

## To Act or Not to Act? Managing a Council's Liability Exposure in the Exercise of its Legislative Powers

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### Abstract

*Legislation confers an array of powers, functions and duties upon councils and Animal Management Officers. The powers are, in most cases, discretionary in nature meaning the decision to exercise them must be properly assessed on a case by case basis. However, sometimes a failure to act (or a failure to act adequately) can have liability implications for a council if that council (or an officer of council) is found to have been negligent or where it can be established that the incompetent exercise of a public law power gives rise to the creation of a public law duty to act.*

*By way of example, consider the situation where a council that has been made aware of a dangerous dog which poses a significant risk to public safety, takes inadequate steps (or none at all) to manage that risk. Where the dog causes injury or damage to any person or property, the council may be liable in negligence. The decision to act or, indeed not to act, is, therefore, an important one.*

*Effective management of a council's exposure to liability in the exercise of its powers can be achieved through diligent and carefully considered application of statutory powers and, therefore, an understanding of these matters is essential. This Paper, in reference to cases which have progressed through the Courts, addresses the principles relating to the application of statutory powers in 'real-life' scenarios in a manner to minimise the council's exposure to liability.*

### Introduction

Councils and their employees, including AMOs, have duties and powers imposed upon them by legislation. An example of this, which is relevant in the context of the AIAM conference, is the powers and duties conferred upon councils and AMOs to administer and regulate dog registration and ownership. These powers are often discretionary in nature. That is, the decision as to whether or not to exercise them is a matter left to the AMO.

The inherent risk is that sometimes, a decision of an AMO not to act or, a decision to act inappropriately, can occur. In particular, where such a decision is made, there is potential that a member of the public may suffer some form of harm or loss as a result. Where this occurs that member of the public may seek to recover compensation from the council by action in the courts by making a claim for damages upon the basis that the council acted negligently by failing to properly exercise its powers.

The questions which, therefore, arise are:

- can a council be liable for a failure to exercise its statutory powers effectively and properly and,
- how can a council manage its exposure to any such liability?

The answers to these questions are addressed in this Paper.

### Statutory Powers of Councils & AMOs

As mentioned above, AMOs are authorised, whether expressly by legislation or under delegated authority, to exercise various statutory powers. For example, in South Australia, some AMOs are authorised to issue dog control orders and/or destruction orders which may be issued in prescribed circumstances.<sup>1</sup> Similarly in New South Wales, an AMO may make a decision to declare a dog to be a dangerous dog, in which case, obligations attach to the owner of the dog.<sup>2</sup> Legislation also confers various inspectorial powers upon AMOs<sup>3</sup> such as the power to enter onto private land and/or the power to require production of certain documents.

The decision to exercise a legislative power is discretionary and often, is dependent upon a statutory pre-condition. However, in some circumstances, a failure or omission by an AMO to exercise a power may amount to negligence and this can result in a council being liable to any person that has suffered harm and/or loss as a direct result of the AMO's negligence.

The question as to whether a council may be found liable for a failure to act (either by it or an AMO) is governed by the common law principles of negligence in conjunction with legislation. Legislation may also limit a council's and/or an AMO's liability. For example, in South Australia, section 121(1) of the *Local Government Act 1999* provides that 'no civil liability attaches to an employee of a council for an honest act or omission in the exercise, performance or discharge. . . of powers, functions or duties under [the Act] or other Acts'. Further, section 69 of the *Companion Animals Act 1998* (NSW), provides that 'a person who destroys an animal under a power conferred by [the Companion Animals] Act is not liable in damages for any loss that the owner of the animal or any other person has sustained as a result of that action and nor is a council that authorised the person, unless it is established that the person or council did not act in good faith'.

The general rule, which is founded in common law but has been encapsulated into and/or modified by State legislation, is that that so long as an AMO acts honestly and in accordance with legislation, any liability that may arise as a result of the AMO's actions (or non-action) will attach to the council as the employer of the AMO.

1 Such orders are issued pursuant to section 50 and 51 of the *Dog and Cat Management Act 1995* (SA).

2 Refer Part 5, Division 1 of the *Companion Animals Act 1998* (NSW).

3 See for example, section 30 of the *Dog and Cat Management Act 1995* (SA), section 74 of the *Domestic Animals Act 1994* (Vic) and Part 7A, Division 1 of the *Companion Animals Act 1998* (NSW).

## The Principles of Negligence

A council may be found to be negligent (whether it be through its own actions or inactions or those of its staff), where the following elements have been made out:

1. the council **owes a duty of care** toward the person bringing the action in negligence;
2. the council **breached that duty** whether it be through action or an omission; and
3. the person to whom the duty of care was owed **suffered harm or loss as a result of the breach of that duty.**

With respect to the duty of care element, this relates to the duty to take reasonable precautions to protect a person from foreseeable risk. In that regard, the question to be asked is: 'would a reasonable person in the council's position have foreseen the risk?'

Having regard to a council's duties, powers and functions under various dog management legislation across the country, it is clear the objectives of the respective Acts are to encourage responsible dog ownership and to reduce public and environmental nuisance and/or harm caused by dogs. Taking this into account, it can be said that in many circumstances councils will have a public law duty arising from these Acts to exercise their powers as appropriate in order to protect the public from harm caused by dogs.

The High Court decision in the *Pyrenees* case<sup>4</sup> is an important one in relation to assessing the liability of a council which may arise from a decision not to act or to take action but not to properly see that action through to an acceptable conclusion. The decision is important because it provides guidance to council's with respect to the factors to be taken into account in making decisions to exercise statutory powers, functions and duties.

The case relates to damage suffered by Mr and Mrs Day to their fish and chip shop as a result of a fire which originated on residential premises adjoining their shop. The fire escaped from the fireplace of the residence due to the fact the chimney of the fireplace was defective. The defect was known to the Council and the Council's inspector had inspected it. As a result of that inspection, the inspector sent the tenant of the residential premises a letter setting out the rectification works required to be carried out in relation to the chimney and directing that the chimney not be used unless the requisite repairs had been effected. The tenant failed to notify the landlord or the subsequent tenants of the letter. The Council did not follow up on the letter to ascertain whether it had been complied with nor did it exercise powers available to it under legislation to compel the owner to repair the chimney (being a failure to act on the part of the Council). The new tenant subsequently used the chimney and the fire broke out causing the damage. Mr and Mrs Day brought proceedings in negligence against the Council to recover compensation for the loss they had suffered.

Ultimately, the Court held that the Council's failure to follow up on the letter amounted to a breach of its duty of care and, therefore, the Council was liable to Mr and Mrs Day, the landlord and the new tenant for the damage caused by the fire.

The fact that the Council had the means of preventing or averting the fire and knowledge of what potentially could occur from its failure to do so, contributed to the finding of liability against the Council;

The Court further found that a council's measure of control of a situation (i.e. its ability to remedy a situation through taking enforcement action for example) and its knowledge of the potential risks associated with an omission to take action, is directly related to and may give rise to the existence of a duty of care which compels the council to Act by exercising its statutory powers, even though the decision to exercise those powers is discretionary.

The *Pyrenees* case demonstrates that there is, at the very least, a duty upon councils to follow up where initial action is taken to manage a risk, especially in circumstances where the council has statutory powers to control the risk and knowledge of the damage that may occur if it fails to do so. This is an important lesson for all councils.

Ultimately, whilst a finding of liability on the part of a council which arises from its decision not to act will be guided by common law and legislation, the circumstances of every case are vital, such that any finding may only be made on a case-by-case basis having regard to all relevant considerations.

### Applying the Principles: Practical Example

The following hypothetical example serves to illustrate the application of the principles of negligence that are discussed above and demonstrates how inappropriate action, or inaction in relation to dog management matters may result in the council being exposed to liability in negligence.

#### *A Failure to Act*

Consider the situation where an AMO fails to issue a dog destruction order following an incident in which a child has severely been bitten by a dog that has a history (or propensity) of displaying aggressive tendencies. The AMO may have not considered the incident to be serious, or had considered the matter serious but had simply been unable to respond immediately due to a back-log of work at the office. Either way, a failure on the part of the AMO to exercise the statutory powers available to him/her to assist in protecting the community from a repeated attack by the dog, would be likely to have liability consequences for the council in circumstances where the dog attacks another person and causes injury.

The principles of negligence can be applied to this example. In that regard, the first question that arises is, does the council owe a duty of care? As a result of the statutory powers and duties imposed by relevant legislation, such as the *Dog and Cat Management Act 1995* (SA), the council owes a duty of care to members of the public to take appropriate action that is necessary to protect the public from dogs it considers to be dangerous.

<sup>4</sup> *Pyrenees Shire Council v Day* (1998) 162 CLR

In this example knowledge by the council of the propensity of the dog and the lack of action by the AMO may amount to a breach of the duty of care owed by the council because appropriate action was not taken to protect the community from the dog. Finally, as discussed above, if a person suffers harm or loss as a result of a breach of the duty of care, the council may be liable in negligence to compensate that person, in the form of damages. To that end, in this example, if the dog did indeed attack again, the fact that the council could (and should) have taken action to prevent the attack (by way of a dog destruction order for example) but didn't, may amount to it being liable to pay damages to the victim.

An alternative scenario may be that the AMO does choose to issue a dangerous dog order to the owner of the dog, but fails to follow up on whether or not the owner has complied with his/her obligations under the order. Applying the test from the Pyrenees case, if the order was not complied with and, as a result, the dog caused serious injury again, there is a significant risk that the council would be liable to the victim of the attack.

### Managing Liability Exposure

Where a council (including its staff) has knowledge of a risk and does all that is reasonably possible in its power to take action to protect the public from that risk, this will go some way towards alleviating any potential liability.

In determining what action is required to avoid liability the following are relevant considerations to be taken into account:

- the probability or likelihood of the risk occurring;
- the magnitude of the risk and the likely seriousness of any harm that may result from it; and
- the level of control available to the council to take action to mitigate against or protect persons from the risk *vis a vis* the burden to council in taking such action (which may arise from any associated costs).

The question whether or not to act it also one which should be guided by the council's risk management procedures.

There is no hard and fast rule as to how an AMOs should respond in any given circumstance. There are, however, a number of prudent measures and procedures that AMOs can put in place to help demonstrate that they have done all that they can reasonably do. This may include, for example, the maintenance of a register detailing all complaints to council concerning dogs in addition to the action the council has taken to respond (if any) and, the adequate keeping of records which demonstrate the reasons as to why an AMO has decided to act or not to act. It is also critical that appropriate training, policies, and procedures are implemented in order to ensure that best practice decision making processes are achieved by AMOs.

### Conclusion

The decision as to whether or not to take action (such as enforcement action by way of prosecution or by issuing a control order) in relation to a breach of legislation is a discretionary one.

This decision should be made having regard to considerations outlined above. It is important to be aware that where serious breaches of law have the potential to cause injury or damage to a person and the council has powers available to it to control or remedy that breach, thereby minimising any associated risk of harm to the public, at law, there is a greater onus on the council (and its staff) to exercise its powers.

Any subsequent failure to do so may amount to a breach of the council's duty of care.

AMOs should be aware that a decision not to act may give rise to liability implications for the respective council in circumstances where, as a direct result of the decision, injury to a person or damage to property occurs. Further, AMOs should also have regard to and be guided by the risk management measures discussed above which will minimise a council's exposure to liability arising from a failure to act.

### References

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Calvaresi vs Beare (2000) SASc21  
 If council does everything reasonably possible it can not be held liable.  
 (clearing of roadside vegetation)

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Cimon was admitted to legal practice in 2007 and holds an honours degree in Laws and Legal Practice and a Bachelor of Arts from the University of Adelaide. Cimon worked in the Office of the Director of Public Prosecutions before joining Wallmans Lawyers in 2008 as a specialist practitioner in the firm's leading Local Government team.

Cimon advises metropolitan and regional Councils on a diverse range of governance issues and regulatory matters relevant to local government practices and procedures including:

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Active in her field, Cimon also regularly presents training seminars and papers.

With a keen passion for and an appreciation of the political environment in which local government operates, Cimon's approach is to provide her clients with practical solutions that will withstand public scrutiny.