



If it is true that progress is made by those who accept the challenge of change and boldly chart a course into the unknown, asset managers have a reason to be grateful for the imagination and courage shown by the Victorians in the Road Management Act 2004 as a reaction to the Brodie decision. In 'Beyond Brodie' we look at the how Australian states have responded to the lifting by the Federal Government of the immunity for nonfeasance.

Asset managers have triumphed over many 'challenges of change' in recent years and we look at some of these in "Challenges Overcome"

And then ask "If we have succeeded this far, what is to stop us going further? For example, are the principles of 'Beyond Budgeting' (outlined in the last issue) really beyond the public sector? Or Can Asset Managers help to move this agenda forward? See "Moving Beyond Budgeting" – and contribute your ideas and suggestions to our group development project.

Contents

712-714 Beyond Brodie: Non-feasance immunity today

715 Challenges Overcome - The changes that asset management has met in recent years

716-718 Moving Beyond Budgeting: An agenda for group development

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BEYOND BRODIE

Removal of the Immunity from Non-Feasance for Australian Road Authorities

At the recent, and excellent, Asset Management Conference convened by the Municipal Association of Victoria, all States reported on their reaction to the lifting of immunity for non-feasance by the Federal Government, following the Brodie case of 2001. In addition, Rick Sarre presented a paper on the Brodie aftermath. All papers can be accessed from the MAV website at www.mav.asn.au

What's the fuss all about?

For the benefit of overseas readers and non-road asset managers, until 2001, all Australian road authorities enjoyed the benefit of protection against accidents on their roads and footpaths that resulted from maintenance or repair works not being done, or warnings not given, (immunity from *nonfeasance*) but not for maintenance or works carried out that were directly or indirectly the cause of an accident (no immunity from *misfeasance*). In other words, they were given an immunity against negligence enjoyed by no other private or public sector entities. The right to this immunity was eventually challenged by a series of cases, most notably by the case of Brodie v Singleton Shire Council. The following account is taken from an article by Rick Sarre, in Road & Transport Research, vol 12, No 4, December 2003.

Immunity Pleaded

"The Brodie case involved a motor vehicle accident. Scott Brodie was driving his 22 tonne truck along a road in the Shire of Singleton. His route took him over two old timber bridges. On the approach to the first bridge, there was a sign limiting road users to 16 tonne vehicles. He drove over the bridge notwithstanding. The second bridge had no load limit sign. The bridge partially collapsed when Mr Brodie's truck crossed it, causing injury to Mr Brodie and damage to the truck. He sued the Single Shire Council in negligence.

The council, in evidence before the trial court, maintained that all wooden bridges were inspected about four times a year. This bridge had been graded as being in 'moderately poor condition'. The council pleaded the immunity [from non-feasance]."

Now the story gets interesting.

Immunity Rejected

"The trial judge ruled that the nonfeasance immunity was good law, but, since the council had replaced some of the timber planks at some time before the accident, then it became a case of misfeasance and hence he made an award of substantial damages against the council. The council appealed.

Immunity Re-Instated

The NSW Court of Appeal held that the replacement of the surface planks from time to time had nothing to do with the collapse of the bridge. The real cause of complaint was failure to inspect and repair the girders. This was nonfeasance, which attracted the immunity, and hence the decision of the trial judge was reversed.

Immunity Rejected—as a principle

Mr Brodie then appealed to the High court. In a joint judgement by three of the four majority judges, the High court put aside the question of misfeasance versus nonfeasance in favour of an approach that simply applied the ordinary principles of negligence.

The High Court went on to argue a case for 'reasonableness' in determining liability. Persons using the road are expected to take ordinary care and road authorities are now obliged to address reasonable risks within a reasonable time, having regard to budgets and timetables, and cannot claim an immunity if they fail to do so. Road authorities must endeavour to consider good management practices based upon reasonable regard to construction and design, repair and maintenance, pedestrian safety, and inspection practices. Even latent risks may render authorities liable, if these risks would have been discernible had a proper inspection been carried out.

Thus, the High Court now applies the common law of negligence to road authority cases.

Good asset management was now the Road Authorities' only defence

How did the States react?

WA

Nonfeasance protection was restored on 20 October 2003 via State legislation, but it is conditional protection for road authorities not blanket immunity – authorities are not liable for harm from failure to carry out or consider carrying out work unless risk was previously acknowledged.

(it may be only a matter of time, before this is challenged on the basis of whether risk should have been acknowledged.)

SA

Set up a Mutual Liability Scheme that was established in 1989; this provides risk management and civil liability protection for Councils. Processes have been introduced to address road/footpath management issues. David Hitchcock, in his presentation, showed that the costs of legal liability in SA, having temporarily risen after Brodie, were now declining and he argued that one of the reasons for this was the good practices employed in SA that made local government a 'harder ask' for the legal profession. It is to be noted that SA (along with Victoria) is one of the only two states to have seriously addressed asset management issue on a state-wide basis.

(on the face of it, the Mutual Liability Scheme protects councils from the financial consequences of liability for damage, but does nothing to protect the community from the actuality of damage. However the necessity to contain the costs of the scheme produces itsr own incentives. SA has an unsealed roads manual and addresses road signage issues, etc..)

Qld

Prior to Brodie, there was a joint submission by LGAO and Old LG Mutual Liability Pool to limit liability exposure of LG. After Brodie, LGAO and State Government sought reinstatement of nonfeasance protection. A modified version of non-feasance was included in the Civil Liability Act 2003 – **similar to provision adopted by NSW**, namely that non-feasance is only available when the council is not aware of the hazard. If aware, then council is subject to a court determination in accordance with the law of negligence, however the Civil Liability Act introduced changes to the law of negligence in that it introduced a 'policy defence'; this enabled councils to claim limited funding and the right to make reasonable decisions on allocation of funds. There is no expiry date for the Civil Liability Act.

Vic

Following the Brodie Case in 2001, the Victorian Government legislated to extend nonfeasance protection to Road Authorities (Vic Roads & Local Government) – but only until Dec 31st 2004. This was done to provide some consistency whilst the Victorian Road Management Bill was being drafted. It is now in place as the Road Management Act 2004 (as of a few days ago) and will take effect at midnight on New Year's Eve. What does it do? (VicRoads has prepared a series of brief 'fact sheets' on the new Act that may be viewed at www.vicroads.vic.gov.au (select 'Road Management Bill')

The Road Management Act 2004

Principally, road authorities **are required to put in place a formal asset management plan**, BUT they may choose the most appropriate form and standards that this is to take, and the appropriate maintenance policies and procedures – these are not prescribed.

The Bill distinguishes who is responsible for what. In particular, it stipulates that utilities are to be responsible for the repair of road infrastructure damaged by failure of utility infrastructure (eg. burst water mains).

The Road Management Act 2004 sets down specific requirements for Local Government Authorities, including the following:

- Road authorities will be required to make an assessment of the need to put into place a formal road management plan.
- Road authorities will be required to establish a Register of Public Roads listing each public road for which it is responsible.
- Road authorities will be required to establish effective policies, administrative processes and systems to manage roads in order to receive a level of statutory protection against civil liability claims under the Bill.
- Road authorities will be required to prepare a report on road conditions following receipt of notification of an intention to claim for property damage as a result of an incident.
- Management of private roads is not covered in this legislation and will remain the responsibility of private owners.

CHALLENGES OVERCOME

Consider the history of Asset Management

Yesterday our focus was project based; for example, building a bridge.

Today our focus is program based and decisions centre on asset collections such as a transport corridor. We have widened our base of thinking. This means that more of the previously external impacts of our actions are now internalised – and thus taken into account.

Yesterday, our emphasis was not only on individual assets such as the bridge; it was short term. In fact, most of our interest was in construction and our project focus meant that we worked towards hand-over.

Today, the emphasis is more likely to be on asset systems and also long term. This has made asset management more holistic in its approach.

Yesterday, we considered design and construction options.

Today we need to think about design & construction and to continue that thinking forward to include operations and maintenance, renewal, replacement and eventual disposal as parameters.

Yesterday, our work was mostly in-house.

Today there are many more options; for example, buying services rather than assets, contracting out, and integrated facility delivery.

Yesterday, our approach was piecemeal and ad hoc.

Today we are moving towards a process that is holistic and systematic. In today's world, input and feedback are essential. Good quality data, well organised and evaluated is critical.

Yesterday, public sector capital was funded by government borrowing or by tax revenues.

Today, public sector capital is increasingly being provided by the private sector and we have a raft of Private Public Partnership and Private Finance Initiatives of incredible variety – and complexity. Where capital provision has been retained by governments, it is far more likely to be subject to commercial rules of return on investment and tax equivalent payments. Where services have been privatised, extensive government regulations have developed. As a result, legal complexities have exploded.

These changes have taken place in a very short space of time. They have influenced both the need for asset management and the way that asset management has developed as a discipline. In many cases asset management has been adopted as a means by which one level of government can control the outputs and quality of a lower level of government, or a means of controlling private sector processes to ensure a greater focus on the longer term.

No longer focused on the asset; no longer using approaches that are piecemeal and ad hoc, asset management today is summed up as being *systemic and systematic*: *systemic*, because it focuses on asset systems, collections of assets, portfolios of assets; and *systematic*, because it follows recognised processes consistently.

Can the budgeting changes keep pace? (See next)

MOVING BEYOND BUDGETING

- A work program

Where we are now

The general tenor of comment about the item on 'beyond budgeting' in the last issue of SAM (#139) was *'tell us more!* Readers agreed that budgets didn't work.

Some felt that with greater flexibility (and greater honesty and integrity and trust in those who allocate the budget!) *maybe* we could make a better fist of our budgets, but there were others who were willing to consider a break with the old and familiar (even if non-working) budgets – but were uncertain what to do. Fair enough!

So far, most of the success stories (and 100% of the ones I have found) emanate from the private sector. But in these days when the public sector is expected to 'act commercially', when we are, in fact, *being* more commercial, entering into partnership agreements with the private sector and taking on board commercial accounting and organization – can this step 'beyond budgeting' be beyond our reach?

Perhaps it needs the ingenuity of asset managers to be applied to the problem?

Remember the longer we stay with budgets, the less able we will be to promote

'Value for money' over 'lowest cost'
'Life cycle value' over 'initial cost'
'Efficient spending' over 'more spending'
'Outcomes' over 'inputs' *and*
'Asset Management' over 'asset expenditure'

I want to suggest the following as a **GROUP DEVELOPMENT PROBLEM**, to do the following

(1) Find out what's stopping us

Identify what is stopping us from adopting the principles of beyond budgeting, recognising that these principles may be applied differently in the public sector from the private sector

(2) Then find ways around these problems

Having identified the things that are stopping us – we figure out a way around each of them - confining our attention for the moment simply to asset management applications within our agency to avoid the problem getting too large to handle (and the charge that we are moving beyond our brief).

(3) Design some possible workable solutions

This is an important issue that goes to the heart of good asset management, so, over the next few issues, we will be exploring - with your help, assistance and suggestions – how the problems of 'beyond budgeting' can be overcome.

To start off with, consider the following issues over page – then tell me what problems you would need to overcome. (you may want to look at some of the work on the 'beyond budgeting' roundtable site at www.bbrt.org)

Have some fun!

Tell us why these 6 Process Based Principles could never work in the Public Sector!

Here are some starting suggestions. Please, talk it over amongst yourselves, or mull over the issues during your coffee break, and then email me the problems you come up with. To give you time to put some thought into this - we will print the list of problems in the next but one issue (i.e. in Issue 142, due out on June 11) To ensure that your issues make the list, [please email me <amqi@amqi.com> by June 7th.](mailto:amqi@amqi.com)

1. Base goals on maximising performance potential

Some problems

- Defining performance
- Defining potential
- Measuring potential

What else?

2. Base evaluation and rewards on relative improvement contracts, with hindsight

This is a beauty! I can see any number of challenges to making this one work!

Some problems

- At present, we have standard rates that apply to the industrious and the not so industrious, the competent and the incompetent – without discrimination.
- The rates are known in advance and paid regardless of performance.
- Any idea of paying public servants extra for good performance runs up against the argument that 'that is what you are paid your basic rate for, why should you be paid more simply for doing your job!'
- Unions may see this as a challenge to their authority, possibly a market for individual contracts.

What else?

3. Make action planning a continuous and inclusive process

Some problems

- Most plans have annual targets, to make action planning a continuous and inclusive process would seem to require much shorter dated targets.
- It would take more time. (bringing in the subsidiary argument that 'if we do more planning, then we do less actual real work!')
- Planning is often done by those 'at the top'; making planning an inclusive process means opening up decision making to those 'at the bottom'. This is the essence of 'beyond budgeting' – that those who get to do the actual work, get also to think about what they are doing – and to do it better! But any change involves concerns. Let us get these concerns laid out and analysed!

What else?

4. Make resources available as required

Some problems

- Where would the money come from?
- What is there to limit spending

What else?

5. Coordinate cross company actions according to prevailing customer demand

Some problems

- Would there be negative reactions from across the company?
- Who gets to interpret customer demand in a public sector context?
When there are many customers, with conflicting interests, how are these resolved so that customer demand serves as a guideline for action?

What else?

6. Base controls on effective governance and on a range of relative performance indicators

Some problems

- What governance?
- Are controls possible?
- Which performance indicators?

What else?

OK, Why won't Beyond Budgeting Work in the Public Sector—Tell Me!
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Are you up to the challenge?

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