

Employment, Workplace Relations & Safety

Update: An OHS “Grace Period” for Councils – Time to prepare for dramatic change

From 1 January 2012 Councils will be subject to the same significant penalties for breach of workplace health and safety obligations as other persons conducting a business or undertaking, and Council officers will bear an express legal duty to show they are exercising due diligence.

While a recent decision confirms that, for now, Councils are subject to a much lesser maximum penalty than corporations, that will change dramatically from 1 January 2012. Prudent Councils will use the intervening “grace period” wisely to prepare.

SIGNIFICANT INCREASE ON ITS WAY - MAXIMUM PENALTY FOR FAILING TO ENSURE WORKPLACE HEALTH AND SAFETY

In a recent appeal decision,¹ President Hall confirmed that under Queensland workplace health and safety (WHS) laws:

- Councils bear the same obligations to ensure safety as other persons conducting a business or undertaking; and
- the maximum penalty for breach of those obligations is one fifth ($\frac{1}{5}$ or 20%) of the maximum penalty that can be imposed on a corporation.

The current maximum penalty for a Council is therefore \$200,000.

However, the Commonwealth, State and Territory governments (including Queensland) have agreed to harmonise WHS laws around the country with effect from 1 January 2012 (**OHS harmonisation**). The maximum penalty under those laws will be **\$3 million**, for any corporation, Council, or any Government Department or agency found to be in breach. The legislation has not yet been presented to the Queensland Parliament. We will provide an update closer to the time.

¹ Robert Fitzsimmons and Sunshine Coast Regional Council (C/2009/55) Hall P, 15 March 2010.

In context, the decision means Councils and their officers have a “grace period” of up to 19 months to ensure they are meeting the WHS standards required by the model *Work Health and Safety Act* and the higher penalties apply.

Prudent Councils will use that time wisely, to review their due diligence, at all levels of the organisation, to ensure they are seeking out and acting on safety risks and concerns before WHS issues arise or injure anyone.

BACKGROUND

On conviction for a breach of the *Workplace Health and Safety Act 1999* (Qld) (**WHS Act**) causing bodily harm, a Council was ordered to pay a penalty of \$5,000 out of a possible \$56,250 (which has since been increased to \$75,000).

The Inspector appealed, saying that the Industrial Magistrate considered the wrong maximum penalty.

The WHS Act does not prescribe different maximum penalties for individuals and corporations, so the maximum penalty for a “body corporate” is 5 times that for an individual.² In this case, the Inspector said the Council was a body corporate, and that the maximum penalty was therefore

² Section 181B of the *Penalties and Sentences Act 1992*.

\$281,250 (which has since been increased to \$375,000).

IS A COUNCIL A BODY CORPORATE?

According to the *Acts Interpretation Act 1954* (Qld), a “corporation includes a body politic or corporate”.

From 13 March 2008 (around 2 months before the incident in this case), the *Local Government Act (LG Act)* of the time said that “a local government is not a corporation”,³ reversing the previous position under the LG Act⁴ After considering the Second Reading Speech, President Hall found that:

- the LG Act changes were designed to constitute Councils as entities that are *not* corporations, so as to insulate their employees from *Work Choices* and the application of Federal workplace relations laws;
- other provisions of the WHS Act, including a number that take effect from 1 January 2009, state expressly that they apply to Government departments and agencies and other entities that are *not* corporations;⁵ and
- if the Parliament had intended Councils or other public sector entities to be exposed to the higher maximum penalty, it would have said so.

The decision does not address whether a Council is a “body politic” and therefore a corporation, or whether the LG Act changes were implemented too late to insulate Council employees from Federal workplace relations laws. In the short term, and putting aside such questions, the decision provides some welcome clarification for Councils.

- Councils bear the same obligations as any other person conducting a business or undertaking, to ensure the safety of persons affected by that business or undertaking.
- For now, the maximum penalty for breach of that duty is one fifth ($\frac{1}{5}$ or 20%) of the maximum penalty that can be imposed on a corporation.

However, that position is due to come to an end on 1 January 2012, when the model *Work Health and Safety Act* is due to come into effect in Queensland,

³ Section 34(3) of the LG Act.

⁴ See the *Local Government and Industrial Relations Amendments Act 2008* and contrast the former section 35 of the LG Act.

⁵ See for example section 170C of the WHS Act.

all others States and the Territories and at the Commonwealth level.

IMPACTS OF HARMONISATION FOR COUNCIL - SIGNIFICANTLY INCREASED PENALTIES, REMOVAL OF THE REVERSE ONUS, AND OFFICERS' OBLIGATIONS TO EXERCISE DUE DILIGENCE

The terms of the model *Work Health and Safety Act* will apply in uniform terms across the country. They have been fixed since 11 December 2009 and with the exception of a small number of reserved State-specific matters, cannot be changed without the agreement of $\frac{2}{3}$ of the State, Territory and Commonwealth governments and $\frac{2}{3}$ of their delegates. Under those terms, from 1 January 2012:

- Councils, and all public sector employers including all State Departments and agencies, will be subject to:
 - the same WHS duty as corporations, to take reasonably practicable steps to ensure the WHS of all persons affected by their business or undertaking; and
 - the same maximum penalties as corporations for breach of that duty;
- to meet their legal duties, Councils will be required to show the steps they have taken, before and when work is performed, to keep people safe, and how they know that those steps are effective in managing their legal risks;
- an officer of a Council will have a duty to exercise due diligence to ensure that Council meets its WHS duty, and may be prosecuted for failing to exercise due diligence (whether or not that failure contributes to any injury or breach of the Council's WHS duty); and
- the maximum penalty for an officer will be \$600,000 (or 3 times the current maximum penalty for a Council).

Under the *Work Health and Safety Act* a person will be an officer of a Council if they make or participate in making decisions that affect the whole, or a substantial part, of the business or undertaking of the Council. Elected members of Council are excluded from the definition of “officer” but may bear a duty in some other way under the *Work Health and Safety Act*.

WHAT DOES THIS MEAN FOR COUNCILS?

To meet their legal duty from 1 January 2012, prudent Councils will be able to demonstrate ongoing due diligence by showing that, at all levels of their organisation, they:

- regularly review *how* their workforce, including all contractors and sub-contractors, perform their work, before that work is undertaken and while it is being performed;
 - look for WHS issues, early and often, and act on them promptly;
 - follow up on issues raised or identified; and
 - manage workplace harassment and stress, proactively, by considering work organisation, and careful planning, communication and implementation of workplace change.
- The last point may take on great significance for Councils as 15 March 2011 and the expiry of the merger-related forced redundancies moratorium approaches. Under the WHS Act and, from 1 January 2012, under the *Work Health and Safety Act*, Councils have a WHS duty to protect employees against workplace stress and workplace harassment and bullying. To manage the risks to workers and the risks of potential claims, prudent Councils will take steps to ensure:
- careful planning takes place before any change is introduced; and
 - clear communication and clarity around roles and accountabilities, before, during and after any change.

This article was produced by Herbert Geer.
It is intended to provide general information in summary form on legal issues.
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