

LEGISLATION TO REPLACE NON FEASANCE IMMUNITY IN NSW? HOW WILL IT WORK AND WHAT WILL COUNCILS HAVE TO DO?

Bill Woodcock [bwoodcock@skm.com.au]
Senior Consultant, Sinclair Knight Merz Pty Ltd

Paper Summary

On the 31st May 2001 road authorities received a rude, but some say an overdue shock.

We could no longer hide behind Non Feasance Immunity.

State and Local Governments are grappling with this problem and it is now down to the State Governments to devise legislative mechanisms to fill the void and try to recover some order.

This paper explores the outcomes of this process and details some of the implications and opportunities in NSW to allow us to win the game and not lose the plot.

An opportunity will be given for a lively debate at the end of the session on this topic.

Introduction

The development of the ultimate defence to loss of non-feasance immunity is likely to develop over time. This paper explores this development with up to date information being provided as this development takes place.

In NSW the Public Bodies Review Committee (PBRC) of the State Government under the Chairpersonship of Milton Orkopoulos, MP, Member for Swansea, has been given the task to investigate and propose a legislative framework to counter balance the loss of Non Feasance Immunity.

The result of this review will or should be available before the commencement of this Conference. The details will be explored at that time.

We will explore some of the possible outcomes of this review in anticipation of the new regulations with the detail

being explored with the benefit of the draft legislation or at least the recommendations from the Public Bodies review committee.

A supplementary paper will be distributed at the Conference.

Loss of Immunity from Non Feasance

Historically (since the 16th Century, originally in England) Courts have upheld Non Feasance as a defence for Road Authorities in regard to defects causing accidents.

Road authorities could feign ignorance as to the state of the road network and avoid litigation.

This immunity was overturned in the UK (its origin) in the 60's and UK road authorities have been working with pro active inspection systems as mentioned by a previous speaker since that time.

Under the new regime, now in Australia, it is now not possible to hide behind Non Feasance as a defence.

We must be aware of the condition of the infrastructure under our control.

In NSW regulations under the Roads Act 1993 are to be prepared (or have recently been prepared) as a result of the recommendations made by the PBRC to provide a system that will give some protection to rampant litigation and tend to cap liability claims.

NSW State Government initial Reaction. "Civil Liability Amendment (Personal Responsibility) Bill 2002"

A first stage of the process to enact legislation and then the Roads Act Regulations to protect road authorities was a draft Bill.

The draft "Civil Liability Amendment (Personal Responsibility) Bill 2002" was released on 3rd September 2002 for comment.

In relation to public and other "Authorities" there were proposed elements in section 44 to be taken into account. The preamble to the draft bill explains the objectives as follows:

"Explanatory note

The object of this Bill is to amend the *Civil Liability Act 2002* (**the Principal Act**) as follows:

(a) Various principles are stated relevant to the determination of what is **reasonably foreseeable** and to the standard of care for risk avoidance, so as to limit the range of consequences that will be considered to be reasonably foreseeable.

In particular, there will be provision to the effect that a possibility does not have to be far-fetched or fanciful before it can be considered not reasonably foreseeable, and the use of the benefit

of hindsight will also be limited. The stated principles will apply to liability in tort and contract.

(b) There will be no civil liability for a failure to take reasonable care in respect of a risk, or to warn of a risk, that a reasonable person would consider being an inherent or obvious risk. "

Other sections of the draft bill are listed in the appendix.

The most important section is section 44, which states:

"44 Principles concerning resources, responsibilities etc of public or other authorities

The following principles apply in determining whether a public or other authority has a duty of care or has breached a duty of care in proceedings to which this Part applies:

(a) the functions required to be exercised by the authority are **limited by the financial and other resources** that are reasonably available to the authority for the purpose of exercising those functions,

(b) the general allocation of those resources by the authority is not open to challenge,

(c) the functions required to be exercised by the authority are to be determined by reference to the broad range of its activities (and not merely by reference to the matter to which the proceedings relate),

(d) the authority may rely on evidence of its compliance with **the general procedures and applicable standards** for the exercise of its functions as evidence of the proper exercise of its functions in the matter to which the proceedings relate."

It is clear that a balance is proposed between "reasonably foreseeable",

“limitation of financial and other resources” and compliance with “general procedures” and “applicable standards”.

Recommendations by the Public Bodies Review Committee to the draft bill.

The full implications of the Public Bodies Review Committee recommendations will be available by the time of the conference and will be the subject of a supplementary paper.

It is expected that the following elements will form part of the recommendations:

-Road authorities will need to inspect their road network.

-A road authority will reduce its liability if it can show it has **followed general procedures** and complied with **applicable standards**.

-Conflicting civic priorities will form part of a defence.

-Proposed standards must be transparent to the community involving advertising and public comment and be based on a consensus between conflicting priorities.

-Stakeholders must have input to the standard setting process.

-Elements including maintenance procedures, defect categorisation, minimum inspection frequencies, intervention level, response time and the rating of different levels of service depending on the status of the road will be required.

-A form of road safety audit may become part of the accepted procedures.

-Inspectors and maintenance personnel will need to be trained and accredited.

-An industry professional body will manage Accreditation.

-Some form of independent standards and procedural auditing may be a part of the proof of compliance and hence assist in reducing liability.

Some possible outcomes

It would seem that a systematic approach to road infrastructure maintenance would be a necessity that will compliment sound asset management while at the same time providing a defence to litigation and therefore reducing Councils risk profile.

Such systems are common in the UK. Chris Champion recently advised that the City of Surrey in Canadian British Columbia are also using such a system.

A number of NSW Councils are already advanced using such a system, They include Bankstown, Penrith, Woollahra, Manly, Lake Macquarie, Randwick and Parramatta Councils. A number of other Councils have like systems such as Blacktown and Bathurst.

These Councils are reaping the benefit of lower claims settlements added to lower premiums allowing more money to be spent on maintenance.

Conclusion

As the systems for pro-active maintenance and risk minimisation advance, the community will benefit and Councils will again be able to effectively manage their assets in a responsible manner

It should be noted that AUS-SPEC #4 – “road reserve maintenance procedures” can provide such a system and hopefully help Council win the game.

References

“Civil Liability Amendment (Personal Responsibility) Bill 2002”

Appendix A

Other related sections of the draft Civil Liability Amendment (Personal Responsibility Bill):

Explanatory Note: (Cont)

(f) Liability in tort (including breach of statutory duty) of a public or other authority will be limited as follows:

- (i) the court will be required to take into account a number of principles relating to the financial and other resources available to the authority and the general responsibilities of the authority,
- (ii) a public or other authority will not be liable for breach of statutory duty (but without affecting liability in negligence) unless it has acted in a way that no reasonable public authority could act and it is clear from the express provisions of the Act that damages are payable,
- (iii) a public or other authority that has functions to prohibit or regulate an activity will not be liable in connection with a failure to exercise the function or to consider exercising the function unless the authority could have been compelled to exercise the function.

Part 8 Liability of public and other authorities

42 Application of Part

- (1) This Part applies to civil liability in tort.
- (2) This Part does not apply to civil liability that is excluded from the operation of this Part by section 3B.

43 Definitions

In this Part:

exercise a function includes perform a duty.

function includes a power, authority or duty.

public or other authority means:

- (a) the Crown (within the meaning of the *Crown*

Proceedings Act 1988), or

(b) a Government department, or

(c) a public health organisation within the meaning of the

Health Services Act 1997, or

(d) a local council, or

(e) any public or local authority constituted by or under an Act, or

(f) a person or body prescribed (or of a class prescribed) by the regulations as an authority to which this Part applies

(in respect of all or specified functions), or

(g) any person or body in respect of the exercise of public or other functions of a class prescribed by the regulations for the purposes of this Part.

44 (Referred to in body of paper)

45 Proceedings against public or other authorities based on breach of statutory duty

(1) This section applies to proceedings to which this Part applies that are based on an alleged breach of a statutory duty by a public or other authority in connection with the exercise of or a failure to exercise a function of the authority.

(2) For the purposes of any such proceedings:

(a) an act or omission of the authority does not constitute a breach of statutory duty unless the act or omission was in the circumstances so unreasonable that no authority having the functions of the authority in question could properly consider the act or omission to be a reasonable exercise of its functions, and

(b) there is no right to damages for injury or loss caused by

an act or omission of the authority unless it is clear from the provisions of the statute that damages are payable for any such injury or loss.

(3) In the case of a function of a public or other authority to prohibit or regulate an activity, this section applies in addition to section 46.

46 When public or other authority not liable for failure to exercise regulatory functions

(1) A public or other authority is not liable in proceedings to which this Part applies to the extent that the claim is based on the failure of the authority to exercise or to consider exercising any function of the authority to prohibit or regulate an activity if the authority could not have been required to exercise the function in proceedings instituted by the claimant.

(2) Without limiting what constitutes a function to regulate an activity for the purposes of this section, a function to issue a licence, permit or other authority in respect of an activity, or to register or otherwise authorise a person in connection with an activity, constitutes a function to regulate the activity.

47 Exercise of function or decision to exercise does not create duty

In proceedings to which this Part applies, the fact that a public or other authority exercises or decides to exercise a function does not of itself indicate that the authority is under a duty to exercise the function or that the function should be exercised in particular circumstances or in a particular way.

Author Biography

Bill Woodcock has 30 years experience in Local Government, Engineering and Management. He has experience at Kogarah, Bankstown, Concord, Blue Mountains City and Marrickville Councils and has also provided consultancy services prior to joining Sinclair Knight Merz. Bill carried out Operational Quality Audits for the Roads and Traffic Authority, NSW. Bill has considerable skills in leadership and his "people skills" have provided him with strengths related to Change Management.

At Statewide Roads - Technical Management Bill provided consultancy services for clients from the local government sector and played a pivotal role in the AUS-SPEC Specification Series which SKM now provides in joint venture with the Institute of Public Works Engineering, Australia.

Bill Woodcock is now providing specialist Local Government advice through a number of ongoing projects as a member of the Asset Management Consulting team of Sinclair Knight Merz.

Postal Address:

Bill Woodcock
Senior Consultant

Sinclair Knight Merz Pty Ltd

100 Christie Street, St Leonards

PO Box 164 St Leonards

1590 NSW

E-mail: bwoodcock@skm.com.au

Web Page: <http://www.ipwea.org.au>

and click on the AUS-SPEC icon.