

12. Exclusion and indemnity clauses

Recycled water suppliers in Queensland and other states have sought to include in supply agreements an indemnity from the customer against any damages, loss, injury or other costs for which the supplier may become responsible or liable resulting from customer's use of recycled water. Generally the indemnity would not apply if the harm resulted from the negligent or deliberate actions of the supplier.

Legal risk can be shared if the customer only indemnifies the supplier against claims if their use of recycled water at the site was not in accordance with the agreement or if the claim arises from the customer's negligent act or omission. To further demonstrate a willingness to share risk, a reciprocal indemnity clause could be included pursuant to which the supplier indemnifies the customer against claims arising from the supplier's breach of the agreement or negligent act or omission. Clause 16

(Indemnity) in the *Model recycled water agreement* provides an example of this approach. The indemnities may also bind or be in favour of the landowner and may also bind the guarantor for the customer.

Some suppliers have sought to extend the customer indemnity to include losses or damages experienced by the customer as a result of failure or interruption to supply, the quality of the recycled water (as long as it conforms to the agreed water quality specification) or operation or maintenance of the supplier's treatment plant and delivery system.

Liability exclusion clauses may have a role in limiting legal risks for suppliers. However, indemnities should be used carefully so as not to give customers the impression that they are being required to bear an unreasonable amount of the risk of the scheme, even when the supplier's actions clearly contributed to any loss.



13. Public liability insurance

Public liability insurance is available to cover local government bodies in the application of recycled water. Recycled water suppliers commonly require customers to take out public liability insurance to cover any claims for damages, loss, injury or other costs by another party due to the use of recycled water on the customer's site and the construction and operation of recycled water infrastructure. The minimum cover required is typically between \$5 million and \$10 million. A public liability insurance clause may also require that the customer provide proof that insurance is in place before any recycled water is supplied, and be able to provide evidence of insurance at any time at the supplier's request. The supplier may even require approval of the insurance product or company.

Under s1123 of the *Local Government Act 1993*, local governments are required to obtain public liability insurance in relation to the exercise of their jurisdiction to a minimum amount prescribed by regulation (currently \$30 million). However, general public liability schemes for local government specifically exclude the release of pollutants, and so do not cover wastewater discharges from STPs, whether it is being disposed of to waterways or land or is being recycled.

A national facility has been developed to provide public liability insurance cover specifically for claims arising from discharge of wastewater from licensed council-operated STPs. Queensland's scheme is run by a business arm of the Local Government Association. The facility breaks water recycling into seven categories, each with different risk exposures. Premiums relate to the end use of the wastewater, the associated risks and the volume of the discharge. The highest risk and premiums attach to domestic uses of recycled water, for example a dual

reticulation scheme. Council use for watering parks and gardens is an intermediate risk, while 'environmental' discharge to waterways has the lowest risk and premium. The insurance for recycled water does not cover the third party using recycled water. The insurance covers claims arising from negligence, unless the council has been recklessly indifferent to damage.

To date, only about one-sixth of the councils with active water recycling schemes have taken up public liability insurance. Reasons for the low uptake could include council uncertainty of the benefits of the insurance, uncertainty about whether they are covered for public liability in relation to water recycling, or concerns about the cost, which would be passed on in the price for recycled water. Public liability insurance for a population of 50 000 people generating recycled water for level 3 – council use, watering parks and gardens was estimated to amount to \$0.55/kL (Price Waterhouse Coopers 2000). This could significantly impact the price of recycled water for rural irrigation-based customers but is unlikely to be significant for urban customers.

Overall, the addition of public liability insurance is not a major increase to the price of recycled water for urban customers and the benefit provided in covering risk far outweighs the small increase in price (Price Waterhouse Coopers 2000).

14. Termination

The supplier and customer are often highly dependent on each other. The customer is likely to depend on the supplier to provide water for its business. The supplier may depend upon the customer purchasing the recycled water in order to comply with mass load licensing requirements for discharges from their treatment facility. Both parties may have invested considerable money and effort in the scheme. Accordingly, termination of the agreement is generally a last resort.

In general terms, three types of breach justify termination: repudiation, breach of an essential term, or a breach causing a substantial loss of benefit. Minor breaches are unlikely to justify termination but recurrent minor breaches in certain circumstances may justify termination.

Clause 18 (Termination) of the *Model recycled water agreement* is an example of a termination clause. In certain cases it provides for immediate termination, for example if the customer contaminates the recycled water so that it is no longer suitable for the customer's specified use or damages the supplier's infrastructure. The contractual right to terminate for other breaches not specifically listed arises after the supplier gives the customer 10 business days' notice to remedy the breach. Contractual rights to terminate are subject to restrictions that apply to rights to terminate conferred by law. The parties should obtain independent legal advice before terminating the contract because premature termination may itself be a breach of contract.

An alternative approach would be to allow the customer a certain number of warnings to rectify breaches before terminating the contract.

Clause 18.3(a) (Termination on interruption of supply or force majeure) also provides for termination by the customer if supply is suspended for a period of three months or more. Broader reciprocal termination rights for the customer could be appropriate. For example, if the customer is under an absolute obligation to take a certain amount of recycled water, the customer may require a right to terminate the agreement if the recycled water supplied exceeds the concentration limits in the water quality specification.

Paragraph (a) of Clause 18.4 (General right of termination) of the *Model recycled water agreement* gives either party the right to terminate the agreement without reason on 12 months' notice. In short-term or temporary supply arrangements, or in situations where finding new customers or alternative water supplies (in the customer's case) is not a practical or cost issue, a shorter period of notice may be able to be negotiated. Paragraph (b) of clause 18.4 permits the customer to terminate the agreement on six months' notice if the customer has sold the land that includes the site.

15. Disputes

Serious disputes can be avoided by good communication between the supplier and the customer. Regular get-togethers with customers through customer forums or site visits may also help to reveal impending issues and head-off a full-blown dispute.

A dispute resolution clause sets out the procedure that the parties may follow as an alternative to resorting to the court system. Dispute resolution clauses often provide that initially the parties or their representatives are to meet to attempt to resolve the dispute. Often the best people to meet to discuss issues in the event of a dispute are those not involved in day-to-day antagonisms. The clause may then set out subsequent procedures such as mediation and/or arbitration. Time limits should be included in the dispute resolution clause to ensure that efforts to resolve the dispute are not delayed or avoided. If a clear procedure is not specified, any claim under the contract is only actionable by the (offended) party instituting court proceedings.

Clause 20 (Disputes) of the *Model recycled water agreement* provides for the parties to firstly negotiate. Failing settlement through negotiation, it provides for mediation and failing settlement through mediation, the dispute is subject to arbitration. The clause is an example only. A party's advisers may consider that other clauses are more appropriate. For example, some practitioners consider arbitration in disputes over recycled water agreements to be undesirable on time and money grounds. Additionally, the appropriate dispute resolution method may depend on the type of dispute. For example, if a dispute is one-sided it may be more appropriate for it to be subject to court proceedings or arbitration than mediation.

