

# Liabilities, Due Diligence and Utilities: HACCP as a Legal Defense

Annette Davison & Daniel Deere

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# Legal benefits of HACCP

- ❑ What you probably already know:
  - ❑ HACCP can reduce risks from breaches
    - ❑ Contracts
    - ❑ Agreements
    - ❑ Licenses
  
- ❑ What you may not know:
  - ❑ HACCP can improve understanding of your legal obligations
    - ❑ To avoid common law breaches
  - ❑ HACCP can protect a water utility from legal action
    - ❑ In the event of statute law breaches
      - ❑ 'due diligence'
      - ❑ 'all reasonable precautions'

# Overview

- ❑ Obligations of water utilities
  - ❑ Common law risks
  - ❑ Statutory risks
  
- ❑ How can HACCP help?



# Obligations of water utilities

- ❑ Water Utilities are clearly in the business of providing products and services to customers that are often critical and potentially high risk
  - ❑ water supply
  - ❑ sewage services
  - ❑ stormwater services
- ❑ Public bodies have similar accountabilities to private bodies where they are fulfilling similar functions

# Key Point #1

- ❑ Water utilities have customers and provide critical yet risky goods and services



# Common Law

- ❑ Court-made law traditionally associated with private property rights. Two main functions:
  - ❑ To enforce the right to exclude others from the benefit or use of private land; and
  - ❑ To prevent the use of private land by one owner from having a detrimental impact on the ability of neighboring private land owners to use their land.
- ❑ To protect these rights, the courts developed the laws of:
  - ❑ Trespass;
  - ❑ Nuisance (odor, runoff); and
  - ❑ Negligence (unfit product).
- ❑ Each of these form part of the law of torts (“wrongs”).

# Negligence Test

- ❑ To be negligent you must:
  1. Owe a duty of care to the plaintiff;
  2. Break that duty by failing to come up to the standard of care required by law; and
  3. Thereby causes some legally recognized damage to the plaintiff.
  
- ❑ Water utilities:
  1. Owe a duty of care to their customers;
  2. Can breach that duty by supplying unfit product; and
  3. Could cause damage.

## Key point #2

- ❑ Water utilities must be aware of and seek to protect themselves against common law claims of negligence and nuisance by understanding and managing their risks



# The power of common law

- ❑ Safe Drinking Water Act
  - ❑ Sets statutory drinking water quality limits and objectives
- ❑ But - even total compliance with the Act may not completely protect you
  - ❑ Common law can still get you

# Key Point #3

- ❑ Just because you comply with your regulations doesn't mean you're invincible!



# The Rise of Statute

- ❑ Problems with the common law:
  - ❑ Designed for other purposes - protecting land values;
  - ❑ Difficult to adapt to the nature and scope of environmental and public health problems;
  - ❑ Protection for private entities not environmental or public health commons;
  - ❑ Burden of proof lies with those alleging they have suffered damage; and
  - ❑ Remedy is limited to damages.

# Statutory Obligations of Water Utilities

- ❑ Dozens of statutes in each state that contain environmental, public health and trading obligations
  - ❑ Many statutory and common law obligations of which WUs must be aware
  - ❑ Not knowing what obligations apply and what to comply with is a source of risk in itself
  
- ❑ Increased widening of liability net i.e.:
  - ❑ Directors, managers, councilors etc, (those who represent the controlling mind and will of the company/organization)

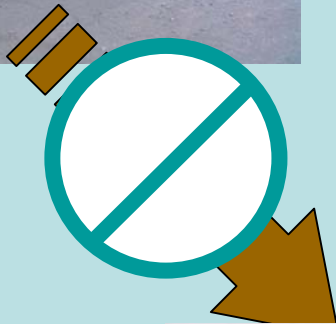
# Statutory Issues for Water Utilities

- ❑ Many statutes to be aware of but the most significant for product quality will include:
  - ❑ A health Act
  
  - ❑ An environmental protection Act
    - ❑ Environmental harms;
    - ❑ Licenses; and
    - ❑ General discharges.
  
  - ❑ A fair trading Act
    - ❑ Goods fit for purpose - drinking water, reuse water etc.

# Defenses in the Event of Breaches

- ❑ Due diligence - often provided for under statute
- ❑ Due diligence can mean:
  - ❑ the prevention of reasonably foreseeable harm; and
  - ❑ showing compliance with statutory obligations
- ❑ Due diligence can be applied in both a preventative sense to mitigate water contamination:
  - ❑ i.e. normal system operation; and
- ❑ Reactive sense to manage contamination to mitigate any further harms:
  - ❑ i.e. corrective actions and incident management

# Demonstration of Due Diligence



- ❑ An assessment of the foreseeable risks to the consumer from source to delivery point;
- ❑ An appropriate system for managing those risks (in the appropriate regulatory and statutory context);
- ❑ Evidence of a culture of compliance (that the system is being adhered to);
- ❑ A rolling revision process to actively seek out and incorporate new knowledge; and
- ❑ Appropriate contingency planning



# Key Point #4



- ❑ Water Utilities should seek to be able to demonstrate due diligence in order to protect themselves in the event of statutory breaches

# How HACCP helps protect utilities

- ❑ Requires explicit understanding and documentation of your
  - ❑ Product specifications
  - ❑ The processes taking place in your system
  - ❑ Risks to your intended customers
  - ❑ Risks from product misuse by all
  - ❑ Statutory obligations relating to product quality

# Key Point #5

- HACCP requires you to establish your standard of duty and the risks related to breaching that duty



# How HACCP helps protect utilities

- ❑ Requires record keeping relating to
  - ❑ Control of critical processes
  - ❑ Validation of the critical limits
  - ❑ Verification that the process is working
  - ❑ Demonstrating that corrective actions have been undertaken



# Key Point #6

- ❑ HACCP requires you to build a body of evidence to substantiate compliance with good and safe practice



# How HACCP helps protect utilities

- ❑ Requires independent audit and review
  - ❑ Second and third party external audit of your system
  - ❑ Assurance of the quality of raw materials from suppliers



# Key Point #7

- ❑ HACCP requires you to obtain independent review of both your system and suppliers' systems



# How HACCP helps protect utilities

- ❑ Requires the development of corrective action plans
  - ❑ Enables rapid response to contamination events or incidents
  - ❑ Requires a traceability and recall procedure

# Key Point #8

- HACCP requires you to be prepared for foreseeable contamination events and incidents

# Sydney Water '98 Water Crisis



"Killer bugs in water!"

# HACCP as a legal defense - summary

- ❑ Common law
  - ❑ Identifies your standard of duty and how it might be breached to reduce risks of breaches
  - ❑ Helps defend against negligence claims
  
- ❑ Statute law
  - ❑ Demonstration of due diligence
    - ❑ Routine
    - ❑ Incidents/events