

Responsibility of local governments to ensure the health and safety of volunteers

By Scott Wade

The requirement of local governments to ensure the health and safety of volunteers, has been reinforced in the recent conviction of the Camden Council in NSW, under the provisions of the *Work Health and Safety Act 2011* (NSW).

In ***SafeWork NSW v Camden Council*** [2021] NSWDC 709, the Camden Council was successfully prosecuted following the fatal injury of a local Men's Shed volunteer, who was assisting with irrigation works at a Council managed equestrian park.

The Camden Council was convicted and fined \$1,000,000.00, for failing to ensure the health and safety of the Men's Shed volunteers, which was ultimately reduced to \$750,000.00 following an early guilty plea.

Legislative Context

The Camden Council as a Person Conducting a Business or Undertaking (**PCBU**), was prosecuted for an offence under section 32 (penalty provision) of the *Work Health and Safety Act 2011* (NSW) (**WHS Act NSW**), for failing to comply with its duty under section 19(1), to ensure the health and safety of volunteers performing work on its behalf.

The WHS Act NSW commenced operation on 1 January 2012 and is based on the nationally harmonised Model Work Health and Safety Bill developed by SafeWork Australia.

As such, the provisions of WHS Act NSW are substantially identical to those of the *Work Health and Safety Act 2020* (WA) (**WHS Act WA**), which is set to become operative in March 2022.

The identical provisions that are relevant to this case include: the definition of a 'worker' under section 7 (with the express inclusion of volunteers at 7(h)); and the primary duty of care owed by a Person Conducting a Business or Undertaking (**PCBU**) under section 19(1).

The elements of an offence under section 32 of both Acts are materially identical, however at the time of the offence by Camden Council, the maximum penalty available under the WHS Act NSW was \$1,500,000.00. In comparison the maximum penalty under section WHS Act WA currently stands at \$1,800,000.00.

As workers for the purposes of the WHS Act, volunteers are owed the same primary duty of care as paid employees, to ensure their health and safety so far as reasonably practicable.

Section 19 of the WHS Act in NSW and WA, requires PCBUs to ensure, so far as is reasonably practicable:

‘... the health and safety of —

- (a) workers [incl volunteers] engaged, or caused to be engaged, by the person; and
- (b) workers [incl volunteers] whose activities in carrying out work are influenced or directed by the person, while the workers are at work in the business or undertaking.’

The duty includes the requirement to provide a safe working environment, safe plant, safe systems of work, and such information, training, instruction and supervision as is ‘necessary to protect all persons from risks to their health and safety arising out the conduct of the’ PCBU.

Factual background to Camden Council case

Camden Council (**Council**) is a local government within NSW that has the management of a community recreation facility known as the Camden Bicentennial Equestrian Park (**BEP**). The BEP is comprised of equestrian facilities, community pavilions, walking trails, and natural bushland and open space.

The BEP is also home to number of community groups, including the Camden Men’s Shed, with a membership comprised of local volunteers who ‘undertake maintenance, development & repair of the assets & facilities’. The Camden Men’s Shed is a volunteer organisation operating from the BEP and which undertakes a variety of maintenance activities at the BEP.

Delegation for the management of the BEP to the Bicentennial Equestrian Park Committee (**Committee**), was made by the Council pursuant to the provisions of the *Local Government Act 1993* (NSW). The Committee is comprised of elected members from the Council and volunteers from the community, including the Men’s Shed, and is governed by a series of procedures developed by the Council. The procedural manual includes documents setting out the internal processes to be followed by the Committee when engaging volunteers to undertake work for the Council.

In March 2016 the Council received an external risk assessment report (2016 risk report), which found that the Committee was not discharging its WHS duty to volunteers who were undertaking high risk work at the BEP. The report recommended a number of urgent corrective actions to be undertaken by the Council to address the issues.

The corrective actions were duly recorded and their progress was tracked over the following years. Unfortunately, although some of the corrective actions were implemented, by the time the fatal incident occurred in 2018, the actions specific to the safety of volunteers undertaking high risk work, had not been adequately addressed.

The incident

In July 2018 volunteers from the Camden Men’s Shed attended the BEP to undertake work on an irrigation system, which had been approved by the Committee. The work involved the laying of heavy-duty irrigation pipe that was approximately 500m in length. The Men’s Shed volunteers were tasked by the Committee with the management of the whole of the works associated with the laying of the irrigation pipe. There were no Council employees in attendance in any capacity relation to the irrigation work on the day that the work was being undertaken.

In order to lay the pipe in the appropriate position, the volunteers had to manoeuvre it around long bends. Due to the size

of the pipe, this task was undertaken by attaching a tractor to one end of the pipe to drag it around the bend and into location. While undertaking this task, the irrigation pipe became dislodged, striking one of the Men's Shed Volunteers and causing fatal injuries.

The Court's decision

In handing down her decision, New South Wales District Court Judge Wendy Strathdee found that the Council and its employees failed to meet its duties under s19(1) of the WHS Act NSW, acting with 'almost flagrant disregard to the significant risks to which the volunteers were exposed'[\[1\]](#).

Amongst her detailed findings, Judge Strathdee highlighted several fundamental and systemic failures in relation to the Council's breach of its duty owed to the Men's Shed volunteers.

Her Honour found that there were several reasonably practicable actions that could have been taken by the Committee to assist the City in meeting its obligations under section 19 of the WHS Act NSW, including ensuring[\[2\]](#):

- (a) an adequate risk assessment had been undertaken for the irrigation work performed by volunteers;
- (b) that the Council's requirements for the recruitment of volunteers as set out in its procedural manual, were complied with;
- (c) the activities of volunteers, including those from the Men's Shed, were being monitored;
- (d) that the volunteers were appropriately qualified to perform the irrigation work;
- (e) the provision of appropriate information, instruction and training to volunteers from the Men's Shed, regarding the nature of work that they may be undertaking; and
- (f) the provision of adequate supervision of Men's Shed volunteers when undertaking work at the BEP.

When considering the appropriate sentence, Judge Strathdee observed that the offence occurred in circumstances where the Council had the benefit of the findings of the 2016 risk report highlighting the inadequacies of its compliance with its duties to volunteers undertaking high risk work. However, even with the benefit of that information, the Council failed to take almost any action to alter its approach to the management of its Men's Shed volunteers, which amounted in her view to, regrettably, 'a substantial chance of the risk manifesting'.

She noted that the objective 'risk of serious injuries being sustained as the result of a 500m long pipe being towed by a tractor around blind corners was clearly obvious' and that there were 'simple, inexpensive and readily available steps that could have been put in place by the defendant to eliminate the risk', which were agreed by the Council (set out above at (a) – (e)). Weighing the above factors, Judge Strathbee imposed a fine of \$1,000,000.00, with the Council being entitled to a reduction by 25% to reflect its early guilty plea.

Conclusion

The decision underlines the importance for local government of ensuring that work health and safety risk assessment and risk mitigation measures are undertaken in relation to work performed by volunteers on behalf of local government as they would be for paid employees. Under the Work Health and Safety legislation volunteers have the same legal status (as workers) as do paid employees. Therefore, a failure to provide a safe workplace for volunteers would contravene statutory duties under the WHS legislation and may result in liability for the responsible local government as occurred in the Camden Council case.

The information contained in this article should not be relied upon without obtaining further detailed legal advice in the circumstances of each case. For further information on matters discussed in this Update please contact Scott Wade by email to swade@mcleods.com.au.

[1] *SafeWork NSW v Camden Council* [2021] NSWDC 709 at [81]

[2] above at [41]

Liability limited by a scheme approved under Professional Standards Legislation