



# Statement of Compatibility with Human Rights

*Prepared in accordance with the Thirteenth Assembly Sessional Orders (Part 12.3)  
as adopted on 20 March 2018.*

## Water Legislation Amendment Bill 2018

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cwlth).

### Overview of the Bill

The Bill amends the *Water Act* (the Act) by repealing sections 7(1) and 7(3) and making other consequential amendments to the Act, and to the *Mineral Titles Act*, *Mining Management Act* and *Petroleum Act*, to ensure that interference and obstruction of waterways, extraction of surface water and groundwater, construction of water bores and recharge of aquifers by and for mining and petroleum activities will be regulated under the Act in the same way as all other water resources users.

The Bill also makes the best practice compliance and enforcement tools of remediation notices and infringement notices available to regulators and modernises provisions for general administration of the Act.

Offences and penalties have been amended to comply with Australian water industry best practice and Part IIAA of the Criminal Code. The offences and penalties that are amended have remained unchanged since enactment in July 1992. Offences associated with the regulation of waste discharge and pollution are not affected by the Bill and will be subject to separate review processes that consider waste and pollution issues more broadly.

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**Human rights implications**

This Bill engages the right conferred under Article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) that everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law. The right to presumption of innocence is also a fundamental common law principle.

Strict liability and absolute liability, when applied to an offence, can be considered a limitation of the presumption of innocence because the defendant can be found guilty, or an element of the offence proven, without the prosecution being required to prove fault.

When strict liability or absolute liability applies to an offence, the prosecution is only required to prove the physical elements of an offence, beyond reasonable doubt, not the fault elements, in order for the defendant to be found guilty. The defence of honest and reasonable mistake of fact is available to the defendant (see section 43AX of the Criminal Code) where strict liability applies.

Use of strict liability or absolute liability may be justified in circumstances where there is public interest in ensuring that regulatory schemes are observed and it can reasonably be expected that a person will be aware of their duties and obligations in relation to the offence. Strict and absolute liability provisions are not considered to be inconsistent with the presumption of innocence if they pursue a legitimate objective and are reasonable, necessary and proportionate to achieving that objective.

In the following assessment of the Water Legislation Amendment Bill, when a strict liability provision is deemed to be reasonable, necessary and proportionate for the objective of sustainable use of water resource, it is concluded that it does not impact on the presumption of innocence to the detriment of a defendant.

### **Absolute liability offence**

**Clause 42** of the Bill provides for the new section 102C of the Act. This new section enables a court to find a director of a body corporate personally liable if the body corporate has committed an offence under the Act. In order to charge this offence, the prosecution must prove that the body corporate intentionally engaged in a relevant offence, namely sections 40(3), 44(2), 56(2), 59(2), or 66(2) of the Act. In accord with section 43BM of the Criminal Code, this will require proving a state of affairs that allow a court to be satisfied that the body corporate expressly, tacitly or impliedly authorised or permitted the commission of the offence, and that this was intentional. Section 102C then attributes criminal responsibility to executive officers of the body corporate, subject to a range of specific defences.

The use of absolute liability in the provision means that the prosecution does not have to also prove that the executive officer themselves engaged in the physical and fault elements, as the basis of vicarious liability is to attribute responsibility to the person managing and controlling the entity that has actually committed the offence. Section 102C holds an executive officer liable unless the executive officer establishes on the balance of probabilities that he/she:

- was not in a position to influence the conduct of the body corporate in relation to the contravention; or
- took reasonable steps to prevent the contravention; or
- did not know, and could not reasonably have been expected to know, that the contravention would happen.

Establishing any one of these excuses is a complete defence.

While this is an offence of absolute liability, the prosecution must first prove that a complex intentional offence was engaged in by the body corporate. Only then does the onus shift to the executive officer to prove a defence.

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This modification of the presumption of innocence is therefore limited to a situation where it is evident that there has been a clear and deliberate intention to engage in criminal conduct by the corporation that is under the direction of the defendant. In these situations, the answer as to who is primarily responsible for what may have been a collective decision, will be peculiarly within the knowledge of the executive officers of the body corporate.

Reaching beyond the corporate veil in this way sends a message on behalf of the community that the offences are not merely regulatory sanctions, with some financial risk to businesses that choose to deliberately flout the rules, but that executive officers of corporations that choose to engage in these offences may be personally held liable for conduct which has the potential to result in great personal harm to individuals, to businesses, and to the environment.

The Bill has been developed by reference to the National Framework for Compliance and Enforcement Systems for Water Management agreed by the Council of Australian Governments in December 2009, which recommended that a best practice water resources compliance regime should provide for the liability of directors and other corporate officers where a corporation is found guilty of an offence. Directors' liability has only been imposed in the Bill in relation to offending with the potential for significant public harm, consistent with the principled approach that has been adopted in the Territory since the *Statute Law Amendment (Directors' Liability) Act 2015* was passed.

New section 102C aligns the Act with the imposition of directors' liability in the *Waste Management and Pollution Control Act*, and is consistent with the modern approach to similar provisions in South Australia and New South Wales.

The maximum penalty that may be imposed on an offender under new section 102C is the maximum penalty applying for the relevant declared provision. All declared provisions carry the maximum penalty of 1,000 penalty units or imprisonment for 2 years.

### **Strict liability offences**

**Clause 9** of the Bill provides for replacement of section 27 of the Act, relating to the unauthorised disclosure of confidential information by a member of the Water Resources Review Panel. Under new section 27, a person commits an offence by intentionally and recklessly disclosing information obtained as a panel member. Strict liability applies to the person's membership of the panel and to the person gaining confidential information as a panel member. This means that it is not necessary for the prosecution of an offence under section 27 to prove that the panel member knew that the information disclosed was confidential in nature. It is reasonable to expect that the panel members will know and/or be advised which information must be treated as confidential.

An offence is not committed if the information is disclosed for the administration of the Act, or for legal proceedings associated with the Act, or with the consent of the person to whom the information relates; or the information is otherwise available to the public. A defendant has legal burden of proof in these matters, consistent with section 43BU of the Criminal Code. In addition, a person will not be criminally responsible if the disclosure is justified or excused by or under a law, as is consistent with section 43BE of the Criminal Code.

The maximum penalty that may be imposed under new section 27 is 200 penalty units or imprisonment for 2 years.

The application of strict liability to the offence at new section 27 is not a significant limitation on the presumption of innocence.

**Clause 10** of the Bill replaces section 31 of the Act, concerning the power of the Water Resources Review Panel. Under new section 31, a person commits an offence by intentionally contravening a notice from the panel requiring attendance at a meeting or provision of a document, as well as by contravening a requirement of the panel to give evidence under oath or answer a relevant question. Strict liability applies to the contravention of a notice made by, or

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requirement from, the Water Resources Review Panel. This means that it will not be necessary for the prosecution of an offence under section 31 to prove the reasons for a defendant's behaviour in contravening a requirement of the panel, it being sufficient to prove that the contravention occurred.

The maximum penalty that may be imposed under new section 31 is 200 penalty units or imprisonment for 2 years.

The application of strict liability to the offence at new section 31 is not a significant limitation on the presumption of innocence.

**Clause 11** of the Bill introduces new section 33C to the Act, which provides the offence of failing to comply with a remediation notice. A remediation notice may be given when it is reasonably believed that a person has contravened a relevant provision of the Act and that the contravention will continue or be repeated. Strict liability applies to this offence, meaning that the prosecution does not have to prove fault on the offender's part in not complying with a remediation notice. It is sufficient to prove that the requirements set out in the notice were not complied with, which does not impact on the presumption of innocence to the detriment of the defendant.

It is a defence to a prosecution under section 33C if the defendant proves that he/she took reasonable steps and exercised due diligence to prevent the offence. The legal burden of proof rests with the defendant in relation to the steps taken and diligence exercised in preventing the offence.

The maximum penalties for the offences to which notices relate are: 500 penalty units for sections 37(1), 40(1), 42(1), 44(1), 46(1), 48(1), 50(1), 56(1), 58(1), 59(1), 61(1), 66(1) and 68(1); 200 penalty units for section 79(3); 50 penalty units for sections 71(1), 81(1) and 96(3); and 30 penalty units for section 55(2).

The application of strict liability to the offence at new section 33C is not a significant limitation on the presumption of innocence.

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**Clause 12** of the Bill replaces section 37 of the Act, for breach of a water investigation permit. Under new section 37, an offence is committed if a person holding a water investigation permit contravenes a term or condition of the permit. Strict liability applies to this offence, meaning that the prosecution does not have to prove fault on the part of the permit holder in contravening the permit. It is sufficient to prove that a term or condition of the permit was contravened, which does not impact on the presumption of innocence to the detriment of the permit holder.

It is a defence to a prosecution under section 37 if the defendant proves that he/she took reasonable steps and exercised due diligence to prevent the offence. The legal burden of proof rests with the defendant in relation to the steps taken and diligence in preventing the offence.

The maximum penalty for contravening a term or condition of a water investigation permit is 500 penalty units.

The application of strict liability to the offence at new section 37 is not a significant limitation on the presumption of innocence.

**Clause 13** of the Bill amends section 39(4) of the Act, relating to the disclosure of confidential information obtained during the administration of the Act. Under new section 39(4), a person commits an offence by intentionally and recklessly disclosing information obtained by the person while involved with administration of the Act. Strict liability applies only to the person having obtained the information in the course of being involved with the administration of the Act. This means that it is necessary for the prosecution of an offence under section 39(4) to prove that the information was obtained as part of the person's involvement in the administration of the Act.

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An offence is not committed if the information is disclosed for the administration of any Act, or for legal proceedings associated with any Act, or with the consent of the person to whom the information relates; or the information is otherwise available to the public. A defendant has legal burden of proof in these matters, consistent with section 43BU of the Criminal Code. In addition, a person will not be criminally responsible if the disclosure is justified or excused by or under a law, as is consistent with section 43BE of the Criminal Code.

The maximum penalty that may be imposed under new section 39(4) is 200 penalty units or imprisonment for 2 years.

The application of strict liability to the offence at new section 39(4) is not a significant limitation on the presumption of innocence.

**Clause 14** of the Bill replaces section 40 of the Act, for unauthorised works that affect water flow in a waterway. New section 40 applies to a broader definition of interference with a waterway (through consolidation of previous sections 15 and 40) and recognises that a right, permit or licence granted under sections 10, 11, 14, 41, 45, 60 or 67 provides authorisation to interfere with a waterway.

New section 40(1) provides for the offence when a person interferes with a waterway without authorisation under the Act but without intent or recklessness in regard to the interference caused. Strict liability applies to this offence, meaning that the prosecution does not have to prove the intent or degree of care exercised by the defendant; being sufficient only to prove that the defendant did interfere with the waterway without authority under the Act.

New section 40(2) provides for the so-called aggravated offence when a person intentionally and recklessly interferes with a waterway and is not authorised under the Act to interfere with a waterway. In this case, strict liability only applies to the person not being authorised to interfere with the waterway. This means that the prosecution must prove that the interference was not authorised under that Act and that the interference was intentional and reckless.

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It is a defence to a prosecution under both new sections 40(1) and 40(2) if the defendant proves that he/she took reasonable steps and exercised due diligence to prevent the offence. The legal burden of proof rests with the defendant in relation to the steps taken and diligence exercised in preventing the offence.

The maximum penalties that may be applied are 500 penalty units under new section 40(1) and 1,000 penalty units or imprisonment for 2 years under new section 40(2).

The application of strict liability to the offences at new sections 40(1) and 40(2) is not a significant limitation on the presumption of innocence.

**Clause 16** of the Bill replaces section 42 of the Act, which applied to the breach of a construction permit to construct or alter works on or in a waterway. This permit will be renamed as a permit to interfere with a waterway in association with the changes to section 41.

Under new section 42, an offence is committed if a person holding a permit to interfere with a waterway contravenes a term or condition of the permit. Strict liability applies to this offence, meaning that the prosecution does not have to prove fault on the part of the permit holder in contravening the permit. It is sufficient to prove that a term or condition of the permit was contravened, which does not impact on the presumption of innocence to the detriment of the permit holder.

It is a defence to a prosecution under section 42 if the defendant proves that he/she took reasonable steps and exercised due diligence to prevent the offence. The legal burden of proof rests with the defendant in relation to the steps taken and diligence exercised in preventing the offence.

The maximum penalty for contravening a term or condition of a permit to interfere with a waterway is 500 penalty units.

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The application of strict liability to the offence at new section 42 is not a significant limitation on the presumption of innocence.

**Clause 17** of the Bill replaces section 44 of the Act, for unauthorised taking or use of surface water. The new section applies to unauthorised take of surface water in recognition that 'use' is included in the definition of 'take' provided in the Act.

New section 44(1) provides for the offence when a person unintentionally takes surface water without authorisation under the Act. Strict liability applies to this offence, meaning that the prosecution does not have to prove the intent of the action taken; being sufficient only to prove that the defendant was not authorised under the Act take the surface water.

New section 44(2) provides for the so-called 'aggravated offence' when a person intentionally takes surface water without authorisation under the Act. In this case, strict liability only applies to the person not being authorised to take the surface water. This means that the prosecution must prove that the interference was not authorised under that Act and that the interference was intentional and reckless.

It is a defence to a prosecution under both new sections 44(1) and 44(2) if the defendant proves that he/she took reasonable steps and exercised due diligence to prevent the offence. The legal burden of proof rests with the defendant in relation to the steps taken and diligence exercised in preventing the offence.

The maximum penalties that may be applied are 500 penalty units under new section 44(1) and 1,000 penalty units or imprisonment for 2 years under new section 44(2).

The application of strict liability to the offences at new sections 44(1) and 44(2) is not a significant limitation on the presumption of innocence.

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**Clause 18** of the Bill replaces section 46 of the Act, for breach of a licence to take surface water. Under new section 46, an offence is committed if a person holding a licence to take surface water contravenes a term or condition of the licence. Strict liability applies to this offence, meaning that the prosecution does not have to prove fault on the part of the licence holder in contravening the licence. It is sufficient to prove that a term or condition of the licence was contravened, which does not impact on the presumption of innocence to the detriment of the licence holder.

It is a defence to a prosecution under section 46 if the defendant proves that he/she took reasonable steps and exercised due diligence to prevent the offence. The legal burden of proof rests with the defendant in relation to the steps taken and diligence exercised in preventing the offence.

The maximum penalty for contravening a term or condition of a licence to take surface water is 500 penalty units.

The application of strict liability to the offence at new section 46 is not a significant limitation on the presumption of innocence.

**Clause 19** of the Bill replaces section 48 of the Act, for drilling and other work carried out on a bore by a person not holding a drilling licence granted under the Act. The new section applies to the same type of work, which will now be referred to as 'bore work'.

New section 48(1) provides for the offence when a person does bore work without holding a drilling licence that authorises that bore work. This offence does not apply while the person doing the bore work is supervised by a driller holding the appropriate drilling licence. Strict liability applies to this offence, meaning that the prosecution does not have to prove the intent of the person in doing the bore work; being sufficient only to prove, if the defendant had not been supervised at all times by an appropriately licensed driller, that the defendant did not hold the appropriate drilling licence.

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It is a defence to a prosecution under section new section 48(1) if the defendant proves that he/she took reasonable steps and exercised due diligence to prevent the offence. The legal burden of proof rests with the defendant in relation to the steps taken and diligence exercised in preventing the offence.

The maximum penalty that may be applied under new section 48(1) is 500 penalty units.

The application of strict liability to the offence of doing bore work without holding the appropriate drilling licence is not a significant limitation on the presumption of innocence.

**Clause 20** of the Bill replaces section 50 of the Act, for breach of a drilling licence. Under new section 50, an offence is committed if a person holding a drilling licence contravenes a term or condition of the licence. Strict liability applies to this offence, meaning that the prosecution does not have to prove fault on the part of the licence holder in contravening the licence. It is sufficient to prove that a term or condition of the licence was contravened, which does not impact on the presumption of innocence to the detriment of the licence holder.

It is a defence to a prosecution under section 50 if the defendant proves that he/she took reasonable steps and exercised due diligence to prevent the offence. The legal burden of proof rests with the defendant in relation to the steps taken and diligence exercised in preventing the offence.

The maximum penalty for contravening a term or condition of a drilling licence is 500 penalty units.

The application of strict liability to the offence at new section 50 is not a significant limitation on the presumption of innocence.

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**Clause 21** of the Bill replaces section 53 of the Act, for the power of the Controller of Water Resources by notice to require drillers to provide information and samples. Under new section 53(2), an offence is committed if a licensed driller fails to comply with the requirement within the time stated in the notice. Strict liability applies to this offence, meaning that the prosecution does not have to prove fault on the part of the driller in not complying with a remediation notice. It is sufficient to prove that the notice was not complied with, which does not impact on the presumption of innocence to the detriment of the defendant.

It is a defence to a prosecution under section 53(2) if the defendant proves that he/she took reasonable steps and exercised due diligence to prevent the offence. The legal burden of proof rests with the defendant in relation to the steps taken and diligence exercised in preventing the offence.

The maximum penalty that may be imposed on a licensed driller for failing to comply with a notice from the Controller of Water Resources requiring the provision of information and samples is 30 penalty units.

**Clause 22** of the Bill replaces sections 55 and 56 of the *Water Act*.

Under new section 55(2), an offence is committed if an owner or occupier of land fails to comply with a requirement specified by the Controller of Water Resources in a *Gazette* notice to provide information about any bores on the land owned or occupied. Strict liability applies if the information is not provided within a specified time or as soon as practicable after the completion of the construction or alteration of a bore. This means that the prosecution does not have to prove fault on the part of a land owner or occupier who does not provide the requested information within the required time limit, which does not impact on the presumption of innocence to the detriment of the defendant.

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It is a defence to a prosecution for an offence against section 55(2) if the defendant proves that he/she took reasonable steps and exercised due diligence to prevent the offence. The legal burden of proof rests with the defendant in relation to the steps taken and diligence exercised in preventing the offence.

The maximum penalty that may be imposed under new section 55(2) is 30 penalty units.

Under new section 56(1) an offence is committed when a person unintentionally does bore work which is not authorised by a permit to bore work granted under section 57 of the Act. Strict liability applies to this offence, meaning that the prosecution does not have to prove the intent of the action taken; being sufficient only to prove that the defendant undertook bore work that was not authorised by a permit granted under section 57.

New section 56(2) provides for the so-called 'aggravated offence' when a person intentionally does bore work which is not authorised by a permit under granted under section 57. In this case, strict liability only applies to the bore work not being authorised by a permit under granted under section 57 of the Act. This means that the prosecution must only prove that the bore work was not authorised by a section 57 permit.

It is a defence to a prosecution under section both of new sections 56(1) and 56(2) if the defendant proves that he/she took reasonable steps and exercised due diligence to prevent the offence. The legal burden of proof rests with the defendant in relation to the steps taken and diligence exercised in preventing the offence.

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It is also a defence to a prosecution under both sections 56(1) and 56(2) if the defendant proves that the bore work was done to prevent pollution or deterioration of water in the bore; or to provide urgently needed water supply; and it was not reasonably practical to apply for a section 57 permit; and all reasonable steps were taken to inform the Controller of Water Resources of the bore work; and any relevant regulations applicable to the bore work were complied with.

The maximum penalties that may be applied are 500 penalty units under new section 56(1) and 1,000 penalty units or imprisonment for 2 years under new section 56(2).

The application of strict liability to the offences of doing bore work without authorisation by a permit granted under section 57 is not a significant limitation on the presumption of innocence.

**Clause 24** of the Bill replaces section 58 of the Act, for breach of a permit to do bore work. Under new section 58, an offence is committed if a person holding a permit granted under section 57 contravenes a term or condition of the permit. Strict liability applies to this offence, meaning that the prosecution does not have to prove fault on the part of the permit holder in contravening the permit. It is sufficient to prove that a term or condition of the permit was contravened, which does not impact on the presumption of innocence to the detriment of the permit holder.

It is a defence to a prosecution under section 58 if the defendant proves that he/she took reasonable steps and exercised due diligence to prevent the offence. The legal burden of proof rests with the defendant in relation to the steps taken and diligence exercised in preventing the offence.

The maximum penalty for contravening a term or condition of a permit to do bore work is 500 penalty units.

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The application of strict liability to the offence at new section 58 is not a significant limitation on the presumption of innocence.

**Clause 25** of the Bill replaces section 59 of the Act, for taking ground water without authorisation.

Under new section 59(1) an offence is committed when a person intentionally takes water from a bore and is not authorised under the Act to take the water. Strict liability applies to this offence, meaning that the prosecution does not have to prove the intent in taking the water; being sufficient only to prove that the defendant took the water and was not authorised to do so under the Act.

New section 59(2) provides for the so-called 'aggravated offence' when a person intentionally takes water from a bore and is not authorised under the Act to take the water. In this case, strict liability only applies to the person not being authorised under the Act to take the water. This means that the prosecution must only prove that the person did not hold rights to take the water under section 14 as a land owner or occupier or as the holder of a licence granted under section 60.

It is a defence to a prosecution under both new sections 59(1) and 59(2) if the defendant proves that he/she took reasonable steps and exercised due diligence to prevent the offence. The legal burden of proof rests with the defendant in relation to the steps taken and diligence exercised in preventing the offence.

The maximum penalties that may be applied are 500 penalty units under new section 56(1) and 1,000 penalty units or imprisonment for 2 years under new section 56(2).

The application of strict liability to the offence of taking ground water without authorisation under the Act is not a significant limitation on the presumption of innocence.

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**Clause 26** of the Bill replaces section 61 of the Act, for breach of a licence to take groundwater. Under new section 61, an offence is committed if a person holding a licence granted under section 60 contravenes a term or condition of the licence. Strict liability applies to this offence, meaning that the prosecution does not have to prove fault on the part of the licence holder in contravening the licence. It is sufficient to prove that a term or condition of the licence was contravened, which does not impact on the presumption of innocence to the detriment of the licence holder.

It is a defence to a prosecution under section 61 if the defendant proves that he/she took reasonable steps and exercised due diligence to prevent the offence. The legal burden of proof rests with the defendant in relation to the steps taken and diligence exercised in preventing the offence.

The maximum penalty for contravening a term or condition of a licence to take ground water is 500 penalty units.

The application of strict liability to the offence at new section 61 is not a significant limitation on the presumption of innocence.

**Clause 27** of the Bill replaces section 66 of the Act, for recharging an aquifer without authorisation.

Under new section 66(1) an offence is committed when a person unintentionally increases the volume of water in an aquifer and is not authorised under the Act to do so. Strict liability applies to this offence, meaning that the prosecution does not have to prove the intent in recharging the aquifer; being sufficient only to prove that the defendant did so and was not authorised to do so under the Act.

New section 66(2) provides for the so-called 'aggravated offence' when a person intentionally recharges an aquifer and is not authorised under the Act to do so. In this case, strict liability only applies to the person not being authorised under the Act to recharge the aquifer. This means that the prosecution must only prove that the person did not hold a licence granted under section 67 of the Act.

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It is a defence to a prosecution under both of new sections 66(1) and 66(2) if the defendant proves that he/she took reasonable steps and exercised due diligence to prevent the offence. The legal burden of proof rests with the defendant in relation to the steps taken and diligence exercised in preventing the offence.

The maximum penalties that may be applied are 500 penalty units under new section 66(1) and 1,000 penalty units or imprisonment for 2 years under new section 66(2).

The application of strict liability to the offence of recharging an aquifer without authorisation under the Act is not a significant limitation on the presumption of innocence.

**Clause 28** of the Bill replaces section 68 of the Act, for breach of a recharge licence. Under new section 68, an offence is committed if a person holding a licence granted under section 67 contravenes a term or condition of the licence. Strict liability applies to this offence, meaning that the prosecution does not have to prove fault on the part of the licence holder in contravening the licence. It is sufficient to prove that a term or condition of the licence was contravened, which does not impact on the presumption of innocence to the detriment of the licence holder.

It is a defence to a prosecution under section 68 if the defendant proves that he/she took reasonable steps and exercised due diligence to prevent the offence. The legal burden of proof rests with the defendant in relation to the steps taken and diligence exercised in preventing the offence.

The maximum penalty for contravening a term or condition of a recharge licence is 500 penalty units.

The application of strict liability to the offence at new section 68 is not a significant limitation on the presumption of innocence.

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**Clause 30** of the Bill replaces section 71 of the Act, for contravention of a notice issued under section 70.

Under new section 71(1), an offence is committed if a person fails to comply with a direction in regard to a bore specified by the Controller of Water Resources in a notice served on the person. Strict liability applies to this offence, which means that the prosecution does not have to prove fault on the part of the person who does not comply with the direction in the notice served. This does not impact on the presumption of innocence to the detriment of the defendant.

It is a defence to a prosecution under section 71 if the defendant proves that he/she took reasonable precautions and exercised due diligence to prevent the offence. The legal burden of proof rests with the defendant in relation to the steps taken and diligence in preventing the offence

The maximum penalty that may be imposed under new section 71 is 50 penalty units.

**Clause 31** of the Bill amends section 79(3) of the Act, for unauthorised construction, maintenance, repair, alteration, operation or removal of works. An offence is committed if a person intentionally engages, without authorisation, in conduct resulting in the construction, maintenance, repair, alteration, operation or removal of works for a purpose mentioned in section 79(1) of the Act.

Strict liability applies to the person not being authorised to engage in the conduct, which means that the prosecution must only prove that the defendant was not authorised to engage in the conduct that resulted in the construction, maintenance, repair, alteration, operation or removal of works for a purpose mentioned in section 79(1) of the Act. This does not impact on the presumption of innocence to the detriment of the defendant.

The maximum penalty that may be imposed under new section 79 is 200 penalty units.

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**Clause 32** of the Bill amends section 81(1) of the Act, for unapproved use of a bore the costs of which were borne by the Territory (Territory Bore). Under new section 81(1), an offence is committed if a person uses a Territory Bore and is not authorised to use the bore under the Act. Strict liability applies to the person using the bore without authorisation under the Act. This means that the prosecution only has to prove that the person used the bore without authorisation under the Act, which does not impact on the presumption of innocence to the detriment of the defendant.

The maximum penalty that may be imposed under new section 81(1) is 50 penalty units.

**Clause 33** of the Bill replaces sections 88 of the Act, for the powers of the Controller of Water Resources to require a person to take a range of actions related to the investigation, use, control, protection, management or administration of water or in relation to waste. These powers are exercised through notices issued in accordance with section 88(1).

An offence is committed under new section 88(2) if a person intentionally engages contravenes a requirement specified in a notice issued by the Controller of Water Resources under section 88(1). Strict liability applies to the contravention of a requirement in the notice, which does not impact on the presumption of innocence to the detriment of the defendant.

The maximum penalty that may be imposed under new section 88(1) is 50 penalty units.

**Clause 34** of the Bill replaces section 96 of the Act, for emergency powers to limit rights to take water under sections 10, 11 or 14 of the Act. These emergency powers are exercised by the Minister through the issuing of notices in accordance with sections 96(1) and 96(2).

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Under new section 96(3), an offence is committed if a person contravenes a notice made under sections 96(1) or 96(2). Strict liability applies to this offence, meaning that the prosecution must prove that the defendant contravened the notice. This does not impact on the presumption of innocence to the detriment of the defendant.

It is a defence to a prosecution under section 96 if the defendant proves that he/she defendant contravened the notice for the reasonable protection of life or property, or the defendant took reasonable steps and exercised due diligence to prevent the offence. The legal burden of proof rests with the defendant in relation to these matters.

The maximum penalty that may be imposed under new section 96 is 50 penalty units.

**Clause 35** of the Bill replaces sections 98, 100 and 101 of the Act and adds new section 102B.

Section 98 is concerned with works constructed or used under a licence granted or power given under the Act and the benefits required or derived from those works.

Under new section 98(1), an offence is committed if a person intentionally engages in conduct that results in those works being damaged or destroyed or results in those benefits being diminished. Strict liability applies to the conduct engaged in, meaning that the prosecution must prove that the conduct damaged or destroyed the works or resulted in the required or derived benefits from the works were diminished. This does not impact on the presumption of innocence to the detriment of the defendant.

The maximum penalty that may be imposed under new section 98 is 100 penalty units.

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Section 100 is concerned with wasting water. Under new section 100(1), an offence is committed if a person intentionally engages in conduct that results in more water being used than reasonably necessary, or results in unnecessary or excessive water flow, or results in water being taken without adequate control or supervision. Strict liability applies to the conduct engaged in, meaning that the prosecution must prove that the conduct resulted in water being wasted as described in section 100(1)(b). This does not impact on the presumption of innocence to the detriment of the defendant.

The maximum penalty that may be imposed under new section 100 is 50 penalty units.

Section 101 is concerned with obstruction of authorised officers. Under new section 101(1) an offence is committed if a person intentionally obstructs an authorised officer who is known by the person to be acting in an official capacity under the Act. Strict liability applies to the authorised officer acting in an official capacity. This does not impact on the presumption of innocence to the detriment of the defendant.

The maximum penalty that may be imposed under new section 101 is 200 penalty units or imprisonment for 2 years.

New section 102B is concerned with criminal liability of an executive officer of a body corporate. Under new section 102B(1), the executive officer commits an offence when the body corporate contravenes a declared provision; if the executive officer was in a position to influence the body corporate's conduct in contravening the declared provision and was reckless both about whether the contravention would happen and in failing to take preventative action.

Declared provisions are the offences of unauthorised interference with a waterway; breaching a permit to interfere with a waterway; unauthorised taking of surface water; breaching a licence to take surface water; doing bore work without authorisation; breaching a permit to do bore work, unauthorised taking

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of ground water; breach of a licence to take ground water; unauthorised aquifer recharge; and breach of a permit to recharge an aquifer.

Strict liability applies only in regard to the executive officer being in a position to influence the conduct of the body corporate in contravening the declared provision. This does not impact on the presumption of innocence to the detriment of the defendant.

The maximum penalty that may be imposed under new section 102B is 500 penalty units, which is the maximum that may be imposed on an individual for the relevant offence.

### **Summary**

Where strict liability applies, the need to prove fault is not required, but the prosecution must prove the physical elements of the offence beyond reasonable doubt. The strict liability offences in this are those which are straight-forward and for which it is reasonable to expect that a person is aware of their duties and obligations. Notwithstanding, the defence of mistake of fact is available to the accused in addition to the defence of having taken reasonable steps and exercised due diligence to prevent the commission of an offence that is provided throughout the *Water Act*.

The single absolute liability offence and other strict liability offences in the Bill will act as a deterrent to behaviour that would compromise the integrity, sustainability and opportunity for beneficial uses of water resources that are vital to the continuing well-being and unique environmental standing of the Territory. They are compatible with Article 14(2) of the ICCPR, as they pursue a legitimate objective of deterring unauthorised or aberrant activities that put water resources at risk and they are reasonable and proportionate in pursuit of that objective.

### **Conclusion**

The Bill is compatible with human rights.