

## PUBLISHED VERSION

Gabrielle Appleby, Adam Webster

### **Cycling and the law**

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## CYCLING AND THE LAW

GABRIELLE APPLEBY\* AND ADAM WEBSTER\*\*

Every cyclist [is] to be presumed, in all legal proceedings, to be a reckless idiot and on the wrong side of the road, unless he can bring conclusive evidence to the contrary.<sup>1</sup>

*Punch* (1896)

### I INTRODUCTION

There is a strong connection between those associated with the law and cycling. It is possible to find cycling enthusiasts in all three arms of government: former Prime Minister Tony Abbott's love of cycling is well documented;<sup>2</sup> members of the Commonwealth Parliament who also share this passion for the sport have formed their own cycling group – Riders on the Hill;<sup>3</sup> and cyclists can be found within the judiciary.<sup>4</sup> A love of lycra exists more broadly within the

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\* Associate Professor, UNSW Law, University of New South Wales; cyclist, occasional runner and motorist.

\*\* Lecturer, Adelaide Law School, University of Adelaide; runner, occasional cyclist and motorist.

1 'New Rules for Cyclists', *Punch* (London) 2 May 1896, 210.

2 Michael O'Reilly, 'Will Prime Minister Tony Abbott Be a Cycling Champion?' on Michael O'Reilly, *Executive Style: On Your Bike* (9 September 2013) <<http://www.executivestyle.com.au/will-prime-minister-tony-abbott-be-a-cycling-champion-2teje>>.

3 Cycling Promotion Fund, *Riders on the Hill: Wheel Solutions for the Electoral Cycle* (2014) Bicycle Industries Australia <<http://www.bikeoz.com.au/index.php/cpf-news/72-riders-on-the-hill>>. The 'Pollie Pedal', an annual cycling event to raise money for charity is supported by a number of members of Parliament: Sarah Kimmorley, 'Tony Abbott Is Back on His Bike for His Annual Pollie Pedal Cycling Event', *Business Insider Australia* (online), 16 August 2014 <<http://www.businessinsider.com.au/tony-abbott-is-back-on-his-bike-for-his-annual-pollie-pedal-cycling-event-2014-8>>.

4 For example, Justice Ruth McColl of the New South Wales Court of Appeal is known to be a keen cyclist: 'On the Record', *The Sydney Morning Herald* (online), 17 October 2010 <<http://www.smh.com.au/nsw/on-the-record-20101016-16oa2.html>>. Justice Wigney of the Federal Court of Australia enjoys cycling: Transcript of Proceedings, *Ceremonial Sitting of the Full Court for the Swearing In and Welcome of the Honourable Justice Wigney* (Federal Court of Australia, 9 September 2013) <<http://www.fedcourt.gov.au/publications/judges-speeches/justice-wigney/wigney-j-20130909>>.

legal profession.<sup>5</sup> Presumably it is the love of the physical activity rather than the laws regulating it that attracts those associated with the law to cycling. This article examines the latter.

Few sports or recreational activities are regulated as directly and heavily by the law as cycling. Runners and swimmers go about their physical pursuits with relative legal freedom. It is the dual character of cycling as both a recreational activity and a form of transport undertaken, at least in part, on the road, that results in its greater legal regulation. The law regulates the conduct of cyclists by way of the rules of the road, and it sets standards for cycling products (such as bikes and helmets), as well as minimum requirements for the construction and maintenance of roads and paths along which cyclists travel.

Governments across Australia have undertaken to promote cycling as a desirable recreational activity and form of transport in recognition of its social, health (both physical and mental), environmental, economic and other community benefits.<sup>6</sup> In doing so it has been necessary to address the inherent vulnerability of cyclists as road users. Governments have addressed this challenge through non-legal means, such as the building of dedicated cycle paths<sup>7</sup> and public education campaigns,<sup>8</sup> as well as legal means, including increased regulation of other road users who might pose a threat to cyclists. While the non-legal, infrastructure and culturally focused reforms are pivotal in promoting cycling safety, it is the *legal* means by which governments have addressed the issue of cyclists as vulnerable road users that is explored in detail in this article. Although, as we will demonstrate, the legal regulation and protection of cycling intersects in many ways with these other aspects of cycling protection and promotion.

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- 5 For a number of years the Law Society of South Australia has entered a team in the Tour Down Under charity ride: Morry Bailes, 'Random Acts of Kindness Are Alive and Well within the Legal Profession', *The Advertiser* (online), 16 November 2014 <<http://www.adelaidenow.com.au/news/opinion/morry-bailes-random-acts-of-kindness-are-alive-and-well-within-the-legal-profession/story-fni6unxq-1227124800939>>. See also Malavika Santhebennur, 'Law Firm Puts Pedal to the Metal', *Lawyers Weekly* (online), 19 August 2014 <<http://www.lawyersweekly.com.au/folklaw/15651-law-firm-puts-pedal-to-the-metal>>; Martin Porter, *The Cycling Lawyer: Thoughts from a 3rd Cat and Vet Racing and Commuting Cyclist* (12 December 2015) <<http://thecyclingsilk.blogspot.com.au>>.
  - 6 See, eg, Department of Infrastructure and Regional Development (Cth), *Active Transport – Walking and Cycling* (26 May 2015) <[http://www.infrastructure.gov.au/infrastructure/pab/active\\_transport/index.aspx](http://www.infrastructure.gov.au/infrastructure/pab/active_transport/index.aspx)>; Department of Transport (WA) and Department of Health (WA), *TravelSmart Workplace Fact Sheet: Promoting Cycling* (Fact Sheet, October 2014) <[http://www.transport.wa.gov.au/mediaFiles/active-transport/AT\\_TS\\_P\\_PromotingCycling.pdf](http://www.transport.wa.gov.au/mediaFiles/active-transport/AT_TS_P_PromotingCycling.pdf)>.
  - 7 See, eg, Brisbane City Council, *Bikeway and Shared Pathway Maps* (16 December 2015) <<http://www.brisbane.qld.gov.au/facilities-recreation/sports-leisure/cycling-brisbane/bikeway-shared-pathway-maps>>.
  - 8 See, eg, the South Australian Motor Accident Commission's 'Be Safe Be Seen' campaign: Motor Accident Commission (SA), *Aware & Prepared: Be Safe Be Seen* (2016) <<http://www.mac.sa.gov.au/be-safe-be-seen/be-aware>>.

Cyclists have different legal statuses, and thus rights and obligations, depending on where they ride.<sup>9</sup> Predominantly through the *Australian Road Rules*, the law defines the rights and responsibilities of cyclists in different environments when they are either vulnerable or dangerous, and sometimes both. Cyclists are the primary users of a road or path only where there is a dedicated, separated cycle path. Cyclists ordinarily travel on roads designed primarily for motor vehicles. On roads, the cyclist is legally recognised as a legitimate road user, and their inherent vulnerability has meant that special laws have been passed to protect them in this environment. On shared paths, cyclists are legitimate users, but pedestrians are treated by the law as prioritised and vulnerable to cyclists. Footpaths are designed almost exclusively for pedestrians and cycling is highly regulated.

This article will examine in detail the impact of the law on cycling, considering the way in which the law regulates the *user* (that is, the cyclist or those whose conduct affects cyclists), the *environment* and the *product*. It will draw together the numerous and disparate areas of the law that regulate cycling. We demonstrate that there is a complex interrelationship between the legal treatment of cyclists and community treatment of them.

## II LAW, ADVOCACY AND COMMUNITY ATTITUDES

The level of legal protection for and from cyclists at any given time can be seen as broadly reflective of contemporary community attitudes towards them.<sup>10</sup> Certainly many of the changes in the legal regulation and protection of cyclists have occurred as community attitudes towards cycling as a desirable form of transport, leisure or exercise activity have evolved. But, of course, there is very rarely an identifiable consensus in community attitudes. In the regulation of cycling, the interests of motor vehicle drivers, pedestrians and cyclists will often lead to divergent and conflicting community acceptance of the level to which cycling ought to be encouraged and prioritised by the law. As we discuss below, consensus over the proper regulation of cyclists might not exist even within the cycling community (for example in relation to helmet law reform and mandating safe passing distances).

Even if a general consensus can be found in the evolution of community attitudes, law reform is unlikely to occur without a champion: ‘someone or some group must have a strong enough interest in [the] creation [of new laws] to press for their enactment and to *make* them happen.’<sup>11</sup> That someone or group must

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9 Cycling off-road on trails (that is, mountain bike riding) has not been considered separately in this article. Generally speaking, similar rules apply in areas that permit mountain bike riding to those that apply to off-road cycling. Regulation of where mountain bike riding is permitted brings with it an additional dynamic and stakeholders because of the potential for this activity to cause environmental degradation.

10 Geoffrey Sawyer, *Law in Society* (Oxford University Press, 1965) 147 ff.

11 Stephen Bottomley and Simon Bronitt, *Law in Context* (Federation Press, 4<sup>th</sup> ed, 2012) 305 (emphasis in original).

bring the problems with the existing law to the attention of the public, convince the public that the state of the law is *so* dangerous that its reform is a priority (and in doing so may have to convince the public to protect or prioritise certain interests ahead of others) and, finally, that someone or group must have access to political power.<sup>12</sup> As is explained below, cyclists are well represented by a number of advocacy groups. These groups have been effective in agitating for road safety reform. Thus we see that cyclists as a group are vulnerable and therefore disadvantaged in the physical dimension but not (necessarily) the social dimension.

Law has more than simply an instrumental effect. Law can, to a certain degree, protect and secure the interests of cyclists.<sup>13</sup> But law is also symbolic, reflecting values and interests within the community.<sup>14</sup> In modern Australia, tensions between cyclists and other road users can be high and manifest in aggressive behaviour. The symbolism contained within legal prioritisation of one group over another can inflame these tensions.

Beyond its instrumental effect in protecting cyclists, and its important symbolic value, law also has ideological value in its potential to shape the community perception of cyclists as legitimate users of roads and paths deserving of access and protection.<sup>15</sup> Law can give cyclists the imprimatur of the state, providing rights, procedures and practices both to protect *and further* their interests.<sup>16</sup> However, to work in this way, law reform must be carefully managed. Governments and Parliaments must be careful lest its symbolic message undermine its capacity for promoting cycling within the wider community.

In this respect, governments and those seeking law reform must also recognise the limits of law as a social tool. Cyclists are vulnerable directly, from the inherent dangers posed by sharing roads with motorised vehicles. Cyclists' own behaviour may also exacerbate their vulnerability. Legal reform regarding the rules of the road can only combat this vulnerability to a limited extent. Rules are not always obeyed, whether that be intentionally or not. Regardless of the law, cyclists are vulnerable indirectly where other road users have poor attitudes towards them. Poor attitudes may manifest in intentionally dangerous behaviour, or negligent behaviour towards cyclists on the road. This vulnerability is recognised by government in its emphasis on prioritising public campaigns as part of its road safety framework. For example, a 2013 Queensland parliamentary committee report recommended that the government needed to do more to 'humanis[e]' cyclists and negate the perception of them as 'outliers'.<sup>17</sup>

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12 These conditions are adopted from Howard S Becker, *Outsiders: Studies in the Sociology of Deviance* (Free Press, 1963) ch 8. See especially at 162.

13 Roger Cotterrell, *Law's Community: Legal Theory in Sociological Perspective* (Clarendon Press, 1995) 5.

14 W G Carson, 'Symbolic and Instrumental Dimensions of Early Factory Legislation: A Case Study in the Social Origins of Criminal Law' in Roger Hood (ed), *Crime, Criminology and Public Policy: Essays in Honour of Sir Leon Radzinowicz* (Heinemann, 1974) 107, 136–7.

15 Bottomley and Bronitt, above n 11, 313.

16 Cotterrell, above n 13, 4.

17 Transport, Housing and Local Government Committee, Parliament of Queensland, *A New Direction for Cycling in Queensland: Report No 39 – Inquiry into Cycling Issues* (2013) 5.

Across Australia, the law regulating cycling is now largely uniform. However, some important jurisdictional differences have emerged that are revealing of changing community attitudes. This article highlights some of the recent amendments in the various states that have led to these jurisdictional differences. Why has change been able to occur in some jurisdictions but not others? We explore the role that individuals, the public, cycling advocacy groups, the media, and more formal law reform inquiries have played in achieving legal change.

Across the Australian jurisdictions, there has never been a general reference to a law reform body to investigate the regulation of cycling, although there have been parliamentary committee inquiries into the issue. In 2013, a Queensland parliamentary committee conducted a sustained review of cycling regulation and infrastructure in that State. Parliamentary committees in New South Wales and the Australian Capital Territory conducted inquiries into vulnerable road users in 2010 and 2013 respectively, which considered bicycle safety and regulation.<sup>18</sup> There has never been a royal commission into cycling regulation (although more specific aspects of cycling reform have been the subject of royal commissions, such as the Kapunda Road Royal Commission in South Australia, set up to investigate a hit-and-run accident involving a cyclist).<sup>19</sup>

The Australian Bicycle Council provides a forum for cyclists to communicate directly with all levels of government. It is neither a law reform body nor a lobby group. It includes representatives from non-government cycling groups and the cycling industry, as well as government representatives. It is responsible for developing, managing and coordinating the implementation of the National Cycling Strategy.<sup>20</sup> The Council provides government with a 'cycling perspective' in its policy development.<sup>21</sup> The Council reports to the Transport and Infrastructure Council (the national ministerial council) through Austroads and the Transport and Infrastructure Senior Officials' Committee.<sup>22</sup> In implementing the National Cycling Strategy, an important aspect of the Council's work is monitoring and collating information and data regarding the implementation of the strategy in the states,<sup>23</sup> which includes managing the biennial Australian National Cycling Participation Survey.<sup>24</sup> The survey provides important data in understanding cycling participation in Australia, which can also be used to

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18 Joint Standing Committee on Road Safety, Parliament of New South Wales, *Vulnerable Road Users: Inquiry into Motorcycle and Bicycle Safety* (2010); Standing Committee on Planning, Environment and Territory and Municipal Services, Australian Capital Territory Legislative Assembly, *Inquiry into Vulnerable Road Users* (2014).

19 South Australia, Kapunda Road Royal Commission, *Report* (2005).

20 Australian Bicycle Council, *National Cycling Strategy* (16 December 2013) <<http://www.bicyclecouncil.com.au/publication/national-cycling-strategy>>. The current National Cycling Strategy runs for a period of five years from 2011 to 2016: Australian Bicycle Council, 'National Cycling Strategy 2011–2016: Gearing Up for Active and Sustainable Communities' (Strategy Report, Austroads, September 2010).

21 Australian Bicycle Council, *About Us* (2014) <<http://www.bicyclecouncil.com.au/about/us>>.

22 Ibid.

23 Australian Bicycle Council, *National Cycling Strategy*, above n 20, 25.

24 Australian Bicycle Council, 'National Cycling Strategy 2011–16: 2013 Implementation Report' (Implementation Report, Austroads, 2014) 6.

evaluate the efficacy of the National Cycling Strategy as well as specific government programs. Advocacy groups can also use the information to support their various reform agendas.

Australia has a plethora of cycling advocacy groups that pursue wide claims for infrastructure reform and the general promotion of cycling as a desirable form of transport and leisure activity, together with more specific law reform. This is often referred to as Australia's powerful 'cycling lobby', but it is far from homogenous or coordinated and there is no single peak cycling lobby group in Australia.<sup>25</sup> For instance, the Amy Gillett Foundation, formed after the tragic death of elite Australian cyclist Amy Gillett, has been focused on advocacy for reform of safe passing distance laws with its 'a metre matters' campaign.<sup>26</sup> The Foundation has been involved in petitioning the Commonwealth Government to amend the *Australian Road Rules* to include a minimum passing distance for motor vehicles overtaking cyclists.<sup>27</sup> The Foundation has also been lobbying state governments: the Foundation made a submission to the 2013 Queensland parliamentary committee inquiry into cycling issues advocating for the introduction of a minimum overtaking distance for motor vehicles passing cyclists.<sup>28</sup> As is explained later in this article, the report of the Queensland parliamentary committee recommended that a minimum overtaking distance be included in the road rules in Queensland,<sup>29</sup> which was ultimately adopted by the Queensland Parliament.<sup>30</sup> Advocacy groups include state-based groups (such as Bicycle SA)<sup>31</sup> as well as national groups, including the Amy Gillett Foundation, the Bicycle Network<sup>32</sup> (which started as a Victorian group but now operates nationally) and the Cycling Promotion Fund.<sup>33</sup> There are an increasing number of grassroots 'bicycle user groups' or 'BUGs', which often operate locally or provide alternative advocacy.<sup>34</sup> The Australian Cyclists Party has contested

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25 For competitive cycling, membership of Cycling Australia through state organisations provides a national peak group. There is no equivalent for non-competitive cyclists.

26 Amy Gillett Foundation, *A Metre Matters* (2015) <<http://www.amygillett.org.au/a-metre-matters>>.

27 Amy Gillett Foundation, *National Petition Calling for Improved Cycling Safety: Road Rule for Minimum Overtaking Distance When Drivers Pass Bicycle Riders* (2014) <<http://enews.trivic.org.au/uploads/files/Petition%20minimum%20distance%20information.pdf>>.

28 Amy Gillett Foundation, Submission No 97 to Transport, Housing and Local Government Committee (Qld), *Inquiry into Cycling Issues*, 26 July 2013.

29 Transport, Housing and Local Government Committee, above n 17, xvi [Recommendation 8].

30 See below n 173.

31 See, eg, Bicycle SA, *Bike SA* (2015) <<http://www.bikesa.asn.au>>.

32 Bicycle Network, *Bicycle Network* (2015) <<https://www.bicyclenetwork.com.au>>.

33 Cycling Promotion Fund, *Cycling Promotion Fund* (2014) Bicycle Industries Australia <<http://www.bikeoz.com.au/index.php/cycling-promotion-fund>>.

34 Department of Transport and Main Roads (Qld), *Bicycle User Groups* (25 June 2014) <<http://www.tmr.qld.gov.au/Travel-and-transport/Cycling/Bike-user-guide/Bicycle-user-groups.aspx>>.

elections in various Australian jurisdictions.<sup>35</sup> These groups operate in the advocacy sphere, but also often provide activities for and services to cyclists such as organised rides and insurance.<sup>36</sup> The interests, priorities and perspectives of these groups do not always align, and reform in areas such as mandatory helmets has been plagued by disagreement within the cycling lobby itself.<sup>37</sup>

The relationship between cycling advocacy and law reform is complex. Successful reform requires delicate navigation of law's instrumental, symbolic and ideological dimensions. Assertive campaigns and responses by cyclists and advocacy groups can be perceived as indignant or arrogant and further entrench negative views within the community and polarise positions rather than garnishing needed community support. Protest rides, such as the now global 'critical mass' movement that uses mass mobilisation protest and civil disobedience in relation to road rules, can both promote cyclists and their concerns, putting them on the public and political agenda, but also risk backlash from other road users and commuters.<sup>38</sup>

Law reform must be alive to the complexity of the equal status and special status of cyclists based on the combined desirability and vulnerability of cycling. Special treatment of cyclists in the law must not raise the ire of other road users. The resulting tensions create further dangers for cyclists sharing the road, undermining progress towards community acceptance.

### III A TAXONOMY OF 'BICYCLE SAFETY LAWS'

In this article, we explain the broad concept of Australian 'bicycle safety laws' by reference to a taxonomy developed in the United States by Professor Ross D Petty.<sup>39</sup> Petty divided safety laws into three categories: those that relate to the *user* (in terms of both the regulation of the user and of those whose conduct may affect the user), those that relate to the *environment*, and those that relate to

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35 At the 2015 New South Wales election the Australian Cyclists Party had 22 candidates contesting both Legislative Assembly and Legislative Council seats: Australian Cyclists Party, 'Australian Cyclists Party Announces NSW Election Plans' (Media Release, 24 January 2015) <<https://australian-cyclists-party.org/wp-content/uploads/2014/02/MediaRelease-ACPAAnnouncesNSWElectionPlans-fnl.pdf>>. The party did not win any seats in the NSW election: Omar Khalifa, 'Australian Cyclists Party May Not Have Won a Seat, but We Made a Difference', *The Sydney Morning Herald* (online), 13 April 2015 <<http://www.smh.com.au/comment/australian-cyclists-party-may-not-have-won-a-seat-but-we-made-a-difference-20150413-1mjz25.html>>.

36 For example, in South Australia, Bicycle SA provides such services as part of membership of the organisation: Bicycle SA, above n 31.

37 See below n 88.

38 For information on the Critical Mass movement and rides in Australia see: Critical Mass Australia, *Critical Mass Australia* (27 February 2008) <<http://www.criticalmass.org.au/>>; Critical Mass Sydney <<https://www.facebook.com/SydneyCriticalMass/>>.

39 Ross D Petty, 'The Impact of the Sport of Bicycle Riding on Safety Law' (1998) 35 *American Business Law Journal* 185, 191. Petty himself developed the taxonomy from that of William Haddon Jr, 'Advances in the Epidemiology of Injuries as a Basis for Public Policy' (1980) 95 *Public Health Reports* 411, 417.

the *product*. A modified version of Petty's taxonomy that we will apply to the Australian legal framework is set out in Table 1.

Table 1: Taxonomy of Bicycle Safety Laws

Categories	Regulation (ex ante)	Litigation (ex post)
User	Rules off and on the road Operator responsibility for bicycles and equipment Registration and/or licensing	Enforcement of rules Negligence
Environment	Road design and maintenance	Negligent design and maintenance
Product	Safety standards Product recall	Negligent manufacture and design

## IV REGULATING THE CYCLIST AND OTHER ROAD USERS

### A The Cyclist as a Road User

It was in the nineteenth century that the cyclist gradually received legal recognition as a road user as the activity was increasingly accepted as a legitimate form of transport. In Australia, the first bicycles were imported in the 1860s and 1870s.<sup>40</sup> It was not until the 1890s that cycling became more than a pursuit of the wealthy.<sup>41</sup>

Even in this early period the dangers of bicycles to other road users were recognised. A letter to the editor of *The Geelong Advertiser* in 1870 observed that a bicycle or velocipede rushing down a road could startle a horse drawing a buggy.<sup>42</sup> In 1879 in England, the Queen's Bench found that a cyclist was liable as a carriage for driving 'furiously so as to endanger the life or limb of any passenger'.<sup>43</sup> In 1898, in one of the earliest reported Australian cases involving a

40 A race of 'velocipedes' is reported to have taken place at the Melbourne Cricket Ground in 1869: 'Velocipede Race on the MCC Ground', *The Australasian* (Melbourne), 12 June 1869, 748. It is noted in the article that at the time there was a 'scarcity' of bicycles in Melbourne, but that manufacturers were starting to build them locally.

41 Heath Gilmore and Rocco Fazzari, 'The Social History of Cycling in Australia', *The Courier* (online), 24 July 2013 <<http://www.thecourier.com.au/story/1655114/the-social-history-of-cycling-in-australia/>>.

42 'The Danger of Velocipedes', *The Geelong Advertiser* (Geelong), 21 March 1870, 3. See also Rob Hess, 'Bigger than Cadel: Australia's Century-Old Love Affair with Cycling', *The Conversation* (online), 20 October 2011 <<http://theconversation.com/bigger-than-cadel-australias-century-old-love-affair-with-cycling-3584>>.

43 *Taylor v Goodwin* (1879) 4 QBD 228, 229 (Mellor J), quoting *Highway Act 1835*, 5 & 6 Wm 4, c 50, s 78.

cyclist, the Supreme Court of Victoria held that cyclists, like motorists, could be guilty of ‘negligent driving’.<sup>44</sup>

As cycling became more popular within the community at large, express statutory recognition and regulation followed.<sup>45</sup> As Petty explained with reference primarily to the United States and the United Kingdom, ‘[t]he sport of bicycle riding brought a greater demand for traffic control rules’,<sup>46</sup> and the rise of cycling also brought with it the regulation of the conduct of other road users towards cyclists. The following section explains that the same can also be said for Australia.

## B The Legal Framework

Under the *Australian Constitution*, the states and territories have general jurisdiction to make laws that regulate the conduct of road users.<sup>47</sup> For decades after Federation, the laws across jurisdictions varied substantially, which led to concerns over safety. An attempt was made to implement nationally uniform regulation through the National Traffic Code, first adopted in 1958 but eventually abandoned in 1988.<sup>48</sup> The Code was never adopted universally across Australia and the problematic legal fragmentation continued. The Australian Road Rules Project was developed by the National Road Transport Commission (now the National Transport Commission), pursuant to a process approved by the Australian Transport Council (the transport ministerial council, now the Transport and Infrastructure Council).<sup>49</sup> Today, the *Australian Road Rules* are developed by the National Transport Commission. They are given legal force, however, only when adopted by a state or territory Parliament.

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44 The defendant was fined under s 5(xvii) of the *Police Offences Act 1890* (Vic), which prohibited any person ‘[f]uriously or negligently riding or driving through any public place’. While the relevant section referred to ‘riding or driving’, the judge focussed on the meaning of ‘driving’ and held that cycling constituted ‘driving’ for the purposes of this section: *Howard v Robb* (1898) 4 ALR 290, 290 (a’Beckett J). In reaching this conclusion the Court relied upon the early English decision of *Taylor v Goodwin* (1879) 4 QBD 228. In *Taylor v Goodwin*, the Court had to determine whether riding a bicycle fell within the meaning of the expression ‘driving any sort of carriage’: *Highway Act 1835*, 5 & 6 Wm 4, c 50, s 78.

45 Petty, above n 39, 196.

46 *Ibid* 202.

47 The power to make laws with respect to road users is not a power vested in the Commonwealth: *Australian Constitution* ss 51–2, 107.

48 Ian W Shepherd and Fiona A Calvert, ‘The Australian Road Rules – What Are They and Where Are They Going?’ (Paper, National Road Transport Commission, May 2001) 3–4.

49 The present Transport and Infrastructure Council has undergone a series of name changes since its inception as the Australian Transport Council on 11 June 1993. In 2011 its name was changed to the ‘Standing Council on Transport and Infrastructure’ and in 2013 its name was again changed to its current name: Department of the Prime Minister and Cabinet (Cth), *Guidance on COAG Councils* (Report, May 2014) 1 [1.3].

Since their first promulgation in 1999, the *Australian Road Rules* have been adopted across all Australian states and territories.<sup>50</sup> The *Rules* operate in each state and territory by virtue of the legislation in each jurisdiction granting power to the executive to make regulations and rules with respect to the use of the roads.<sup>51</sup> They are broadly uniform, although differences still persist.<sup>52</sup> In its response to a 2013 parliamentary committee report, *A New Direction for Cycling in Queensland*, the Queensland Government explained that ‘the value in national consistency must be weighed against opportunities to improve road safety through innovation’.<sup>53</sup> For the average cyclist, these variations can be difficult to locate, as the law is often contained in a number of pieces of legislation or regulations.

### 1 *Rules of the Road*

The *Australian Road Rules* define a ‘road’ as ‘an area that is open to or used by the public and is developed for, or has as one of its main uses, the driving or riding of motor vehicles’.<sup>54</sup> Despite this car-centric definition, the *Rules* define a bicycle as a road vehicle.<sup>55</sup> Generally speaking, this gives cyclists the same rights and responsibilities as other road users. Cyclists are subject to rules imposed on all road users: cyclists must obey speed limits, red lights, stop signs and give way signs;<sup>56</sup> they cannot lead an animal.<sup>57</sup>

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50 The *Australian Road Rules* came into force in all states and territories (except for the Australian Capital Territory and Western Australia) in 1999 and they were adopted in the Australian Capital Territory in the following year: Thomson Reuters, *The Laws of Australia* (at 1 July 2013) 10 Criminal Offences, ‘9 Motor Vehicle Offences’ [10.9.20].

51 For example, in South Australia, s 80 of the *Road Traffic Act 1961* (SA) gives the Governor power to make ‘rules (*Australian Road Rules*) to regulate traffic movement, flow and conditions, vehicle parking, the use of roads, and any aspect of driver, passenger or pedestrian conduct’. The *Australian Road Rules* have been implemented and operate in other jurisdictions in a similar fashion: see, eg, *Road Transport (Safety and Traffic Management) Act 1999* (ACT) pt 8, enabling *Road Transport (Safety and Traffic Management) Regulation 2000* (ACT); *Road Transport Act 2013* (NSW) ss 23–4, enabling *Road Rules 2014* (NSW); *Traffic Act 1987* (NT) s 53, enabling *Traffic Regulations 1999* (NT) sch 3; *Transport Operations (Road Use Management) Act 1995* (Qld) ss 146, 171, enabling *Transport Operations (Road Use Management – Road Rules) Regulation 2009* (Qld); *Traffic Act 1925* (Tas) s 31A, enabling *Road Rules 2009* (Tas); *Road Safety Act 1986* (Vic) s 95D, enabling *Road Safety Road Rules 2009* (Vic). For simplicity, National Transport Commission, *Australian Road Rules* (at February 2012) will hereafter be referred to as the ‘*Australian Road Rules*’. A reference to the *Australian Road Rules* in this article is a reference to the rules as developed by the National Transport Commission.

52 For example, in Western Australia, the *Road Traffic Code 2000* (WA) largely mirrors the *Australian Road Rules*, but there are some differences between the Western Australian legislation and the *Australian Road Rules*. In this article we have noted some, but not all, of the differences with regard to how the *Australian Road Rules* have been implemented in the states and territories.

53 Queensland Government, *Response to the Transport, Housing and Local Government Committee’s Report No 39 – Inquiry into Cycling Issues: A New Direction for Cycling in Queensland*, Parl Paper No 5206 (2014) 16.

54 *Australian Road Rules* r 12.

55 *Ibid* r 15.

56 By virtue of r 19, the *Rules* apply to ‘riders’ in the same way as ‘drivers’ unless otherwise expressly stated.

57 *Australian Road Rules* r 301(3).

Cyclists must be in control of their bicycle at all times. Part 15 of the *Australian Road Rules* provides additional road rules that apply specifically to cyclists. The *Rules* specify that cyclists must ride with at least one hand on the handlebars,<sup>58</sup> and have ‘proper control’ over the bicycle.<sup>59</sup> Cyclists must ride facing forward and seated,<sup>60</sup> carrying no more passengers than the bike is designed for.<sup>61</sup> Cyclists must not be towed by, or hold onto, a moving vehicle,<sup>62</sup> and cannot slip stream or pace off the back of a vehicle.<sup>63</sup> Cyclists can ride two abreast (but no more)<sup>64</sup> and cannot ride more than 1.5 metres apart.<sup>65</sup> In place of indicators, cyclists must use hand signals to indicate when turning or steering right.<sup>66</sup> Cyclists can overtake vehicles on the left, except where the vehicle is turning left and indicating as such.<sup>67</sup>

There are special rules designed to protect cyclists on the road, recognising, for example, their vulnerability crossing traffic. Cyclists are allowed to execute hook turns when turning right at intersections,<sup>68</sup> which allows cyclists to turn right safely at busy intersections without having to cross lanes of traffic. Cyclists are permitted to turn right from the left-hand lane of a multi-lane roundabout provided they give way to traffic on the roundabout.<sup>69</sup>

There are rules that regulate on which roads and where on the road cyclists can ride. Cyclists cannot ride on a road on which bicycles are prohibited, a fact that will be signed.<sup>70</sup> Bicycle lanes are for the exclusive use of bicycle riders during the times stated for operation, unless there is an emergency, or use of the lane is required for avoiding an obstruction, entering or leaving a private property or another road, overtaking a vehicle or making a U-turn, or driving a bus or taxi picking up or dropping off passengers.<sup>71</sup> If cycling on a road with a bicycle lane, a cyclist must, if practicable, ride in that lane, although the cyclist can move for debris, holes, water hazards, etc.<sup>72</sup> Cyclists must only ride on the correct side of the road in a bicycle lane.<sup>73</sup> Bicycles are allowed in the bus, tram, and transit

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58 Ibid r 245(b).

59 Ibid r 297(1).

60 Ibid r 245(a).

61 Ibid r 246.

62 Ibid rr 254(1)–(2).

63 Ibid r 255.

64 Ibid r 151(1).

65 Ibid r 151(4).

66 Ibid rr 49(2), 50.

67 Ibid rr 141(1)–(2).

68 Ibid r 35.

69 Ibid rr 111(3), (5)–(7), 119.

70 Ibid r 252. More generally, road access signs can prevent certain types of vehicles driving on a length of road: r 97. Such signs are commonly used on freeways or motorways to prevent bicycles and animal-drawn vehicles coming onto those roads.

71 Ibid rr 153, 158.

72 Ibid r 247.

73 Ibid.

lanes, provided the lane is not signed as a bus only lane.<sup>74</sup> Cyclists must keep ‘as near as practicable’ to the left hand side of the road except where turning right, where there are two lanes, and when overtaking.<sup>75</sup>

Many of the above *Rules* are designed not only to protect cyclists, but to protect other road users from cyclists. Cyclists must not cause a ‘traffic hazard’ by riding into the path of drivers or pedestrians.<sup>76</sup>

## 2 Operator Responsibility for Bicycles and Equipment

The *Australian Road Rules* also place requirements on cyclists with respect to their bicycles and other equipment. Decisions of courts that cyclists were negligent for failing to warn a pedestrian of his or her approach led to the development of product requirements such as the requirement to have within easy reach a functioning warning device (such as a bell or similar device) and lights (when riding at night or in hazardous weather).<sup>77</sup> Under the *Rules* bicycles ridden at night must be equipped with a flashing or steady white light clearly visible at least 200 metres from the front of the bicycle, a flashing or steady red light clearly visible at least 200 metres from the rear of the bicycle, and a red rear reflector visible at least 50 metres from the bicycle when headlights are projected onto it on low beam.<sup>78</sup> Further, under the *Rules*, a bicycle must be suitably constructed and equipped, and properly maintained. It must have at least one effective brake: this can be either an operational back pedal foot brake or a hand brake.<sup>79</sup>

In some states additional responsibilities apply to bicycle trailers, with specific regulation as to the maximum width of trailer and how the trailer is to be attached to the bicycle.<sup>80</sup> The *Australian Road Rules* require children in bicycle carrier seats to be restrained and wear a helmet.<sup>81</sup> Children in bicycle trailers also have to wear a helmet and be under the age of 10.<sup>82</sup> The rider of a bike towing a trailer carrying a person must be over the age of 16 years.<sup>83</sup>

When the motor vehicle replaced the bicycle as the preferred mode of transport for adults, bicycles became an important part of childhood experience.

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74 Rule 158 of the *Australian Road Rules* provides that: ‘The driver of any vehicle may drive in a bicycle lane, bus lane, tram lane, transit lane or truck lane if ... (b) information on or with a traffic sign applying to the lane indicates that the driver may drive in the lane; or (c) the driver is permitted to drive in the lane under another law of this jurisdiction.’ For example, in South Australia, the rider of a bicycle is expressly permitted to ride in a bus lane: *Road Traffic (Road Rules – Ancillary and Miscellaneous Provisions) Regulations 2014 (SA)* reg 12.

75 *Australian Road Rules* rr 129–30. Rule 129 refers to ‘drivers’, but applies equally to cyclists: r 19. Curiously the rule does not apply to motor bikes: r 129(2).

76 *Ibid* r 253.

77 Petty, above n 39, 204–5. Under the *Australian Road Rules* a bicycle must have a ‘bell, horn, or similar warning device, in working order’: *Australian Road Rules* r 258(b).

78 *Australian Road Rules* r 259.

79 *Ibid* r 258(a).

80 See, eg, *Road Traffic (Miscellaneous) Regulations 2014 (SA)* reg 56.

81 *Australian Road Rules* r 256(2).

82 *Ibid* r 257.

83 *Ibid*.

Increased numbers of child cyclists brought calls for more robust safety laws.<sup>84</sup> Children, particularly young children, could not be expected to learn and obey the traffic rules, and they could not be held liable for failing to do so.<sup>85</sup> Instead, rules were introduced to provide minimum protection for cyclists regardless of their conduct on the road. For instance, the *Australian Road Rules* stipulate that helmets are compulsory for cyclists of all ages.<sup>86</sup>

Questions have been raised as to the effectiveness of compulsory helmet laws. There is research that suggests cyclists take higher risks when wearing helmets, and that when overtaking, motorists give less space to cyclists wearing helmets.<sup>87</sup> There are questions as to the extent to which any reduction in head injuries in cyclists is attributable to the protection provided by helmets, or the reduction in participation in cycling (which may itself be attributed to the mandatory helmet laws).<sup>88</sup> There is some evidence to suggest that the requirement to wear a helmet is one reason why some people do not ride their bike more frequently.<sup>89</sup> By decreasing participation rates, there is an argument that the overall safety of cycling within that area decreases because individual safety increases with greater participation.<sup>90</sup> So while law reform may be influenced by community attitudes, the effect of mandatory helmet laws on participation rates provides some evidence that the converse is also true: that the law also shapes community attitudes towards cycling, at least with regard to participation.

### 3 *Cyclists off the Road*

Off the road, cyclists are recognised as path users only where the path is designated as a shared or separated path.<sup>91</sup> The *Rules* provide a discretion as to

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84 Petty, above n 39, 207.

85 Across Australia children have no criminal responsibility under 10 years of age: *Children (Criminal Proceedings) Act 1987* (NSW) s 5; *Children, Youth and Families Act 2005* (Vic) s 344; *Young Offenders Act 1993* (SA) s 5; *Criminal Code Compilation Act 1913* (WA) sch s 29; *Criminal Code Act 1899* (Qld) s 29(1); *Criminal Code Act 1924* (Tas) sch 1 s 18(1).

86 *Australian Road Rules* r 256. In the Northern Territory, helmet usage is not mandatory for cyclists over the age of 17 years when riding on footpaths and bicycle paths: *Traffic Regulations 1999* (NT) reg 86.

87 See Ian Walker, 'Drivers Overtaking Bicyclists: Objective Data on the Effects of Riding Position, Helmet Use, Vehicle Type and Apparent Gender' (2007) 39 *Accident Analysis and Prevention* 417.

88 Luke Turner, 'Australia's Helmet Law Disaster' (2012) 64(1) *Institute of Public Affairs Review* 28. It is beyond the scope of this article to review in detail the scientific and medical articles in relation to the impact that helmets have had on injury prevention and also on cycling participation rates. It is sufficient to note that these issues are 'highly contested': Chris Rissel, 'Politics Trumps Hard-Headed Reason on Bicycle Helmets', *The Conversation* (online), 4 December 2013 <<https://theconversation.com/politics-trumps-hard-headed-reason-on-bicycle-helmets-20973>>. See also Petty, above n 39, 208; Dani Cooper, 'Helmets Reduce Head Injury Severity', *ABC Science* (online), 6 May 2013 <<http://www.abc.net.au/science/articles/2013/05/06/3751304.htm>>.

89 Cycling Promotion Fund and Heart Foundation, *Riding a Bike for Transport: 2011 Survey Findings* (Survey Findings, March 2011) <<https://heartfoundation.org.au/images/uploads/publications/Cycling-Survey-2011-Riding-a-Bike-for-Transport.pdf>>. The results of this survey (at 5) suggested that 16.5 per cent of people surveyed did not ride a bike more frequently because they did not like wearing a helmet. See also Chris Rissel, 'Ditching Bike Helmets Laws Better for Health', *The Conversation* (online), 24 March 2011 <<https://theconversation.com/ditching-bike-helmets-laws-better-for-health-42>>.

90 Chris Rissel, 'Ditching Bike Helmets Laws Better for Health', above n 89.

91 *Australian Road Rules* r 239.

whether cyclists who are 12 years of age or older can ride on the footpath. Each jurisdiction has dealt with this in a slightly different way.<sup>92</sup> In this way, the *Rules* recognise the danger posed by cyclists to pedestrians in an environment where pedestrians are the primary user. When riding on a shared path, a cyclist has an obligation to exercise due care and consideration for pedestrians and other users. A cyclist must sound a bell or horn when passing pedestrians<sup>93</sup> and keep to the left.<sup>94</sup> On separated paths, cyclists must not ride on any part of the path designated for pedestrians.<sup>95</sup> On all paths, pedestrians have right of way.<sup>96</sup>

#### 4 Enforcement of Rules

A failure to comply with the *Australian Road Rules* or other road traffic laws can result in a fine or a loss of demerit points. As the states are responsible for fixing the rate of penalties, there can be variations between states. These penalties apply to drivers as well as cyclists.<sup>97</sup> If cyclists commit a traffic offence, they too can incur demerit points against their driver's licence or, if no driver's licence is held, it can impact on their ability to obtain one in the future.<sup>98</sup> However, there are necessary modifications and certain exclusions and additions that apply to cyclists.<sup>99</sup>

Drivers and cyclists are also subject to the criminal law, which regulates conduct that falls short of the standard that the community expects of road users. For example, this includes offences such as driving while under the influence of alcohol, driving without due care and dangerous driving.<sup>100</sup>

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92 *Australian Road Rules* r 250; see, eg, *Road Rules 2014* (NSW) r 250(1). A rider accompanying a rider who is under 12 years old can also ride on the footpath: at r 250(1)(a). In October 2015, South Australia introduced changes to allow cyclists of all ages to use footpaths: *Road Traffic (Road Rules – Ancillary and Miscellaneous Provisions) Variation Regulations 2015* (SA) reg 4, repealing *Road Traffic (Road Rules – Ancillary and Miscellaneous Provisions) Regulations 2014* (SA) reg 33. In Queensland, bicycles are only prohibited from riding on footpaths where there is a 'no bicycles' sign: *Transport Operations (Road Use Management – Road Rules) Regulation 2009* (Qld) regs 250, 252. Further, cyclists are permitted to cross using pedestrian crossings in accordance with various conditions designed to give pedestrians right of way: *Transport Operations (Road Use Management – Road Rules) Regulation 2009* (Qld) reg 248.

93 See, eg, *Road Traffic Act 1961* (SA) s 99A.

94 *Australian Road Rules* r 250(2).

95 *Ibid* r 249.

96 *Ibid* r 250(2)(b).

97 For example, in South Australia the *Road Traffic (Miscellaneous) Regulations 2014* (SA) sch 4 pt 3 sets out the fines payable for offences against the *Australian Road Rules*. The *Motor Vehicles Regulations 2010* (SA) sch 4 sets out the number of demerit points that will be lost for offences against the Rules.

98 See, eg, *Motor Vehicles Act 1959* (SA) s 98BC(1).

99 *Australian Road Rules* pt 15.

100 See, eg, *Road Traffic Act 1961* (SA) s 47. The section makes it an offence to 'drive a vehicle ... while so much under the influence of intoxicating liquor or a drug as to be incapable of exercising effective control of the vehicle'. To 'drive' a vehicle 'includes [to] be in control of the steering, movement or propulsion of the vehicle' and 'vehicle' is defined to include a bicycle: at s 5.

## 5 Negligence

All road users, including cyclists, owe a duty of care to their fellow road users. The standard of care that cyclists must exercise is ‘reasonable care to avoid causing injury to other road users’.<sup>101</sup> Exercising such care will ordinarily include paying attention to what is happening around them<sup>102</sup> and obeying the law.<sup>103</sup> A breach of the *Road Rules* is not definitive of a breach of duty of care,<sup>104</sup> but it will be an important factor to be taken into account in determining a breach.<sup>105</sup> A failure to exercise the requisite standard of care will result in a breach of the duty to take reasonable care and the cyclist will be liable for any damage that flows from their negligent actions.

In the recent case in the Australian Capital Territory of *Franklin v Blick*, the Court found that the duty to exercise reasonable care ‘extends to exercising reasonable care to avoid running over objects on the cycleway likely to cause him to lose control of his bicycle’.<sup>106</sup> In this case, the defendant cyclist lost control after hitting a piece of wood that was lying in the cycleway. In losing control, the defendant collided with the plaintiff, who was cycling next to him. The plaintiff fell off his bicycle and was struck by a motor vehicle. The judge found that had the defendant been ‘exercis[ing] reasonable care he would have seen and avoided the piece of wood’.<sup>107</sup> The plaintiff was awarded \$1.65 million in damages.<sup>108</sup>

Motor vehicle drivers will be tortiously liable for any damage they cause to cyclists as a result of their negligence. Drivers, like cyclists, owe a duty of care to other road users. The standard of care is that of a ‘reasonable driver’.<sup>109</sup> The High Court has explained that standard in the following way:

the reasonable care that a driver must exercise when driving a vehicle on the road requires that the driver control the speed and direction of the vehicle in such a way that the driver may know what is happening in the vicinity of the vehicle in time to take reasonable steps to react to those events.<sup>110</sup>

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101 *Franklin v Blick* [2014] ACTSC 273, [73] (Burns J).

102 See, eg, *ibid* [72]–[73] (Burns J); *Nettleton v Rondeau* (2014) 67 MVR 259, 278 [75] (Hoeben CJ at CL).

103 *Cheng v Geussens* (2014) 66 MVR 268. In this case a cyclist was struck by a motor vehicle at an intersection and the trial judge could not be satisfied that either party had a green light: at 271 [2]–[3] (Basten JA). In these circumstances the cyclist’s damages were reduced by one third on the basis of his contributory negligence: at 275–6 [30]–[31] (Basten JA).

104 See *Sibley v Kais* (1967) 118 CLR 424, 427 (The Court), cited in *Russell v Chu* [2015] Aust Torts Reports ¶82-236, 69 234 [100] (Wood J).

105 *Penrith City Council v East Realisations Pty Ltd (in liq)* (2013) 63 MVR 180, 193 [53] (Tobias AJA), 184 [4] (McColl JA).

106 *Franklin v Blick* [2014] ACTSC 273, [73] (Burns J).

107 *Ibid*.

108 *Ibid* [75] (Burns J).

109 *Imbree v McNeilly* (2008) 236 CLR 510, 521 [27] (Gummow, Hayne and Kiefel JJ).

110 *Manley v Alexander* (2005) 223 ALR 228, 231 [12] (Gummow, Kirby and Hayne JJ).

In *Walton v Rowbottom*, von Doussa J explained that a ‘reasonable driver’ is not just a ‘defensive driver’, but one who *protects* other road users.<sup>111</sup> However, a driver is not required to predict every possible event that could happen around them.<sup>112</sup> Ultimately the question comes down to ‘what a reasonable driver in the ... circumstances would have done, if anything, by way of response to any foreseeable risks of injury or sources of danger to other road users’.<sup>113</sup> Answering this question will ultimately turn on the individual facts of the case.<sup>114</sup>

While cyclists owe a duty of care to other road users just like motorists, there is not a legal requirement for cyclists to hold insurance. In all states and mainland territories of Australia, motorists are required to have compulsory third party (‘CTP’) insurance.<sup>115</sup> In some jurisdictions, this is included as part of or with the car registration fee.<sup>116</sup> In general terms, CTP insurance covers drivers against claims for any loss suffered in relation to personal injury caused as a result of the driver’s negligence. Cyclists, pedestrians, and other motorists and passengers who are injured as a consequence of the negligent acts of a driver will be covered by CTP insurance. In addition to CTP insurance, many motorists also elect to take out either third party property insurance – to indemnify themselves against any damage they cause to property (including other vehicles) – or comprehensive insurance – which covers not only third party property damage, but also damage to their own vehicle.

Where a cyclist is injured in a motor vehicle accident the cyclist will be able to make a claim against the CTP insurance scheme.<sup>117</sup> Such schemes also allow claims to be made against a ‘nominal defendant’ where the identity of the negligent driver is unknown or the negligent driver uninsured. A cyclist could, for example, make a claim against the ‘nominal defendant’ where they are

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111 *Walton v Rowbottom* (Unreported, Supreme Court of South Australia, von Doussa J, 17 September 1986). Justice von Doussa explained that ‘[t]he community now requires not only a measure of defensive driving, but a measure of protective driving – to protect drivers, cyclists or pedestrians. Drivers must guard against all reasonably foreseeable dangers’. *Walton v Rowbottom* was quoted in *Fleet SA – South Australian Government Financing Authority v Thomas Luke Transport* [2014] SASC 194, [16] (Gray J) and *Murray’s Transport NSW Pty Ltd v CGU Insurance Ltd* (2013) 118 SASR 11, 36 [99] (Gray J).

112 *Warth v Lafsky* (2014) 66 MVR 445, 455–6 [55]–[56] (McColl JA), quoted in *Nettleton v Rondeau* (2014) 67 MVR 259, 271–2 [52] (Hoeben CJ at CL).

113 *Marien v Gardiner* (2013) 66 MVR 1, 10 [34] (Meagher JA), quoted in *Warth v Lafsky* (2014) 66 MVR 445, 455–6 [55] (McColl JA).

114 *Kigetzis v Roche* (2014) 69 MVR 282, 284–5 [6] (Rush J).

115 It is an offence to drive a motor vehicle that does not have the requisite CTP insurance: *Road Transport (Third-Party Insurance) Act 2008* (ACT) s 17; *Motor Accidents Compensation Act 1999* (NSW) s 8; *Motor Vehicles Act 1949* (NT) s 13A and *Traffic Act 1987* (NT) s 33; *Motor Accident Insurance Act 1994* (Qld) s 20; *Motor Vehicles Act 1959* (SA) ss 99A, 102; *Motor Accidents (Liabilities and Compensation) Act 1973* (Tas) s 29; *Transport Accident Act 1986* (Vic) s 109 and *Road Safety Act 1986* (Vic) s 7; *Motor Vehicle (Third Party Insurance) Act 1943* (WA) s 4.

116 See, eg, *Motor Vehicles Act 1949* (NT) s 13A; *Motor Vehicles Act 1959* (SA) s 99A; *Transport Accident Act 1986* (Vic) s 109. In some jurisdictions where the insurance is part of the registration fee, the offence is simply one of driving an unregistered vehicle.

117 See, eg, *Motor Accidents Compensation Act 1999* (NSW) s 10; *Motor Vehicles Act 1959* (SA) s 104.

injured in a motor vehicle accident and the driver flees the scene and cannot be identified.<sup>118</sup>

In contrast, cyclists are not required to hold CTP insurance. The decision to take out insurance is up to the individual cyclist. Some cycling bodies provide public liability insurance to their membership as part of the membership fee, which typically covers third party injury and damage to third party property.<sup>119</sup> In addition, some home insurance policies will also cover liability for third party injury and damage to third party property where a bicycle is insured as part of the contents of the home. The case of *Franklin v Blick* – in which a cyclist was found to be liable for damages in excess of \$1.65 million for the injuries caused to another cyclist – highlights the importance of cyclists having adequate insurance coverage. In that case, the defendant was insured as part of his membership of Pedal Power – a cycling community and advocacy group in the Australian Capital Territory. After the Court’s decision there was reportedly an increase in cyclists taking up insurance.<sup>120</sup>

While cyclists may *in theory* be liable for the damage caused as a result of their negligence, the likelihood of another road user or pedestrian being able to make a claim against a negligent cyclist might well depend on the wealth of the cyclist; there is no point commencing litigation against an impecunious or uninsured cyclist. In *Hollis v Vabu Pty Ltd* the plaintiff, a pedestrian, was struck by a courier cyclist and suffered injury as a result of the accident.<sup>121</sup> The courier rider was never identified, but they were wearing a uniform of the defendant company, Vabu Pty Ltd. The question in the case was whether the courier was an employee of the defendant and therefore whether the defendant company was vicariously liable for the actions of the courier rider. In joining with the decision of the majority, McHugh J noted that from a practical perspective holding the (insured) defendant company liable ‘provides people in [the plaintiff’s] position with *effective* compensation’,<sup>122</sup> especially in a case where the courier rider could not be identified. However, McHugh J also remarked that ‘even if [the courier rider] could be identified, it is likely that he and other couriers would be unable to provide adequate compensation for their victims. Because that it so, the company is likely to be a “more promising source of recompense” than the

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118 See, eg, *Motor Accidents Compensation Act 1999* (NSW) s 34; *Motor Accident Insurance Act 1994* (Qld) s 31(1)(d); *Motor Vehicles Act 1959* (SA) s 115. For the history of the development of the ‘nominal defendant’ in Australia and its origins see: Alex C Castles, ‘Legislative Reform of the Nominal Defendant Provisions of the Motor Car Act’ (1955) 7 *Res Judicatae* 153.

119 See, eg, Bicycle SA, *Membership and Insurance Cover* (2015) <<http://www.bikesa.asn.au/joinorrenewtoday>>.

120 Matthew Raggatt, ‘Pedestrian Case Sparks Cyclist Insurance Calls’, *The Canberra Times* (online), 24 January 2015 <<http://www.canberratimes.com.au/act-news/pedestrian-case-sparks-cyclist-insurance-calls-20150113-12np1y.html>>.

121 *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21, 25–6 [2] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

122 *Ibid* 56 [89] (emphasis in original).

individual couriers'.<sup>123</sup> The same might be said for cyclists and road users more generally – an insured party is a 'more promising source of recompense'.

A recent incident in New South Wales in which a pedestrian was hit by a cyclist (and left with a \$15 000 medical bill) has led to calls for cyclists to be required to have CTP insurance as part of a registration and licensing scheme for bicycles (in much the same way as for motor vehicles).<sup>124</sup> Similar incidents have led to these calls in other parts of Australia.<sup>125</sup> Following the incident in New South Wales, the Government convened a series of roundtables with motorists, cyclists and pedestrians on the issue of bicycle safety. It was reported to be seriously considering the issue of the creation of a compensation fund (funded by a levy, tax or fines) and requiring all cyclists over a specified age (16 or 18) to carry identification.<sup>126</sup> Compulsory identification was suggested because of the perceived difficulties in implementing any registration or licensing scheme. These proposals were met with hostility from some bicycle groups. Bicycle Network claimed that the Government's proposals would only provide a disincentive to taking up cycling, where the actual numbers of pedestrian casualties caused by cyclists where the cyclist leaves the scene are small.<sup>127</sup> As is discussed below, compulsory identification was announced in March 2016, although its implementation delayed by 12 months. The government stated two intentions behind the change: to assist rider identification in an emergency, and to assist New South Wales police to identify riders they believe have broken the road rules.<sup>128</sup>

## 6 Registration and Licensing

As recent debates in New South Wales demonstrate, tension between motorists and cyclists often manifests in a debate over whether cyclists should pay 'registration' fees, or be licensed. For instance, in January 2012, after a cyclist allegedly hit his car and abused him, an angry Shane Warne took to Twitter calling for bike riders to pay 'rego' so he would have the cyclist's number plate.<sup>129</sup> A lengthy public debate about the merits of the proposal followed.

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123 Ibid.

124 Jacob Saulwick, 'Compulsory Insurance for Cyclists: NSW Government Considers Schemes', *The Sydney Morning Herald* (online), 2 October 2015 <<http://www.smh.com.au/nsw/compulsory-insurance-for-cyclists-nsw-government-considers-schemes-20151002-gjztv2.html>>.

125 Raggatt, above n 120.

126 Saulwick, 'Compulsory Insurance for Cyclists', above n 124; Jacob Saulwick, 'Cyclists To Be Required To Carry Photo Identification under NSW Government Proposal', *The Sydney Morning Herald* (online), 15 July 2015 <<http://www.smh.com.au/nsw/cyclists-to-be-required-to-carry-photo-identification-under-nsw-government-proposal-20150714-gibwil.html>>.

127 Saulwick, 'Compulsory Insurance for Cyclists', above n 124.

128 New South Wales Centre for Road Safety, *Go Together* (5 January 2016) Transport for New South Wales <<http://www.roadsafety.transport.nsw.gov.au/campaigns/go-together/index.html>>

129 Nick Galvin, 'Warne's Bicycle Rego Demand Belted for Six', *The Sydney Morning Herald* (online), 21 January 2012 <<http://www.smh.com.au/sport/cycling/warnes-bicycle-rego-demand-belted-for-six-20120120-1qa7o.html>>.

Those in favour of a registration and/or licensing system argue that it can perform a number of purposes. It is argued that it can be used to help identify breaches of the *Road Rules*; that it can be used as payment towards road infrastructure that is used by cyclists as well as motorists; that it could be used to fund compulsory third party insurance for damage caused by cyclists; or that it could be used to regulate the quality of cyclists through an initial 'cycling test'.

In addition to these instrumental roles, and as the tenacity of the debate evidences, a registration and/or licensing system could also play an important *symbolic* role. A registration/licensing system could recognise that cyclists are equal, and therefore must be *responsible*, road users. It may also provide recognition that while cycling may be a vulnerable and desirable form of transport, and therefore cyclists have legitimate reasons for calling for increased government protection, they are also a potential danger to others.

Despite its prominence in public debates, registration has not been widely adopted in other jurisdictions. Where it has been adopted, it has been done for limited purposes. In Japan and Milwaukee registration is required as an anti-theft measure.<sup>130</sup> In Honolulu, registration and a one-off fee is used as a revenue-raising measure to fund bicycle-related projects.<sup>131</sup>

In most jurisdictions, the disadvantages of a registration/licensing system are usually perceived to outweigh the arguments in favour of its adoption. Cycling is recognised at a governmental level as a desirable form of transport and recreational activity. Governments are actively investing money (for example in infrastructure) to *encourage* cycling, with its social, health (both physical and mental), environmental, economic and other community benefits. There are concerns that requiring a licence or registration may reduce participation in this activity. Cyclists (and prospective cyclists) may be unwilling to pay a cycling registration/licence fee in addition to car licensing and registration (most adult cyclists – over 80 per cent – also own a motor vehicle and have a motor vehicle licence<sup>132</sup>). There is also the question of how a registration fee would be applied to children. Cyclists may be put off taking up cycling by an additional administrative hurdle. It is also argued that cyclists cause little wear and tear on infrastructure in comparison to any other road users (although similar arguments could be made about motorcycles and cars). In any event, it is unlikely that a cycling registration fee would provide anything more than a symbolic contribution to building or maintaining cycling infrastructure. Finally, administration and enforcement would be difficult and costly. There would be bureaucratic costs associated with establishing and then administering a scheme. Enforcement of the scheme could also be difficult and may turn out to be largely ineffective unless significant police resources were dedicated to it.

One possible way of simplifying the registration fee would be to make it a one-off fee payable on the purchase of every new bicycle. However, this might

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130 Transport, Housing and Local Government Committee, above n 17, 102–3.

131 *Ibid* 103.

132 *Ibid* 104.

not provide a sufficient source of funding if the registration fee was also to include CTP insurance. Further, it may also unfairly burden those who wish to purchase more than one bicycle, or need to replace existing bicycles, for example, for children as they grow out of existing bicycles.

Despite being routinely rejected by governments, motor vehicle clubs, and cycling groups, the idea of a registration or licensing system often becomes the fulcrum for public debate. In 2013, a Queensland parliamentary committee observed:

The Committee is concerned that the continuing debate over whether bicycles should be registered is not in the interests of improving interaction between cyclists and other road users and that the reasons bicycles are not subject to registration is [sic] little understood by motorists. The Committee is also concerned that the debate takes the focus away from the real issues and improvements that are required to make cycling a mainstream activity, thereby improving the interaction between cyclists and other road users.

The Committee is therefore recommending that the Minister for Transport and Main Roads make a public statement clearly outlining the reasons the Government has decided not to introduce bicycle registration.<sup>133</sup>

## C Challenges of Law Reform

A review of the road rules across the Australian jurisdictions shows that while many of the road rules that apply to drivers of motor vehicles also apply to cyclists, there are also some important differences. Some of these differences are simply a reflection of the obvious physical differences between a motor vehicle and a bicycle (for example, the fact that bicycles do not have indicators). However other differences in the laws that apply to cyclists reflect an acknowledgement by the community that cyclists are vulnerable road users, and to be safe on the road, they need additional protections. Often laws to protect cyclists have come as a response to community concern over tragic instances that reinforce this vulnerability. However, even as the law has moved to protect cyclists, there have been counterpressures to ensure that cyclists have the same responsibilities as other road users. This reflects a reasonable expectation that cyclists will be responsible for their own safety and the safety of other road users, but may also be the manifestation of an underlying tension within the community about the legal status of cyclists on Australia's roads.

### 1 Community Animosity

Despite their status as legitimate road users under the law, there is still some scepticism within the community, and a 'car-centric' attitude often pervades. This attitude is acknowledged, for example, in the South Australian Government's publication on 'Cycling & the Law', which states:

- Although the law gives you the same rights and responsibilities as other road users, other road users may not be aware of this.

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133 Ibid 106.

- You are more easily injured than motor vehicle occupants and it is therefore safer for you to be highly visible and look out for other road users when riding. ...
- Some people will judge all bicycle riders by your actions. If you disregard the road rules, you can undermine the goodwill of other road users.<sup>134</sup>

Despite the legal recognition afforded cyclists, these warnings demonstrate the dangerous dance that cyclists perform with motorists when they take to the roads. On the road, cyclists will often find that power, size, skills and goodwill are more important than legal rights. These warnings also suggest there could be a community perception that cyclists disregard the road rules more so than drivers.<sup>135</sup> However, a study (n = 61) in South Australia over a three year period (2008–10) revealed that motorists were responsible for 79 per cent of accidents (not just fatalities) involving cyclists.<sup>136</sup>

Community animosity against special legal treatment of cyclists, particularly where it extends beyond treating cyclists the same as other road users, is often evident. In Australia, unlike in a number of foreign jurisdictions,<sup>137</sup> governments have largely resisted calls for a relaxation of road rules as they apply to cyclists (although as outlined above, some of the rules have been). For example, cyclists, like motor vehicles, must come to a stop at a stop sign and are not allowed to come to a ‘rolling stop’ that allows them to continue their momentum.<sup>138</sup> News of the opening of a new bike lane<sup>139</sup> or a change in the

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134 Department of Planning, Transport and Infrastructure (SA), *Cycling & the Law* (Guide, 25 October 2015) 8–9 <[https://www.sa.gov.au/\\_\\_data/assets/pdf\\_file/0020/23438/DPTI-Cycling-and-the-Law-Booklet\\_ALT5.pdf](https://www.sa.gov.au/__data/assets/pdf_file/0020/23438/DPTI-Cycling-and-the-Law-Booklet_ALT5.pdf)>.

135 These perceptions were reinforced in a recent episode of the game show *Family Feud* in which contestants were asked, ‘What is something annoying that cyclists might do?’: see Lucy Cormack and Tom Decent, ‘Family Feud Question about “Something Annoying a Cyclist Might Do” Causes Backlash’, *The Sydney Morning Herald* (online), 13 January 2015 <<http://www.smh.com.au/entertainment/tv-and-radio/family-feud-question-about-something-annoying-a-cyclist-might-do-causes-backlash-20150114-12niow.html>>.

136 V L Lindsay, ‘Injured Cyclist Profile: An In-Depth Study of a Sample of Cyclists Injured in Road Crashes in South Australia’ (Report No CASR112, Centre for Automotive Safety Research, January 2013) 1, 8 <<http://casr.adelaide.edu.au/publications/list/?id=1346>>.

137 Such as Idaho. See Transport, Housing and Local Government Committee, above n 17, 48–9.

138 Recommendations made by a Queensland parliamentary committee to reform these rules were rejected by the Government on the basis that there was little data and research on the safety of both measures: *Response to the Transport, Housing and Local Government Committee’s Report No 39*, above n 53, 12.

139 This was recently the case in South Australia: Jordanna Schriever, ‘Drivers and Cyclists Divided over New Frome St, City, Bike Lane’, *The Advertiser* (online), 15 May 2014 <<http://www.adelaide.com.au/news/south-australia/drivers-and-cyclists-divided-over-new-frome-st-city-bike-lane/story-fni6uo1m-1226917054919>>.

law<sup>140</sup> that is perceived to benefit cyclists at the expense of drivers is often met with hostility by some drivers. This response can lead to an ‘us-and-them’ tension between cyclists and drivers.

The underlying tension between cyclists and other road users that manifests in these public debates has not stopped governments reforming the law to further protect cyclists. However, there is evidence that it informs this reform. For example, when Queensland introduced the minimum passing distance rules in 2014, it *also* introduced at the same time increases in fines for cyclists who disobey the road rules. When it was under consideration by a parliamentary committee, one cycling group had actually opposed the minimum passing distance on the basis it may ‘elevate the level of animosity between cyclists and road users’.<sup>141</sup> By implementing the Committee’s report in a way that both emphasised the vulnerability and therefore special nature of cyclists, while at the same time being seen to be tough on cyclists who do the wrong thing, the Queensland government was clearly navigating the politics of community attitudes to cycling and law reform in this sphere.<sup>142</sup>

Similar politics can be seen at play in other states. In South Australia, where the mandatory minimum passing laws were introduced on a permanent basis in October 2015 as part of a package of cycling-friendly laws (including removal of the prohibition on cycling on footpaths), with no similar increase in penalties or obligations on cyclists, the changes have been controversial. Independent MP John Darley indicated he would bring a motion to disallow the changes in Parliament.<sup>143</sup>

Following the bicycle safety roundtables in New South Wales in 2015, the Government indicated it was poised to introduce minimum passing distance laws. After the roundtables it was reported that ‘[government] representatives have also made it clear the government does not only intend to introduce cycling-friendly policies’.<sup>144</sup> As part of those roundtable discussions, increased penalties and mandatory carriage of identification were also under consideration. In late 2015,

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140 For example, the change in the law in Queensland that requires drivers to allow a minimum distance of one metre when overtaking a cyclist: Michael O’Reilly, ‘Cyclists Win Battle for a Metre Passing Law’, *The Sydney Morning Herald* (online), 2 December 2013 <<http://web.archive.org/web/20140831100419/http://www.smh.com.au/executive-style/fitness/on-your-bike/cyclists-win-battle-for-a-metre-passing-law-20131202-2yk8s.html>>. The comments left by readers at the bottom of this story provide a good example of the tension that exists between cyclists and drivers. While these views might not be a proportionate representation of community attitudes, they do demonstrate the divergence of views.

141 Transport, Housing and Local Government Committee, above n 17, 26.

142 This conclusion is supported by the explanatory notes to the *Transport Legislation and Another Regulation Amendment Regulation (No 1) 2014* (Qld). The notes acknowledged the need to ‘increase safety for cyclists’, while quoting from the Committee’s report that ‘the current imbalance between cyclists and other vehicle drivers in relation to infringement penalties warrants review’: Explanatory Notes, *Transport Legislation and Another Regulation Amendment Regulation (No 1) 2014* (Qld) 1, quoting Transport, Housing and Local Government Committee, above n 17, 100.

143 ‘New SA Cycling Laws Allowing Riders on Footpaths “Too Costly and Dangerous”’, *ABC News* (online), 26 October 2015 <<http://www.abc.net.au/news/2015-10-26/new-sa-cycling-laws-too-costly-and-dangerous/6886526>>.

144 Saulwick, ‘Cyclists To Be Required To Carry Photo Identification’, above n 126.

the New South Wales Government announced a ‘new cycling package to improve safety for all road users’.<sup>145</sup> The package – launched by the Government as the ‘Go Together’ campaign – included the introduction of minimum passing distances along the same lines as those recently introduced in other jurisdictions.<sup>146</sup> However, the changes to the law also include increases to penalties for cyclists who disobey the rules of the road,<sup>147</sup> make it compulsory for adult cyclists to carry photo identification<sup>148</sup> and introduce a new recommended safe passing distance for cyclists passing pedestrians on a shared path.<sup>149</sup> In announcing these changes, the Minister described the package as ‘striking a balance for everyone on the roads and footpaths’.<sup>150</sup> The introduction of these measures as a ‘package’ – some of which are seen to give cyclists special treatment and some of which are seen to treat cyclists in the same way as motorists – might be a response to the tensions that can exist between cyclists and other road users and an attempt to avoid creating the impression that cyclists are receiving special treatment. Cycling advocates have strongly opposed the increase in penalties and argued that the requirement for adult cyclists to carry identification is unnecessary.<sup>151</sup>

## 2 Law Reform to Protect Cyclists

The relative size, power and weight of a motor vehicle when compared to a bicycle make cyclists vulnerable road users. If the law is to treat all road users equally in a practical sense – that is, in the sense that all road users are able to use the road safely – uniform application of the law to all road users is insufficient. For all road users to be able to travel safely, there is a need for different law for more vulnerable road users.

The Bicycle Victoria review of cycling deaths in 2002 stated that four actions of other road users that can contribute to the dangers of cycling were handheld

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145 Duncan Gay, Minister for Roads, Maritime and Freight (NSW), ‘Wheeling out New Cycling Safety Package’ (Media Release, 21 December 2015) <<http://www.transport.nsw.gov.au/sites/default/files/b2b/media/Wheeling%20out%20new%20cycling%20safety%20package.pdf>>.

146 Ibid.

147 Ibid. The penalties for the following offences have been increased: not wearing a helmet (from \$71 to \$319); running a red light (from \$71 to \$425); riding dangerously (from \$71 to \$425); holding onto a moving vehicle (from \$71 to \$319); not stopping at children’s/pedestrian crossing (\$71 to \$425).

148 Ibid. The rationale for this change is so that cyclists ‘can be identified in an emergency or if they break the road rules’.

149 Ibid.

150 Ibid.

151 Those opposing the requirement to carry identification have described it as ‘draconian’ and have suggested New South Wales will become ‘the laughing stock of the world’. Those opposing the requirement have argued that if the law is about identifying those involved in a road accident, pedestrians are not required to carry identification. Further, it has been argued that cyclists who break the law can be stopped by police and fined irrespective of whether they are carrying identification, making the carrying of identification by cyclists unnecessary: see ‘Cycling Laws: NSW To Become “Laughing Stock of the World” over Push for Bike Riders to Carry ID’, *ABC News* (online), (22 December 2015) <<http://www.abc.net.au/news/2015-12-22/new-south-wales-plan-for-cyclists-to-carry-id/7048244>>.

mobile phone use, speeding, sleep deprivation and drink or drug driving.<sup>152</sup> All of these actions are offences under state legislation or regulations.<sup>153</sup> Beyond these offences, there have been a number of recent instances where states have reformed the law in a manner that reinforces a community commitment to protect cyclists. This sits in contradistinction to the community attitudes that we have explored above when the law treats cyclists as privileged road users. Many of these reforms have been in direct response to motor vehicle–bicycle accidents that have shocked the community and overcome any underlying opposition to differential and special treatment. These reforms have included the creation of new offences as well as increasing the penalty for a number of existing offences.

In 2005 in Victoria, the penalty for a driver involved in an accident failing to stop and render assistance was increased from two to ten years.<sup>154</sup> The increase in penalty was in response to several hit-and-run incidents, one of which involved a cyclist.<sup>155</sup> (The Opposition sought an even tougher response, seeking the penalty to be increased even further to 20 years;<sup>156</sup> however, the amendment did not receive Government support.<sup>157</sup>)

In South Australia similar reforms were introduced following recommendations of the Kapunda Road Royal Commission.<sup>158</sup> The Commission was set up to investigate the circumstances surrounding the hit-and-run accident involving cyclist Ian Humphrey. The driver, Eugene McGee – a lawyer in Adelaide – had hit Humphrey and failed to stop and render assistance. It was alleged that Mr McGee had deliberately avoided attempts by police to locate and question him. The *Criminal Law Consolidation Act 1935* (SA) was amended to include a new provision that made it an offence to leave the scene of an accident after causing serious injury or death that resulted from driving without due care and attention.<sup>159</sup> The *Road Traffic Act 1961* (SA) was also amended so that the

152 Bicycle Victoria, *30:30:30 – Cyclists: Motorists: Government – Bicycle Victoria’s Report into Cycle Deaths in Victoria* (30 May 2002) 3, 19 <[https://www.bicyclenetwork.com.au/media/vanilla\\_content/files/2002\\_Deaths\\_report.pdf](https://www.bicyclenetwork.com.au/media/vanilla_content/files/2002_Deaths_report.pdf)>.

153 Using a mobile phone while driving is an offence under the *Australian Road Rules* r 300. It is an offence to disobey the speed limit: r 20. Driving while sleep deprived would amount to at least a charge of careless driving: see, eg, *Road Traffic Act 1961* (SA) s 45; *Road Safety Act 1986* (Vic) s 65. Drivers must not drive under the influence of alcohol or drugs: see, eg, *Road Traffic Act 1961* (SA) pt 3 div 5; *Road Transport Act 2013* (NSW) pt 5.1; *Road Safety Act 1986* (Vic) pt 5.

154 *Road Safety (Further Amendment) Act 2005* (Vic) s 5, amending the *Road Safety Act 1986* (Vic) s 61.

155 In January 2005, cyclist Matthew Cole was hit by a driver who had momentarily fallen asleep at the wheel: ‘Ex-State Cricketer Jailed on Cyclist Hit-Run Death’, *Herald Sun* (online), 3 August 2007 <<http://www.heraldsun.com.au/news/victoria/ex-cricketer-jailed-on-hit-run/story-e6frf7kx-1111114100852>>.

During the Second Reading debate, reference was made to the deaths of pedestrians James Donnelly and Andrew Knowles, both of whom were the victims of hit-and-run incidents: Victoria, *Parliamentary Debates*, Legislative Assembly, 24 May 2005, 1300 (Terence Mulder).

156 Victoria, *Parliamentary Debates*, Legislative Assembly, 24 May 2005, 1297, 1300 (Terence Mulder).

157 *Ibid* 1317 (Peter Batchelor, Minister for Transport).

158 The purpose of the *Statutes Amendment (Vehicle and Vessel Offences) Act 2005* (SA) was, in part, to implement some of the recommendations of the Royal Commission: South Australia, *Parliamentary Debates*, Legislative Council, 24 November 2005, 3213 (Paul Holloway, Minister for Industry and Trade).

159 *Criminal Law Consolidation Act 1935* (SA) s 19AB.

driver of a vehicle involved in an accident in which a person is killed or injured must not only render assistance but must also present themselves to police (either at the scene of the accident or at a police station) within 90 minutes of an accident and submit to any drug or alcohol testing.<sup>160</sup> The amendments also increased the penalty for the offence of causing death or harm by use of a vehicle so that the most serious of these offences would carry the same maximum penalty (of life imprisonment) as manslaughter.<sup>161</sup> In 2013, Justice Anne Bampton of the South Australian Supreme Court was found to be driving under the influence of alcohol when she hit a cyclist. The public outrage that ensued over the lack of formal disciplining Bampton received perhaps reflected the community's continuing concern over the danger posed by motor vehicles to cyclists and other vulnerable road users.<sup>162</sup>

Further amendments were made to Victorian road laws that affected cyclists: they became subject to dangerous driving laws and have a duty to 'render ... assistance'.<sup>163</sup> These reforms were not about protecting cyclists, but ensuring that cyclists had the same responsibilities as drivers. This is further evidence that while the community accepts that cyclists can be *vulnerable* road users, particularly in the wake of a tragic accident, there is also a strong community expectation that they will be *responsible* road users.

In 2010 a Melbourne cyclist was killed after a collision with a car door knocked him into traffic and he was run over by a truck.<sup>164</sup> The *Australian Road Rules* make 'dooring' an offence, that is: 'A person must not cause a hazard to any person or vehicle by opening a door of a vehicle, leaving a door of a vehicle open, or getting off, or out of, a vehicle'.<sup>165</sup> Previously, the penalty attached to the offence of 'dooring' was only three penalty units.<sup>166</sup> Partly in response to the death of the cyclist in 2010,<sup>167</sup> in 2012 a private member's Bill, the Road Safety Amendment (Car Doors) Bill 2012 (Vic), attempted to increase the penalty – to

160 *Road Traffic Act 1961* (SA) s 43. The amendments also increased the maximum penalty for failing to render assistance from one to five years: South Australia, *Parliamentary Debates*, Legislative Council, 24 November 2005, 3214 (Paul Holloway, Minister for Industry and Trade).

161 *Criminal Law Consolidation Act 1935* (SA) s 19AA. The maximum penalty for manslaughter is life imprisonment: s 13.

162 See, eg, Sean Fewster, 'Hit-Run Widow Di Gilchrist Says SA Courts' Response to Concern over Drink-Driving Judge "Insulting"', *Adelaide Advertiser* (online), 9 December 2013 <<http://www.adelaidenow.com.au/news/south-australia/hitrun-widow-di-gilchrist-says-sa-courts-response-to-concern-over-drinkdriving-judge-insulting/story-fni6uo1m-1226778997037>>.

163 In 2009 the *Road Legislation Amendment Act 2009* (Vic) invested a new provision – s 61A – in the *Road Safety Act 1986* (Vic) to require drivers of 'specified vehicles' to render assistance where they are involved in an accident. The definition of 'specified vehicles' includes a bicycle: *Road Safety Act 1986* (Vic) s 61A(8).

164 Adam Cooper, 'Cyclists Plead on "Dooring" Penalties: Push To Raise Fines, Demerit Points', *The Age* (Melbourne), 24 May 2012, 6.

165 *Australian Road Rules* r 269.

166 'Penalty units' are calculated in accordance with the *Monetary Units Act 2004* (Vic). As a guide, from 1 July 2015 to 30 June 2016 one penalty unit is \$151.67: Victoria Legal Aid, *Penalty Units* (30 June 2015) <<http://www.legalaid.vic.gov.au/find-legal-answers/fines-and-infringements/penalty-units>>.

167 Express mention was made of the 2010 'dooring' incident that resulted in the death of the cyclist: Victoria, *Parliamentary Debates*, Legislative Council, 8 February 2012, 75–6 (Gregory Barber).

10 penalty units and three demerit points. The Bill did not pass. However, while the Bill was being considered by the Legislative Council's Economic and Infrastructure Legislation Committee,<sup>168</sup> the Government amended the *Road Safety Road Rules 2009* (Vic) – the regulations implementing the *Australian Road Rules* in Victoria – to increase the penalty to 10 penalty units.<sup>169</sup>

There are still steps that could be taken to offer greater protection for cyclists. In this respect, Australia is often compared to foreign jurisdictions that have done more. For example in the United States, some states have trialled a prohibition on cyclists using headsets or earphones in both ears.<sup>170</sup> Many jurisdictions in the United States and Europe have also introduced fixed distance passing laws.<sup>171</sup> In most states of Australia, the requirement is for a 'safe distance'.<sup>172</sup> In 2014, Queensland implemented a two year trial of 'fixed minimum distance' passing laws, requiring a minimum distance of one metre when the speed limit is not more than 60km/h and 1.5 metres when the speed limit is above 60km/h.<sup>173</sup> In 2015, the Australian Capital Territory adopted a similar trial and South Australia has now adopted it on a permanent basis.<sup>174</sup> The cycling community is, however, still divided on the issue. Some cycling advocates have argued that the Australian position is, in fact, stronger for cyclist protection as 'safe passing distance' will take into account a number of factors including speed of the passing vehicle.<sup>175</sup> Some lobby groups argue that there is no evidence a mandated passing distance will improve behaviour towards cyclists.<sup>176</sup>

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168 Legislative Council Economy and Infrastructure Legislation Committee, Parliament of Victoria, *Inquiry into the Road Safety Amendment (Car Doors) Bill 2012* (2012) 5.

169 *Road Safety Road Rules Amendment (Car Doors) Rules 2012* (Vic). See *Road Safety Road Rules 2009* (Vic) r 269(3).

170 Petty, above n 39, 210.

171 Amy Gillett Foundation, 'Minimum Overtaking Distance – AGF Position, Rationale and the Evidence' (Media Release, 2, 15 November 2013) 15–21 <<http://www.amygillett.org.au/wp-content/uploads/2015/09/Minimum-Overtaking-Distance-AGF-position-rationale-and-the-evidence-3.pdf>>. A 'fixed distance passing law' is a law that explicitly states the minimum distance that a motor vehicle must leave when overtaking a cyclist.

172 *Australian Road Rules* r 144. Rule 144 applies to both motor vehicles and bicycles (r 19) and states: 'A driver overtaking a vehicle ... must pass the vehicle at a sufficient distance to avoid a collision with the vehicle or obstructing the path of the vehicle'.

173 *Transport Operations (Road Use Management – Road Rules) Regulation 2009* (Qld) reg 144A.

174 *Road Transport (Safety and Traffic Management) Regulation 2000* (ACT) reg 38A; *Road Traffic (Road Rules – Ancillary and Miscellaneous Provisions) Regulations 2014* (SA) reg 11A.

175 Lucy Martin, 'Cycling Safety: Debate over Mandating a Safe Distance for Overtaking Cyclists in WA', *ABC News* (online), (17 March 2014) <<http://www.abc.net.au/news/2014-03-17/improving-safety-for-cyclists/5326094>>.

176 Bicycle Network takes this position: see Alan Davies, 'Cycling: Is the One Metre Overtaking Rule Good Policy?' on *Crikey* (5 December 2013) <<http://blogs.crikey.com.au/theurbanist/2013/12/05/is-the-minimum-one-metre-overtaking-rule-good-policy/>>; Bicycling Western Australia also takes the view that the one metre overtaking laws are ineffective: Bicycling Western Australia, *Legislation* (2016) <<https://www.bwa.org.au/bikes-and-riding/735/>>.

## V REGULATING THE ENVIRONMENT

Once cyclists were accepted as legitimate public road and path users, they gained important rights to have those environments maintained to ensure safe bicycle use.<sup>177</sup> Early examples of this included legislation that prevented creating hazards for cyclists (in the United States in the mid-1890s it was apparently popular to lay broken glass or other hazards to puncture pneumatic tyres),<sup>178</sup> or from driving vehicles with narrow wheels that would create dangerous ruts in the road surface.<sup>179</sup>

This section examines the development of the law with respect to the duty of public authorities to maintain roads. While that duty is limited by statute, there is a clear obligation on road authorities to carry out repairs where they have knowledge of a particular risk or hazard. A review of the case law in this area reveals that courts will also closely examine the conduct of cyclists to determine if they are contributorily negligent.

### A Road Design and Maintenance

In Australia, the responsibility for maintaining roads has traditionally been the responsibility of both local<sup>180</sup> and state government authorities,<sup>181</sup> and this continues to be the case.<sup>182</sup> Historically, local government authorities have also had the power to make by-laws with respect to regulating bicycle use upon streets and footpaths.<sup>183</sup>

Today in Australia the legal rights of cyclists against a public authority for the maintenance of their environment are regulated by the law of torts and the

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177 Petty, above n 39, 192.

178 Ibid 196.

179 Ibid 197. In South Australia the *Municipal Corporations Act 1861* (SA) s 197 stated that '[n]o person shall damage any ... bridge, road, street ... within the [City of Adelaide]'.

180 In South Australia, see, eg, *Municipal Corporations Act 1861* (SA) s 89; *Local Government Act 1934* (SA) s 314, as repealed by *Local Government (Implementation) Act 1999* (SA) s 6(i). In Queensland, see, eg, *Local Government Act 1936* (Qld) s 30.

181 See, eg, *Roads Act 1849* (SA).

182 For example, in South Australia the Commissioner of Highways may 'carry out roadwork in relation to a road vested in or under the care, control and management of the Commissioner': *Highways Act 1926* (SA) s 26(5). In Queensland a more onerous obligation is placed on the chief executive of the department administering the *Transport Infrastructure Act 1994* (Qld) with respect to government supported transport infrastructure. Section 9 of the Act states that the 'chief executive *must* ensure that ... the construction [and] maintenance ... of all government supported transport infrastructure ... takes into account best practice and national benchmarks' (emphasis added). This requirement relates to road transport infrastructure and raises the question whether it places an additional duty on the government with respect to road transport infrastructure construction and maintenance, and how such obligations would be enforced. It also raises the question as to whether it places any additional or higher duty on the government beyond the tortious liability of public authorities with respect to the negligent construction and maintenance of road transport infrastructure. The liability of public authorities is discussed further below.

183 See, eg, the *Municipal Corporations Act 1890* (SA) s 314. The section gave the local municipal corporations the power to make by-laws '[f]or regulating or prohibiting the use of bicycles and other velocipedes in or upon the streets, roadways, and footways'.

liability of public authorities (such as state governments and local authorities) for negligence.<sup>184</sup>

As a general rule, governments and their authorities are tortiously liable in the same way as ordinary citizens. However, public authorities inhabit a very different conceptual status from the individual. They have responsibilities ‘to protect and further societal (or “public”) interests’.<sup>185</sup> While this position could lead to arguments that public authorities therefore owe a stricter duty to members of the public, in law it has led to a position where the duties placed on public authorities are less strict. This is justified on the basis that public authorities must prioritise interests of the public and in doing so they must be given some leeway when that prioritisation results in harm to some individuals.<sup>186</sup> A state government will need to make a budgetary decision as to how much they can spend on the maintenance of roads in a financial year, and that decision will affect other decisions, for example, those they must make about the allocation of funding to schools.

In determining whether a public authority has been negligent in the construction or maintenance of roads and paths for cyclists the court will ask whether the harm caused to the cyclist is reasonably foreseeable (the standard legal formulation), but this will not be sufficient. In *Graham Barclay Oysters Pty Ltd v Ryan*,<sup>187</sup> Gleeson CJ explained:

In the case of a governmental authority, it may be a very large step from foreseeability of harm to the imposition of a legal duty, breach of which sounds in damages, to take steps to prevent the occurrence of harm. And there may also be a large step from the existence of power to take action to the recognition of a duty to exercise the power. Issues as to the proper role of government in society, personal autonomy, and policies as to taxation and expenditure may intrude. Even where a statute confers a specific power upon a public authority in circumstances where mandamus will lie to vindicate a public duty to give proper consideration to whether to exercise the power, it does not follow that the public authority owes a duty to an individual, or a class of persons, in relation to the exercise of the power.<sup>188</sup>

In *Brodie v Singleton Shire Council*,<sup>189</sup> Gaudron, McHugh and Gummow JJ considered the extent to which people might be expected to avoid hazards on roadways:

The discharge of the duty involves the taking by the authority of reasonable steps to prevent there remaining a source of risk which gives rise to a foreseeable risk of harm. Such a risk of harm may arise from a failure to repair a road or its surface, from the creation of conditions during or as a result of repairs or works, from a failure to remove unsafe items in or near a road, or from the placing of items upon

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184 These *legal rights* are obviously distinct from the moral claim of cyclists against such authorities to provide safe and separate paths and networks in which cyclists are the primary users. The debate over this moral claim occurs in the public and political realm, not the courts.

185 Kit Barker et al, *The Law of Torts in Australia* (Oxford University Press, 5<sup>th</sup> ed, 2012) 584.

186 P Vines, ‘Straddling the Public/Private Divide: Tortious Liability of Public Authorities’ (2010) 9 *Judicial Review* 445, 449.

187 (2002) 211 CLR 540.

188 *Ibid* 555 [9].

189 (2001) 206 CLR 512.

a road which create a danger, or the removal of items which protect against danger.

In dealing with questions of breach of duty, whilst there is to be taken into account as a 'variable factor' the results of 'inadvertence' and 'thoughtlessness', a proper starting point may be the proposition that the persons using the road will themselves take ordinary care.<sup>190</sup>

Since 2002, the liability of public authorities for negligence claims has been limited in most Australian jurisdictions, and when determining the existence of a duty and the question of its breach, the legislation requires the court to consider the overall financial and other resources available to the public authority. The test for breach is now formulated restrictively so that liability will only lie where an act or omission is so unreasonable that no public authority could consider it a reasonable exercise of its functions.<sup>191</sup>

Specific legal rules have developed around the question of whether a public roads authority is liable for nonfeasance (such as failing to repair or maintain a highway). Road authorities were always liable for malfeasance, that is, negligent acts which created or exacerbated dangers to users, but historically had immunity at common law for nonfeasance. This common law immunity for nonfeasance was abolished by the High Court in 2001 in *Brodie v Singleton Shire Council*.<sup>192</sup> In response, legislative changes were introduced. These do not reinstate the immunity in its entirety, but restrict the liability of road authorities for nonfeasance.<sup>193</sup>

Australian courts have been required on a number of occasions to consider the liability of public authorities to cyclists across a range of different circumstances. A brief overview of the cases demonstrates that in each one, the

190 *Ibid* 580 [159]–[160] (citations omitted).

191 *Civil Law (Wrongs) Act 2002* (ACT) ss 42–4; *Civil Liability Act 2002* (NSW) ss 5B–C; *Civil Liability Act 2003* (Qld) ss 9–10; *Civil Liability Act 1936* (SA) ss 31–2; *Civil Liability Act 2002* (Tas) ss 11–12; *Wrongs Act 1958* (Vic) ss 48–9; *Civil Liability Act 2002* (WA) ss 5B–C.

192 (2001) 206 CLR 512.

193 *Civil Law (Wrongs) Act 2002* (ACT) s 113; *Civil Liability Act 2002* (NSW) s 45; *Civil Liability Act 2003* (Qld) s 37; *Civil Liability Act 1936* (SA) s 42; *Civil Liability Act 2002* (Tas) s 42; *Road Management Act 2004* (Vic) s 102; *Civil Liability Act 2002* (WA) s 5Z. See discussion in Richard Douglas, 'Road Authority Immunity – How Is It Travelling' (2012) 111 *Precedent* 27. While there are differences across the jurisdictions, s 45 of the *Civil Liability Act 2002* (NSW) provides an example of one such provision:

45 Special nonfeasance protection for roads authorities

(1) A roads authority is not liable in proceedings for civil liability to which this Part applies for harm arising from a failure of the authority to carry out road work, or to consider carrying out road work, unless at the time of the alleged failure the authority had actual knowledge of the particular risk the materialisation of which resulted in the harm.

(2) This section does not operate:

- (a) to create a duty of care in respect of a risk merely because a roads authority has actual knowledge of the risk, or
- (b) to affect any standard of care that would otherwise be applicable in respect of a risk.

(3) In this section:

'carry out road work' means carry out any activity in connection with the construction, erection, installation, maintenance, inspection, repair, removal or replacement of a road work within the meaning of the Roads Act 1993.

'roads authority' has the same meaning as in the Roads Act 1993.

court carefully considers the reasonableness of the conduct of the public authority and the contribution to the damage by the cyclist.

In *Suvaal v Nominal Defendant*,<sup>194</sup> the New South Wales Supreme Court considered a claim by cyclist Anthony Suvaal against the Cessnock City Council that it had poorly designed and constructed a road and failed to maintain and repair it properly such that it had caused him to lose control. Mr Suvaal lost control while riding, the head stem of his bicycle failed and he was propelled over his handlebars. His injuries left him a quadriplegic. Mr Suvaal had argued that the accident was caused by him hitting potholes in the road. The Council contended that the accident was a result of the failure of the head stem of the bicycle.<sup>195</sup> It was agreed that the Council owed a duty of care to users of the road and that it was foreseeable that cyclists would be such users.<sup>196</sup> The New South Wales Court of Appeal overturned the decision at first instance.<sup>197</sup> The Court of Appeal found that the cause of the accident was a result of the failure of the head stem of the bicycle, which occurred *prior* to Mr Suvaal hitting any potholes.<sup>198</sup> As a consequence, the Court of Appeal held that the Council was not liable.<sup>199</sup>

In *Marsden v Ydalia Holdings (WA) Pty Ltd*,<sup>200</sup> the Western Australian Court of Appeal considered a tort claim by a cyclist against a private contractor engaged by the City of Perth. The contractor had been carrying out works on a dual-use path that required the flow of pedestrian and cycle traffic to be diverted from the path. They set up a sign to indicate the diversion that read ‘CAUTION! CYCLISTS DISMOUNT & WALK’.<sup>201</sup> However, the plaintiff injured himself after falling onto rocks in the Swan River as a result of attempting to dismount on

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194 [2000] NSWSC 1043.

195 A brief summary of the facts is provided in the judgment of the Court of Appeal: *Cessnock City Council v Suvaal* [2001] NSWCA 428 [4]–[5] (Giles JA). See also *Suvaal v Cessnock City Council* (2003) 200 ALR 1, 31 [124]–[125] (Callinan J).

196 *Suvaal v Nominal Defendant* [2000] NSWSC 1043, [125] (Master Harrison). The question of negligent design and construction is judged against the standards of the time at which a road was constructed and the circumstances then prevailing: *Buckle v Bayswater Road Board* (1936) 57 CLR 259, 284–5 (Dixon J). In determining whether a road or bridge has been designed in a negligent manner, reference might be made to the Austroads design standards for roads or bridges: see, eg, *Roads and Traffic Authority of New South Wales v Dederer* (2007) 234 CLR 330, 362 (Kirby J); *Shire of Corrigin v Hunter Holdings Pty Ltd* (2007) 46 MVR 448, 450–1 [22] (Pulin JA); *Suvaal v Nominal Defendant* [2000] NSWSC 1043, [178] (Master Harrison).

197 At first instance, the plaintiff lost his action against the Council for negligent construction and design on this test: *Suvaal v Nominal Defendant* [2000] NSWSC 1043, [209] (Master Harrison). However, it was successfully argued by the plaintiff that the Council’s temporary repairs of the potholes, patching and edge drops on the road fell below a reasonable standard: at [255]–[258]. Further, even after taking into account economic factors, the Council did not act reasonably in failing to do more than just temporary repairs, repairs which did not last very long: at [249], [285]. However, the Master found that because Mr Suvaal’s path had only taken him to the edge of the road because of his own lapse of concentration, he was contributorily negligent for 20 per cent of the damage he sustained: at [308]–[311].

198 *Cessnock City Council v Suvaal* [2001] NSWCA 428, [11], [16] (Giles JA); with whom Powell JA and Rolfe AJA agreed: at [1] (Powell JA), [23] (Rolfe AJA).

199 The High Court upheld the Court of Appeal’s decision: *Suvaal v Cessnock City Council* (2003) 200 ALR 1, 2 [1] (Gleeson CJ and Heydon J), 38 [149]–[150] (Callinan J).

200 [2006] Aust Torts Reports ¶81-840.

201 *Ibid* 68 462 [78] (Pulin JA).

soft sand that he had been diverted onto from the dual-use path. The Court found that while the defendants would have a duty to exercise reasonable care not to create reasonably foreseeable risks of injury while making alterations to the path,<sup>202</sup> they had not breached the duty. Cyclists would be expected to have knowledge of the dangers of riding and attempting to dismount on soft sand and therefore, the sign was a sufficient response to the diversion.<sup>203</sup>

In *Shellharbour City Council v Rigby*,<sup>204</sup> the plaintiff was a 13-year-old girl, an inexperienced cyclist. She was riding her BMX at a track in a sporting complex open to the public.<sup>205</sup> Responding to a dare, she took herself to the top of the highest point of the track and attempted to ride over a speed hump. As she hit the hump, she became airborne and fell, suffering brain damage.<sup>206</sup> She sought damages against the Council and the BMX Club. The Court held that the Council and the Club were in breach of their duty of care to inexperienced cyclists using the facilities. The Club had designed and had ongoing management responsibilities with respect to the track,<sup>207</sup> and the Council had an obligation as the owner and occupier of the land and manager of the sporting complex.<sup>208</sup> The Council and Club therefore had a duty of care to fence off the starting pad and ramp to avoid it being used by inexperienced young riders.<sup>209</sup> The Court found that the culpability fell predominantly on the Council and the Club,<sup>210</sup> although they apportioned 20 per cent to the plaintiff's contributory negligence.<sup>211</sup>

*Carey v Lake Macquarie City Council*<sup>212</sup> concerned injuries incurred by Michael Carey after riding into a bollard that had been placed by the Council in the centre of a concrete public path.<sup>213</sup> The accident occurred in the early hours of the morning,<sup>214</sup> the path was not lit and some of the reflector tape on the bollard was missing.<sup>215</sup> The trial judge initially found that the damage had been caused by the plaintiff's failure to keep a proper lookout.<sup>216</sup> The Court of Appeal overturned this decision, finding that the Council had breached its duty of care; the bollard

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202 Ibid 68 448 [2] (Roberts-Smith JA), 68 453 [33] (McLure JA), 68 463 [83]–[84] (Pullin JA). Roberts-Smith JA agreed with Pullin JA: at 68 448 [1].

203 Ibid 68 448 [3]–[4] (Roberts-Smith JA), 68 465 [96], 68 467–9 [112] (Pullin JA).

204 (2006) 150 LGERA 11.

205 Ibid 17 [1] (Beazley JA).

206 Ibid 19 [13]–[14] (Beazley JA).

207 Ibid 18 [6] (Beazley JA).

208 Ibid 18 [4] (Beazley JA).

209 The Council owed a duty of care: *ibid* 28–9 [60]–[67] (Beazley JA). Justice of Appeal Beazley, with whom Ipp and Basten JJA agreed, also held that the Club owed a duty of care: at 35 [97], 36–7 [102]–[104] (Beazley JA), 73 [293] (Ipp JA), 73 [294] (Basten JA).

210 The Council and Club had breached their respective duties of care: *ibid* 32–3 [81]–[84] (Beazley JA), 73 [293] (Ipp JA), 73 [294] (Basten JA). Both Ipp and Basten JJA agreed with Beazley JA on the issue of negligence.

211 Ibid 38 [111] (Beazley JA), 73 [293] (Ipp JA), 73 [294] (Basten JA). Both Ipp and Basten JJA agreed with Beazley JA on the issue of contributory negligence.

212 [2007] Aust Torts Reports ¶81-874.

213 Ibid 69 221 [15] (McClellan CJ at CL).

214 Ibid 69 222 [19] (McClellan CJ at CL).

215 Ibid 69 222 [23] (McClellan CJ at CL).

216 Ibid 60 223 [32] (McClellan CJ at CL).

was of little practical utility and created a serious hazard for cyclists and others using the path at night.<sup>217</sup> However, the cyclist's speed and lack of forethought when riding on an unknown path in the dark led to a finding of contributory negligence of 50 per cent.<sup>218</sup>

Legislation now limits the liability of public authorities to circumstances where the authority had actual knowledge of a particular risk and failed to carry out work to remove that risk.<sup>219</sup> A review of recent cases reveals that whether liability arises against a public authority for breach of duty to cyclists very much depends on the facts of the case. In examining the facts, in addition to the conduct of the public authority, the court will also have regard to the conduct of the cyclist. As the examples herein demonstrate, a road authority will not be found liable (or its liability will be reduced) where the conduct of the cyclist is unreasonable. This reflects an underlying assumption of legal regulation in this area, already outlined above, that accepts the vulnerability of cyclists while simultaneously acknowledging their responsibility for their own safety.

## VI BICYCLES AND EQUIPMENT

### A Product Standards

We have already explained that many of the product requirements in the *Australian Road Rules* place the obligation for standards of bicycles and other equipment on the cyclist. In addition to the responsibility of the cyclist as user to have a bicycle and other gear that meets the standards set in the Rules, there are obligations on manufacturers and sellers of bicycles and equipment. Under the *Consumer Product Safety Standard: Pedal Bicycles: Safety Requirements*,<sup>220</sup> the consumer safety standard for bicycles in Australia is AS/NZS 1927:1998.<sup>221</sup> Supplying goods that do not comply with the safety standards is an offence under the *Australian Consumer Law* and can lead to civil pecuniary penalties.<sup>222</sup> Under the *Trade Practices (Consumer Product Safety Standard) (Bicycle Helmets) Regulations 2001* (Cth) helmets must comply with Australian Standard AS/NZS

217 Ibid 69 229–30 [66]–[68] (McClellan CJ at CL); with whom McColl JA and McDougall J agreed: at 69 220 [7] (McColl JA), 69 238 [114] (McDougall J).

218 Ibid 69 238 [111] (McClellan CJ at CL); with whom McColl JA and McDougall J agreed: at 69 221 [13] (McColl JA), 69 239 [118] (McDougall J).

219 See above n 193.

220 Parliamentary Secretary to the Treasury, 'Consumer Product Safety Standard: Pedal Bicycles: Safety Requirements' in Commonwealth, *Gazette: Special*, No S 443, 2 November 2004, 4. The notice setting the product safety standards for pedal bicycles was made pursuant to s 65E of the *Trade Practices Act 1974* (Cth) and continues to operate under s 104 of the *Competition and Consumer Act 2010* (Cth) sch 2 ('*Australian Consumer Law*'): see *Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010* (Cth) sch 7.

221 'Pedal Bicycles – Safety Requirements' (Standard No AS/NZS 1927:1998, Standards Australia and Standards New Zealand, 5 September 1998). For an overview of the standard see: Product Safety Australia, *Bicycles (Pedal Bicycles)* (2016) Australian Competition and Consumer Commission <<https://www.productsafety.gov.au/content/index.phtml/itemId/973482>>.

222 *Australian Consumer Law* s 106.

2063:2008.<sup>223</sup> Unlike for bicycles and helmets, there is no mandatory consumer product standard for child carrier seats or bicycle trailers prescribed by the *Australian Consumer Law*;<sup>224</sup> instead, this is left to state regulation.<sup>225</sup>

In March 2011, the Commonwealth government refused to adopt new international designs for motor vehicle bull bars as the industry standard. Bull bars contribute to pedestrian and cyclist deaths and injuries and are banned in Europe.<sup>226</sup> The Parliamentary Secretary for Infrastructure and Transport, Catherine King, explained the government's failure to adopt the new product as an industry standard:

While the Government is committed to improving the safety of pedestrians, we also recognise that bull bars play a positive role in the safety of vehicle occupants.<sup>227</sup>

However, some states have implemented regulations to ensure bull bars installed to new cars comply with the Australian Standard.<sup>228</sup> Despite the fact that cars in New South Wales have had to comply with the Standard since 2003,<sup>229</sup> the New South Wales Government has recently stated that it will give drivers until 2016 to ensure their vehicle complies with the law.<sup>230</sup> The delay in full implementation might reinforce the perception of motor vehicles as the primary road user.

One area in which product standards have been controversial and there have been calls for law reform is the regulation of electric bicycles, or 'e-bikes'. The debate has centred on whether and when cyclists riding e-bikes ought to be required to hold a licence. Before 2012, any cyclist riding an e-bike with an output exceeding 200 watts was required to hold a licence and register their

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223 State legislation also makes reference to the requirement that helmets comply with the Australian Standards: see, eg, *Road Traffic (Miscellaneous) Regulations 2014* (SA) regs 51(3)–(4), which make it an offence to sell a bicycle helmet that does not meet 'the impact attenuation requirement of Australian Standard 2063'. The maximum penalty for this offence is \$2500: at reg 51(4).

224 However, there is a voluntary design standard: 'Child Carrier Seats for Pedal Bicycles – Safety Requirements' (Standard No AS/NZS 4287:1995, Standards Australia and Standards New Zealand, 5 June 1995).

225 Most states do not prescribe additional standards for child carrier seats; however, in Western Australia there is quite detailed regulation with regard to child-carrying seats: see *Road Traffic (Bicycles) Regulations 2002* (WA) reg 14.

226 Gail Liston and Lucy McNally, 'Government Considers Banning Bullbars', *ABC News* (online), 25 January 2011 <<http://www.abc.net.au/news/2011-01-25/government-considers-banning-bullbars/1916912>>.

227 Catherine King, 'Pedestrian Safety and Bull Bars' (Media Release, CK006/2011, 24 February 2011).

228 For example, in South Australia, from 1 July 2013 all new cars fitted with a bull bar had to comply with the Australian Standard for bull bars: see *Road Traffic (Light Vehicle Standards) Rules 2013* (SA) r 31. The relevant Australian Standard is 'Motor Vehicle Frontal Protection Systems – Part 1: Road User Protection' (Standard No AS 4876.1–2002, Standards Australia, 17 September 2002).

229 See *Road Transport (Vehicle Registration) Amendment (Motor Vehicle Frontal Protection Systems) Regulation 2002* (NSW), which has now been consolidated into the *Road Transport (Vehicle Registration) Regulation 2007* (NSW) sch 2 cl 25(3).

230 'Five-Post Bull Bars Given Grace Period in NSW', *ABC News* (online), 27 August 2014 <<http://www.abc.net.au/news/2014-08-26/bull-bar-period-of-grace/5697940>>.

e-bike.<sup>231</sup> This caused difficulty because e-bikes imported from Europe (where there is a wide range available) often had a power output of 250 watts (which is permitted under the European Standard).<sup>232</sup> The Australian position limited the availability of electric bicycles in Australia and in turn made it more difficult for those who required or desired the assistance of a motor to take up cycling (such as the elderly, people with a disability or people with a lower level of fitness).<sup>233</sup> In 2012, the federal government changed the national vehicle safety standards in the Australian Design Rules as part of the Austroads National Cycling Strategy, to bring the Australian Rules in line with the European Standard.<sup>234</sup> The change allowed e-bikes with a power output of up to 250 watts for pedal-assisted e-bikes (known as ‘pedalecs’ – this term means that the power is generated by pedalling rather than with a handlebar throttle as on a motorcycle). Motorised assistance must cut out at 25km/h, although the e-bike cyclist may go faster than this provided the additional speed is as a result of manual power.<sup>235</sup>

## B Product Recall

Where a supplier – a manufacturer, importer, distributor or retailer – becomes aware that a bicycle or other piece of cycling equipment has caused serious injury or death, the supplier must notify the Commonwealth Minister responsible for consumer affairs.<sup>236</sup> Further, where a supplier becomes aware that a product presents a safety risk to consumers they may issue a recall of the item. These recalls are often referred to as ‘voluntary recalls’.<sup>237</sup> Notification of voluntary recalls must be given to the Commonwealth Minister responsible for consumer affairs.<sup>238</sup> The Minister also has the power to issue product recalls when he or she is not satisfied that the supplier is taking the necessary steps to prevent the consumer from being injured by the product. These are often referred to as

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231 Although note the practical enforcement difficulties that might arise in determining the wattage of e-bikes that were evident in *Emmerson v Police (SA)* [2015] SASC 161.

232 ‘Cycles – Electrically Power Assisted Cycles: EPAC Bicycles’ (Standard No EN 15194:2009+A1:2011, European Committee for Standardization, 31 May 2012).

233 Phillip Thomson, ‘More Power to the Pedallers’, *The Canberra Times* (Canberra), 16 June 2013, 11.

234 Some states have amended the *Australian Road Rules* (as implemented within that state) to take into account this change in the Australian Design Rules: see, eg, the definition of ‘bicycle’ and accompanying notes in the *Road Safety Road Rules 2009* (Vic) dictionary. The definition of ‘bicycle’ includes ‘a power-assisted pedal cycle within the meaning of vehicle standards, as amended from time to time, determined under section 7 of the Motor Vehicle Standards Act 1989 of the Commonwealth’. Within the *Australian Design Rules* made pursuant to s 7 of the *Motor Vehicle Standards Act 1989* (Cth), a ‘power-assisted pedal cycle’ includes a ‘Pedalec’: see *Vehicle Standard (Australian Design Rule – Definitions and Vehicle Categories) 2005* (Cth) s 4.2.2. A ‘Pedalec’ is also defined within the Design Rules as a ‘vehicle meeting European Committee for Standardisation EN 15194:2000 or EN 15194:2009+A1:2011 Cycles – Electrically power assisted cycles – EPAC Bicycles’. This is a rather convoluted way of the *Australian Road Rules* expanding the definition of bicycle to include pedalecs constructed in accordance with the European Standard.

235 See ‘Cycles – Electrically Power Assisted Cycles: EPAC Bicycles’ (Standard No EN 15194:2009+A1:2011, European Committee for Standardization, 31 May 2012).

236 *Australian Consumer Law* s 131.

237 *Ibid* s 128.

238 *Ibid* sch 2 s 201.

'compulsory recalls'.<sup>239</sup> Under the *Australian Consumer Law*, where a product is defective the purchaser may have rights against the retailer or manufacturer for a repair or refund.<sup>240</sup> In addition, where a cyclist is injured as a result of a faulty bicycle or bicycle-related product they might also have a cause of action in negligence against the manufacturer to recover for any loss suffered as a result of the negligence of the manufacturer.<sup>241</sup>

## VII CONCLUSION

Across Australia, governments are committed to promoting cycling as a desirable form of transport and leisure activity. The interactions between cyclists, drivers and pedestrians are now highly regulated by law. Because of this close relationship between law and cycling, and therefore the capacity of law to influence community attitudes towards cycling, law reform is an important part of an agenda to promote the uptake of cycling.

This article provides an overview of the legal regulation of Australian cyclists and other road users, the roads and those responsible for maintaining the roads, and bicycles and other bicycle-related goods. The *Australian Road Rules* largely provide a uniform legal framework across the states and territories. Many of the Rules apply in the same way to cyclists as they do to drivers of motor vehicles; however, there are some additional protections granted to, and further requirements placed on, cyclists.

This article traces the development of the current legal regulation of cycling in Australia. Unsurprisingly, as cycling has become a more popular form of transport and been perceived as more desirable by government, there has been significant legal reform in this area. At times individual reforms have been in response to serious (and sometimes fatal) road accidents involving cyclists. These changes often reflect the community's desire to respond to these tragedies and protect the cyclist as a demonstrably vulnerable road user.

Not all laws intended to protect cyclists have been met with widespread public support. There has, at times, been a tension between the community's desire to protect vulnerable road users and a belief that cyclists should be treated equally in terms of rights *and* responsibilities. This reflects an expectation that cyclists will take a reasonable amount of responsibility for their own safety. There also remain some members of the community who perceive that cyclists receive special treatment from the law or that cyclists disobey the law more than drivers, which causes ongoing difficulty around proposed reform in this area.

To receive widespread community support, governments pursuing law reform in this area often need to balance carefully the interests of motor vehicle drivers and cyclists. This is an important dimension of securing the passage of

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239 Ibid sch 2 s 122.

240 See respectively, *Australian Consumer Law* s 54, pt 3-5.

241 It is a well-established principle that a manufacturer owes a duty of care to the ultimate user or consumer of a product: *Donoghue v Stevenson* [1932] AC 562.

reforms. The recognised imperative to ensure ongoing community support of cycling also reflects the reality that legal regulation and protection can only ever be part of the promotion of cycling and the protection of cyclists when they take to the road.