

**ARTICLE FOR “WESTERN COUNCILLOR”
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THE RISK IN ROADS

How does a Local Government weigh up the competing consequences of doing nothing and let a road decay as opposed to either doing inadequate repairs due to insufficient funding, or closing the road?

For many Councils the above issues are becoming a significant concern with increasing litigation for accidents alleging civil liability for failure to maintain or substandard maintenance of roads, in a society ever more dependant on road transport in an ever increasing road network in WA.

When it comes to roads, Local Government in WA has the care, control and management of public roads, except where those roads are highways and main roads under the control of the Commissioner for Main Roads. Budget constraints and limited Government grants for roads makes it a balancing act for Councils over what work to do and what to leave undone.

Civil Liability of Local Government

It is well understood that Local Government may be liable to persons who suffer loss or injury caused by a Local Government’s negligence in carrying out road works. Section 9.57 of the Local Government Act 1995 provides some protection from liability but does not protect against liability where the mishap is caused by the negligence of the local government in the execution of works then in progress, or which has been completed by the local government.

What is not so clear is the extent to which a failure of a Local Government to take steps to maintain or upgrade roads within its District for which it is responsible may expose a Local Government to some liability risk.

A common law duty of care exists which requires a Local Government to take positive action to exercise its powers to notify of and remove risks within its District of which it is aware in order to prevent injury or property damage.

Whether a Local Government has a duty to act depends on whether it would be unreasonable for a Local Government to not exercise its powers, which in turn depends on the degree of identifiable risk to the safety of the public, the resources available to a Local Government to carry out the work, and the cost a Local Government would incur in carrying out work to limit or remove the perceived risk.

Since 2003 the *Civil Liability Act 2002* has modified the law in relation to the responsibilities of Local Government in the performance of statutory duties. Essentially the *Civil Liability Act* provides that a Shire will not be liable for harm arising from a failure to carry out road work or to consider carrying out road work, unless at the time of the failure the Local Government had actual knowledge of the particular risk that caused the harm.

There is also provision in the *Civil Liability Act* that policy decisions cannot be used to support a finding that the Local Government was at fault unless the decision was so unreasonable that no reasonable public body or officer could have made it. Policy decisions in this context would include decisions based substantially on financial, economic, political or social factors or constraints to do or refrain from undertaking particular works.

Accordingly a Local Government will not necessarily incur any liability if it does not maintain a road, even if someone is injured on the road. This is especially the case if a Local Government does not have the resources to maintain and repair the road. However, a Local Government will not escape liability where it knows that the road is in such bad condition that it could cause injury.

A risk assessment of roads under its control should be considered to determine risk that might cause accidents to occur, what can be done to alert people to these risks, and how to improve the road to minimise the risk. Whether the Local Government takes any action will be a balanced decision based on factors such as degree of risk, resources available, competing risks that require allocation of resources, and extent of public use of the road.

For as long as the road remains a road there will always be some risk that inaction where there is a known risk will result in a compensation claim being brought against a Council.

Option of Closing the Road

An option available to Councils to remove their risk is that of road closure. Once a road ceases to be a road, it ceases to be under the control of the Local Government. If a Local Government decides it wants a road closed it will need to comply with the procedures set out in the *Land Administration Act*.

Not every road can be closed, or would be closed just because a Council requests it. The process for having a road closed involves various notices and considerations. The considerations would include, objections received and the number and nature of such objections; current use of the road, particularly if it is the only road available for certain destinations; any services or mining rights in the area of the road; costs associated with maintenance of the road versus closure of the road; and the risk of injury to person or property if the road remains open.

The Minister for Lands has the final say on whether a road is closed.

It will be interesting to see what happens as Councils consider closing roads they cannot maintain, as an innovative approach to risk management.

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