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Our Ref: PKC: PedCouncil

21 November 2008

Mr Harold Scruby  
Chairman / CEO Pedestrian Council of  
Australia Limited  
P.O. Box 500  
NEUTRAL BAY NSW 2089

**Also by Email: [walking@walk.com.au](mailto:walking@walk.com.au)**

Dear Mr Scruby

## **CIVIL LIABILITY OF ROADS AUTHORITIES ARISING FROM COLLISIONS BETWEEN PEDESTRIANS AND BICYCLISTS IN SHARED BICYCLE PATHS**

I refer to our telephone conversation on 19 November 2008 in relation to possible civil liability in negligence on the part of local councils or Roads and Traffic Authority ("RTA") as "roads authorities" in relation to collisions between pedestrians and bicyclists on "shared paths" referred to in Rule 242(2) of the *Australian Road Rules 2008* or Shared Bicycle Paths.

The issue raised is of some importance as pedestrians would not have recourse to compensation for their injuries against bicyclists under compulsory third party personal injury insurance under the *Motor Accidents Compensation Act (NSW) 1999* as bicycles are not "motor vehicles" for the purposes of that legislation.

It was accepted by the High Court of Australia in *Brodie –v- Singleton Shire Council (2001) 206 CLR 512* that a "roads authority" owes a duty of care to avoid reasonably foreseeable risks of injury to users of public roads that may arise from the exercise of failure to exercise statutory functions or powers under the *Roads Act (NSW) 1993* (the "*Roads Act*"). This decision of the High Court abolished a rule at common law that granted immunity to roads authorities in relation to claims in negligence arising from a failure to exercise statutory functions to carry out road works by way of maintenance or repair or act of *non-feasance*. Prior to the abolition of immunity provided by the *non-feasance rule*, lawyers attempted to avoid this immunity by characterising problems with the construction and maintenance of public roads as positive acts of negligence (rather than omissions) described as acts of *misfeasance* (a failure to carry out road works properly). The immunity of roads authorities arising from *non-feasance* has since been re-enacted by Section 45 of the *Civil Liability Act (NSW) 2002*. It has therefore been necessary for lawyers to avoid the immunity from negligence conferred by Section 45 on roads authorities by returning again to the distinction between *non-feasance* and *misfeasance* and attempt to characterise problems with road works as positive negligent acts of *misfeasance*.

It is provided by Section 7(4) of the *Roads Act* that a local council is the relevant "roads authority" in relation to public roads within its local government area although the RTA

would be the relevant “roads authority” in relation to any major roads, bridges or other roads prescribed by regulations promulgated under the *Roads Act* even though these are within or pass through a local government area.

A roads authority is empowered by Section 71 of the *Roads Act* to carry out “road works.” These are defined by Section 4 to include the installation of any structure including a footway on or in the vicinity of a public road. It has generally been accepted that pedestrian footpaths constitute public roads for the purposes of the *Roads Act* and this has been confirmed in a recent decision of the High Court in *Leichhardt Municipal Council –v- Montgomery (2007) 81 ALJR 686*. It would follow that Shared Bicycle Paths would also constitute public roads for the purposes of the *Roads Act*.

A local council is required to seek the approval of the RTA according to Sections 75 and 76 of the *Roads Act* in relation to “major works” costing more than \$2 million or where the road works are to be carried out in the vicinity of “classified roads.” It would certainly be possible for the construction of Shared Bicycle Paths to cost more than \$2 million. The RTA may also become involved in the planning, design and construction of Shared Bicycle Paths through its participation in Local Government Traffic Committees.

It would not be in doubt that a local council would owe a duty of care to take reasonable steps to avert any risk of injury arising from conflict or collisions with bicyclists on the part of pedestrians using Shared Bicycle Paths as a “matter of law” in its capacity of the relevant roads authority under the *Roads Act*. This would also be the case with the RTA in relation to bridges, major roads or other gazetted roads that it has control over as the relevant roads authority under the *Roads Act*. The RTA may also owe a duty of care to pedestrians using Shared Bicycle Paths that is co-extensive to any such duty of care owed by the local council through its involvement in the approval, planning or design of Shared Bicycle Paths through participation in Local Government Traffic Committees.

I do not believe that there would be much scope for the *non-feasance* immunity provided Section 45 of the *Civil Liability Act (NSW) 2002* to protect a local council or RTA from claims in negligence arising from collisions between pedestrians and bicyclists on Shared Bicycle Paths as allegations of negligence in relation to such claims are most likely to arise from planning, design and construction rather than maintenance or repair.

The critical issue in establishing liability in negligence on the part of roads authorities in relation to claims in negligence brought by pedestrians injured in collisions with bicyclists in Shared Bicycle Paths is whether those authorities are in breach of duty of care owed. This is a “question of fact” rather than a “question of law.” A Court would determine whether a breach of duty of care had occurred by considering the response of a reasonable person in the position of a roads authority to the particular risks posed by the configuration of the Shared Bicycle Path by “balancing” factors such as the “magnitude” of the risk of injury to pedestrians, “seriousness” of the harm that would result in the event that the risk materialised, “difficulty and inconvenience” on the part of the roads authority in taking alleviating action to avert the risk of harm as well as the “social utility” of Shared Bicycle Paths according to Section 5B of the *Civil Liability Act (NSW) 2002*. A Court would also be directed by Section 42 of the *Civil Liability Act (NSW) 2002* to consider the financial resources available to the roads authority in the context of all of its functions and responsibilities in assessing whether the response on the part of the roads authority to the risks posed by the configuration of a particular Shared Bicycle Path was reasonable or in breach of duty of care owed.

In balancing these factors that are not exclusive in assessing whether a breach of duty of care has occurred, a Court would also consider the existing statutory or regulatory framework applying to the design, construction and use Shared Bicycle Paths including *Austrroads Guide to Traffic Engineering Practice*, *Australian Road Rules* as well as any offences applying to bicycle use under the *Road Transport Legislation*. Austrroads is the national association of road transport and traffic authorities in Australasia consisting of the

chief executives of the road and traffic authorities from Australia's six states and two major territories as well as the Commonwealth Department of Transport, Australian Local Government Association and Transit New Zealand. It published a Guide to Traffic Engineering Practice in 1995 that has become a practical guide for transport engineers in local governments. Section 6.3.2 of Part 14 concerns the design of shared paths and recommends adequate sight distances between pedestrians and bicyclists on shared paths to avoid conflicts and accidents between these users. In the case of a bi-directional shared path, a minimum pathway width of 3.5 to 4.0 metres was recommended under the design rules.

The creation of bi-directional Shared Bicycle Paths is envisaged by Rule 242 (2) of the *Australian Road Rules* through the erection for a "Shared Path Sign" to indicate the commencement of the Shared Bicycle Path and an "End Shared Path Sign" indicating the conclusion of the path. Rule 250(2) requires only that a bicyclist keep to the left on a Shared Bicycle Path unless it is impracticable to do so and to give way to pedestrians on a Shared Bicycle Path by slowing down and stopping if necessary to avoid a collision. It is significant that no offence for speeding has been created for bicyclists under the *Road Transport Legislation* with the result that there may be some doubt as to whether roads authorities could impose speed limits on bicyclists and most of the signage erected on Shared Bicycle Paths do not impose a speed limit on bicyclists even though riders can achieve speeds of up to 35km/h or more creating a serious risk of injury for pedestrians.

The lack of regulation for Shared Bicycle Paths will necessitate recourse to general transport engineering principles by Courts in assessing whether a roads authority is in breach of duty of care in relation to the planning, design and construction of Shared Bicycle Paths.

This was evident from a civil claim brought by Maria Guliano against Leichhardt Municipal Council and the RTA as a result of being struck by a bicyclist in a Shared Bicycle Path on Iron Cove Bridge on 7 March 2002. Maria had been walking with her husband, John Zalugna, on the "Bay Run" Shared Bicycle Path from Five Dock and had climbed the pedestrian stairway below the eastern end of the Iron Cove Bridge in order to join the Shared Bicycle Path on the northern side of the bridge. There were no warning signs on the pedestrian stairway at the time that would operate to warn her that she would join a Shared Bicycle Path at the top of the bridge. The point of merger between the top landing of the pedestrian stairway and the Shared Bicycle Path was obscured to bicyclists travelling in an easterly direction by a concrete abutment that formed part of a concrete wall that ran along the northern side of the bridge. Bicyclists travelling in an easterly direction would not have been able to sight pedestrians joining the Shared Bicycle Path from the top landing of the pedestrian stairway until the pedestrian walked from behind the abutment onto the path.

A bicyclist travelling in an easterly direction along the northern Shared Bicycle Path of the Iron Cove Bridge struck Maria Guliano at a speed of approximately 20 km per hour immediately after she stepped from behind the abutment onto the Shared Bicycle Path resulting in a severe traumatic head and brain injury.

It is significant that the Shared Bicycle Path along the northern side of the Iron Cove Bridge arguably complied with *Australian Road Rules* at the time as Shared Path Signs had been erected at the approaches to each side of the bridge with further signage warning bicyclists to give way to pedestrians. The width of the path was only 2.8 metres and arguably in breach of *Austroads* design rules in that respect although this deficiency did not appear to operate as a cause of the accident. The sight distances were arguably adequate for bicyclists joining the bridge under the *Austroads* design guidelines as these only dealt with sight distances in relation pedestrians already on the path and not off the pathway. The *Austroads* engineering guidelines did not provide for any sight distance requirements for pedestrian walkways that merged with Shared Bicycle Paths. The

*Australian Road Rules* did not provide for any requirements for signage in relation to pedestrian walkways that merged with Shared Bicycle Paths.

It was contended on the basis of expert engineering evidence that the design of the Shared Bicycle Path in relation to the point of merger of the top landing of the pedestrian stairway and shared path was inconsistent with proper transport engineering standards. It was the opinion of the expert engineer retained for the purposes of the claim that a pathway ought to have been extended from the top landing for some distance away from the concrete abutment so as to create a merger point further to the west of bridge that would enable oncoming bicyclists to sight merging pedestrians and avoid any collision. It was also the evidence of the expert engineer that line markings at the edge of the top landing of the stairway and signs warning of the presence of bicyclists on the Shared Bicycle Path would probably have prevented the accident. The expert engineer was also of the opinion that the speed travelled by the bicyclist of 20km per hour was unsafe for a Shared Bicycle Path.

The civil proceedings commenced by Maria Guliano in the Supreme Court of NSW were settled for a substantial amount of money with the result that the Court did not have to determine whether any breach of duty of care arose in the circumstances. This civil claim nevertheless identified a number of deficiencies in the existing design guidelines and regulation of Shared Bicycle Paths and that roads authorities may be liable in negligence to pedestrians injured by Bicyclists on Shared Bicycle Paths even though the existing requirements are satisfied.

I am therefore of the opinion that local government road authorities may be found to be in breach of duty of care for failing to impose safe speed limits for bicyclists on Shared Bicycle Paths although any such finding of breach of duty of care must necessarily depend upon the particular facts of the case before the Court. Allegations of breach of duty of care based upon the design or configuration of Shared Bicycle Paths may also be successful even though those paths apparently conform to existing design guidelines in circumstances where they offend general transport engineering principles in relation to acceptable sign distances for users and other engineering requirements.

If would be pleased to provide more specific advice on receipt of further instructions from you.

Yours faithfully

Paul Creed  
Accredited Specialist  
Lawyer  
**SLATER & GORDON**