proceedings against the Crown, the 'rights of the parties in the case shall as nearly as possible be the same... as in an ordinary case between subject and subject' (*Crown Proceedings Act 1988* (NSW) s 5). Nevertheless, there are limited circumstances where the Crown is granted immunity from civil liability. There are practical reasons for this immunity, reflecting the unique role and duties of government. The Crown must decide matters of policy, prioritise finite resources and act in the face of competing interests. Consequently, statutory protections limiting the liability of public authorities exist where necessary to enable government to exercise those functions.

Historically, Parliament has used such provisions sparingly and subject to caveats (e.g. where conduct is in 'good faith'). The courts have also construed protections of this kind strictly, reading down provisions where they consider the immunity unnecessary.

The *Civil Liability Act 2002* (NSW) sought to 'codify' common law Crown immunities and create certainty as to when public authorities could be sued. Part 5 of the Act requires consideration of the 'financial and other resources that are reasonably available to the authority' in determining whether an authority has a duty of care or has breached that duty (s 42). The Act also reduces the standard of care, in limited circumstances, to an obligation to not exercise, or not fail to exercise, its duty or power in a manner that is 'so unreasonable that no authority having' that duty or power 'could properly consider the act or omission to be a reasonable exercise' of it (s 43). It exempts roads authorities from liability for failing to carry out road work unless they had specific knowledge of the particular risk that resulted in the harm. These protections recognise 'the wide responsibilities and limited resources of public authorities and their duties to the public as a whole' (New South Wales, *Civil Liability Amendment (Personal Responsibility) Bill 2002*, Second Reading Speech, Legislative Council, 19 November 2002, Michael Egan).

Similarly, s 733 of the *Local Government Act 1993* provides local government with an exemption from liability where the council has acted in 'good faith' in providing advice or otherwise doing anything, or omitting to do anything, relating to land liable to flooding, subject to bush fire risk, or within a coastal zone. A council is deemed to have acted in good faith where it has complied with the relevant NSW government flood management or coastal management manual.

Section 398(1)(a) and (b) of the *Water Management Act 2000* (NSW) ('**WM Act**') exempts the Crown from liability in relation to the unavailability of water or any failure in the quantity or quality of water where it has acted in good faith.

These protections apply in limited circumstances where the government's liability is disproportionate to its capacity to carry out its functions. In these cases, they respond to externalities beyond the government's reasonable control (e.g. climate change risks). These statutory immunities are well established, have been the subject of judicial consideration, and recognise the need for governments to be empowered to make decisions and implement actions to manage large scale risks, provided they act in accordance with a responsible decision-making framework.

statutory exclusion of Crown liability to cover matters arising from the release of water for environmental purposes’:

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

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(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,

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](#) (emphasis added).

**The ‘good faith’ immunity under s 398(c) will
have the unique effect of immunising the
Crown against the very liability that it will,
with knowledge, cause.**

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Releases of ‘water for environmental purposes’ (**‘Environmental Flows’**) are controlled releases of held environmental water (purchased by the Commonwealth or held by the State) from upstream storages at specific times to create peak flows of sufficient duration to inundate wetlands and other targeted environmental sites. To achieve these outcomes, the Environmental Flows will exceed riverbank constraints and thus inundate private and public land adjoining the river system. The scale of the Environmental Flows releases is significant and the water delivery mechanism is crude. For example, the Murrumbidgee River is approximately 1,500 km long, with water taking an average 25 days to reach the South Australian border. Environmental Flows on the Murrumbidgee (released from Burrinjuck and Blowering dams in the Snowy Mountains) are proposed to inundate wetlands along the river (principally between Wagga Wagga and Hay), as well as wetlands and forests in the Lowbidgee area, and to flow through to the Murray River and on to the South Australian border. To achieve those environmental outcomes, it is proposed to periodically release water to increase the flow rate to 40,000 ML at Wagga Wagga (flow peak for 3-5 days and in excess of 22,000 ML for 14 days). The current channel capacity constraint in the river is equivalent to a flow rate of 22,000 ML at Wagga Wagga.

Practical impacts and limited recourse

Environmental Flows will inundate private land, infringe proprietary rights, and impact property and livestock. The ‘good faith’ immunity under s 398(c) will have the unique effect of immunising the Crown

- a. *Identification of Nominated Landholders by way of a 'Declaration Order'* (This order must describe the proposed environmental water release and the area of land likely to be impacted) (sch 9, *Water Management (General) Regulation 2025*. See, for example, declaration order made 25 August 2025 for Phase 1 – Darlington Point to Balranald);
- b. *Standard terms for 'flow easements'* (being an easement that grants the holder a right to periodically or permanently cover the burdened land with water);
- c. *Nominated Landholders invited to participate in negotiations* for the acquisition of flow easements under the voluntary Landholder Negotiation Scheme ('LNS') established under special purpose regulations under the *Water Management Act 2000* s 399B; *Water Management (General) Regulation 2025* (NSW) cl 11 sch 9. Compensation (in works, land and/or cash) is to be paid for the acquisition of flow easements as assessed in accordance with Part 3 of the *Land Acquisition (Just Terms Compensation) Act 1991* ('*Just Terms Act*').
- d. *Compulsory acquisition of flow easements* (in accordance with the *Just Terms Act*) if negotiations under the LNS fail or are not concluded within 12 months;
- e. *Timing, volume and delivery of Environmental Flows releases agreed* between state and federal authorities;
- f. *Nominated Landholders notified of the proposed Environmental Flows releases* (in accordance with a yet-to-be published guideline); and
- g. *Release of Environmental Flows*.

In conjunction with the Environmental Flows, works are being undertaken to remove 'constraints' to encourage more efficient delivery of water downstream. Additionally, negotiations under the LNS may result in further works, such as levees to protect private land or weirs/regulators to alter local flows.

The identification of Nominated Landholders and the negotiation of compensation under the LNS are one-off and, in the case of land identified in the August 2025 Declaration Order, potentially years before any releases of Environmental Flows.

Accurate and robust modelling of the anticipated extent and duration of inundation of land is fundamental to confidence that environmental outcomes will be achieved and to assessing impacts on, and appropriate compensation for, landholders. The modelling exercise is immensely complex and must account for dynamic factors outside the control of government. These include how proposed flows will interact with other 'constraints' upstream, the delivery of irrigation water orders, water release programs and new works (undertaken as part of the LNS or otherwise), as well as weather and catchment saturation conditions over the course of the flows across a 1,500 km river system.

Landholders will bear the risk if the modelling is inadequate or the impacts of the Environmental Flows exceed current predictions and government is protected from liability if it has acted in 'good faith'. It remains to be seen what 'good faith' requires where the government intentionally causes loss, is immunised from liability, and seeks to remedy that loss in advance through a one-off compensation payment. It is possible that the courts may interpret s 398(c) strictly. The courts have read down provisions of this kind in the past by reference to the following principles:

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2. A 'jealous interpretation' may be applied to immunise against only 'positive acts in the exercise of functions "which of their nature will involve interferences with persons or property"' (*Puntoriero v Water Corporation* [1999] HCA 45 at [18] per Gleeson CJ and Gummow J).
3. It is presumed 'that legislators would not deprive a person of legal rights otherwise enjoyed against a statutory body, except by the use of clear language' (*Bropho v Western Australia* [1990] HCA 24 at 17-18).

Landholders and other users of land along the Murrumbidgee and Murray-Darling river systems should be mindful that their recourse against the Government for damage to property, land and livestock caused by Environmental Flows may be limited.



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