

NATIONAL REVIEW INTO MODEL OCCUPATIONAL HEALTH AND SAFETY LAWS

Submission by the Local Government and Shires Associations of New South Wales

EXECUTIVE SUMMARY

The Local Government Association of NSW and the Shires Association of NSW are registered industrial organisations of employers who represent constituent councils in NSW. The Associations support the development of model OHS legislation and have endeavoured to address the issues of greatest concern to councils.

The primary issues of concern to the Associations are:

- Due to the multiplicity of working relationships in the local government sector and the disparate and transient nature of places where work is performed, it is essential that the general duty of care be tied to the conduct of the work rather than the workplace.
- The general duties of care owed by duty holders needs to be applied subject to the test of “reasonably practicable”.
- Councillors of local government authorities should not be considered as ‘officers of a corporation’ for the purposes of liability due to the legislative bar to councillors participating in day to day management decisions, such as, occupational health and safety.

These issues are discussed in further detail below.

WORKPLACES AND NON-WORKPLACES

It is the Associations’ view that general duties of care should be tied to the conduct of the work, rather than the workplace or some other criteria.

Councils are expected, and in some cases required by legislation, to provide a variety of services to constituents such as waste collection, the provision of water and sewerage, maintaining parks and gardens, and road maintenance. The nature of these services means that a council’s ‘workplace’ will often include public places where the council may only have a limited amount of control over potential risks to health or safety. Alternatively, these areas may be a workplace under the control of the council on one day and not on the next. In the Associations’ opinion, the approach of tying general duties of care to a workplace is unreasonably onerous on councils because it fails to take into account whether the council is reasonable able to restrict access to workplaces in public places.

In some cases a public roadway will be a transient workplace for a number of organisations whilst work is being conducted, for example, suppliers of telecommunications, water, sewerage and drainage, gas, electricity and road authorities such as the RTA and the local council. As there is not the same controller of the workplace all of the time, it is appropriate that the general duties of care be tied to the conduct of the work.

The Associations submit that there are a number of examples of council operations that support our view of the need for control by the duty holder to be determined by the conduct of the work, rather than as a workplace where work is, or maybe performed. This is particularly evident in instances where council has responsibilities as an owner or lessor rather than as an employer.

For example, some councils own, or are the trustees of, the local showground. The showground is operated by the local showground committee comprising council representatives as well as members of the general public. The committee would take all bookings and perform minor maintenance and upkeep of the facilities with volunteers from the community. A person volunteers to repair a section of old timber fencing for the showground committee and to use his own tools and materials and perform the job at a time of his choosing. The work performed is not part of council's operations and the council does not provide tools, supervision or assess the quality of the work nor give direction as to how it would be performed. It is the Associations' view that the council would not have effective control of this workplace nor the manner in which the work is performed and should not be liable for any injuries to the volunteer.

Similarly, If a council leases its property, for example, a cattle saleyard to a stock company or agent the obligations relating to identifying hazards, assessing and minimising the risks is clear. Section 10(1) of the NSW OHS Act provides that "a person who has control of premises used by people as a place of work must ensure that the premises are safe and without risks to health." The council would ensure this, prior to the execution of the lease and may be advised by the operator/agent if any maintenance or repair needed to be performed. The operations of the saleyard would be under the control of the lessee and the council would have no operational control, or interest. The lessee would allow persons, other than the employees of the lessee, access to the facility. It is the Associations' view that the operator/agent may be responsible for any accidents that occur at the salesyard arising from the sale, whilst the council should be liable if the accident arose due to the salesyard not being provided to the operator in a safe condition.

Many councils support community groups that perform work, but not under the authority of the council, for example, Clean Up Australia campaigns. Councils may support the groups by providing resources and advice but do not provide labour or designate when the work is to be performed. Volunteers may pick up rubbish from council administered properties, including road sides, riverbanks, parks and Crown reserves under council control. Rubbish will also be collected from private property and property of the State Government such as National Parks, rivers etc. Council's involvement is generally to remove the collected rubbish on the next working day. Councils may have little or no involvement in the promotion, organisation or selection of participants. If council staff do not participate in the community activity then council should not be seen as having control and should not be liable.

The above scenarios illustrate the practical difficulties that local government faces in complying with OHS requirements when the general duty of care is tied to the workplace rather than the general duty of care being based on the conduct of the work.

CONCEPT OF 'REASONABLY PRACTICABLE'

The Associations support the inclusion in the model OHS Act of a test of 'reasonably practicable'. WorkCover NSW in its Report on the Review of the OHS Act 2000 in May 2006 recommended the following legislative changes:

- Clarifying that the general duties apply 'so far as is reasonably practicable' in place of the existing defences under s28 of the NSW OHS Act (similar to the Victorian OHS Act 2004);
- Clarifying that 'ensuring' health and safety means eliminating risks to health and safety so far as is reasonably practicable and if it is not reasonably practicable to eliminate, to reduce the risks to the lowest level that is reasonably practicable;
- Explaining the meaning of 'reasonably practicable' as involving consideration of the following (similar to s20 of the Victorian OHS Act 2004):
 - What the person concerned knows, or ought reasonably to know, about the hazards giving rise to the risk concerned;
 - The likelihood of the risk eventuating;
 - The degree of harm that would result if the risk eventuated;
 - What the person concerned knows, or ought reasonably to know, about any ways of eliminating or reducing the risk;
 - The availability and suitability of ways to eliminate or reduce the risk; and
 - The cost of eliminating or reducing the risk.
- Clarifying that all persons at a place of work have an active role in contributing to a healthy and safe workplace.

The Associations would support these provisions being included in the model OHS Act.

LIABILITY OF OFFICERS

In the Associations' opinion, an officer of a corporation (however defined) should only be liable where there is a causal link between the acts or omissions of the officer and the breach of duty. Adding the concept of 'reasonably practicable' to the general duties tied to the conduct of the work and allowing for delegation of control would also be supported by the Associations.

In the Report on the Review of the *OHS Act 2000* (NSW) WorkCover NSW commented at p40:

"The Legal Panel that provided advice in relation to workplace deaths in June 2004 suggested the following three principles that should inform any new approach to the liability of directors and managers:

- The conviction of directors and managers without fault is unacceptable;
- Corporate personnel have and should be accountable for individual responsibilities where personal fault exists;
- Principles of individual responsibility, however, must also allow for:
 - Excuse where relevant events occur without an individual's actual or constructive knowledge of material facts;

- Excuse where relevant events are beyond the individual's control."

The Associations support the above comments.

Exemption from liability for councillors

Section 26, Offences by corporations – liability of directors and managers subsection (4) of the *Occupational Health and Safety Act 2000* (NSW) provides:

"In the case of a corporation that is a local council, a member of the council (in his and her capacity as such a member) is not to be regarded as a director or person concerned in the management of the council for the purposes of this section."

The Associations' view is that this clear and unequivocal provision should remain within the occupational health and safety legislative provisions.

The *Local Government Act 1993* (NSW) provides a clear hierarchy of control between councillors and the general manager of councils. It is clear from the legislative structure of the Act that the NSW Government intended that elected councillors would make policy decisions and provide appropriate resources for the organisation to carry out its' functions. The general manager is charged with the responsibility to carry out those functions.

Section 335 of the *Local Government Act 1993* (NSW) outlines the functions of the general manager including being responsible for the efficient and effective operation of the council's organisation which includes day-to-day management of the council. Similar differentiations between the responsibilities of elected members and general managers exist in other states and territories.

Whilst the Associations support the obligations on the corporation to provide a safe place of work and the responsibility of managers to achieve this, in the local government context the directors (i.e. the councillors) do not have day to day control over the operations of the corporation.

The Associations regard occupational health and safety as a day to day management operation and not one that should be left for elected councillors to make decisions when they meet periodically. Whilst councillors have the responsibility to provide sufficient resources to the council's general manager to achieve a safe place of work, councillors should not be called to account if a workplace accident leads to a finding that the council did not achieve that objective.

In our view the provisions of the *Local Government Act 1993* (NSW) prevents elected members from exerting such an influence and, if this is so, it would be an unnecessary and costly impost for councillors to have to satisfy the court that the statute prevents them from having any substantive involvement in occupational health and safety management.

Whilst it may be reasonable to apply the concepts of a director being in a position to influence the conduct of the corporation and who used all due diligence to prevent the contravention to private sector organisations, it is not reasonable to apply the same tests to councils. As mentioned above, councillors are legislatively prevented from participating in matters that lead to a safe place of work and thus should not be treated the same as directors of private sector companies who are not prevented from participating in day to day management decisions.

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