PARLIAMENT OF NEW SOUTH WALES

Report of the
PUBLIC BODIES REVIEW COMMITTEE

The Effects on Government Agencies of the Abolition of Nonfeasance Immunity

September 2002

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Functions of the Committee

To examine the annual reports of all public bodies and to enquire into and report on:

a. the adequacy and accuracy of all financial and operational information;

b. any matter arising from the annual report concerning the efficient and effective achievement of the agency's objectives;

c. any other matter referred to it by a minister or the Legislative Assembly.

COMMITTEE MEMBERSHIP

Mr Milton Orkopoulos MP – Chairman -
Mr John Bartlett MP
Mr Alan Ashton MP
Mr Daryl Maguire MP
Mr Michael J. Richardson MP
(until 30 May 2002 replaced by)
Mr. Russell H.L. Smith MP

Secretariat:

Ms Catherine Watson – Committee Manager
Ms. Jackie Ohlin – Project Officer
Mr Keith Ferguson – Committee Officer
Ms Glendora Magno – Asst. Committee Officer

Terms of Reference of the Inquiry

The Terms of Reference for the Inquiry were to inquire and report on:

1. The potential effect of the High Court decision in *Brodie v Singleton Shire Council* and any other cases on NSW state and local government agencies with respect to their public liabilities, insurance premiums as well as maintenance and administration costs;

2. Preventative measures currently being undertaken by NSW state and local government agencies to address their public liability risks;

3. Possible suitable administrative and/or legislative actions which can be undertaken in the absence of nonfeasance immunity;

4. Attempts to address the issue in other jurisdictions;

5. Any other relevant matters.

CHAIRMAN'S FOREWORD

The Public Bodies Review Committee was established in 1995 to examine financial and operational issues concerning New South Wales public bodies. It has undertaken a vast array of different inquiries since its inception. In November 2000 the Committee tabled a report entitled "Public Liability Issues Facing Local Councils".

At this time the most cumbersome and financially draining type of public liability exposure that councils faced were trips and falls on footpaths. While these claims are not generally dramatic in terms of the amount of compensation awarded, they are numerous and often fall well below the excess carried by each individual council. In making recommendations to address the problem, the Committee tried hard to strike an equitable balance which would provide some relief for councils but still promote good risk management. It was therefore recommended that councils be provided with a statutory immunity based on the provision that they have met a specified standard of inspection, maintenance and repair. It was also recommended that accident victims be required to report any trip and fall to the relevant council within three months of the incident.

The recommendations of the report were wholeheartedly accepted by the relevant Ministers concerned and the government was preparing to act on them when the High Court of Australia handed down its decision in *Brodie v Singleton Shire Council.*

As a result of the High Court's decision, the Committee received a reference from the Minister for Local Government, the Honourable Harry Woods MP, to look at its possible effect on the New South Wales Roads and Traffic Authority, local councils and other state road authorities.

Since July last year the Committee has been receiving submissions, talking to key stakeholders and conducting visits of inspection to council areas around the state in relation to the issue.

In total the Committee received 78 written submissions, conducted several visits of inspection and personally spoken to 35 regional and metropolitan councils, the major local government insurance pools and their insurers, the Roads and Traffic Authority, the Department of Land and Water Conservation, the Australian Plaintiff Lawyers Association and the NSW Bar Association, Institute of Public Works Engineering, Australia, Standards Australia and the Insurance Council of Australia.

The Committee has also travelled interstate and overseas to examine the issue in those jurisdictions.

Key issues which emerged have been:

- Rising numbers of claims – claims are rising in most areas of council public liability exposure and are not just confined to roads. However, while the non feasance immunity was good law councils had the ability to deny most road claims at first instance on the basis of the immunity;

- Steadily rising insurance premiums which have generally required councils to carry greater excesses than ever before;

- The inability of smaller councils (particular regional) with small ratebases and large expanses of roads to inspect and maintain these roads adequately;

- Lack of a certainty as to what is the requisite standard which will satisfy a court of law;

- Late notification of claims – a recurring concern of councils is that they often are given no ability to inspect the condition of a road at the time of an accident. The statute of limitations means that councils are often not notified of a claim until 3 years after the event in cases of personal injuries and 6 years in cases of property damage;

- Police reports – councils expressed concern about the fact that police who are not qualified to make technical judgements on the state of road structures and maintenance have a requirement to do so in their accident reports. These police statements are often favoured by the judiciary. This situation is exacerbated by the fact that road authorities have not themselves been able to inspect the road at the time of the accident due to the fact they did not know about it.

Although there are those who believe that the non-feasance immunity should be legislatively reinstated, the Committee never believed that this was a realistic option. In *Brodie v Singleton Shire Council* the majority of the High Court declared the highway rule unacceptable on the grounds that it was out of step with other areas of negligence, it provided a strong incentive for an authority not to address a danger on a roadway and it placed too onerous an evidentiary burden on plaintiffs to prove that road authorities had acted to repair the road at some stage.

The Committee agreed with these points. Given the cost to both individuals and society as a whole of serious road accidents, the aim should surely be to try to limit them happening in the first place and to compensate adequately where the required duty of care has been breached. It is obviously not realistic to think that road accidents can ever be entirely eliminated but every effort should be made to eradicate those ones that are foreseeable due to adverse road conditions over which road authorities have control.

The Committee talked with many councils which, prior to the Brodie decision never inspected their roads at all. This has led the Committee to the conclusion that the High Court's decision to lift the immunity is in the overall public interest.

However, good risk management must be balanced with the individual abilities of councils to meet the required duty of care in relation to road construction, inspection and maintenance. The abolition of the highway rule should not mean we can now all expect to drive on gold plated roads. As the majority of the High Court observed in the Brodie Judgement "the opposite of non repair is not perfect repair".

What came through clearly to the Committee throughout the inquiry was that road authorities want certainty. They want to know where their duty of care exactly lies so they can provide adequately for it each year in their budgets with confidence that, in turn, they will then receive protection from litigation.

The Committee consider this to be entirely reasonable. Road authority money is public money, it is limited and competes with other important community resources.

The Committee does not believe that courts are the proper forum to establish whether road authorities' adopted systems of inspection and maintenance form a good defence to litigation.

Judges are not engineers, neither are they in a position to comment on proper allocation of public monies for road inspection and maintenance within a road authority's budget vis-a-vis other priorities. Instead road authorities should be offered a statutory defence by state government which they can choose to avail themselves of if they wish to meet its requirements.

A statutory immunity also works in the interests of plaintiffs. Legal fees are not wasted trying to establish where the line for negligence is drawn. The Plaintiff Lawyers Association has told the Committee that it would support such an immunity provided it is set after external stakeholder consultation.

Of course the real difficulty here is how to draw up standards which are reasonable for the vast divergence of road authorities in New South Wales. Clearly a universal standard would be have to be so low it would be meaningless.

The Committee is aware that some councils are currently using AUSPEC 4 and appear to be satisfied with the way it can be adapted to their individual circumstances.

Similarly AUSTROADS is working toward a consensus between the States on a national classification of roads and their treatment.

The *Civil Liabilities Bill* and the *Civil Liabilities (Personal Responsibility) Bill* should provide greater protection for road authorities from actions in negligence.

However, there is still a need for greater legislative clarification and guidance for road authorities and the courts as to principles of a good system.

The Committee is therefore recommending a series of principles which should be followed in establishing a good road inspection and maintenance regime. It is being recommended that these be incorporated into the regulations of the *Roads Act* 1993 (NSW) to provide greater legislative protection for road authorities and greater guidance for the courts. Road authorities which incorporate these principles into their inspection and maintenance regimes should be able to use it as a good defence to claims.

The Committee also believes that there is also a capacity for councils, particularly regional, to attempt greater resource sharing in regards to the establishment and administration of their inspection and maintenance regimes.

As proper inspection and maintenance is a new technical area for many road authorities the Committee believes that there is need for standardised training and eventual accreditation of road and footpath inspectors. The Committee believes that the Institute of Public Works Engineers would be the organisation best placed to fulfil this role.

I would like to thank all the stakeholders who contributed to this inquiry. Their assistance have been invaluable in allowing the Committee to really understand the key issues facing road authorities in New South Wales.

Milton Orkopoulos MP
Chairman

Summary of Recommendations

RECOMMENDATION 1:

That the Roads Act 1993 (NSW) be amended to provide a framework for inspection and maintenance regimes that government agencies classified as "road authorities" under that Act can rely upon in negligence claims where the condition of the relevant road or footpath infrastructure is identified as a factor.

RECOMMENDATION 2:

The following should be used when drafting Regulations to the Roads Act 1993 (NSW) as the principles by which road authorities set their inspection and maintenance regimes and standards:

- *The 'public interest' focus and context of the process must be defined for each road authority.*
- *A balance of stakeholder interests must be involved in setting the standards. Stakeholder identification should be broad, including, but not limited to, affected population and community groups, educators, researchers, road and footpath users, businesses, regulators/government agencies, legal and technical experts.*
- *The standard-setting process must be transparent (ie draft standards must be externally advertised for public comment with an adequate period for consultation)*
- *In setting standards, there is a clear onus on authorities to undertake repairs in a proactive and systematic manner in response to identified risks.*
- *Standards should be achievable within the road authorities' ability to fund under the existing organisational funding arrangements in the jurisdiction.*
- *Standards, and the response by the authorities to standards, need to be systematically documented and published.*
- *Standards should be realistic about user expectations in relation to service.*
- *Practices must be able to prove adherence to the system.*

- *At a minimum, standards should address road safety measures; road maintenance procedures; defect categorisation; minimum inspection frequencies; intervention levels/response times; road redesign/geometry issues; roadside runoff hazards; and, the erection of signage.*

- *Once adopted, an inspection and maintenance regime needs to be regularly reviewed.*

- *Standards will be comparable with like authorities.*

RECOMMENDATION 3:

- *That councils should work cooperatively, where feasible, within regional associations or networks to gain greatest cost effectiveness within road and footpath inspection and maintenance systems.*

RECOMMENDATION 4:

- *That the Institute of Public Works Engineering, Australia develop and undertake a training and accreditation program for Council staff responsible for the oversight of road and footpath inspection and maintenance.*

Chapter 1: Background

What was nonfeasance immunity?

The non feasance rule traditionally protected road authorities from actions in negligence regarding a failure to either maintain or repair their roads. This rule also extended to other related road functions such as failing to signpost or fence off dangers on or near the road.

The nonfeasance rule's origins can be traced back to the middle ages when roads were originally in private hands. It emerged well before the development of the modern rules of negligence and was originally a defence in nuisance.

Road authorities have always been liable in misfeasance under the normal principles of negligence if they actually created dangers on roads.

Dixon, J in *Buckle v Bayswater Road Board* succinctly summarised the nonfeasance rule in the following way:

> *It is well settled that no civil liability is incurred by a road authority by reason of any neglect on its part to construct, repair or maintain a road or other highway.*

The exception to the rule was an absolute duty imposed by statute. In New South Wales the relevant statutes provide road authorities with the power to repair but do not impose a duty to do so.

Section 71 of the *Roads Act* 1993 (NSW) states:

> *A road authority may carry out road work on any public road for which it is the roads authority and on any other public land under its control.*

The distinction between misfeasance and nonfeasance has been notoriously hard to draw in borderline cases. As noted in the 1987 New South Wales Law Society Report *Liability of Highway Authorities for Non-Repair:*

> *This is demonstrated by the large number of reported cases in which the distinction has been the principle issue in dispute and by the often acute differences of opinion between individual judges hearing such cases either in the same court or at different levels of the appellate hierarchy . Unanimity of opinion is rare even among judges hearing the same facts and it is impossible to draw any general guidelines taken from the body of cases as a whole.*

The effect of this has been that courts had, over time, created distinctions based on the facts of each case which had the effect of eroding the invincibility of the rule. An example was *Hughes v Hunters Hill Municipal Council (1992) 78 LGERA 415* which removed councils' immunity regarding damage to footpaths

caused by trees when a plaintiff sustained an injury on a footpath as a result of tripping over broken asphalt caused by a tree root. The NSW Court of Appeal held that a tree planted by a council is "an artificial structure" and therefore Council had been negligent in planting it when it was foreseeable that it would dislodge pavers over time and pose a danger to pedestrians.

In abolishing the common law rule of highway immunity in May 2001, the High Court noted the exceptions and qualifications to the immunity rule which caused confusion.

However, the High Court was principally concerned with the capriciousness and unfairness of the rule, effectively potentially denying justice to parties injured through the negligent omissions of roads authorities, while victims of the negligent actions of other public authorities might be compensated for those actions. The conclusion of the High Court was that it was appropriate to intervene in the case of highway immunity.

Issues arising post-Brodie

The most significant issue following the High Court decision in the Brodie Case is the need to establish a degree of certainty to assist local councils' good governance and planning responsibilities. The Local Government Association and Statewide Mutual argued that the nonfeasance rule must be legislatively reinstated. It should be noted that this view was not shared by the Roads and Traffic Authority.

Defining the highway rule in legislation would be difficult, owing to its previous constant redefinition by the courts. Secondly, the highway rule was laden with illogical and artificial exceptions used by the courts to get around immunity and as noted by the High Court in the *Brodie* case*,* these exceptions did not offer road authorities a clear defence at the tail end of the rule's life. Thirdly, the High Court clearly took the view that the nonfeasance was out of step with modern tort law principles.

As the High Court made clear in the Brodie Case, the abolition of the non feasance principle means that road authorities will need to demonstrate that they have established and documented programs for the inspection and maintenance of roads, and that these respond to an appropriate set of standards for the hierarchy of roads in their jurisdiction. For some road authorities, this will involve a change in work practices to achieve the stated outcomes. However, this is considered to be the optimum response for effective risk management. The Committee would consider that such a response should be the necessary precursor to any legislation for good faith immunity.

The road authorities in New South Wales

Road authorities in New South Wales are defined under the *Roads Act* 1993 (NSW) consist principally of the Roads and Traffic Authority and local councils. The Minister for Land and Water Conservation, National Parks and Wildlife Services and State Forests also perform certain functions as roads authorities.

Together these authorities provide for the design, construction and maintenance of local, regional and State roads (including National Highways). These responsibilities encompass bridges, culverts, signage and tunnels and can include kerbing and guttering, shoulder construction and footways.

Nationally, the Australia road network has more than 800,000 kilometres of public roads of which New South Wales has approximately 180,000 kilometres or 21%.

The responsibilities for maintaining specified roads within New South Wales are classified as:

National Roads ***3,010 Kms***
Managed by RTA, fully funded by the Federal Government.

State Roads ***14,672 kms***
Managed by RTA. Fully funded by the State Government.

Regional Roads ***18,942 kms***
Generally managed by local councils though the RTA manages 519 km Regional Roads in far western NSW where there is no council, termed Unincorporated. RTA provides financial assistance to councils to help them manage their Regional Roads.

Local Roads ***142,158 kms***
Generally managed by local councils, though the RTA manages 2,461 km of Local Roads in Far western NSW where there are no local authorities. Generally funded by councils with financial assistance from the State and Federal Governments.

Source: RTA submission.

Recognised standards

The Committee acknowledges that there are currently several sets of standards which could form the basis of a set of recognised standards for roads within the State. These include:

- AUSTROADS specifications;
- standards developed by the RTA for State roads, through the single-invitation contract process;

- the AUS-SPEC #4 system; and
- standards being voluntarily developed by groups of councils.

A research paper recently prepared by AUSTROADS for the Standing Committee on Transport suggests that recognised standards need to be established in three areas. These are:

- routine maintenance;
- risk identification and search; and
- road infrastructure management.

The AUSTROADS paper suggests that the greatest change in the duty of care will be in the area of Risk Identification and Search, with particular regard to maintaining carriageways and footpaths; and in assessing the structural capacity risks arising from old bridges and major culverts.

Road authorities in other jurisdictions

In most jurisdictions across Australia there has been a general perception that following the High Court decision there is potential exposure of some road authorities to significant claims following the loss of the nonfeasance immunity. However, across the states responsibilities and potential liabilities vary as significantly as do road conditions, topography, weather and population density.

There is a concern amongst road authorities that leaving courts to define which actions should be regarded as 'reasonable' when addressing identified risks (including resource allocation, repair, posting of a warning or no action) contributes to their exposure. Yet a uniform national standard is widely regarded as inappropriate. Most jurisdictions are in some way addressing the definition of standards and this topic is dealt with in detail elsewhere in the report. Most road authorities feel that as a result of increased exposure they would also be subject to increased administrative costs.

Most jurisdictions expressed the view that there was an increasing tendency for road authorities to be 'joined' in actions under the principle of joint and severable liability. With the abolition of the non feasance principle New South Wales road authorities also expressed concern about potentially becoming the "deep pocket" in motor accident claims given that the Third Party Motor Accident Scheme and Workers' Compensation Scheme are both capped.

Other Australian Jurisdictions

During the course of the inquiry the Committee studied the situation in other states following the abolition of the non feasance principle.

South Australia

Transport South Australia is responsible for roads across two-thirds of the State, in particular the sparsely populated unincorporated area from Port

Augusta to the Northern Territory border. The State Government anticipates increased administrative costs as a result of the High Court decision.

The 68 Local Government authorities in South Australia have responsibility for all other roads. The councils are all members of a Mutual Liability Scheme and they are backed by the South Australian Government for any successful claims over $2m. The Mutual Liability Scheme has a risk management program operating in each area across the State and is in the process of updating a risk management manual which was previously used in court and upheld. The updated version will focus on proactive rather than reactive approaches to risk management.

Victoria

VicRoads has responsibility for State roads whereas declared roads (including main roads) are the responsibility of local councils. The standard of roads in Victoria is generally highly regarded although councils point out that they have responsibility for unsealed roads, footpaths and bridges. Most Victorian councils are members of the insurance group Civic Mutual Plus, while for VicRoads, the Victorian Managed Insurance Authority cuts in at $5m. In Victoria, common law liability still exists for serious injuries and non-serious injuries are capped for third party motor vehicle accidents.

Section 205 of the *Local Government Act* 1989 (Vic) contains a restatement of the non feasance immunity. Civic Mutual Plus received Queens Counsel advice post the Brodie decision which casts real doubt on whether Section 205 still offers any real protection to defendants.

VicRoads and Victorian local councils are concerned that what is understood as a 'reasonable' standard of care by a road authority is currently not objective, and needs to be better defined.

A recent Inquiry was conducted by the Road Safety Committee of the Victorian Parliament into Rural Road Safety and Infrastructure. In its March 2002 report the Committee referred to the legal implications of failing to properly care for roads and recommended a review of the sections of the *Transport Act* 1983 (Tas) relating to State legal classifications. The Committee also recommended measures to address documentation and maintenance regimes with a focus on road safety.

Tasmania

In Tasmania an immunity from liability for any injury or loss arising from the condition of a highway is provided in Section 21(4) of their *Local Government (Highways) Act* and *Forestry Act.* in relation to local highways. TasRoads does not share this immunity.

In spite of legal opinion obtained by insurer Civic Mutual Plus that the provision of the Act should still provide robust protection for councils post the Brodie decision this defence has yet to be tested in court. All of Tasmania's 26

councils are members of Civic Mutual Plus. Concern has been indicated about the capacity of small councils with a small rate base to effectively plan, manage and deliver services.

TasRoads is currently establishing partnerships with some councils to develop a program of asset management for roads.

Western Australia

Like Victoria, the Western Australian Local Government Act has a statutory restatement of the non feasance rule in Section 9.57 of its *Local Government Act* (section 9.57).

Queensland

The Local Government Mutual Liability Pool (LGM) in Queensland notes that it has had a large number of enquiries from lawyers requesting a review of claims previously rejected on the basis of the nonfeasance immunity. The LGM and the Local Government Association of Queensland believe that this activity indicates a likely increase in claims costs.

The LGAQ notes that most councils may not currently have an inspection and maintenance program that could be considered adequate to defend claims in courts. However, LGAQ has drafted a legislative proposal for consideration by the State Government regarding adoption of risk management practices and proposing that implementation of these should provide a defence to claims against roads authorities.

Overseas Common Law Jurisdictions

Prior to the High Court's decision in the Brodie Case, Australia and New Zealand were virtually the only major common law jurisdictions where the non feasance rule remained good law. As New Zealand has a no fault capped national compensation scheme the rule has become fairly redundant there.

In arriving at its judgement in the Brodie Case, the majority of the Australian High Court were very persuaded by the abolition of the rule in other jurisdictions. In particular, it was noted that the decision to get rid of nonfeasance in the United Kingdom some four decades ago had not resulted in an untenable upsurge in claims.

The Committee therefore looked closely at these jurisdictions during the course of the inquiry.

United Kingdom

The non feasance principle was removed by statute in the United Kingdom in 1959. The *Highways Act* 1960 (UK) creates a stricter liability than under

ordinary negligence by shifting the burden of proof regarding reasonable care onto the defendant in respect of claims. The standard of care is defined in the Act.

The Transport Research Laboratory (TRL) in the United Kingdom undertakes accident investigations and risk management for roads authorities. TRL has evidence of an eightfold increase in claims on road authorities over the past ten years, and estimates that the cost of claims is rising by 9% per annum. Up to 80% of claims received by local councils relate to highway claims, and failure of the Council's duty of care in relation to maintaining the highway is alleged in 90% of claims. TRL suggests that a good practice standard for road authorities is to address safety in the first instance, and defence of claims in the second. In the light of their experience in the UK, a 'lack of finances' on the part of the road authority has been no defence to a claim. Rather, there is a need for rational prioritisation of tasks, underpinned by sound asset and risk management and policies.

It must be acknowledged that, without the layer of state governments, UK local councils are generally larger and more autonomous. Road and weather conditions are also very different from New South Wales.

Currently, the upgrading of road infrastructure in the United Kingdom at all levels is being driven strongly "from the top". Upgrading of public infrastructure has been a key policy platform of the Blair central government. This 'best value' focus aims to examine existing practices and query whether there may be a better way of doing things. Its aim appears to be one of encouraging continuous improvement. The central government challenge includes a new vision for road infrastructure embedded in government policy and development of a Code of Practice for Maintenance Management.

At a local scale, councils are being required to document their roadway infrastructure, maintenance and repair regimes in policy as a means of creating transparency and securing commitment and resources to the tasks.

The UK Department of Transport worked with two local government authorities to develop parameters of the Code of Practice. This has become the model for other local authorities, but has the capability of being adapted for differing local conditions. The National Code of Practice was issued in July 2001 and offers recommendations for local road authorities as well as reminding them of their legal obligations.

While some central government resources are identified for local road maintenance management, there remains reliance upon local rates for the task.

In the UK, central government offers assistance by processing local roadway surveys (inspections) through a centralised data base. Resource packages are allocated in response to these surveys, and disseminated to local authorities which undertake more detailed prioritisation of works. Although the new Code of Practice has been in place for just a little over twelve months it has generally been regarded by councils as an achievable system.

Another key factor of the policy is its 'incremental' approach. For example, the Department for Transport, Local Government and the Regions has insisted upon regular inspection of principal roads and is gradually increasing the proportion of these that are inspected mechanically. By 2004 all principal roads will be subject to mechanical inspections and visual inspections will be completely phased out. A minimum of 25% of local roads must be surveyed annually but continuous improvement is emphasised.

The centralisation of the data base in the UK has allowed for the concentration of expertise which is made available to local authorities in the form of technical support and advice about options for roadway inspections and maintenance. Local authorities there have acknowledged that this level of expertise would be unlikely to be available to them if they were each operating independently.

In the UK both the central government agency and local authorities have developed training packages designed to familiarise elected representatives, staff and private contractors with the aims and practicalities of the system. The training programs are regarded as critical for successful adoption of the system. In transition some local authorities have recognised the need for ongoing training at regular intervals with area teams in order for the changes to be 'owned' and properly implemented.

Accreditation for road and footpath inspectors in also currently under consideration in the UK.

The central government agency encourages councils to develop benchmarking processes with related councils, and again, some councils are already working towards this.

Local road authorities are required to have five year plans for all roads. These plans will be audited by the Audit Commission and if the plan is below standard 'significant penalties' apply and local authorities can be referred to the Secretary of State.

The UK Code of Practice does not prescribe standards, but makes recommendations. These are, however, provided in a comprehensive point-by-point framework for local authorities to follow, which emphasise the legal obligations of local authorities and the consequences (ie the potential to be the subject of claims) if they choose not to follow the Code). The Code of Practice regularly refers to best practice and in terms of system intervention levels and types of pavement treatment it refers to the UK Pavement Management System (UKPMS) as an accepted application. The Code of Practice indicates that authorities may vary the UKPMS rules and parameters but these variations must be recorded and monitored.

The United States

Since the United States Supreme Court essentially abolished the long standing national legal concept of Sovereign Immunity each individual state has approached the issue of reinstating government immunities in their own way.

The US courts have traditionally approached government liabilities on the basis of policy versus administrative decisions. If the injury was caused as a result of a decision of government policy then sovereign immunity is invoked. However, if the accident happened as a result of an administrative decision (which therefore involves a degree of discretion) then the government agency is liable in negligence.

However, each state Supreme Court has brought its own interpretation on the issue of Sovereign Immunity since the US Supreme Court ruling. Some state courts, such as California, virtually do not recognise its existence. Other state courts, such as New Jersey, have been far more conservative in their approach to the issue.

In relation to public liability for road conditions the erosion of the immunity has brought a greater focus upon regular inspection and maintenance regimes and these have tended to be highly favoured by the courts.

Many states have also acted legislatively to limit negligence actions by a variety of means such as capping, statutory notification periods and special court systems. Most of the Southern States such as Texas and Florida have statutory caps. Similarly, Indiana.

The State of Illinios has capped all compensation claims relating to road conditions against the Department of Transport at US$100,000 for many years. Further, all tort claims relating to roads brought against the Department are heard by a special Court of Claims. There are no longer any lower court processes relating to these claims and jury trials have been eliminated. The defence of claims in this system relies heavily upon notices of intent and notices of hazard. If it cannot be proven that the Department of Transport knew of a hazard the plaintiff cannot bring an action. Further, the Court of Claims has no power to not alter or question standards but merely rules whether the Department's own policy has been followed.

New York City has a "15 day notification rule". The City is not held to be liable under statute unless it has had prior written notification of the defect within 15 days of the accident which gives rise to the claim occurring.

In the District of Columbia the courts have evolved a system of 100% contributory negligence which can actually cancel out all government liability in certain circumstances.

Others states have responded with the requirement for regular inspection and maintenance regimes for state owned roads although this has become more difficult as all US states currently experience strained financial circumstances.

ASHTO is the standard adopted by the US and states without legislative immunities have to demonstrate why they have deviated from this standard. The State of Michigan, for example, has implemented a preventative maintenance system which is regarded by the US Transportation Research Board as being a very expensive front-end operation. However, it should result in very low, ongoing maintenance costs.

The State of Arizona currently has arguably the best system of road maintenance and inspection in the United States due to its 10 year budgetary cycle.

In California, the most litigious and least legislatively protected of the US states in relation to claims concerning roads the only defence available to road authorities is effective regular inspection and maintenance regimes. The implementation of Proposition 51 means that if the road agency has been found guilty of any degree of negligence whatsoever it is held to be 100% liable for the damage with contributory negligence apportioned. Some councils such as the City of Los Angeles have chosen not to implement serious inspection and maintenance systems and inspectors merely drive inspection routes.

However, the Committee studied the County of Alhambra in Los Angeles which had implemented a pro active inspection and maintenance policy which has effectively managed their risks and therefore limited their claims. Roads are inspected visually on a monthly basis. Any identified problem is rendered "safe" by the end of the day it is detected. Parkways are inspected twice yearly by walking inspectors. All inspectors are subjected to a strong degree of training. All serious accidents are also followed up through data collected by the Highway Agency and all serious and fatalities are investigated by the County. Personal claims must be brought within 6 months of the accident for personal injury and nine months for property damage.

As a result the County only pays out $7m in road related claims each year.

Canada

The nonfeasance rule had never really been embraced by the Canadian common law system. There has been an increasing tendency for the Canadian courts to apply the US "policy versus administrative decision rule". This means that courts do not enquire into the appropriateness of adopted policies of road authorities, they merely examine whether the agency has a policy and if it has been followed in the relevant instance.

Some states have adopted standards into legislation. For example, in Ottawa, a regulation under the *Municipal Act* applies minimum maintenance standards for municipal highways. These rely upon a standard classification of roads which in turn determines an inspection frequency, response times and level of response for the aftermath of storm events, potholes, distortions in the road pavement, debris removal, signage/lighting and bridges.

New Zealand

Although the abolition of nonfeasance immunity was recommended in New Zealand before the introduction of the general accident compensation scheme there, New Zealand is one of the few jurisdictions where the immunity remains. However, as previously mentioned, the introduction of the scheme has made the rule virtually redundant.

Chapter 2: Local Roads

Councils' responsibility for New South Wales roads

The responsibilities of local councils in respect of roads in New South Wales are defined within the *Roads Act* (1993), Part 1, 7(4):

> *The council of a local government area is the roads authority for all public roads within the area, other than any freeway or Crown road.*

The Act specifies the responsibilities for all roads authorities including the extent of decision-making powers, the preparation of plans and specifications for roads, the carrying out of road works and repairs and councils' functions in relation to private roads, footways and Crown roads where these are transferred to councils. The Act is clear that unless it is otherwise specified the designated road authority has responsibility for all matters pertaining to roads in that jurisdiction.

In certain instances councils carry out duties on behalf of the RTA under contract. This might includes such duties as inspection and maintenance programs for main roads in regional areas.

The effect of councils' role as roads authorities is one of localising the duty of care for all aspects of management for public roads. Thus, while local conditions and responses to those conditions will vary considerably from council to council an overall expectation exists of effective management of that duty of care. The following sections examine the effects of councils' management role of the abolition of nonfeasance immunity with regard to insurances, public liabilities and risk management and maintenance programs.

Councils' insurance arrangements

Approximately ten years ago the vast majority of councils in New South Wales found themselves unable to buy their insurance either individually or locally due to a hardening in the insurance market. This lead to the formation of self insurance pooling arrangements. By far the most dominant of the pools is the Statewide Mutual Liability Scheme which covers around 93% of councils in New South Wales. Jardine Lloyd Thompson is the insurance manager for the Scheme, and advises member councils on risk management strategies.

Additionally, there are two smaller insurance pools - Westpool and Metropool - whose insurance arrangements are managed by AON Risk Services.

Some of the larger councils such as City of Sydney, Bankstown and Wollongong have found it more economical in the past to buy their insurance individually. However, with the current hardening once again of the insurance market, some of these councils have opted to transfer into pools.

Within the pools councils generally have some freedom to decide how much excess they will carry vis a vis their premiums.`

Insurance pooling is used widely throughout the United States as a way for public agencies such as school boards to manage their insurance costs. It is similarly used by the New South Wales government in insuring its departments through its Treasury Managed Funds. The major advantage of pooling is obviously buying power and bargaining expertise.

Pools are particularly useful during "hard" insurance cycles when reasonably priced local insurance is hard to find.

A recognised disadvantage of self insured pools is the 'averaging' effect of participation. Pools do not operate with the hard edged commercialism of the average insurer. Good risk and asset management performers are not usually properly financially rewarded for their efforts through premium reductions. Likewise poor performers are not given remedial attention, penalised or ultimately expelled for continued non compliance with practices or standards.

As one Council officer appearing before the Committee observed:

> *There is a need to segregate and review the performance of each Council (in a scheme or pool) regarding risk management and maintenance, and weight these results accordingly.*

This does not mean that the council self insurance pools have not tried to promote good risk management. Statewide Mutual, for example, issues Best Practice Manuals and conducts Risk Management Excellence Awards among members. The pools also sponsor peer discussion groups on good practice. Current significant court decisions and cases are also placed on the Statewide website.

However, with coverage of such a large group of diverse councils it is extremely difficult for an insurance pool to provide the proper relevant training, analysis of the state of individual members' infrastructure and targeted risk management advice for all its members given its limited resources. This is particularly so for councils which do not employ risk managers, as is the case with many of the smaller regional councils.

The Committee also found that some of the insurance pools tended to promote a climate of fear amongst its members post the Brodie decision which was largely unproductive.

The two smaller pools - Metropool and Westpool – do not face the problem of an extremely diverse membership which may leave them better able to constructively tackle the problem of implementing road inspection and maintenance systems amongst their members in a timely manner. These pools consist of larger metropolitan or semi metropolitan councils which all employ full time risk managers. Westpool, in particular, is a group councils with quite similar financial and administrative resources and demographics.

The Committee believes that it is most appropriate that councils remain free to pursue their own insurance arrangements. The fact that the current public liability crisis has not impacted as greatly on council premiums as it has on the premiums of small business and community groups is testament to the bigger and more sophisticated buying power that the pools offer their members, particularly the smaller ones.

The Committee considers that promotion of good risk management should remain a core function of the NSW council insurance pools. It is particularly valuable here as there is no overarching agency to otherwise perform the function as there is in the United Kingdom. However, it must be acknowledged that there are limitations in what insurance pools can provide and potential conflicts of interest which arise.

Councils' public liability exposure

The November 2000 report of the Committee, *Public Liability Issues Facing Local Councils* found that there is considerable concern about the level of public liability exposure faced by councils. Councils' exposure is accentuated by the range of services and activities they must carry out as part of their everyday functions.

Councils expressed concern during both the previous and current Inquiries about both the rising number of notifications of claims and the cost of these claims. On the basis of information provided by councils the most numerous claims remain small claims relating to trips and falls on footpaths and other surfaces prepared and maintained by local government. Apart from insurance premiums, the direct costs involved in dealing with these claims are twofold:

- they are generally small, and thus fall below councils' insurance excess, and as a result draw from councils' general revenue; and,
- there are administrative costs in the processing of each claim notification – whether or not it proceeds to a further level.

Councils' exposure to ever increasing numbers of small claims is their greatest concern in terms of budgeting for the future.

Another problem facing councils is the difficulty of recovering costs expended on successful cases from plaintiffs with no resources. Councils blame this on the aggressive "no win, no pay" promotional campaigns of some lawyers.

Councils have also clearly fallen unwitting victim to the other issues that have resulted in a huge spike in public liability premiums. These issues have been documented elsewhere* as including:

- the September 11 2001 terrorist attacks;
- the collapse of HIH insurance;
- a 'hardening' of the insurance market as a part of its' cycle of competition;

- a perceived drift in the legal definition of negligence from a reasonable duty of care in all circumstances to a stricter interpretation of absolute responsibility for the care of an individual on the premises;
- increasing deregulation of legal fees designed to increase legal access, including 'no win, no pay' arrangements, especially when accompanied by legal advertising;
- changing community attitudes from those of personal responsibility for actions to recognition of the potential of a windfall opportunity as the result of an unforseen accident;
- perceived higher payouts for injuries; and
- changes to prudential regulation resulting in compulsory risk management processes by insurance agencies and more conservative management of financial reserves.

This has in turn resulted in some councils becoming risk-averse to events and activities being conducted on their premises or under their jurisdiction. The Committee heard of instances involving the cancellation of community activities from the apparently risky (a horse-muster) to the apparently innocuous – exercise classes for over-50s. Submissions also told of the large scale removal of playground equipment by councils and in one instance of the removal starting-blocks at the municipal swimming pool as risk-aversion measures. Further indicators of the so-called 'death of fun' brought about by the current public liability crisis.

Issues for Councils

The Committee received submissions from 14 metropolitan and 38 regional councils as well as from the Local Government and Shires Associations and regional organisations of councils. Many indicated that their greatest concern was that a future court case might result in a precedent being established with regard to a definition of what is a reasonable duty of care which has not been objectively set. Councils suggest that the concept of what is reasonable in each circumstance is currently too open to interpretation by different parts of the legal system. Likewise, councils require some guidance in the form of principles and standards.

A concern in establishing prescriptive standards is that there are considerable variations between local government areas in terms of road types and conditions, usage, topography, weather conditions, seasonal barriers, etc which would render a common standard ineffective. The enormous financial and resource differences between councils must also be acknowledged here.

Regional Councils

Many regional councils indicated that they do not currently have documented inspection and maintenance programs with which to attempt to defend claims received following the Brodie decision. Many commented that the cost of initiating such programs would be prohibitive given their limited rate bases. Many councils believed that the presence of rate-pegging over successive years had contributed to a decline in infrastructure. It was further suggested

that rate-pegging had contributed to a back-log in maintenance works which could never be filled. It was considered that a documented inspection and maintenance program would add to the cost burden of restoring infrastructure back to a standard which the courts might regard as 'reasonable'. Councils with large numbers of old wooden bridges were particularly concerned about the implications for replacement of these bridges.

Councils covering a large geographic area with an extensive network of roads have out of necessity evolved reactive work practices attuned to the local situation. These include a reliance on to the community to report road problems and the postponement of road works to coincide with the harvesting of seasonal crops..

For regional councils, in particular, there is a concern that the cost of bringing road infrastructure up to a recommended standard has the potential to dominate the agenda for local government to the detriment of its other community responsibilities. Greater Taree Council told the Committee that it was impossible for it to attain the optimal $10.4m which was estimated to bring its sealed and unsealed roads up to a standard recommended by a 1999 study. In 2001/2002 the amount of $6.68m available for roads expenditure within the Council represents 20.4% of Council's budget. Some regional councils are spending far higher proportions of their budgets on road infrastructure.

Tumbarumba Council indicated that issues such as economic development which is so vital to arresting rural decline might fail to get budgetary consideration in Council ahead of road maintenance concerns.

Metropolitan Councils

Metropolitan councils which made submissions to the Committee generally felt that they had reasonable inspection and maintenance programs in place to document risk management practices and prioritise works. Still, all were concerned about the financial implications of the High Court decision due to the high cost of inspection and maintenance programs – for example Baulkham Hills Council estimated that it currently spends around $200,000 a year on wages alone in this area. Council believed that in order to achieve a level of inspection required by the High Court decision a further two full-time staff members would be needed to carry out a complete cycle of inspection of the road network every month.

Some councils such as Campbelltown and Bankstown have enshrined their risk management systems for assets in council policy. They believe that this provides the most adequate defence of Council's intent in a court of law in the current climate.

On revisiting their risk management programs in the light of the High Court decision some metropolitan councils have already sought to increase the frequency of inspections or to systematically raise the standards for repairs and maintenance. This has been particularly prevalent in relation to trip hazards on footpaths.

How councils manage road liability risks

The extent of risk management programs implemented by councils varies considerably across the State. The Committee received submissions from some councils describing detailed and sophisticated risk management practices. These generally include:

- a set of standards developed by Council as a target to be achieved (including optimal intervention levels);
- a documented inspection program;
- a direct link between inspection and Council's prioritised maintenance program; and
- a commitment to these programs embedded within Council policy.

This level of commitment to risk management is unfortunately practiced by a minority of councils. There is also a concern that the objective of risk management is not generally viewed as one of improving road safety but of minimising exposure to claims. The point is made that the two need not be mutually exclusive.

It is common larger councils within Statewide Mutual employ risk managers who conduct their business with reference to a set of Good Practice Guidelines developed by Statewide Mutual. Council Risk Managers also meet regularly at a regional and sub-regional level to discuss and respond to pertinent issues.

International insurers such as the American Reinsurance Corporation and Public Entity Risk Management Administration Inc have for some time expressed concern about the state of risk management in New South Wales councils and the level of expertise devoted to it. The need for a better understanding of, and commitment to, risk management by Councillors and General Managers was suggested. Such commitment might need to include a break with old practices. Several witnesses remarked upon the 'averaging' effect of participation in mutual insurance schemes on member councils. They indicated that current conditions of membership implied little, if any, pressure to improve risk management performance and argued the need for Statewide Mutual in particular to take a more proactive role in effecting changes in practice among non-performing members.

Some councils have a long-standing reliance on community involvement in the notification of changes in road conditions. Some councils encourage staff involvement in notification of changes in road conditions and they are training officers who are constantly in the public domain (for example, parking officers) in methods of reporting. The importance of these methods as an adjunct to other risk management processes lies in ensuring that they are part of a system of documented inspection.

Despite the well-publicised implications of the High Court decision many councils still have no program of documented inspection for road infrastructure.

Since the High Court decision, some councils have individually reviewed their standards and intervention levels. Other councils such as those in the Riverina Eastern Regional Organisation of Councils have banded together at the regional scale to develop standards which may be both locally-appropriate and agenda-setting. REROC has also initiated a shared purchase of equipment designed to expedite councils' inspection programs across the region. Participating councils reasoned that through cooperation more effective outcomes could be achieved than by individual councils which by themselves could not hope to afford the outlay for new technologies.

The Committee believes that the sharing of expertise and resources makes sense, where possible.

Councils managing road infrastructure – financial constraints

In submissions to the Committee local councils indicated the range of financial constraints which influence their capacity to manage road infrastructure. These include:

- Rate-capping: Councils noted that the effect of successive years of rate-capping had meant that for many, it had not been possible to address maintenance at the same rate as the deterioration of civic infrastructure. Further, current exigencies might tend to result in some aspects of infrastructure management failing to receive adequate priority attention.

- Inability to rate Crown lands: For some councils, the inability to rate Crown lands has had a significant impact on their resources, particularly in those regions of the State where parcels of land under Crown control have increased significantly over time or where the activities carried out on Crown lands affect the condition of the roads (for example, State forests).

- Competing community priorities: The demands upon the resources of local councils are diverse and some increasing. This may lead to the diminution of the importance of road infrastructure management.

- Rising administration and inspection costs: Councils informed the Committee that with anticipated increases in claims arising from the High Court decision they were anticipating a commensurate rise in the cost of dealing with claims. Councils were also anticipating the need to budget for increased costs associated with inspection regimes and most Councils also anticipated increased payouts for small claims and increased premiums for public liability insurance.

These constraints were generally more prevalent for regional councils than for metropolitan councils.

That said, improved road maintenance technologies, improved communications tools and better work practices for managing road infrastructure are mitigating factors in increasing efficiencies and in helping to bring down costs for councils.

There are significant opportunities for road authorities to pursue cooperative effort for mutual gain in the management of road infrastructure. This might occur at even the most basic level of sharing officer training opportunities.

Chapter 3 – Roads and Traffic Authority (RTA)

Introduction

The Roads and Traffic Authority (RTA) is the specialist state government road organisation within New South Wales. *Road maintenance is a core function of the RTA.* The Roads and Traffic Authority (RTA) is a statutory corporation established under the *Transport Administration Act* 1988 and has the primary construction and maintenance role for over 17,000 kilometres of roads within New South Wales.

The RTA's responsibility regarding NSW Roads.

The RTA's road and bridge asset portfolio is valued at more than $44 billion, and expends about $2.2 billion per annum.

The RTA is responsible for 4,275 bridges on State Roads including timber bridges that form part of the Timber Bridge Program. The RTA is also responsible for nine vehicular ferries.

The RTA provides road management, design, construction and maintenance solutions for New South Wales *"within an integrated urban and regional design framework with an emphasis on meeting community, environmental, regulatory and aesthetic needs." [Submission page 7].* The RTA has a state wide coverage providing road maintenance through more than 200 offices throughout the State.

The RTA's responsibility for construction and maintenance of roads within New South Wales roads is defined within the *Roads Act 1993.* Section 7(1) provides responsibility of freeways to the RTA, *the RTA is the roads authority for all freeways,* but also the RTA may take responsibility for other roads such as state roads, metropolitan main roads and any other classified road through either agreement (*Section 62*), by direction of the Minister for Roads (*Section 63)* or by a decision of the RTA to exercise one or more functions of the roads authority (*Section 64).*

Briefly then, the RTA comes into contact with other road authorities, specifically local councils through:

(a) through managing roads (National or State Roads) in their local government area,
(b) assisting local councils with funding assistance or arrangements, funding assistance for regional roads and some finance assistance organised for local roads,
(c) assisting local governments through a variety of financial assistance grants (the RTA and the Local Government and Shires Association have an annual agreement re the Block Grant funding.)

and expert advice, secretarial assistance to regional/local committees.

(d) the RTA's Single Invitation Maintenance Contracts.

The Roads and Traffic Authority RTA's vision is provide a continually improving and increasingly safe roads and traffic system in respect to New South Wales Roads. It is responsible to the NSW Government for:

- Providing road planning, construction and maintenance solutions for the NSW community, with an emphasis on meeting community, environmental, regulatory and economic needs,
- Improving road safety, through better road user behaviour, vehicles and roads to save lives and reduce injuries,
- Managing the use of the road network, and
- Testing and licensing drivers, and registering and inspecting vehicles.

To deliver its core function of providing road planning, construction and maintenance, the RTA has similar functions as other local authorities (Local councils, Department of Land and Water Conservation etc) conferred upon it by the legislation, the *Roads Act 1993*. The functions include:

(a) Carrying out road work on or in the vicinity of public roads for which it is the road authority and other land under its control, (Section71)

(b) Carrying out

(I) traffic control work on classified roads (with the consent of the RTA), unclassified roads, transitways (that are not public roads) and on roads and road related areas under the Road Transport (General) Act 1999 that are not public roads, other than those in respect of which the RTA has advised that it proposes to carry out traffic control work; and

(ii) the construction, erection, installation, maintenance, repair, removal or replacement of traffic control lights. (Section 87)

(c) Control of certain activities within public roads including;

(I) regulation of traffic for certain specific purposes;

(ii) regulation of or and structures (eg. section 138 of the Roads Act 1993 requires the consent of roads authority for certain works and structures on a public road and provides that a consent may not be given with respect to a classified road except with the concurrence of the RTA).

RTA's public liability exposure regarding their infrastructure

Previous to the existence of the NSW government's proposed *Civil Liability Amendment (Personal Responsibility) Bill* 2002 in September 2002, the RTA considered it would be difficult to assess the full impact of the nonfeasance rule. However, there would be the likelihood of an increase in the number of claims lodged against the RTA. Even if the abolition of the rule does not increase the

number of claims lodged it will increase the evidentiary burden on the RTA and other road authorities.

The RTA considers that the abolition of the nonfeasance immunity will require the RTA and other road authorities to review and possibly modify and enhance maintenance, inspection, record keeping and contractual arrangements to meet the increased scoop of the duty of care imposed by the High Court. This will necessarily result in additional time and resource costs.

The Committee accepts that road authorities will be required to undertake obligations in respect to inspections of their road systems. The RTA submits that while it is difficult to assess the impact of the abolition of the nonfeasance rule will impose more onerous duties and obligation on the RTA and other road authorities with significant attendant costs for the RTA and the States.

RTA's insurance arrangement

The RTA is covered for public liability and other losses through the New South Wales Treasury Managed Fund. The Treasury Managed Fund is a self-insurance scheme owned and underwritten by the Government.

The RTA has informed the Committee that over the past five years they have noticed a steady increase in the number and quantum of liability claims and a consequential increase in the liability premiums.

How RTA currently risk manages its road liabilities

Prior *to Brodie's* case the RTA, along with the other road authorities, had no legal duty of care to maintain or repair a road. Nevertheless the RTA has had in place a comprehensive maintenance regime for the system of roads under their responsibility. The road maintenance plans are developed in accordance with the principles of Total Asset Management.

It is fair to say that the New South Wales' state roads are internationally recognised to be of a high standard.

The RTA has classified its road maintenance activities into routine (day to day maintenance) periodic or major work.

Routine maintenance primarily being patching work and shoulder grading, periodic being resealing of roads, usually occurring between 5 and 10 years and major work is the significant reconstruction of the roadway.

The RTA has a developed a detailed system of infrastructure maintenance plans – termed *Total Asset Management. Total Asset Management* is defined by Austroads as a comprehensive and structured approach to the long-term management of assets as tools for the efficient and effective delivery of community benefits. The scheme promotes proactive planned maintenance to

manage the risk of asset deterioration rather than react to it thus ensuring serviceability and reliability of the asset.

To further strengthen the aims of the RTA in respect to road maintenance the outcomes for the RTA's maintenance program are set out in their Strategic Plan titled *The Journey Ahead 200-2005.* The primary goal is to maintain roads and bridges at the first priority at minimum whole of life cost to ensure reliability, safety and retained value. An important feature of the RTA's plans is the balancing its resource allocation with its maintenance program. The first stage is to support the financial commitments made in the Department of Transport's *Action for Transport 2010.* Included within the Action for Transport 2010 is financial assistance grants to Local Government for their roads and bridges as well as financial provisions for disaster repairs to all public roads and bridges damaged as a result of declared natural disasters.

Further the RTA adopts a risk-based strategy to allocate resources giving priority to the safety of those using the State Roads. That is *route availability* - whether the acceptable level of safety requires complete closure of the road while repairs are made; *route safety* routine maintenance focussing on managing an acceptable level of safety where major risk impact individual road users.

Past Claims history pre-Brodie

During the past four years the RTA has received on average, 315 claims per annum. The yearly figures are:

1998	363
1999	208
2000	346
2001	343

To determine what if any effect the Brodie decision has thus far had on claims to the RTA the figures for the current six months were compared to the first six months of each previous year. The comparison indicated that a rise of around twenty per cent has occurred. 150 cases in the first six months of 2002 compared to 123 in 1998, 90 in 1999, 120 in 2000, and 120 in 2001.

While the rise may be indicative of a post-Brodie surge in lodgement of claims, the RTA believes that it is still too early to tell whether or not the rise is directly and solely related to non-feasance issues.

Issues arising for the RTA post-Brodie

The RTA considers that the most likely impact of the Brodie decision will be a more onerous duty on road authorities. The decision does not require the road authority to maintain roads in a state of perfect repair but must discharge its duty to take "reasonable" steps to prevent any source of risk giving rise to a foreseeable risk of harm.

The question of what is reasonable involves deciding what is a good standard of repair or maintenance and what steps have been taken to inspect roads to ascertain their condition and at what point intervention should occur to rectify the defect. Post Brodie, the RTA has been looking specifically at what is a "reasonable standard" for the purpose of their duty of care.

To determine such standards the RTA considers that its current regime of "technical standards". For example, good practice guidelines for the maintenance of timber bridges may be sufficient. However, while these guidelines are long established and widely recognised as being good practice in the industry it is uncertain how they will be treated by the Courts after the Brodie decision.

Along with the issue of what is reasonable is the question of foreseeability. The RTA considers that road authorities must have in place formal, documented systems and procedures for dealing with all aspects of road maintenance, inspections, priority planning and risk management in a manner which can be sued for litigation purposes. Subsequently the RTA is reviewing its management systems and procedures for road maintenance, and its maintenance plans.

Unlike the Department of Transport in the United Kingdom the RTA does not see itself as having a 'paternalistic' role towards local road authorities. It has a definitive policy of having no involvement in local roads. Apart from the "Single Issue Contracts" under which local road authorities in regional areas inspect and maintain RTA roads in their area the RTA has no role in how the local councils are performing vis-à-vis their road obligations. As discussed in the previous Chapter, this leaves local road authorities in somewhat on a 'vacuum' regarding access to technical expertise.

Chapter 4: Crown Land

The Department of Land and Water Conservation's role as a road authority

The Minister for Land and Water Conservation is the roads authority for Crown roads.

The Department of Land and Water Conservation (DLAWC) estimates that the Crown roads for which it has responsibility currently comprise around 45% of the public road network in New South Wales. However, it is estimated that only about 5% of public roads actually in use are Crown roads. This is due to the fact that most of the public road network was created in the initial subdivision of the State (that is, before motorised transport) and most of the network remains as 'paper' roads which have never been constructed or used.

Despite this DLAWC considers that it is not able to carry out such a role due to lack of funding. DLAWC does not monitor the number and character of public roads under its control. Neither does it design, construct or maintain public roads, nor inspect these roads for defects or hazards.

Types of Crown roads

The existing network of Crown roads is the result of the history of the settlement of the State and the manner in which responsibility was granted to other authorities to manage and develop roads, where these were identified as 'in demand' for common use. In the main, Crown roads were progressively transferred to local councils for this purpose.

Initially, most Crown roads were created as a consequence of early 'grid pattern' subdivisions. Today they exist as legal public roads but most are not in use as they are not formed as roads. There is no statutory definition of what should remain a Crown road.

However, the Crown roads which are used for passage or for property access have a natural terrain surface or some standard of road formation. They can cross hills and waterways and can have structures on them including bridges, culverts, drainage and cut and fill. They may also have gates or stock grids where they pass through property fences.

Crown roads may also have a range of widths from the standard 20m up to 100m in width. The additional width was initially provided either to facilitate stock movement (that is, to connect with travelling stock reserves) or, where weather made surfaces unstable, to provide a parallel track to a road formation.

Issues specific to Crown roads

In spite of its legal responsibility for roads, the Department's principal roles in relation to Crown roads are in fact limited to the administrative functions associated with legal road creation and road closing. This may currently involve the Department in lengthy negotiations with private individuals, local councils and/or the Roads and Traffic Authority. The process of these negotiations can often be tedious for all parties, particularly when it is known that the DLAWC will not be responsible for ongoing building or repair of the road in question.

DLAWC maintains that it has no capacity (either funds, resources, knowledge or expertise) to carry out the duties of a road authority.

The Department indicated to the Committee that it would like to be relieved of its responsibility as a road authority with that responsibility shifted largely to local councils. This proposal is unlikely to be accepted by councils without additional resourcing to cover administrative duties and additional inspection and maintenance costs of an as yet largely unknown road network.

The implication of this situation is that DLAWC may need to seek additional funding from the Minister to effectively carry out its role as a road authority, and that a partial solution to the issue of capacity may involve leasing that capacity on a case-by-case basis, either from local councils or through the private sector.

The Committee does not consider that it is beyond the capabilities of the Department, with additional funding, to introduce a road classification scheme which would prioritise its roads which are in use in terms of inspection and maintenance. The very nature of Crown roads should mean that inspection and maintenance priorities and intervention levels should be very low based on usage and funding.

The proposed *Civil Liabilities (Personal Responsibility) Bill* 2002 will further assist DLAWC in terms of tightening up the definitions of 'reasonable foreseeability' and 'inherent risk'.

Chapter 5: Issues Affecting Public Liabilities for Roads Authorities

Financial constraints

Funding for all government agencies is largely a policy decision and will always be dependent upon each individual government's priorities and competing areas of need. The RTA, it is fair to say, is best placed administratively and financially to construct, inspect, repair and maintain its road network and it currently does this to a high standard. Local roads suffer somewhat from being managed by a level of government which, over time, has had more an more responsibility shifted down to it, giving it many competing priorities and community demands.

Councils have indicated that the broad extent of the road network and the age of infrastructure they must maintain (in particular the replacement and repair of old wooden bridges) has grown into an enormous financial burden where maintenance backlogs are perpetual. Councils argue that financial constraints have contributed to the deterioration of community assets, as in a climate of extremely tight budgeting trade-offs between more urgent works constantly relegate other priorities to the back of the queue.

Councils therefore consider that there are public liability implications arising due to restricted asset management. Councils experiencing resource constraints for the maintenance of roads believe that the quality of the task may also suffer with cheaper, short-term solutions replacing the option of longer-term investment.

The financial constraints are accentuated for regional councils which are small in terms of revenue base but very large in geographic area.

The very act of prioritising maintenance works may have the effect of creating a potential exposure to liability as there is a formal acknowledgment of the defect.

Competing demands

While related to the issue of financial constraints the reality of competing demands for asset management by road authorities is that in any budgetary cycle there will be 'winners' and 'losers' among areas of infrastructure identified for development or upgrade. The dilemma for roads authority managers is that their response to a need may not always accord with community expectations or perceptions of priorities \such as trading off the maintenance of one small bridge against kilometres of road repairs. There is pressure in juggling competing demands for authorities to enact a compromise which may be ineffective for either party (ie splitting of the funds results in only temporary bridge works and attention solely to the crests of the roads). The potential exposure to liability in these types of situations may be thus compounded,

whereas competent completion of one of the tasks would lower liability exposure. Clearly, roads authorities can address such situations through effective community consultation and transparency of operations but the example as described is all too common.

Where competing demands are numerous, a decision to allow an asset to merely deteriorate until replacement can be effected also creates a public liability issue for the authority to administer.

Administrative costs

Road authorities have indicated to the Committee that the administrative costs of managing public liability with regard to the road network are extremely high. One of the key administrative cost-savers for road authorities of the nonfeasance rule was that it allowed them to deny the claim upon receipt. Further, many councils do not as yet have a system of regular inspection of the road network, and others with inspection programs advised the Committee that as a result of the High Court decision they were not confident that these were of sufficient standard to mount an adequate defence in court. In these situations, an immediate administrative cost to the councils concerned will involve budgeting for inspection programs, which may include the purchase of software, specialised training, and/or the engagement of additional staff.

Some councils indicated that they have experienced an increased administrative burden in the receipt and processing of claim notifications. Anticipating an increase in future litigation, other councils are devoting additional resources to this area in order to provide more of a customer focus to address claim notifications and also to ensure that the claims register is responsive. At one end of the scale councils may deal intensively with the notification of an incident. For example, Sydney City Council employs a Manager to personally respond to notified incidents within the day. Sydney City Council does not maintain a register of claims. Most councils keep claim notification registers that specify varying degrees of risk analysis including indicative sums for successful payouts to plaintiffs in the event of their successful litigation against the Council.

Many councils make a practice of settling small claims out of court in order to avoid costly litigation. In the light of recent publicised public liability cases in which plaintiffs were awarded large payouts councils will also be giving serious consideration as to the legal costs involved in pursuing appeals to higher courts. Some councils indicated to the Committee their concern that even when they win, they still incur significant costs. This is due to the fact that many unsuccessful plaintiffs do not have the ability to pay Council's costs. In one case alone, a Council indicated that the costs of defending a case in which it was successful amounted to $250,000. The costs cannot be recovered.

This report has noted that the Roads and Traffic Authority identified its need to factor in the cost of implementing appropriate risk management strategies in response to the High Court decision, as well as the need to review its record-

keeping processes. These steps will, in turn, have some initial administrative cost although this has not been quantified.

The Department of Land and Water Conservation has indicated its lack of resources with which to address risk management in relation to Crown roads as well as its lack of administrative or technical capacity to address its role as a road authority. The administrative costs of redressing this situation, even for the estimated small extent of the Crown road network currently in use is as yet unknown.

Insurance pricing

The Insurance Council of Australia, the principal lobby organisation for insurance companies, has indicated that the current sharp increase in premiums is due among other factors, to the cyclical nature of the market. A soft market will be characterised by relatively cheap insurance and a wide range of products, with lots of companies offering insurance cover. In a 'hard' market (the current situation) there may be a rise in 'incidents', capital and capacity are withdrawn from the market, prices rise and some activities or industries can be rejected on the basis of a risk analysis.

The Insurance Council of Australia has also noted that it is "widely acknowledged that there has been a significant level of 'under-reserve' pricing of insurance" by parties within the insurance industry. The recent rapid increases in premiums have therefore been in part due to this practice, in an attempt by companies to address their prudential obligations.

Representatives for Statewide Mutual, the largest insurer of councils in New South Wales, told the Committee that councils may shortly face significant pricing issues in relation to their insurance due to the reinsurer advising that it will be providing no insurance underwriting after 2003. Statewide will therefore be searching for an underwriter in a shrinking market. It is currently estimated that this is likely to lead to an increase in premiums of between 10 and 20%. However, Statewide also suggests that an implication of the abolition of nonfeasance immunity may be to push the costs of premiums up 100% or higher.

It must also be taken into account that, in spite of a so-called 'crisis', the insurance industry itself asserts that it expects to be again experiencing levels of profitability within twelve months.

Actions are being put in place by the Australian Prudential Regulation Authority to make more visible the data collected on the insurance industry. This will include a separation of details of claims from notifications. The Federal Minister, Senator Helen Coonan has indicated that APRA will also monitor the pricing of premiums.

The two smaller council insurance pools have told the Committee that their analysis of claims coming through from the District Court has prompted them to increase their reserves by 20%. This is a direct result of the abolition of

nonfeasance immunity. There are similar concerns held about a shrinking reinsurance market. It is expected that this will have the effect of driving premium prices higher and at least one of the pools faces the prospect of having to self-insure for the first $1m in respect of claims.

Systems of inspection and repair

As already discussed, some local road authorities currently have no documented systems for inspection and maintenance of their road networks. This needs to be addressed. Following the High Court decision this practice leaves such councils significantly exposed to potential negligence claims.

The Brodie decision indicated that to claim a good defence road authorities should at least have in place a regime of documented regular road inspections which identify defects that are or could become hazards. Good documentation is fundamental to the quantification of risk and assessment of priorities. Firstly, road authorities must prioritise all roads in terms of their usage and importance. To be effective inspections should be conducted by staff qualified in identification of defects. Inspections should be conducted with a regularity determined by what is reasonable in terms of the known level of risk and the road authority's resources. The priority assigned to a response to a defect should be linked to the authority's maintenance program where the nature of the response will depend upon the size of the risk and the resources available to address said risk. Safeguarding the public, however, if danger is indicated, must be the paramount response.

The Committee believes it is not unreasonable that if roads authorities implement reasonable systems of proactive road inspection and maintenance, they be given a 'good faith' immunity.

The role of Police Reports

Some councils raised concerns about the role of police reports in litigation involving road conditions. Often incidents occur to which police respond, but council officers may be unaware of the event until many years later when council actually receives the claim. Councils point out that the opportunity for their officers to respond under these circumstances is limited as the physical condition of the road may well have changed in the intervening period and seasonal or climatic conditions may also have changed. Councils expressed a wish to be in a position to inspect and document conditions as soon as possible after an incident. They would welcome a means of more systematic and timely notification of incidents by Police to the road authority concerned.

A further concern raised by councils in relation to police reports is that the nature of information recorded may become prejudicial in court proceedings. For example, councils say that the term "gravel on road" is sufficient grounds to have insurers reaching for their cheque-books and yet there may be no technical understanding about what is a safe level of gravel on the road whether it was legitimate for it to be there or whether it contributed to the accident.

Councils sought the opportunity for discussion with Police about the terminology used in compiling these reports.

The Committee spoke to the New South Wales' Police about the issue. Police currently send all information on fatalities to the RTA on a daily basis and information on all serious accidents on a weekly basis under a Memorandum of Understanding. Road conditions are one of the contributing factors that police are required to comment upon.

The RTA uses this information for statistical purposes but the raw data is not fed back to councils.

Some regional councils have established informal arrangements with their local police that they be notified directly when serious accidents involving road conditions occur in order that they have an opportunity to inspect the site as close as possible to the time of the accident. These appear to be working well and the Committee encourages other councils to do this if they believe it would be useful.

However, documented systems of inspection and maintenance should allow road authorities a defence without inspecting a road at the time of an accident.

Potential Impact of the Civil Liabilities (Personal Responsibility) Bill 2002

There are several elements in this Bill which should provide relief for road authorities in relation to their public liability exposure generally as well as specifically to claims relating to roads and footpaths.

Firstly, limiting non economic loss through the *Civil Liability Bill* 2002 should have an effect on the large end of claims which involve catastrophic injury. The tightening of definitions relating to foreseeability and remoteness and inherent and obvious risk as well as the barring of claims where intoxication was the key factor in causing the accident should all provide road authorities with public liability relief. Likewise, the introduction of proportionate liability.

One of the key parts of the Bill for road authorities is the proposed Part 8. Proposed Clause 44 provides for the principles to be considered when a court considers whether a public authority has a duty of care or has breached that duty of care.

Proposed Part 8 reads:

In determining whether a public authority has a duty of care or has breached a duty of care, the following principles apply:

(a the functions required to be exercised by the authority are limited by financial and other resources that are reasonably available to the authority for the purpose of exercising those functions;
(b)the general allocation of those resources by the authority cannot be challenged;

(c)the functions required to be exercised by the authority must be determined by reference to the broad range of its activities; and

(d)he authority may rely on evidence of its compliance with general procedures and applicable standards as evidence of the proper exercise of its functions.

The Committee considers that Part 8 encapsulates many of the key concerns of road authorities and quite rightly requires the court to consider these before making a judgement as to the authorities' liability in each matter.

However, Clause 44(d) still leaves the question of what are the "general procedures and applicable standards" for road inspection and maintenance. While Clause 44 potentially provides road authorities with some relief they, the courts and road users are still left in the dark as to what those standards should be.

Chapter 6: Conclusions and Recommendations

The Committee believes that all road authorities should put in inspection and maintenance systems in place for all their roads as a matter of course. This is in line with most other jurisdictions in the world which no longer enjoy the protection of the nonfeasance rule.

As was observed by Justice Kirby in the Brodie Case this does not mean that the public or the courts should expect "gold plated" roads. Councils, in particular, have many competing financial priorities. Further, they are left without the type of dedicated road funding from fuel levies that is enjoyed by the United States road authorities. There is also no existing state government department to fulfil a paternalistic role similar to that of the UK Department of Transport which means councils do not have access to a high level of low cost technical advice. The New South Wales policy of rate pegging council rates is also a contributing factor as well as councils are unable to raise additional revenue for urgent road infrastructure upgrades.

The Committee believes that there should be some uniformity across road authorities in terms of the inspection and maintenance framework. However, it is not considered that standards should be prescriptive due to the divergence of road authorities, their budgets; their demographics; their community expectations etc. Rather, road authorities should be left to decide their own standards in consultation with their stakeholders having regard to their budgets and other priorities.

It is in everyone's interest that that road authorities do everything that can realistically be done to ensure that accidents don't happen to begin with

The *Civil Liabilities Bill* and the *Civil Liabilities (Personal Responsibility) Bill* offer greater protection for road authorities from actions in negligence. However, there is still a need for greater legislative clarification and guidance for both road authorities and the courts as to principles of a good system.

The Committee is therefore recommending a series of principles which should be followed in establishing a good road inspection and maintenance regime. It is being recommended that these be incorporated into the regulations of the *Roads Act* 1993 (NSW) to provide greater legislative protection for road authorities and greater guidance for the courts. Road authorities who incorporate these principles into their inspection and maintenance regimes should be able to use it as a good defence to claims.

The Committee also believes that there is also a capacity for councils, particularly regional, to attempt greater resource sharing in regards to the establishment and administration of their inspection and maintenance regimes.

As this is a new area for many road authorities the Committee believes that there is need for standardised training and eventual accreditation of road and footpath inspectors. The Committee believes that the Institute of Public Works Engineers would be the organisation best placed to fulfil this role.

RECOMMENDATION 1:

That the Roads Act 1993 (NSW) be amended to provide a framework for inspection and maintenance regimes that government agencies classified as "road authorities" under that Act can rely upon in negligence claims where the condition of the relevant road or footpath infrastructure is identified as a factor.

RECOMMENDATION 2:

The following should be used when drafting Regulations to the Roads Act 1993 (NSW) as the principles by which road authorities set their inspection and maintenance regimes and standards:

- *The 'public interest' focus and context of the process must be defined, for example the aim of setting standards is to effectively manage risk, for the purpose of protecting the public, improving assessment of and responses to identified risks and better accounting for actions in those responses.*

- *A balance of stakeholder interests must be involved in setting the standards. Stakeholder identification should be broad, including, but not limited to, affected population and community groups, educators, researchers, road and footpath users, businesses, regulators/government agencies, legal and technical experts.*

- *The standard-setting process must be transparent (ie draft standards must be externally advertised for public comment with an adequate period for consultation)*

- *In setting standards, there is a clear onus on authorities to undertake repairs in a proactive and systematic manner in response to identified risks.*

- *Standards should be achievable within the road authorities' ability to fund under the existing organisational funding arrangements in the jurisdiction.*

- *Standards, and the response by the authorities to standards, need to be systematically documented and published.*

- *Standards should be realistic about user expectations in relation to service.*

- *Practices must be able to prove adherence to the system.*

- *At a minimum, standards should address road safety measures; road maintenance procedures; defect categorisation; minimum inspection frequencies; intervention levels/response times; road redesign/geometry issues; roadside runoff hazards; and, the erection of signage.*

- *Once adopted, an inspection and maintenance regime needs to be regularly reviewed.*

- *Standards will be comparable with like authorities.*

RECOMMENDATION 3:

That Councils should work cooperatively, where feasible, within regional associations or networks to gain greatest cost effectiveness within road and footpath inspection and maintenance systems.

RECOMMENDATION 4:

That the Institute of Public Works Engineering, Australia develop and undertake a training and accreditation program for Council staff responsible for the oversight of road and footpath inspection and maintenance.