

Issues for local government

by Helen Proctor, Acting Chief Executive Officer, Municipal Association of Victoria

If I say that Ash Wednesday was the disaster that changed the way Victorian communities dealt with catastrophes, you, as people involved in emergency management, will be thinking that is the most obvious and puerile thing that you have heard. But for a number of reasons, the after effects of Ash Wednesday were the catalyst for local government in Victoria to adopt a new approach to the way in which it managed risks and attempted to protect councils, and ultimately communities, from the financial cost of catastrophes.

That new approach resulted in the setting up of local government's own liability insurance scheme (*Civic Mutual Plus*), designed to ensure that councils have adequate levels of cover to deal with claims made against them, but also to put in place risk management strategies to ensure that councils' exposure to risks is minimised.

Before Ash Wednesday, many councils were probably naive about their exposure to risk and claims resulting from natural disasters. Many councils were under-insured because the cost of adequate levels of cover was almost prohibitive, there was a lack of understanding about how councils could be implicated in such matters and there was simply a view that a big claim against a council would not happen.

The Court action involving Stirling Council in South Australia (for property loss occurring because of an inadequately supervised burning operation at the council's tip in the lead up to Ash Wednesday) brought that naivety to an end and made the position clearer. The council, with \$1 million in liability cover, faced a damages bill in the region of \$15 million. Stirling brought the need for councils to have a different approach to their liabilities into sharp focus.

A council's involvement, and therefore a potential liability that could arise from a council's role in emergency management, comes from two sources. These are the legislative requirements that impose clear obligations and duties on councils, and from common law.

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The basics of the laws of negligence are generally understood, so I will deal primarily with the legislative requirements.

The legislative requirements

Local government, as 'community government', has always played a role, and had a commitment to, emergency management, but over the years its role has been more clearly defined in legislation. This is in an environment of rate capping, compulsory competitive tendering and juggling competing community demands for services and council support.

It is also in an environment of increased litigation and higher claims being made against councils. This can partly be explained by restricted access to other sources of compensation, such as that previously paid by the Transport Accident Commission and by new approaches by the legal profession encouraging people to bring claims on a 'no win no fee' basis.

Curiously, the Local Government Act 1989, which is the principal empowering legislation for councils in Victoria, does not deal with the roles and responsibilities of councils in emergency situations. The Act simply provides that the functions listed in Schedule 1 to the Act may be carried out by councils. Schedule 1 states that the functions of councils include 'general public services' including 'fire prevention and protection' and 'local emergency and safety services'.

The Act also sets out the purposes and objectives of councils which could be said to encompass activities which would be consistent with general public services.

In addition, a council can make local laws for or with respect to any act, matter or thing in respect of which a council has a power or function.

There are few limitations on local law-making powers, except that a local law cannot duplicate anything already dealt with in primary or secondary legislation of the State or in planning schemes.

The local law provisions of the Local Government Act give councils the capacity to charge fees etc. for permits and to impose fines for a contravention of a local law. The Local Government Act reinforces the enforcement capacity of a council's authorised officers by giving them powers of entry and a capacity, after certain procedural steps have been followed, to enter onto premises to carry out work which a person has neglected or refused to do or to arrange for another person to carry out that work and to charge the 'offender' for the work.

It is through the use of these local laws powers that councils can deal with matters that might fall into the category of fire prevention, such as clearing unsightly premises and the removal of nuisances.

Additionally, the Country Fire Authority Act 1958, while vesting the control of prevention and suppression of fires in the country area of Victoria in the CFA, specifies duties and powers of councils in relation to fire prevention. It is a clear duty of every municipal council to take all practicable steps to prevent the occurrence of fires and minimise the danger of the spread of fires on or from :

- any land vested under its control or management
- any road under its care or management.

To do that, a council may acquire any equipment, do any thing, or expend any money from its funds. The CFA Act also gives the fire prevention officer of a council an ability to serve a fire prevention notice on the owner or occupier of land and to issue infringement notices and recover penalties where there is a failure to observe the notice and where an objection or appeal against the notice has not been upheld.

The most far reaching requirements applied to councils comes from the Emergency Management Act 1986. In brief, Sections 20, 21 and 21A require councils to 'prepare and maintain a municipal emergency management plan'.

The plan must contain information that:

- identifies the municipal resources and other resources available for use in the municipal district for emergency prevention, response and recovery. (These resources are either owned or under the direct control of a council.)
- specifies how resources are to be used for emergency prevention, response and recovery.

Councils are also required to co-ordinate and plan for emergencies. Councils must:

- appoint an emergency resource officer
- appoint a municipal emergency planning committee
- ensure that municipal emergency management plans are audited by the Director of the Victorian State Emergency Service at least once in every three years.

In summary, councils have clear responsibilities under various pieces of legislation to minimise the risk of fire emergencies to communities.

Recent reforms to local government in Victoria have taken their toll on councils' emergency management functions.

The application of Compulsory Competitive Tendering (CCT) has had a significant impact on the way that the emergency legislation can be implemented. To a lesser extent, amalgamations of councils and the sale of surplus assets have also had an impact.

The Local Government Act requires that councils submit 50 per cent of their expenditure to market testing. Most councils have opted to tender works and services of a physical nature (e.g. road making) within that 50%. These functions are easily identifiable and can quite easily be separated from councils' governance functions. In most cases, physical services were the first 'cab off the rank' in the new CCT process. So for many councils, ownership and the direct control of substantial plant and equipment may not be an option. Restructure and amalgamation also saw councils rationalising plant and equipment, with councils divesting themselves of machinery or limiting it to

equipment that might not entirely suit emergency needs.

The end product of both these reforms is that the availability of resources for emergencies may well be limited by

- the nature of the contracts entered into between a council and a contractor
- the remote location of plant and equipment in larger municipal districts
- the loss of direct control by councils
- the high probability that plant and equipment might be being used by the contractor on non-council contracts, placing the contractor in a dilemma in satisfying other contractual obligations.

While there has been some suggestion that councils ought to be more sophisticated about the contracts that they enter into and that contract documentation should make provision for use of equipment in emergencies, it is doubtful that councils in Victoria have any powers to acquire contractor's staff or their equipment and to allocate either of them to emergency situations. It is also doubtful that councils can be required to, or should, include the resources of contractors in their emergency plan. Such an approach has potential for all sorts of complications and, more particularly, may expose a council in Victoria to a liability claim, e.g. contractor's bankruptcy.

These difficulties do not negate the need for councils to comply with statutory duties imposed on them. It simply means that compliance becomes much harder, unless appropriate recognition and planning go into the process.

Duty of care and litigation

It is clear that if a council has a duty to act, and it does not act, it can be exposed to a liability claim.

For instance, if a Victorian council did not have an emergency plan pursuant to Section 20 of the Emergency Management Act 1986, and as a result of this a third party suffers personal injury, property damage or economic loss, a negligence action could be sustained.

Similarly, following the High Court Australia decision in *Sutherland Shire Council v Heyman* (157 CLR 424), if a council has the power to act in an emergency situation, and does not exercise its powers and act, it could be liable for resultant losses if there is sufficient proximity between council and the third party who sustained the

loss and the third party relied on council so acting.

In situations where a Victorian council has created or increased the risk of physical injury or economic loss, by virtue of its actions in an emergency situation, as opposed to council simply not acting at all, a council can be found to be negligent and therefore liable to the party suffering the loss.

In *Alex Finlayson P/L v Armidale City Council* (1994) (123 ALR 155), the Federal Court of Australia considered a situation where land that had previously been used for industrial purposes and in respect of which it was known that contaminants had spilt, had been approved by the council for rezoning to residential. Years later the land was found to be seriously contaminated and a risk to children.

Brennan J said in this case (p. 479):

'Where a person, whether a public authority or not, and whether acting in exercise of a statutory power or not, does something which creates or increases the risk of injury to another; he brings himself into such a relationship with the other that he is bound to do whatever is reasonable to prevent the occurrence of that injury unless statute excludes the duty.'

The proviso expressed by Brennan J above is important.

In summary, it would therefore appear that while the amount of resources that municipal councils in Victoria have to devote to emergency plans or emergency situations has decreased due to the impact of the CCT process in Victoria (and to a lesser extent amalgamations) there are still three situations where a municipal council in Victoria may be exposed to a liability claim in the performance of its emergency management roles.

These are:

- where the council has a duty to act and yet fails to undertake the necessary action
- where the risk of damage was created or increased by the conduct of council
- where a council has the power to act and does not do so and there is sufficient proximity between the third party and they or it has relied upon a council acting.

Only if there is a statutory immunity in these situations will council be protected.

It is unlikely that councils can abrogate their responsibilities under the legislation by transferring responsibilities for the provision of resources in

emergency situations. The legislation is quite specific about councils' obligations and it is quite clear that for the preparation of plans and so on, the primary obligation rests with councils, irrespective of who a council may have entered into a contract with. If appropriate contractual arrangements are made councils may be able to spread the risk, i.e. a contractor may be joined in any action but councils will not be able to avoid liability altogether.

Management of risks

One of the underlying principles associated with local government's liability insurance scheme is that of managing risks and implementing appropriate risk management strategies. There are a number of steps available to councils in dealing with the sorts of risks that might emerge from catastrophes.

Reality says that all the risk management strategies in the world will not assist councils to avoid liability for circumstances like a Newcastle earthquake.

However, councils ought to be able to identify the potential that might

emerge from a flood or fire. Most councils are aware of the natural disasters that can occur in their municipal districts from time to time. In those cases, the following are suggested ways in which councils might address the risk.

- Be aware of, and identify, the likely hazards or dangers that can exist in the particular municipal district. In other words, councils should have particular knowledge of their own areas to establish what their plans need to be geared to meet. Is there a potential, natural event that sets you apart from an average council? Is the municipal district, or part of it, flood prone or is it in a high fire risk area?
- If the answer is 'yes', then emergency management plans need to be tailored to deal with, and respond to, those identifiable risks.
- The plan needs to ensure and to allocate resources to circumstances or events that are reasonably foreseeable — that is they are likely to occur. Obviously, councils need to be mindful of availability of resources, ability to access resources and to direct and control them.

- The plan should be continually monitored and reviewed to have regard to changing circumstances.

Despite the trend that might exist to sue councils rather than individuals or other organisations for claims of negligence, these sorts of suggestions may assist councils with any potential liability that might arise from an alleged failure to observe their statutory obligations.

At the end of the day, councils need to be mindful and ever vigilant that other spheres of government may have expectations that may go beyond the ability of councils to respond. Councils need to be realistic about their emergency management role, the obligations that are imposed on them and indeed their community's expectations.

Conversely, other governments need to acknowledge that local government has the same limited ability, as they do, to be all things to all people. Emergency management is about minimising, identifying and managing risks to the community and providing appropriate responses to disasters in the best interests of the community.

Emergency Expo '98

Werribee Racecourse, Victoria
October 2nd–3rd, 1998

Bigger and better in '98

Emergency Expo '98 will be held on Friday 2nd and Saturday 3rd of October 1998 at the Werribee Racecourse, Victoria.

Organisers say the event promises to be the 'biggest, best and most comprehensive trade and emergency services expo ever held in Australasia'.

It is expected that over 150 trade exhibitors will be attending, displaying and demonstrating some of the latest equipment for emergency service operations.

An extensive range of workplace safety equipment, fire protection and suppression equipment will also be displayed. In addition, emergency services and others incorporated under the Victorian Emergency Management Plan will be participating. The defence forces will also be attending.

The two-day event commences with a 'trade day' on the Friday, followed by a 'family day' on Saturday. Both days will feature continual displays, a carnival and an array of interactive activities.

For exhibitor or emergency service information contact the expo organisers, Hoppers Crossing Fire Brigade, on:

Phone (03) 9748 0829

Fax (03) 9748 8341

email: hcrossing.fs@cfa.vic.gov.au

Further information can be accessed on the Emergency Expo '98 web page:

www.vicnet.net/~hxfb

Correspondence can be made to:

PO Box 1126, Hoppers Crossing,
Victoria, 3029, Australia

Odd spot

The call — 'There's a croc on the runway at Townsville Airport' — was welcome comic relief to Queensland's State Disaster Co-ordination Centre staff during the recent Townsville floods, in which the airport itself was flooded.

Apparently reopening Townsville Airport became complicated when maintenance staff were required to row rather than drive out to airport navigation installation to refuel the generator and found it covered with snakes! When these were removed and the all-clear was given, a second refuelling team rowed out and found, instead of snakes, a huge crocodile standing guard by the generator!

All in a days work!

from Samantha Keegan and Dilka Whish-Wilson, Queensland Department of Emergency Services