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Planning and Environment

Changes to water and
wastewater services in
South-East Queensland under
the *SEQ Water (Distribution
and Retail Restructuring) and
Other Legislation Amendment
Act 2011*

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Changes to water and wastewater services in South-East Queensland under the *SEQ Water (Distribution and Retail Restructuring) and Other Legislation Amendment Act 2011*

Allconnex customers will receive water and wastewater services from their local council from 1 July 2012 after the *SEQ Water (Distribution and Retail Restructuring) and Other Legislation Amendment Act 2011* was passed on 14 February 2012.

The Act will allow the Gold Coast, Redland and Logan City Councils to withdraw their business from Allconnex and establish their own Council water businesses.

Here, partner Sarah Persijn and trainee solicitor Matthew Jeffrey outline the provisions of the new Act and discuss how water and waste-water services will be transitioned from Allconnex to the relevant government areas.

Key points

- Allconnex and the withdrawn councils must enter into a 'retransfer scheme' to transfer Allconnex's assets and liabilities to the corresponding councils to allow them to perform water and wastewater functions by 1 July 2012.
- Gold Coast City Council will bear certain costs incurred by Redland City Council, Logan City Council and Allconnex for this withdrawal.
- Where Allconnex is a party to an infrastructure agreement, a default position is created (subject to any retransfer documents) whereby the successor council becomes a party to the agreement in the place of Allconnex.
- The *SEQ Water (Distribution and Retail Restructuring) and Other Legislation Amendment Act 2011* provides a default mechanism (when a retransfer document does not apply) to determine which council is to replace Allconnex for certain court proceedings on foot.

The key objectives of the *SEQ Water (Distribution and Retail Restructuring) and Other Legislation Amendment Act 2011*

The key objectives of the Act are to:

- enable a council to withdraw its water business from its South East Queensland distributor-retailer and re-establish its water business within direct council operations;
- apply certain requirements of the *South-East Queensland Water (Distribution and Retail Restructuring) Act 2009* to these specific council water businesses;
- apply additional requirements to the continuing SEQ distributor-retailers to provide greater clarity for councils' pricing and decision-making role with respect to their distributor-retailers; and
- provide that the Queensland Competition Authority will have a price monitoring/oversight role in respect of the new council water businesses.

Background to the *SEQ Water (Distribution and Retail Restructuring) and Other Legislation Amendment Act 2011*

On 7 April 2011, the Premier and Minister for Reconstruction announced proposed amendments to the *South-East Queensland Water (Distribution and Retail Restructuring) Act 2009* to address community concerns about the responsibility for setting water and wastewater prices in South-East Queensland.

Two key changes were proposed:

- The 2009 Act would be amended to introduce a price cap, which would constrain the three South-East Queensland council-owned distributor-retailers' water and wastewater price increases to a Consumer Price Index increase per annum for residential households and small business customers from 1 July 2011 to 30 June 2013. The *Fairer Water Prices for SEQ Amendment Act 2011* implemented this decision.
- The South-East Queensland councils were provided a once-only opportunity to opt out of their distributor-retailer and re-establish council-owned and operated water and wastewater businesses. Where councils made a final decision to withdraw from the distributor-retailer, the transaction must be completed by the end of 30 June 2012. New council water businesses must be re-established and operational by 1 July 2012.

The Gold Coast City Council (GCCC) decided to withdraw from its distributor-retailer, Allconnex. The two remaining participating councils of Allconnex - Logan City Council (LCC) and Redland City Council (RCC) decided that retaining their water businesses with Allconnex was not commercially viable due to GCCC's large (62 percent) share. Both councils therefore also decided to withdraw from Allconnex. The Queensland Government has agreed that GCCC should bear certain costs incurred by RCC or LCC for this withdrawal.

Further amendments to the *South-East Queensland Water (Distribution and Retail Restructuring) Act 2009* and other relevant legislation are necessary to enable the re-establishment of these council water businesses and provide for additional amendments in response to councils' requests for greater clarity about the councils' pricing and decision-making role with respect to their distributor-retailers.

How the objectives will be achieved

The new Act will:

- establish council-specific water businesses for GCCC, LCC and RCC;¹
- enable the transfer of the assets, liabilities and employees from Allconnex to these council water businesses by 1 July 2012;²
- require GCCC to pay the consequential costs of LCC and RCC re-establishing their water businesses (including portions of Allconnex costs);³
- approve a Workforce Framework to transfer employees from Allconnex to councils;⁴
- facilitate greater understanding of community issues by enabling councillor representation on the boards of the councils' distributor-retailers;⁵ and
- ensure councils remain responsible and accountable for their pricing decisions and that such decisions do not impact on other councils, or if relevant, their distributor-retailer.

The key provisions are incorporated in the new chapter 3A of the *South-East Queensland Water (Distribution and Retail Restructuring) Act 2009*.

¹ S 92AG, *South-East Queensland Water (Distribution and Retail Restructuring) Act 2009*. Please note all footnote references are to provisions in this Act.

² Chapter 3A, Part 3

³ Ss 92BX, 92BY, 92BZ and 92CA

⁴ Chapter 3A, Part 8

⁵ Ss 33(3), 34

The effect on third parties of a retransfer scheme or notice

The Act requires Allconnex and the withdrawn councils to enter into a 'retransfer scheme' to transfer Allconnex's assets and liabilities to the councils to allow them to perform water and wastewater functions.⁶ There is also provision for 'step in powers', enabling the Minister to make retransfer notices and directions which are designed to address errors or shortcomings in the retransfer schemes.⁷ A retransfer scheme or notice has effect despite any other instrument.⁸

All parties will be required to certify that they have met the retransfer scheme requirements. These retransfer schemes will be approved by the Minister and will be given effect by way of notification in the Gazette.⁹

Parties are protected from liability arising from things done as part of their own retransfer scheme or the Minister's retransfer notice or direction.¹⁰ These retransfer requirements replicate, but in reverse, the 'transfer schemes', 'transfer notices' and 'transfer directions' relied on to transfer assets, liabilities, instruments and employees from the councils to distributor-retailers in 2010.

Although actions under these retransfer schemes, notices or directions directly relate to Allconnex and the withdrawn councils, they may affect third parties (ie those entities not party to the retransfer schemes or retransfer documents themselves). For example, a retransfer notice providing for the retransfer of an asset could override a contract under which Allconnex has agreed with a third party not to transfer the asset without that third party's consent. Requiring third party consent to the retransfer (ie to changing the parties to the contract) first could lead to delays in the re-establishment of the operations of council water businesses by the end of 30 June 2012. Any rights or obligations under the contracts will continue to be met by the relevant successor council after the retransfer process.

Allconnex and the withdrawn councils must ensure assets are appropriately identified and transferred, to provide the public with adequate notice, and to seek third party consent to a transfer where there would be a material prejudice to the third party.¹¹ Material prejudice in this context is when a third party is prejudiced in a way that is due to more than just the transfer of the right or obligation to the withdrawn council.¹² Before the retransfer scheme can take effect, Allconnex and the withdrawn councils are required to certify to the Minister that third party interests have not been materially prejudiced without the consent of those third parties.¹³

Allconnex is eventually to be dissolved, once the retransfers and its residual functions (such as conducting last financial accounts and reports) are complete. Unlike the original transfers, it is essential that these matters are provided for, as Allconnex will no longer exist to hold any asset, liability, right or obligation.

Infrastructure agreements

The Act also provides for a situation where Allconnex is a party to an infrastructure agreement. In this situation, a default position is created (subject to any retransfer documents) where the successor council becomes a party to the agreement in the place of Allconnex.¹⁴ This consequently allows Allconnex to be discharged from liability.¹⁵

It is not clear what will happen in a situation where a party has been in negotiations for an infrastructure agreement with Allconnex. It is likely that if negotiations are not finalised before the transfer of services back to the relevant council (ie 1 July 2012), those negotiations will lapse and negotiations may have to recommence with the relevant council.

⁶ Chapter 3A, Part 3 Division 1

⁷ Chapter 3A, Part 3, Division 2

⁸ S 92AA

⁹ Chapter 3A, Part 3, Division 1, Subdivision 3

¹⁰ Ss 92BT

¹¹ S 92AZ(1)

¹² S 92AZ(2)

¹³ S 92BA

¹⁴ Ss 92BL, 92BM

¹⁵ S 92BP

Court proceedings

The Act provides a default mechanism (when a retransfer document does not apply) to determine which council is to replace Allconnex for certain court proceedings on foot:¹⁶

- Where the proceeding is in the Planning and Environment Court (eg for most Sustainable Planning Act matters) or the Land Court (eg for Acquisition of Land Act matters), the successor council is the council in whose local government area the land the subject of the proceedings is located.
- If the proceeding relates to circumstances where a council originally transferred that matter to Allconnex in the water reform process, that council is to become the party to the proceeding.
- In all other cases (ie when the matter arose during Allconnex's operation and is not in one of the above courts), all of the withdrawn councils become proportional joint successors and therefore parties to the proceeding. The councils are jointly responsible for the expenses of the proceeding. While this provision joins the parties to the proceeding, nothing prevents the individual settlement of their own liability.

The Act also provides for a situation of uncommenced proceedings by Allconnex (in circumstances where no retransfer document provides for this):¹⁷

- Where a proceeding would be in the Planning and Environment Court or the Land Court, the successor council is the council in whose local government area the land that would be the subject of the proceedings is located.
- In all other cases, all of the withdrawn councils become parties to the proceeding. Where the councils are jointly proportional successors in this manner, they are jointly responsible for the expenses of the proceeding. Once again, however, nothing prevents the individual settlement of their own liability in the future running of the proceedings.

Power to disclose confidential information

The Act gives broad powers to those involved in the retransfer to disclose to other parties involved any information needed for the retransfer. It provides that a person acting honestly under these provisions, who discloses or uses information, is absolved from liability.¹⁸ Potentially, this information could concern and affect third parties by disclosing information relevant to their commercial affairs or personal information about Allconnex's customers.

Similar provisions in chapter 3 of the original *South-East Queensland Water (Distribution and Retail Restructuring) Act 2009* were necessary to give effect to transferring functions and setting up Allconnex. In the current situation, there is the same need to provide councils and their water businesses with access to information to allow them to perform water functions and take over these functions from Allconnex.

The contents of this paper are not intended to be a complete statement of the law on any subject and should not be used as a substitute for legal advice in specific fact situations. HopgoodGanim cannot accept any liability or responsibility for loss occurring as a result of anyone acting or refraining from acting in reliance on any material contained in this paper.

¹⁶ S 92BJ

¹⁷ S 92BK

¹⁸ S 92BT