

Statutory immunities: when is good faith honest ineptitude?

Introduction

Often when dealing with emergency situations it becomes necessary for emergency service agencies to act, or omit to act, in ways that cause injury or death to people, or damage or destruction to private property. In some instances, due to the pressures of inadequate information and the necessity for quick decision making, the injury, death, damage or destruction caused by the agency's actions or omissions could have been avoided by adopting a different course of action, which may only become apparent with the benefit of hindsight.

At general law an agency or person who causes injury, death, damage or destruction to another is liable both under criminal and civil law for their actions or omissions. However, the law recognises that in certain circumstances a person is immune from prosecution or civil suit arising from their acts or omissions which under ordinary circumstances would amount to criminal offences or attract civil liability to the injured party. Some of these immunities are recognised by the common law, for example that military forces are not responsible for death, injury, damage or destruction caused during actual combat operations.¹ Other immunities are created by statute.

In general, immunities created by statute require that a person be acting in good faith for the immunity to protect them. This paper examines the current state of the law relating to immunities in the light of recent High Court and other superior appellate court authority, in order to provide some indication of the circumstances in which a person or agency will be immune from prosecution or civil suit, and the steps necessary to ensure that actions and omissions are made in good faith.

Immunities

A quick survey of Australian Legislation demonstrates that there are many situations in which a person is immune from civil and criminal liability for their actions carried out in the course of their duties. The immunities contained in legislation generally follow a common form, and are usually subject to the doctrine of 'good faith', or 'bona fides'.

by Mark Henry, Partner,
Maddock Lonie & Chisholm Lawyers

The following three immunities are of a type contained in Federal or State legislation:

Fire Brigades Act 1989 (NSW)

78. Protection from liability
A matter or thing done by the Minister, the Commissioner, any member of staff of the Department, any member of a fire brigade or any person acting under the authority of the Commissioner does not, if the matter or thing was done in good faith for the purposes of executing this or any other Act, subject such a person personally, or the Crown, to any action, liability, claim or demand.

Country Fire Authority Act 1958 (Vic)

18A. Immunity for officers etc.
An officer, member or employee of the Authority (not being a volunteer officer or member) is not subject to any action, liability, claim or demand for any matter or thing done or contract entered into by the Authority if the matter or thing is done or contract is entered into in good faith for the purposes of carrying out a power or duty of the Authority under this Act or the regulations or any other Act or regulations.

Fisheries Act 1995 (Cth)

142. Immunity provision
(1) *The Minister, the Secretary, a delegate or deputy of the Minister or the Secretary, an officer of the Department, an authorised officer, a member of the Fisheries Co-Management Council, a member of a fishery committee, a member of the Commercial Fisheries Licensing Panel or a member or deputy of the Licensing Appeals Tribunal is not personally liable for anything done or omitted to be done in good faith –*
(a) *in the performance of a function or the exercise of a power under this Act; or*
(b) *in the reasonable belief that the act or omission was in the performance of a function under this Act.*
(2) *Any liability that would but for sub-section (1) attach to the persons specified in sub-section (1) attaches instead to the Crown.*

An immunity will be utilised as a defence by an individual or entity who is being sued or prosecuted. The immunity will be effective provided the person relying on it can show they acted in good faith. It is incumbent upon the individual or entity relying on the defence to prove by adducing evidence they were acting in good faith.²

Good Faith

So what is the concept of good faith, and when will it cause an immunity to fail?

The Macquarie Dictionary defines good faith to mean: 'honesty of purpose or sincerity of declaration: to act in good faith.'

The leading Australian case in relation to concept of good faith is *Mid Density Developments Pty Ltd v Rockdale Municipal Council* (1993) 116 ALR 460. In that case the Federal Court of Australia held that the question of whether or not the concept of good faith embraces more than honesty will depend upon the statutory context. The Court found that the statute under consideration called for something more than 'honest ineptitude'.

This case establishes a basis which has been consistently applied in the interpretation of whether actions are in good faith and hence whether an immunity should stand. The case proposes that there will be subjective and objective tests applied to interpreting whether the actions of an individual are in good faith, and so protected by a statutory immunity.

There are two generally recognised tests of whether a person has met a standard imposed by the law. These are a subjective test which looks to the inten-

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1. *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* [1965] AC 75; [1964] 2 WLR 1231; [1964] 2 All ER 348, Lord Reid at 99-101, Lord Pearce at 145-146. However military forces engaged in armed combat are subject to the treaties and conventions known as the Laws of Armed Combat and under the Australian Constitution the Commonwealth may be liable to pay fair compensation for property appropriated or destroyed by Australian or allied forces within Australia in circumstances amounting to less than actual combat operations against an armed enemy.
2. *Barrett and Ors v South Australia & Anor.* (1994) 63 SASR 208 per Bollen J.
3. *State of South Australia v Clark* [1996] 66 SASR 199.

tions and state of mind of the person involved, and an objective test which looks to what a notional reasonable person would have done in the same circumstances.

Following on from *Mid Density Developments*, arguably the subjective view might be that honest ineptitude is sufficient, whereas the objective view requires the exercise of caution and diligence to be expected of a reasonably competent person. On the objective view, it seems that demonstrating the existence of a breach of a duty of care will come close to also evidencing an absence of good faith.³ The issue then is which approach will be adopted and in what circumstances.

The subjective approach

There is a mistaken view that where a statutory immunity exists which is subject to good faith, the defence will only fail if there is evidence of bad faith and that the evidence of bad faith is misfeasance in public office. There is no doubt that misfeasance of public office will vitiate a statutory immunity defence, as by definition it requires bad faith.

The concept of misfeasance in public office was analysed by the High Court in *The Northern Territory of Australia & Ors v Mengel & Ors* (1995) 69 ALJR 527. Mengel owned two cattle stations in the Northern Territory. The Mengels purchased their property for \$3 million financing its purchase with a bank loan which they intended to repay with \$1 million from the sale of cattle by the end of the 1998 season. Two employees of the Northern Territory Department of Primary Industry and Fisheries (the inspectors) imposed restrictions on the Mengels moving their cattle because they believed the cattle were carrying a contagious disease. The prohibition placed on moving the cattle by the inspectors prevented their sale. The inspectors erroneously believed that their actions were authorised by law, which they were not.

The Mengels commenced proceedings against the Northern Territory of Australia and the inspectors individually on the basis that there had been misfeasance of public office.

The High Court (expressly rejecting *Beaudesert Shire Council v Smith* (1966) 120 CLR 145) determined that misfeasance of public office required a person to make a **conscious decision** to either act maliciously or outside the power conferred upon them by legislation. The Court went on to say that in so acting the individual had to foresee that their

act would result in damage or loss to a third party.⁴

The Court expressly said that this was a deliberate tort, in the sense that there was no liability unless either there was an intention to cause harm or the officer had knowingly acted in excess of his or her power.

If *Mengel* is an example of how the subjective test circumscribes good faith then it is a very narrow doctrine and an immunity would apply in all circumstances save where there was a **conscious** decision to act beyond power or with malice. Clearly in those circumstances there cannot be good faith.

The *Mengel* interpretation assumes that a reference to good faith in some contexts requires identification of the actual state of mind of the individual, irrespective of the quality or character of its inducing causes (i.e. something will be done or omitted to be done in good faith if the party honestly believes it, albeit that the act or omission was careless).

The subjective approach has been applied in a string of cases where the actual state of mind of the individual is the measure of whether an act was in good faith.

Lord Denning in *Central Estates (Belgravia) Ltd v Woolgar* [1971] 3 All ER 647 at 649, said:

*To my mind, under this Act, a claim is made 'in good faith' when it is made honestly and with no ulterior motive... (so as) to avoid the just consequences of misdeeds or failures.*⁵

In other words, for an act not to be in good faith, it would have to be made with dishonesty and with an ulterior motive.

Another narrow interpretation occurred in the *Board of Fire Commissioners v Rowland* (1961) 60 SR (NSW) 322 which was a case relating to a negligence action against the New South Wales Fire Service.

An officer of the New South Wales Fire Service was sent to a cinema to undertake an inspection to ensure compliance with the *Theatres and Public Halls Act* 1908.

During the course of the inspection the officer dropped his torch. Unable to locate his torch in the dark he utilised his cigarette lighter and in the course of doing so, slipped and ignited a felt curtain. He then failed to utilise a chemical fire extinguisher to put the fire out, but used his hands. Two hours later, the roof of the building was seen to be on fire and before it could be extinguished very substantial damage was done to the theatre.

The Fire Brigade sought to rely upon a statutory immunity contained in s 46 of their Act which provided:

The Board, Chief Officer or an officer of the Board, exercising any powers conferred by this Act or the by-laws, shall not be liable for any damage caused in the bona fide exercise of such powers.

The Court held in favour of the Fire Brigade. It determined that the immunity would stand, and that the activities of the fire service were bona fide or in good faith. Whilst the term 'bona fide' does not appear to have actually been argued, it is inherent in the judgment that a narrow interpretation based on the subjective view as described by Lord Denning in *Central Estates* was adopted. Interestingly the Court said:

*Expressions of this kind have been used in many statutory provisions designed to protect individuals against the possible consequences of acts not actually authorised by law but done in a conscious attempt to perform a public duty.*⁶

R & W Vincent Pty Ltd v Board of Fire Commissioners of New South Wales [1977] 1 NSWLR 15 is a case with a similar fact situation. In that case Windeyer J stated that where the immunity applies it protects the person from liability for damage resulting from acts which are done in good faith and directly in the exercise of a power that the statute conferred, whether the acts are done skilfully or negligently. In other words, an officer expressly empowered to do something can decide, not only that it is to be done, but how it is to be done — and his actions, directions and decision cannot, if done in good faith, be later canvassed before a court on the ground that they were imprudent or that what was done was done in a negligent manner.

Numerous cases demonstrate a subjective approach to assessing good faith. An appropriate basis for application of this test is arguably highlighted in the fire services cases where an immunity is required to protect an agency from liability in relation to what might otherwise be unlawful acts.

It is the balance between the need for public service agencies to be protected from litigation or criminal liability arising out of the exercise of their powers and

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4. There is debate about whether the issue of foreseeability is a requirement — see *Three Rivers District Council and Others v Bank of England* (No. 3) [1996] 3 All E.R. 558 at 559 to 577.

5. Approved in *Smith v Morrison* [1974] 1 ER 957 at 968 per Plowman J.

6. In *Board of Fire Commissioners v Arduin* (1961) 109 CLR 105—Dixon C J limited the immunity to protection of a statutory power which would otherwise be illegal.

the rights of the public to be compensated for personal or property injuries caused by the negligence of public service agencies or their personnel which was subsequently discussed in *Mid Density Developments* and subsequent cases.

The Objective Approach— *Mid Density Development v Rockdale Municipal Council*

Facts

In this case the appellant was a developer who, on 19 October 1990, entered into an agreement to purchase a property. In January 1991 the developer submitted to the local council an application for development of the land. The council eventually approved the development application subject to a large number of conditions, including that the floor level of the proposed units on the land be raised above a minimum level in conformance with a policy that had been adopted by the council in April 1991. This had the effect of making the proposed development unprofitable.

In March 1990 the council had issued certificates under section 149 of the *Environmental Planning and Assessment Act 1979* (NSW) ('EPA') to the appellant's solicitors. Annexures to those certificates stated that the council had no information to indicate that the land was subject to the risk of flooding or tidal inundation. Further certificates in the same terms were issued to the applicant on 26 October and November 1990. The applicant had relied on these certificates when it decided to purchase the land.

Between the time the contract was completed in October 1990 and April 1991 the council had changed its flood management policy for the area based on information available to it for a number of years prior to 1990.

At the first hearing the trial judge found that the council officer who had completed the section 149 certificates had not referred to any files, studies or other information but merely relied upon his general knowledge when he completed the answers in the certificates. The trial judge therefore found that the council officer had been negligent. The council, however, successfully relied at trial on the defence of 'good faith' set out in section 582A of the *Local Government Act 1919* (NSW) ('LGA') and section 149(6) of the EPA.

Section 149 of the EPA stated that:

- (5) A council may, [in a section 149 certificate] include advice on such other relevant matters affecting the land of which it may be aware.
- (6) A council shall not incur any liability

in respect of any advice provided in good faith pursuant to sub-section (5).

Section 582A(1) of the LGA stated that: A council shall not incur any liability in respect of:

- (a) any advice furnished in good faith by the council relating to the likelihood of any land being flooded or the nature or extent of any such flooding.

Section 582A(5) stated that:

This section applies to and in respect of...

- (b) A member or servant of a council or of any such body or authority; ... in the same way it applies to and in respect of a council.

Finding

On Appeal the Full Court of the Federal Court of Australia (Gummow, Hill and Drummond JJ) found that the applicant had specifically relied on the issuing of the section 149 certificate by the council before it entered into the contract on 19 October 1990.

The court held that the Council owed a duty of care to the appellant because the relevant class of persons who may rely on such a certificate included potential purchasers of the property which was the subject of the certificate. The court held that it was sufficient if the negligent misstatement by the Council was made to members of a limited class of persons which included the plaintiff and the plaintiff was entitled to recover damages from the Council, subject to any defences.

It was therefore necessary for the court to consider whether the defence of 'good faith' set out in section 582A of the LGA and section 149(6) of the EPA Act could be made out.

The court found in relation to the concept of 'good faith' that:

1. 'Good faith' could have two meanings depending on the context in which it was used. These meanings were as follows:
 - 1.1 An actual state of mind, irrespective of the quality or character of its inducing causes. Something will be done or omitted in good faith if the party was honest, albeit careless. This is a subjective test.
 - 1.2 On the other hand, 'good faith' may require that exercise of caution and diligence to be expected of an honest person of ordinary prudence. This is an objective test (ie something more than honest ineptitude).
2. In the present case, it would be wrong to assume that the phrases in section 582A and 149(6) operated to leave the council liable only in respect of

misfeasance of public office. The court found that those provisions were designed to strike a balance between:

- 2.1 the interests of the authority which is funded by public not private funds and which, pursuant to statute, provides the information; and
 - 2.2 the interests of the recipient of the information and others reasonably acting upon it where, in the ordinary course, those persons may be expected to incur substantial liability on the faith of what is disclosed by the authority.
3. The EPA and the LGA did not have the effect that the individual interest should yield to the wider public interest only if the conduct of the authority was dishonest.
 4. A party in the position of the council could not be said to be acting in 'good faith' within the meaning of the EPA or the LGA if it issued section 149 certificates where no real attempt had been made to have recourse to the vital documentary information available to it (even if an error is made in the inspection or representation of the results).
 5. The statutory concept of 'good faith' with which the EPA and the LGA were concerned called for more than honest ineptitude. There must be a real attempt by the statutory authority to answer the request for information at least by recourse to the materials available to it.

In short then *Mid Density Developments* stands for the proposition that, in certain circumstances, the test of whether actions are bona fide or in good faith will be based on the exercise of caution and diligence to be expected of an honest person of ordinary prudence. This is confusing because it sounds akin to the imposition of a duty of care onto the officer. However, amplification of the requirement is contained in *Barrett & Ors v State of South Australia* (1994) 63 SASR 208 and *State of South Australia v Clark* (1996) 66 SASR 199.

Barrett and others were the former directors of the State Bank of South Australia. They were sued by the State of South Australia for damages in negligence arising out of their performance of duties as directors of the bank. The directors had authorised the acquisition of share capital in Oceanic Capital Corporation Ltd at a price which exceeded its actual value by about \$30 million when the true value of Oceanic Capital could have been ascertained by an independent valuation prior to acquisition.

The former directors relied on section 29 of the *State Bank of South Australia Act* 1983. That section provided a director an immunity from liability for 'an act or omission done or made, in good faith, and in carrying out, or purporting to carry out, the duties of his office'.

The Full Court of the South Australian Supreme Court agreed with *Mid Density Developments* and stated that it would be wrong to give the term 'in good faith' a precise or narrow meaning. The Court made it clear that 'good faith' within the parameters of s 29 of the Act entailed more than honesty. In adopting the *Mid Density Developments* decision, Bollen J said the protection provided by s 29(1) of the Act did not extend to cases of gross negligence or to cases where there is no real attempt by the director to fulfil the duty of care and diligence imposed upon him by his position.

The relevance of *Barrett's* case is that it makes a distinction between the actual duty of care, and an attempt to fulfil that duty.

State of South Australia v Clark arose out of the same fact situation, but as separate proceedings. Mr Clark was the Managing Director and Chief Executive Officer of the State Bank of South Australia, but also had a conflict of interest in so far as he was a shareholder in the parent company of Oceanic Capital and failed to declare his conflict of interest.

The Court similarly agreed with of the decision in *Mid Density Developments*. Perry J said:

The fact remains that there will be cases, of which the Mid Density case is an example, where the failure to discharge the duty of care required of the director in question is of such a nature that it could not be said that the director is acting in good faith.

These cases clearly confuse the issue of good faith and duty of care. On a proper analysis, however, it is submitted that Bollen J's position, that what is required is not action in accordance with an objective standard, but rather an attempt to satisfy that objective standard, is correct.

This position has been better explained in *Attrill v Richmond River Shire Council* (1995) 38 NSWLR 545

In that case the appellants were the owners of a dairy farm situated between the Richmond River and the main road owned by the council. Prior to roadworks conducted by the council the property drained generally southwards by way of an existing continuous depression with various culverts under the road to take away excess water. Following the flooding of the river the council raised the surface

of the main road but did not carry out work on the culverts to increase their water bearing capacity. The appellants argued that, as a result of the increased height of the road, the area of land inundated by flood waters retained by the roadway had increased. The New South Wales Court of Appeal determined that the council had acted in good faith and was immune from civil liability. The Court made reference to the policies and considered the material required under the legislative scheme. The Court carefully analysed the language of the immunity and determined Parliament's intention was clear. The council had, unlike the position in *Mid Density Developments*, considered the relevant material and then determined a course of action. The Court did not make a finding of fact that the course of action taken by the council was negligent but, merely noted that it had attempted to perform its duty or had at least considered the reports and made appropriate enquiries.

Situations in which the objective test has been applied seem to concern legislation which, rather than protecting an individual from liability for performing acts which are otherwise unlawful, is aimed at mitigating against the risk of civil action (ie acts that without the immunity would not be unlawful). The fact is that, based on the applicable criteria detailed in relation to *Mid Density Developments*, the objective test was adopted.

Implications of *Pyrenees* decision on statutory immunities and the concept of good faith

Pyrenees decision

In *Pyrenees Shire Council v Day & Anor* (1998) 151 ALR 147 the High Court considered the consequences of a council's failure to properly exercise its powers to ensure that premises within its municipal district did not pose an undue risk of fire.

Facts

The facts in *Pyrenees* can be briefly set out as follows:

1. In 1988 a building and scaffolding inspector employed by the council inspected the chimney of a retail shop following a small fire attended by the CFA. The inspector subsequently wrote to the then occupier of the premises warning that the fireplace must not be used unless it was repaired.
2. The council did not make any further inquiries to determine if the fireplace had been repaired or if it was no longer being used.
3. In January 1990 the tenants of the

premises where the chimney was located assigned the lease to new tenants who occupied the premises after that time.

4. The former tenants did not inform the new tenants of the letter from the council and did not advise them not to use the fireplace.
5. A fire occurred as the result of the fireplace's use in May 1990. The fire destroyed the premises where the chimney was located and seriously damaged the adjoining premises.
6. The majority of the High Court found that the council owed a duty of care to exercise its statutory power to prevent the damage caused by the fire. That duty was owed to the occupiers, the lessee, the owner of the premises and the owners of the adjoining premises.

Legislation

The statutory framework that was relevant to the *Pyrenees* decision was as follows:

1. The legislation under which the council had a power to inspect the premises was section 695(1A) of the *Local Government Act* 1958 (Vic) ('LG Act') then in force. That section stated that:

For the purpose of preventing fires the owner or occupier of any land upon which is erected any chimney or fire-place which is constructed of inflammable material or which is not adequately protected so as to prevent the ignition of other adjacent material of an inflammable nature may by notice in writing be directed by the council of the municipality within the municipal district of which such land is situated to alter the fire-place or chimney so as to make it safe for use as a fire-place or chimney, as the case may be.

2. When notice was given by the council under section 695(1A), section 890 of the LG Act provided that the person to whom notice was given was bound to comply with that notice. Section 891 imposed a penalty for failure to comply.
3. Section 885 of the LG Act authorised the occupier of a building to, with the approval of the council, carry out work and charge the owner of the building where the owner defaulted in complying with a notice requiring them to execute work.
4. Section 694(1) of the Act provided that if neither the owner nor the occupier complied with the notice requiring work to be done to prevent fire:
The council of any municipality

may carry out or cause to be carried out any works or take any other measures for the prevention of fires.

The effect of these provisions is that the fire-prevention powers of the Council were adequate, if fully exercised, to ensure that the defect in the fireplace was remedied and that, until it was remedied, no fire would be lit in the fireplace.

The *Pyrenees* decision is difficult to summarise because each of the five judges gave separate judgments. However, the key points of the case for the purpose of this paper are as follows:

1. The majority found that the Shire owed a duty of care to the owners and occupiers of the premises where the fire occurred as well as the occupiers of the next door shop, which was breached.
2. The majority found that a duty of care can be based upon the existence of a public authority's discretionary statutory power.
3. The majority rejected the view that general reliance was necessary to establish a duty of care.

Unfortunately the three majority judges chose to set out different factors that a court may take into account in determining whether a common law duty of care will be imposed where a public statutory authority has failed to exercise its statutory powers. Despite this, it is possible to obtain some guidance as to the relevant factors which a court may take into account. The majority judges found that where a public authority becomes aware of the existence of a danger to life or property in relation to which it has a discretionary power to act, it may become liable in damages if it does not exercise that power. This liability will arise where:

1. the authority has knowledge of a grave danger to a definable class of people or their property
2. the people concerned are unaware of that danger and are unlikely to become aware of it
3. the authority has statutory powers enabling it to avert or prevent the problem
4. there are no policy considerations which prevail to override the duty

Specific reliance by the plaintiff on the public authority exercising its power is not essential.

Comparison of *Pyrenees* decision and principles of 'good faith'

Section 166A of the LG Act was an immunity provision that was applicable

to the activities of the council inspector who wrote the letter to the occupier of the premises. That section states:

(1) *Nothing done or omitted and no contract entered into by any officer or employee of the council shall if the act or omission occurred or the contract was entered into bona fide in the course of his functions as such officer or employee subject any such officer or employee personally to any action, liability, claim or demand whatsoever.*

The meaning of the term 'bona fide' is the same as that of 'good faith'.

The difference between the provisions in the LG Act then in force and the relevant provisions under consideration in *Mid Density Developments* is that there is no provision providing an immunity to the council itself in the LG Act. An immunity is only extended to officers of the council.

If such a 'good faith' provision providing an immunity to the council had existed as it did in the *Mid Density Developments* case:

1. It is likely that the council would have met the subjective 'good faith' test in that the council inspector did not act dishonestly.
2. The council probably would not have acted in 'good faith' in accordance with the broader objective test set out in *Mid Density Developments* as there was not a genuine attempt by the council to perform its function correctly. This would have been a matter to be determined by the court after weighing up a number of factors.

The factors identified by the majority judges in *Pyrenees* in determining whether a common law duty of care will be imposed where a public statutory authority has failed to exercise its powers share some similarities with the statutory defence of 'good faith' as set out in *Mid Density Developments*. These similarities are as follows:

1. The knowledge of the danger held by the public authority and the relevant class of people.
2. The need to closely examine relevant legislation to determine whether the powers conferred on the public authority warrant the imposition of a duty of care.
3. The significance of policy considerations.

Knowledge of the danger

In *Mid Density Developments* one of the key considerations in determining the broader meaning of 'good faith' concerned the interests of the recipient of the

information and others who incurred substantial liability on the faith of what was disclosed by the public authority.

Some examples of this factor in *Pyrenees* are as follows:

1. Gummow J stated that, unlike the council, the tenants of the two properties at the time when the fire occurred did not know of the imperative need for something to be done. He stated that their ignorance was the product of the incomplete and inadequate course of action taken by the council which was aware of the danger and had the means of preventing or averting it or bringing it to the tenants' knowledge (page 192).
2. Brennan CJ stated that, consistent with the purpose of arming a council with fire-prevention powers, a council that knows of a risk by fire to persons or property cannot refuse to exercise its fire-prevention powers where an exercise of those powers would protect those persons or property, unless the council has some good reason for not doing so (page 154).
3. One of the public policy considerations identified by Kirby J for rendering the council liable related to the opportunity which the plaintiffs had to inspect and appreciate the source of danger to them. Kirby J identified that, in the balance of the possession of relevant information, the council was at an enormous advantage and the plaintiffs were at a profound disadvantage (page 222).

Determination whether the powers conferred on the public authority warrant the imposition of a duty of care

Another factor considered by the court in *Mid Density Developments* was that the council should have made a real attempt to have recourse to the vital documentary information available to it in order to be acting in 'good faith'. The court also stated that there must have been a real attempt by the statutory authority to answer the request for information at least by recourse to the materials available to it. In following the line of argument through *Barrett v State of South Australia* and *Clark v State of South Australia* there must have been an attempt by the person relying on the immunity to have fulfilled the duty of care.

Pyrenees poses some interesting propositions with respect to this analysis. These are as follows:

1. Brennan CJ stated that the care and diligence needed to discharge a duty vary according to the circumstances which are known to the defendant. It is

therefore presumed that the attempt to discharge the same duty will similarly vary. He stated that where there was a risk of fire that could destroy a large part of a township, the care and diligence to be exercised is greater than where the risk is of an escape of fire that poses a threat only to an isolated structure or to crops, trees or pasture within a confined area. He therefore found that the council was under a public law duty to enforce compliance with the requirements in the inspector's letter. The risk of non-compliance was extreme for lives and property in the neighbourhood of the defective chimney (page 158). If the duty varies the distinction between the attempt to fulfil the duty and the actual duty, any meaningful application of the good faith test will be impossible.

2. One of the considerations identified by Kirby J for rendering the council liable was the statutory power in question, which his Honour said was not simply another of the multitude of powers conferred upon local authorities such as the council, but was a power addressed to the special risk of fire. Kirby J also identified that, where a public authority enters upon an exercise of its powers, it must do so carefully. He stated that had the action taken by the council been competent and careful, the damage suffered by the plaintiffs would probably have been avoided (page 219). Kirby J also stated that the peril that was foreseen rendered it fair, just and reasonable that the council should have exercised its powers (page 222).
3. Gummow J identified that the situation occupied by the council as the arm of local government gave it a significant and special measure of control over the safety from fire of persons and property in the street where the premises were located. He stated that the touchstone of the council's duty was its measure of control of the situation, including its knowledge, not shared by the plaintiffs, that if the situation were not remedied the possibility of fire was great and damage to a whole row of shops might have occurred (page 192).

Significance of policy considerations

In *Mid Density Housing* the court considered the public policy reasons for the immunities, including that the provisions were designed to strike a balance between the interests of the authority and the recipient and in what circumstances the individual interest should yield to the wider public interest.

Some examples of policy considerations undertaken by the majority judges in *Pyrenees* are as follows:

1. One of the three tests identified by Kirby J in determining whether a legal duty of care exists was if it was fair, just and reasonable for the common law to impose a duty of care upon the council for the benefit of the plaintiffs. Some of the matters considered by Kirby J included the degree of danger to which the claimant was exposed by the omission of public authorities to exercise statutory powers, the expertise available to the authority, the opportunities of intermediate self-protection, the cost and inconvenience involved in the authority's exercise of its powers, the promotion of individual choice and the efficient use of resources, the size and resources of the council and the undesirability of adopting a rule which would result in insurance companies recouping their expenses from the purse of a public authority (pages 219-221).
2. Gummow J identified that questions of resource allocation and diversion and budgetary imperatives should fall for consideration along with other factual matters to be balanced out when determining what should have been done to discharge a duty of care (pages 195-196).
There is a unique conflict here in so far as it seems public policy on the one hand dictates that, where a public authority alone is in a position to provide information and to act, a failure to do so would evidence a failure in the exercise of the ordinary prudence and diligence expected of an honest person. This would mean that no good faith immunity would apply. This flies in the face of the intent of the statutes which confer such an immunity.

Conclusion

Emergency Services will be able to avail themselves of a statutory immunity and their acts will be regarded as bona fide on the subjective test, where their actions would otherwise be unlawful and/or are acts required to be performed in exercise of their statutory function.

Whilst the *Pyrenees* decision did not specifically consider the issue of 'good faith', it is interesting that many of the factors weighed up by the Full Court of the Federal Court in *Mid Density Developments* in relation to whether or not the council had acted in 'good faith' within the broader meaning of the term were similar to the factors the majority judges in *Pyrenees* identified as being relevant to whether a duty of care will be imposed where a public statutory authority has

failed to exercise its powers. The High Court's development of the law in relation to the liability of public authorities for failing to exercise a statutory power in the absence of specific reliance shares some distinct similarities with the development of the statutory defence of 'good faith' in relation to an officer of a public authority or the authority itself. These developments make it almost impossible to assess in what circumstances a statutory immunity defence aimed at risk mitigation will succeed and where it will not. The difficulty in making any practical distinction between an attempt to fulfil a duty and the actual satisfaction of the duty means whether or not a court considers an act is in good faith will depend on issues of public policy.

In summary, I am of the view that the following trends can be discerned:

1. An immunity will be enforceable and the principle of good faith assessed on the subjective test where the immunity is required to make an unlawful act lawful.
2. In circumstances where the immunity operates to mitigate risk, the good faith principle will be measured against competing public policy issues.
3. The public policy issue relevant to determining if an act is performed in good faith will be measured by an **attempt** to satisfy a standard of care.
4. The reality of measuring the **attempt** to satisfy the standard of care and actually satisfying the standard is confused.
5. The public policy considerations relevant to the application of the immunity will have to be assessed by the courts on the facts of each case.

In short, there are real unresolved issues about when an immunity will apply, even given their unambiguous statutory intent.

About the Author

Mark Henry is a Partner of the Melbourne firm Maddock Lonie & Chisholm. He has a Bachelor of Arts and a Bachelor of Laws. He is a member of LawAsia and the Law Council of Australia. Mark acts for both the Victorian Country Fire Authority and Metropolitan Fire and Emergency Services Board and has represented the CFA at coronial inquests including the forthcoming inquest into the deaths of 5 CFA volunteers at Linton in 1998 and the Royal Commission into the Esso Longford Gas Plant Accident.

Mark heads Maddock Lonie & Chisholm's emergency services team and has particular expertise in emergency services and their interface with the private sector. He regularly advises on administrative law, statutory interpretation, contractual matters and large projects.

