

# WATERSIDE RESIDENTS ASSOCIATION

## DISCUSSION PAPER

### PUBLIC LIABILITY IN RELATION TO JETTIES ON WATERSIDE CANALS

Brian Roylett Principal RRM Risk Management

#### **Background:**

Within the Waterside (Dudley Park) precinct the vast majority of Waterside properties have marine jetties constructed or erected for private domestic purposes. All jetties within the Waterside precinct must be constructed, erected maintained and used in accordance with the terms and conditions of a licence granted by the Minister for Transport.

An important element of the Department of Transport Jetty Licence Deed (1998 version) are the covenants and agreements under Clause 1 of the Licence and more specifically sub-clause 1, (i) and the indemnity provisions under paragraphs (a) and (b).

Under these provisions the Licensee (Jetty Licence Applicant) indemnifies the Minister and Crown (and all instrumentalities of the Crown, the Licensor) against all destruction, loss, injury or damage of or to any person or any property of the Minister or Crown, or anyone else. Additionally the indemnity provisions protects the Minister and Crown against all actions, suits, proceedings, claims costs, expenses and demands arising out of the construction, erection, maintenance and use of a licensed jetty.

A jetty licence will only be issued by the Minister in Western Australia on acceptance of these terms as part of the Jetty Licence Deed.

Concern has been raised that the granting of an indemnity to the Minister and Crown without the *“express permission of your insurance company, your insurance company may reject your claim.”*

This paper seeks to clarify the circumstances of liability in relation to jetties within the Waterside precinct and to create discussion on suitable risk management strategies to mitigate the risks associated with jetty construction, erection, maintenance and use.

## **The Jetty Facts:**

- There are more than 4,000 licensed jetties in Western Australia administered by the Department of Transport.
- There are approximately 386 waterfront properties in the Waterside precinct and although not all have jetties there is the opportunity for this number of properties to be affected by the indemnity.
- Each legal jetty within the Waterside precinct must be licensed by the Department of Transport and therefore each Licensee under the terms and conditions of the license deed has agreed to indemnify the Minister and Crown against all legal liabilities.

## **The Risk Exposures:**

In the context of the indemnities under the license being sought by the Minister and the Crown, it is important to understand the full extent of the risk exposures to which the Minister and Crown are seeking to indemnify themselves against and to remove any liabilities.

The risks associated with construction, erection, maintenance and use of jetties for domestic purposes primarily involve personal injury and/or loss or damage to property. Risks within each of these primary areas are many and varied, most of which are traditionally managed by risk transfer under a contract of insurance.

Typical risks within these categories include;

1. Personal Injury:
  - Injury to self or family during construction or erection
  - Injury to self or family as a consequence of maintenance or use
  - Injury to workmen during construction, erection or maintenance of the jetty (usually but not always covered by workers compensation insurance)
  - Injury to any other third party (member of the public) arising out of construction, erection, maintenance or use of the jetty.
  - Loss of amenities or lifestyle to any third party arising out of construction, erection, maintenance or use of the jetty (e.g loss of privacy, or amenity (views and outlook etc)
2. Loss or Damage to Property:
  - Loss of the jetty or its structural components through theft or fire.
  - Malicious damage to structure by known or unknown parties
  - Impact from extraneous sources (e.g boats and watercraft)
  - Loss of structural integrity due to storm damage, erosion, corrosion.

While one may reasonably expect that it would be difficult to assign negligence to the Minister and the Crown in respect to any of the above risk exposures arising out of construction, erection, maintenance and use of jetties in domestic situations, it is important to understand that jetty location, design features and public safety under license renewals are governed by the license conditions issued by the Minister and the Crown.

There are numerous examples where jetty location and design features may have a significant effect on the probability of a collision by a boat and subsequent property damage and or injury or death to third parties. It is the design, approval and administration process risks that the Department of Transport is transferring to jetty licensees through the indemnities afforded by the Jetty License Deed terms and conditions.

### **The Licensees Risk Management Strategy:**

Most Waterside residents with licensed jetties elect to manage the personal injury and property damage risks associated with jetties through the traditional insurance process.

There is a widely held belief that current householders insurance policies which include coverage of property risk (buildings cover) and incidental asset protection (home contents) provides the required level of financial protection against most risk exposures. Conventional building insurance and contents policies, while they may provide a degree of protection for loss of home and contents do not necessarily cover householders liability risk exposures; i.e. the chance of personal injury to a third party arising out of the use of the property.

Most contemporary householder's insurance policies include additional protection for legal liability cover for accidents arising out of use of the premises, usually for an amount covering liabilities in the range of \$10-\$20 million. Importantly not all policies afford this level of protection. The wording of the legal liability cover of policies (where this cover is included) is central to this issue.

## Key risk management issues for consideration

- Do not assume that your homeowner's policy automatically includes liability protection covering workers on the site or injury to third parties or damage to third party property.
- Do not assume that your policy extends to jetties, either permanently affixed to the property, or unattached (floating) and are automatically insured under the buildings cover or if included, the legal liability cover. Check the wording.
- The costs of financing your legal liability through payment of an insurance premium specifically covering licensed jetties is an important consideration in decisions to either accept the financial risks or seek protection under an insurance policy.

### **Dependency on Insurance Protection:**

If your risk management strategy for your licensed jetty is highly dependent upon risk financing through risk transfer to an insurer, it is critical to understand that the cover must include;

- Property damage to include a licensed jetty as part of the "buildings" cover.
- Liability protection arising out of the construction, erection, maintenance and use of a licensed jetty for domestic purposes.

In most insurance policy wordings the policy will not respond to claims where the policyholder has

- agreed to accept a legal liability where the liability has arisen and where the policyholder has agreed to take that liability upon themselves
- denied the insurer the opportunity to exercise for their benefit, the policyholders legal right of recovery against any other party.

The indemnity provided to the Minister and Crown under the Deed of Jetty License by the policyholder, has most certainly absolved the insurer of meeting responsibilities for the full or partial costs of claims under the policy and your protection under the policy may be null and void.

## **Conclusions:**

- All Licensees of jetties within the Waterside precinct have most certainly provided the Minister and the Crown of indemnities which relieve them from all legal liabilities associated with the construction, erection, maintenance and use of the licensed jetty.
- Not all Licensees of jetties in the Waterside precinct will have effected insurance protection covering the legal liabilities arising out of construction, erection, maintenance and use of jetties, therefore they remain personally exposed to these liabilities
- Of those jetty licensees that have effected adequate insurance protection there is a high probability that in accepting the terms and conditions of the Jetty Licence Deed, their liability and property insurance in relation to the jetty may not respond in the event of a claim.
- There is a high likelihood that insurers may not accept the policyholders request for insurers to “note and allow” the indemnity provided to the Minister and Crown and the refusal of the request will be noted on the policy
- Insurers may request an “additional premium” on existing policies to allow for the indemnity in assessing an acceptable premium for the additional risk.
- In seeking to address the licensed jetty insurance protection issue through insurance brokers and insurance underwriters there is a strong possibility that the overall cost of risk transfer from Licensees to insurers will increase over existing levels.

## Options:

There are a range of options available to Waterside residents to manage the property and liability risks arising out of the construction, erection, maintenance and use of private domestic jetties in the Waterside precinct.

### 1. The Do Nothing Option:

This option probably maintains the status quo for most Waterside residents, unaware that in accepting the Jetty License Deed, they have already accepted responsibility for all financial liabilities arising out of the construction, erection, maintenance and use of a licensed jetty without any form of insurance protection.

### 2. Notification To Insurers:

This option requires each Waterside resident that is a Jetty Licensee to independently approach their insurer to advise them of the indemnity provisions of the Jetty License Deed, requesting them to note and allow the indemnity to the Minister and the Crown with an endorsement on the policy which may or may not attract additional premium.

### 3. Alternative Risk Financing:

This option assumes that

- (a) the “do nothing option” is unacceptable to the majority of individual residents;
- (b) the notification to insurers requesting them to “note and allow by an endorsement on the policy” has been unsuccessful; or
- (c) the additional premium requested by individual insurers for cover noting the interests of the Minister and Crown is uneconomical.

The Alternative Risk Financing Option focuses on the collective buying power of waterfront residents within the Peel Region who currently have or wish to enter into a Jetty License Deed with the Department of Transport.

The current competitive nature of the global insurance market is such that insurers may consider a bulk purchase insurance arrangement for “Supplementary Liability Protection Cover for Licensed Jetties”. This cover would be separate from existing and traditional “*householders buildings, contents and liability protection*”. Appropriate marketing through a suitable insurance intermediary (broker) could produce economies of scale to influence premium pricing.