

MEMORANDUM OF ADVICE

RE OBLIGATIONS OF ELECTED COUNCILLORS UNDER THE WORK HEALTH & SAFETY ACT, 2011 (WHS)

I am asked to provide Local Government New South Wales with an Advice in answer to the following question:

“Would an elected councillor under the *Local Government Act, 1993* (NSW) be in breach of a health and safety duty under the *Work Health & Safety Act, 2011* (NSW) if, by act or omission, they adversely affected the health and safety of other persons?”

The WHSA imposes a range of duties and obligations on various persons. A health and safety duty is one imposed under Division 2, 3 or 4, s.30 WHSA. The duties are not transferrable, s14 WHSA. More than one person can have a duty in relation to a particular matter, s16 WHSA.

Although a duty is imposed on an “officer” the definition of “officer” found in s.4 of the WHSA includes an exclusion for:

“an elected member of a local authority acting in that capacity”.

Elected councillors therefore are excluded from the definition of officer in s4 whilst acting in their elected capacity and the health and safety duties imposed on officers do not apply to them.

It is to be noted that the exclusion to which I have referred does not exclude elected councillors from the operation of the WHSA generally. There is no general exclusion from the operation of the other provisions of the WHSA in favour of elected councillors.

In my opinion, s.29 WHSA does impose a health and safety duty upon elected councillors. Section 29 is found in Division 4 of Part 2 of the WHSA and is therefore

clearly a health and safety duty enforceable by fine under s.32 or s.33 and if recklessness is established and serious injury or illness results then by fine or prison term under s.31 WHSA.

Section 29 is in the following terms:

“A person at a workplace (whether or not the person has another duty under this Part) must:

- (a) take reasonable care for his or her own health and safety, and
- (b) take reasonable care that his or her acts or omissions do not adversely affect the health and safety of others; and
- (c) comply, so far as a person is reasonably able, with any reasonable instruction, that is given by the person conducting the business or undertaking to allow the person conducting the business or undertaking to comply with this Act.”

It is to be noted that the s29 duty is imposed upon “a person at a workplace”. Person is defined in the Interpretation Act 1987 and includes “an individual”. Therefore “person” as used in the WHSA includes elected councillors. There is no definition of “person” in the WHSA and more importantly unlike the definition of officer there is no exclusion in favour of elected councillors from the duties imposed by s.29 on persons at a workplace.

“Workplace” is defined in s.8 of the WHSA. For present purposes, it is sufficient to note that part of the definition found in s.8(1) which is in the following terms:

“A workplace is a place where work is carried out for a business or undertaking and includes any place where a worker goes, or is likely to be, while at work.”

It is clear that council chambers, offices and other buildings in which workers carry out their work duties are workplaces for the purposes of WHSA. It is also clear that, as a minimum, all employed staff including senior management staff of council are workers for the purpose of the WHSA, s.7.

It follows that an elected councillor is required to take reasonable care that his or her acts or omissions do not adversely affect the health and safety of others who are at a council workplace, s.29(b). The duty is defined by the consequence being the

adverse affect on another person. The duty therefore applies to any act or omission that has the stated consequence.

As an example, it seems clear that if by act or omission an elected councillor engaged in behaviour in a council workplace that was properly characterised as bullying and as a consequence another person's health and safety was adversely affected, then that councillor would be in breach of the duty imposed by s.29 of the WHSA.

The term "others" as used in s.29 extends the operation of the duty beyond persons who are workers and would also include other councillors and any visitor to the workplace who might be present at the time of the act or omission and who is adversely affected by it.

It is to be noted that the standard imposed by s.29(b) is that health and safety of others is not to be "adversely" affected. As far as I am aware, there are no decisions that discusses the meaning to be given to the word "adversely" or the phrase "adversely affected" as they are used in the WHSA.

"Adverse" is defined in the 6th Edition of the Macquarie Dictionary to be

"Antagonistic in purpose or effect;
Confronting."

It is likely that scope of this duty would include circumstances where by act or omission, the elected councillor caused a persons' existing medical condition to be aggravated or worsened in some relevant way.

In my opinion, by using the words "adversely affect" the legislator has included circumstances that are broader than those which cause a health and safety problem. Circumstances that contribute to or exacerbate a problem, even an existing health and safety problem are also included. The duty potentially applies on a very wide area of circumstance and it is not possible to identify with certainty the boundaries in which the duty is confined.

It follows from this advice set out above that an elected councillor does have a broadly defined health and safety duty imposed upon them. It is to be noted that a breach of the duty under s.29 invokes the same penalty range as applies to persons who breach their duty under the WHSA as an officer.



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