



Risks for Local Government Free / Low Cost Facilities

FACT SHEET
February 2014

This fact sheet outlines key risks for local government free/low cost facility (“FLC Facilities”). It aims to assist local governments in understanding the risks involved in operating a FLC Facilities.

Insurance

Most local governments have a risk management policy in place which requires them to take out appropriate insurance policies in relation to local government infrastructure.

FLC facilities pose an added insurance risk that otherwise may not arise for a local government. Premiums for insurance such as public liability insurance are assessed on a risk profile. Insurers (such as LGIS) may require local governments to take out additional insurance cover or increase premiums due to the added risk posed by FLC Facilities.

If a local government FLC Facility is not properly managed and maintained and:

- property on the FLC Facility is damaged; or
- a member of the public injures themselves whilst on the FLC Facility,

the local government may be exposed to substantial costs or expensive litigation claims.

Occupational Health & Safety

The *Occupational Safety & Health Act 1984* (“OSHA”) requires that employers/principals provide a high standard of safety at their workplace to prevent harm or injury.

Local governments that operate FLC Facilities have a responsibility to provide their workers with a safe workplace, as far as practicable, and

to consider the individual needs of their workers in providing a safe workplace.

Local governments need to consider such safety issues as:

- work-related stress;
- proper training for specific tasks;
- exposure to risk of disease and health hazards.

For FLC facilities the risk is not just in the day to day maintenance of a facility. It extends to the roles staff have in the management of the people who use the facilities. Without having appropriate procedures in place, local governments may breach the OSHA and expose staff to risk of injury and the local government to fines or prosecution, or expensive litigation.

EXAMPLE 1 – NORTH WEST FACILITY

A North West caravan park is operated by the local Shire and has approximately 20 allocated campsites in the facility.

During the recent Christmas holidays there were large numbers of campsites during the peak time, with more camps than facility could accommodate. This resulted in overcrowding and social behaviour problems. With no management or supervision on hand, campers took action against each other for issues that would normally be resolved by a manager or caretaker, primarily that being level of noise and “quiet time” at night.

The local police were called on a number of occasions, but after responding continuously

to calls for help, the police refused to continue to attending call-outs to the facility.

The local government still has an obligation to users of the facility, and any staff sent to manage such behavior will be in an unsafe work environment for which the Shire will be liable.

By failing to provide adequate supervision or management, the Shire increased the risk of violence and harm to its workers and the members of the public accessing the facility.

Public Liability Issues

Local Governments must perform their duties with a reasonable degree of care. If they do not do so then they may be liable to pay damages to anyone who suffers injury to themselves or their property because of the Local Governments acts or omissions.

Local government duties arise under:

- general common law duty of care
- *Occupiers' Liability Act 1985* ("OLA")
- *Civil Liability Act 2002* ("CLA")

Common Law

The law creates a duty of care on the part of the local government to take all "**reasonable**" measures to ensure that invitees (ie members of the public) to those premises are not unnecessarily exposed to the risk of harm.

Whether the Local Government has a duty to act depends on whether it would be unreasonable for the Local Government to not exercise its powers. This, in turn, depends on factors such as:

- (a) the degree of identifiable risk to the safety of the public. This may include:
- (i) an objective assessment of the probability of the risk resulting in loss or damage to a member of the public;
 - (ii) an objective assessment of the magnitude and value of the loss or damage to a member of the public;
 - (iii) the "vulnerability" of the party likely to suffer injury or loss (ie the party's inability to protect themselves from the consequences of Council's want of reasonable care); and

- (iv) any identifiable element of known reliance or dependence by the public and/or any assumption of responsibility by Council;
- (b) the resources available to the Local Government to carry out the work required to minimise or remove the perceived risk; and
- (c) the cost the Local Government would incur in carrying out the work to minimise or remove the perceived risk;

The creation of FLC Facilities by a local government may:

- be an assumption of responsibility by a local government;
- imply the local government has identified risks and accordingly should take care to protect against them;
- raise an expectation that the local government will in fact apply resources to the maintenance of the facility and the safety of users of the facility.

Occupiers Liability Act

Under section 5(1) of the OLA a local government which occupies premises (by reason of their occupation or control of the premises) has a duty of care to ensure persons entering onto the premises do not suffer injury or damage as a result of any dangers due to the state of the premises or any act or omission with respect to the premises.

In determining whether the Local Government has discharged its duty of care arising from its control of the premises, factors that must be considered: under the OLA include:

- (a) the gravity and likelihood of the probable injury;
- (b) the circumstances of the entry onto the premises;
- (c) the nature of the premises;
- (d) the knowledge which the occupier of premises has or ought to have of the likelihood of persons or property being on the premises;
- (e) the age of the person entering the premises;
- (f) the ability of the person entering the premises to appreciate the danger; and
- (g) the burden on the occupier of eliminating the danger or protecting the person entering the premises from the danger as compared to the risk of the danger to the person.

The “dangers due to the state of the premises or to anything done or omitted to be done on the premises” by the Local Government are the risks of injury to a person from a wide range of hazards from moving vehicles, the condition of the road surface, condition of any facility provided etc.

The creation of FLC Facilities by a local government is for the purposes OLA:

- an invitation to the public to enter and use the facility with full knowledge that the facility will be used;
- the local government has assumed the burden of eliminating risks from the facility as it has the choice to not provide the facility at all;

EXAMPLE 1 – SOUTH WEST WASTE DISPOSAL (DUMP POINT) FACILITY

In November 2013, members of the public complained that the waste disposal facility/dump point located in the South West had human waste and chemical solutions overflowing out of the facility. This facility was serviced and operated by the local Shire.

The Shire failed to remedy the issue within 48 hours and this resulted in members of the public contacting CIAWA out of concern.

By failing to clean up the human waste and chemical solutions, the Shire potentially exposed their workers and members of the public to infectious diseases which could have resulted in serious harm or injury.

Civil Liability Act

Section 5B(1) of the CLA provides that a person is liable for harm caused by that person’s fault in failing to take precautions against a risk of harm where:

- (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known);*
- (b) the risk was not insignificant; and*
- (c) in the circumstances, a reasonable person in the person’s position would have taken those precautions.*

In determining whether a reasonable person would have taken precautions against a risk of harm, the Court will consider the following

(amongst other relevant things): (section 5B(2) of the CLA)

- (a) the probability that the harm would occur if care were not taken;*
- (b) the likely seriousness of the harm;*
- (c) the burden of taking precautions to avoid the risk of harm;*
- (d) the social utility of the activity that creates the risk of harm.*

Section 3 of the CLA defines “harm” as “harm of any kind, including ... (a) personal injury; (b) damage to property; (c) economic loss”.

Where a local government can choose between various possible courses of action, the choice involves weighing up priorities and available resources.

Where it establishes a FLC facility it does so on the basis that it must allocate significant resources to maintenance and management or face the risk of claims against it.

Planning & Development Risks

Many local governments are constructing toilets and/or shower facilities on Crown land, for example at designated rest areas and 24 camp sites.

Pursuant to section 49 of the *Land Administration Act 1997* (“LAA”), managing bodies of Crown reserves (such as local governments) must submit to the Minister a plan for the development, management and use of a Crown reserve.

If local governments are developing toilet blocks and/or shower facilities on Crown reserves without submitting a plan to the Minister, they will be in breach of section 49 of the LAA.

In light of the risks associated with operating a caravan park, local governments should consider leaving the operation of caravan parks to commercial operators. Commercial caravan operators comply with all health and safety regulations, including the *Caravan Parks and Camping Grounds Act 1995*, and are generally better equipped to deal with the risks highlighted in this fact sheet.

FURTHER INFORMATION

For more information about the risks associated with local government FLC Facilities, please contact the Caravan Industry Association Western Australia Inc on (08) 9358 5622.