CityLink Customer Ombudsman

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DECISION

Reason for Decision

This dispute arises from a claim made by Mr X for the cost of damage done to his vehicle whilst driving on a section of CityLink on 31 January 2005. The amount of the claim is $1,085.31.

Background to the Complaint

Mr X reported to CityLink on 7 February 2005 that at 9.18 am on 31 January 2005 whilst travelling on the Tullamarine section of CityLink road (inbound) between Brunswick Road and Flemington Road he noticed a piece of debris on the road surface on the adjacent lane ahead. This debris was then struck by a passing semi-trailer which caused the debris to become airborne and strike his vehicle, causing damage. Mr X provided copies of photographs showing the damage to the vehicle and quotation for the cost of repairs estimated at $1,085.31.

CityLink acknowledged the complaint on 7 February 2005 and advised that it was having its contractor, Translink Operations Limited, and its sub-contractors report about the incident. CityLink also suggested that Mr X contact his insurer about the incident and the damage. It also noted that it was not liable for damage caused by items of debris that fall from other vehicles or any damage caused by the negligence of third parties. It suggested that if Mr X was able to identify the vehicle in question he may be able to seek compensation from the owner or driver.

Mr X responded on 7 February 2005 regarding the debris and identification of the semi-trailer and stated that the debris was not observed to have fallen from this vehicle and the issue was not about unsecured loads or objects falling from vehicles. He pointed out that the material that struck his vehicle was debris and that he had observed it some days prior to and days after the incident. There, however, is no suggestion that Mr X reported the presence of the debris to CityLink prior to the incident.

Mr X further commented in relation to the identity of the passing vehicle, that CityLink should have been able to identify it via its tolling/security/monitoring systems based on the information that he had provided about the location and time of the incident.

CityLink responded further on 8 February 2005 in the following terms:

"*I refer to my letter to you dated 7 February 2005 and your response of the same day.*

We have made enquiries with our contractor, Translink Operations Ltd, about this incident. Translink Operations has no record of this incident and furthermore advises that there were no works or traffic management in the area you allege the incident occurred. Translink Operations have further advised that they do not have any knowledge of where the debris came from. It therefore appears that the debris which you allege caused damage to your vehicle, may have fallen from a third party's vehicle.

We understand that in your reply to my acknowledgement letter you have reiterated that the debris that had caused the damage to your vehicle was observed lying on the road and was dislodged by a passing truck / semi-trailer. It was not observed falling from a vehicle, as I had noted in my letter dated 7 February 2005.

We would like to clarify that as the debris that caused damage to your vehicle was not part of any CityLink infrastructure, it may have fallen from a third part vehicle.

As previously advised, neither CityLink Melbourne nor it's (sic) contractors are liable for damage caused by items that fall from other vehicles. I note that, in this situation, the owner or driver of the vehicle that the debris may have fallen from, may be liable for the damage. If you are able to identify the vehicle in question, you may be able to seek compensation from the owner or driver. Unfortunately we do not have information that could assist you to identify this party.

Accordingly, CityLink Melbourne declines to offer a compensation payment in this case for the reasons outlined above."

Mr X was not satisfied with this response and referred the matter to the CityLink Customer Ombudsman. He reiterated the history of the complaint and stated, amongst other things:

"The primary concern that I have is that CityLink / Transurban to date have refuse (sic) to acknowledge their responsibility to provide the tollway to its customers in a safe, clean, maintained operational manner. To date, I am still observing debris along the toll road (this can be readily witnessed and recorded), which has been there for some time and remains potentially hazardous. Notwithstanding the drivers/users obligations and responsibilities to secure their loads and mitigate against falling objects whilst in transit, the responsible drivers/users are not permitted to stop on the toll road without permission or assistance and accordingly cannot be expected to remove any objects or debris that may have fallen in the presence of through traffic. This surely is a matter of responsibility for the maintenance provider for CityLink / Transurban who is adequately equipped to ensure that the road remains clear at all times.

CityLink maintain in their correspondence that they did not have works or contractors carrying out any works that caused any debris within the vicinity of the incidence.(sic) Notwithstanding whether this is the case or not, this is somewhat irrelevant given that the incidence of debris exists and in some cases has not been removed. Transurban / CityLink has an obligation to maintain the tollway and provide it to its customers in a clean and safe manner. The incidence of debris witnessed during this incident and on subsequent occasions is unsafe and unacceptable.

I maintain that Transurban / CityLink are responsible for this incidence in their failure to maintain and provide the road in a safe trafficable manner, and seek compensation for repair of the damage caused to my vehicle. I have provided CityLink with photos of the damage caused and also invited CityLink to inspect the vehicle. However given that CityLink have not acknowledged to date, to mitigate against any further losses, expenses and disruption caused to me, I have commenced arrangements for repairs to my vehicle. Upon finalisation of such repairs, I shall be notifying you of the full extent of costs incurred and request for compensation".

Mr X was advised on 28 February 2005 of the process required before the CityLink Customer Ombudsman could consider and determine the matter.

In the interim CityLink was contacted by the CityLink Customer Ombudsman to advise it of the potential of a formal claim and on 7 March 2005 CityLink advised:

"Neither CityLink Melbourne nor it's (sic) contractors are liable for damage to vehicles using the road where the damage is caused by the act or omission of a third party.

CityLink contracts with Translink Operation (TLO) to manage and maintain the road. TLO has a process in place for the removal of hazardous and general debris that can be summarized as follows;

- *The response time for hazardous debris that causes a hazard to the travelling public is ten minutes from notification.*
- *Programmed sweeping of the road pavement is undertaken on a monthly basis. The tunnels are programmed for sweeping on a fortnightly basis and on request by TLO.*
- *The collection of large debris on the carriageway is undertaken nightly by an Incident Response Officer, as the sweeper cannot collect large debris.*
- *Maintenance conducts runs for rubbish that cannot be collected by the sweeper for both on payment and off pavement on Monday and Fridays each week. This activity is undertaken when it is safe to do so.*

As a comparison, claims for compensation sent to VicRoads (including claims for compensation arising from debris on the road) are assessed on their merits. If VicRoads believes that under the law it is liable to pay compensation it will seek to settle the claim and pay compensation to the affected person.

With respect to debris claims, section 37A of the Transport Act 1983 ("the highway rule") provides a strong defence to these claims. The highway rule provides that a road authority is not liable to pay compensation for any failure

to inspect and maintain a road. The usual cause of debris on roads is the negligence of a road user other than the affected person. Therefore the highway rule preventing liability for failing to inspect and remove debris, and the cause of the debris being a third party, means that usually the road authority is not legally liable to pay compensation to a person affected by debris on the road."

This correspondence was forwarded to Mr X by the CityLink Customer Ombudsman. Mr X lodged a formal complaint with the CityLink Customer Ombudsman on 17 March 2005. This complaint submitted principally:

- *"CRA claim that neither CityLink Melbourne nor its contractors are liable for damage cause to vehicles using the road. There is no evidence to suggest that incidence of debris that caused damage to my vehicle was as a result of an act or omission of a third party.*
- *CRA claim that removal and collection of small debris is undertaken fortnightly by sweepers and nightly for large debris by an Incident Response Officer. The fact remains that there is incidence of small and large debris during any time of the day that can be hazardous and unsafe. Whilst the public are generally safety conscience, it is not the public's responsibility to notify CityLink of the incidence of hazardous conditions on their toll road, given the surveillance obligations.*
- *CRA acknowledges that Maintenance conducts runs for rubbish that cannot be removed by sweeper and that this is undertaken when "safe to do so". How does CRA expect the public to remove at its discretion any debris that has been caused by 3rd party acts or omissions to avoid any safety hazards?*

With regards to CRA's comparison to VicRoads, I do not believe that this matter is of relevance given that CityLink is a privatised infrastructure asset and service that the State, public and its users have an expectation for its operation, maintenance and safety that is provided under its tolling. Notwithstanding the requirements of section 37 of the Transport Act 1983, its is my understanding that there is evidence of VicRoads and other related statutory road authorities effecting settlement of claims by way of compensation for similar such matters.

I have provided Assist@CityLink and CRA with generally all known details, which describe the incident that caused damage to my vehicle at the time. Notwithstanding CRA's comments on CityLink and their contractors process for clearing of debris from the road, my vehicle was struck by debris found on the toll road on the day, that could have caused a serious accident. Equally, I am disappointed to have observed on numerous occasions prior to and since this event, the incidence of debris on the road and shoulders. Should CRA wish to maintain that their maintenance and cleaning 'obligations' are being met, it remains an option for the public to readily observe, monitor and record such incidences that may substantiate otherwise."

There was then a further exchange of correspondence between CityLink, Mr X and the CityLink Customer Ombudsman in relation to the merits of the claim and the dispute could not be resolved by way of conciliation.

Outcome and Reasons
The issues in this complaint are whether (a) CityLink owed a duty of care to Mr X as the owner of a vehicle that used a road for which CityLink was responsible; (b) whether CityLink breached that duty of care in respect of Mr X; and (c) whether CityLink is liable for the damage done to Mr X's vehicle.

Duty of Care
CityLink was the responsible road authority for the Tullamarine section of the road on which Mr X's vehicle was damaged on 31 January 2005. It had the lawful authority to care and manage the road to keep it safe in accordance with the Road Management Act 2004. Its civil liability for any damages law in relation to its duty of care is contained in Part 6 Division 2 of this Act.

The History of the law– Pre 2001
It is useful in the context of this claim, to discuss the law in relation to the duty of care owed by a road authority to those who use the roads for which they are responsible. The duty of care owed by a highway authority to a user of the highway was recently discussed in the Supreme Court of Victoria in *Moyne Shire Council v Pearce* [2004] VSCA 246 and the decision is relevant in relation to the responsibility of CityLink. The Shire, like CityLink, was a road authority which had been empowered to care for and manage public highways for which it was responsible.

The law in respect of the care and management of roads had been clear in Australia for almost 100 years until 2001. The law provided that a road authority like CityLink, having the care and management of a road, could be the subject of criminal proceedings for non-repair but no proceedings could be brought against it by a person who suffered damage or loss as a result of a failure to maintain the road. **A road authority was not liable for failing to do anything even where there was a defect that constituted an obvious hidden danger.**

By way of contrast, if a person suffered a damage or loss because of a defect resulting from some act by the road authority, the authority could be liable to compensate for the damage or loss. In simple terms, the road authority was not liable for damage or loss resulting from non-activity but it was so liable if it negligently performed work such as erecting a barrier or a false curb and the damage or loss resulted.

These principles were clearly discussed by Australia's High Court in a case of *Buckle v Bayswater Road Authority (Buckle's case)* (1936) 57 CLR 259 and were stated by Dixon J at pp 281 and following. He said:

> *"In order that the public right may be enjoyed to best advantage, road authorities are established and armed with powers in relation to the highways. For that purpose a legal authority is given to them to construct, maintain and repair roads and to keep them free of obstruction and in an orderly condition.* ***The existence of such powers gives rise to no civil liability*** *for the consequences of the defective state of a road. …* ***It is well settled that no civil liability is incurred by a road authority by reason of any neglect on its part to construct, repair or maintain a road or other highway."***

He said further at p 282:

> *"A failure to act, to whatever it may be ascribed, cannot give a cause of action. No civil liability arises from an omission on its part to construct the road, to maintain a road which it has constructed, to repair a road which it has allowed to fall into disrepair, or to exercise any other power belonging to it as a highway authority."*

This was known as the road authority immunity rule.

The History of Law – Post 2001

The law on a road authority's duty of care changed briefly after May 2001 when the High Court decided in the case of *Brodie v Singleton Shire Council* (2001) 206 CLR 512 that a road authority's immunity from civil legal proceedings for damages resulting from its inactivity or failure to properly maintain a road did not apply. The Victorian Parliament then intervened by way of legislation and restored the road authority immunity from these claims.

This was done by way of the Transport (Highway Rule) Act 2002. Section 37A of that Act provided from 4 November 2002 that a road authority was immune from liability not only for failing to repair but also for failing to inspect a highway. This again removed liability for damage caused in situations similar to Mr X's incident.

However, the Victorian Parliament again intervened and this law was repealed by the Road Management Act 2004 as at 1 January 2005. This legislation has removed the previous immunity rule and replaced it with other provisions. **This Act applies to any claim for damages resulting from negligence in relation to the performance or non-performance of a road management function regardless of whether the claim is brought in tort, in contract, under statute or otherwise.**

Section 101 of the Act sets out a road authority's duty of care.

As far as CityLink's responsibility to remove litter is concerned, relevantly s 102 in Part 6 of this Act provides:

> *"1) Subject to this section, a road authority* ***is not liable in any proceeding for damages, whether for breach of the statutory duty imposed by section 40 or for negligence, in respect of any alleged failure by the road authority—***
>
> ***(a) to remove a hazard or to repair a defect or deterioration in a road; or***
>
> ***(b) to give warning of a hazard, defect or deterioration in a road.***
>
> *(2) Sub-section (1) does not apply if, at the time of the alleged failure, the road authority had actual knowledge of the particular risk the materialisation of which resulted in the harm.*
>
> *(3) For the purposes of sub-section (2), the road authority is to be taken to have had actual knowledge of the particular risk if it is proven in the proceedings that the deterioration in the road had been reported in writing to the road authority under section 115.*

(4) This section does not affect any liability of a road authority arising out of a breach of the duty to inspect a public road imposed by section 40."

There is no evidence that CityLink had actual knowledge of the particular risk that caused the damage to Mr X's vehicle so that the exceptions in subsections (2) and (3) to s 102(1) do not apply. Accordingly, at first instance, CityLink is not liable for the damage sustained by Mr X's vehicle by virtue of its failure to keep the road free of litter.

However, consideration should be given to the meaning of subsection (4) and CityLink's responsibility to inspect the road.

Accordingly, s 40 of the Act becomes relevant and it provides:

*"**40. Statutory duty to inspect, maintain and repair public roads***

(1) Subject to Part 6, a road authority has a statutory duty to inspect, maintain and repair a public road-
(a) to the standard specified in the road management plan for that public road or a specified class of public roads which includes that public road; or
(b) if paragraph (a) does not apply, to the standard specified in a policy in respect of that public road; or
(c) if no standard is specified for that public road or in relation to a particular matter, to a reasonable level having regard to the matters specified in paragraphs (a) to (e) of section 101(1).

Note: Section 101 sets out principles for determining whether there is a duty of care and if there is a duty of care, the standard of care.

(2) The statutory duty imposed by sub-section (1) does not create a duty to upgrade a road or to maintain a road to a higher standard than the standard to which the road is constructed.

(3) The statutory duty to inspect applies to any part of a public road which is-
(a) a roadway;
(b) a pathway;
(c) a shoulder;
(d) road infrastructure."

This section read with section 102 imposes a duty of care on CityLink to inspect, manage and repair a public road but not to have the public road clear of all litter from the road at all times.

In order to assess CityLink's obligation under subsection 102(4) it is necessary to examine s 103 which provides:

"Policy defence

For the purposes of any proceeding to which this Division applies, an act or omission which is in accordance with a policy—

(a) determined by the relevant road Minister under section 22 does not constitute a wrongful exercise or failure unless the policy is so unreasonable that no Minister in that Minister's position acting reasonably could have made that policy;

(b) determined by the relevant road authority under section 39 does not constitute a wrongful exercise or failure unless the policy is so unreasonable that no road authority in that road authority's position acting reasonably could have made that policy.

Note 1: One of the ways in which a road authority may determine a policy with respect to its road management functions is by a road management plan: see section 52.

Note 2: Section 27 enables a relevant Code of Practice to be used as evidence of the reasonableness of a road management plan."

CityLink, in this regard, has provided evidence that it did have a management plan in place through Translink Operations Limited, details of which are set out earlier in this Decision. Further, CityLink has advised in relation to the Translink Operations Limited operations and process at the time of Mr X's incident:

- *"The response time for hazardous debris that caused a hazard to the travelling public is ten minutes from notification.*
- *The collection of large debris on the carriageway is undertaken nightly by the Incident Response Officer, as the sweeper cannot collect this debris. Large debris collection was undertaken on 31 January 2005 from 01:00 to 05:30.*
- *Maintenance conducts runs for rubbish that cannot be collected by the sweeper for both on payment (sic) and off pavement on Monday and Fridays each week. This activity is undertaken when it is safe to do so. Such rubbish runs were undertaken on Friday 28 and Monday 31 January 2005*
- *Programmed sweeping of the road pavement is undertaken on a monthly basis. The tunnels are programmed for sweeping on a fortnightly basis and on request by TLO. The sweeping on the section of pavement being the Tullamarine section of CityLink (inbound) between Brunswick and Fleminton (sic) Roads was undertaken on 13 January 2005."*

Discussion

Was there a breach of the duty of care?

CityLink's duty of care owed to Mr X is contained within the provisions of Division 6 section 2 of the Road Management Act 2005 as outlined above. This legislation provides that a road authority such as CityLink is not liable for damages caused by the failure to remove a hazard such as litter.

CityLink is required to have in place a management plan that will reduce the likelihood of such damage happening. Such a plan should ensure that a road authority has taken such care in all the circumstances that could be reasonably required to ensure that the relevant part of the public road was not dangerous for traffic.

CityLink has provided details of aspects of that management plan that related to the process of its contractor, Translink Operations Limited. This indicated a comprehensive inspection and maintenance procedure as required in the CityLink Operations and Maintenance Manual, which includes the regular inspection of CityLink for, and the removal of, debris. This clearly establishes in my view that it has complied with the provisions of section 103 of the Road Management Act 2004.

I am accordingly satisfied that CityLink has not breached the duty of care that it owed at law to Mr X as a road authority and is not in that sense liable for the damage done to his vehicle.

Is CityLink different from any other responsible road authority?

Mr X asserts that, because CityLink is a privatised infrastructure asset and service that the State, public and its users have an expectation for its operation, maintenance and safety that is provided under its tolling, that it is in a different position from other responsible road authorities.

However, this is not reflected in the Road Management Act 2004, in any other legislation or under any agreement with the State. Significantly, Dixon J in *Buckle's case* went on to say that at common law no civil liability arose by reason of the road authority being a body corporate or being capable of being sued. Further, it was not liable even though the soil of the highway was vested in it by statute or the highway was under its management and control.

State Governments have entered into contracts with companies to construct and be responsible for the management of public roads under tolling arrangements as opposed to borrowing funds and using taxpayers' money to repay the loans. Such arrangements are not deemed under the law to impose greater liability upon them than other road authorities. Accordingly, CityLink's obligation to the users of its road is no greater than those of other responsible road authorities.

Is this fair and reasonable?

Leaving aside the provision of the Road Management Act 2004, CityLink cannot, like any road authority, be strictly liable for all damage done to vehicles travelling on its roads at any time. This would mean that it would virtually be required to guarantee that all vehicles that travel on its roads would not or could not suffer damage. This would be an impossible risk management situation and not one that could be reasonably expected of CityLink or any responsible road authority.

CityLink has an obligation to develop and maintain a road management plan that met reasonable requirements to ensure that the relevant part of the Tullamarine section of CityLink was not dangerous to traffic. It has done this in accordance with its duty of care and obligation under the legislation.

I note that in addition to its management plan, that CityLink has undertaken public campaigns in relation to the encouragement of vehicles to maintain loads in order to reduce the litter on its roads. (A copy of the press release is attached). This is a positive step that will further assist in the limitation of damage to the vehicles using its roads.

Decision
The complaint is not upheld.

It is noted that privacy laws prevent CityLink from disclosing the details of toll road users except in specific circumstances set out in section 90A of the Melbourne City Link Act 1995 (Vic) and that the exceptions set out in section 90A do not appear to apply in the current circumstances.

Further, CityLink does not retain video footage of its roads for a period longer than seven days, therefore it was not able to meet Mr X's request to refer to video footage to verify the incident.

I recommend in the future that in the event of a receipt of a complaint similar to that of Mr X's within seven days of an incident involving damage to a vehicle, that CityLink obtain the video footage so that a decision can be made on the issue of privacy.

I note, as a gesture of goodwill, CityLink is willing to apply $100 in CityLink Account Credits to Mr X's account and I recommend that CityLink re-make this offer to him.

Michael Arnold
CityLink Customer Ombudsman

Dated: 2 August 2005

MEDIA RELEASE

DATE **EMBARGOED:**
Thursday 26th May

LOCK DOWN THAT LOAD!

CityLink and VicRoads have joined forces to tackle a highly dangerous issue that regularly causes traffic chaos and threatens motorists' safety on Victoria's roads.

The two organisations have come together to launch '*Lock Down That Load',* a driver awareness campaign aimed at professional carriers, tradesmen, farmers and any driver who uses a trailer to move house or take rubbish to the tip.

Citylink's road response teams say they could build a small flat, and then furnish it with the debris they collected from the toll road in 2004.

'In 12 months we collected enough wood, bricks, roof tiles, rocks and steel to build a home," said CityLink's Senior Traffic Control Officer, Scott Cain.

'And we would have had plenty of tradesmen's tools plus 10 ladders for the job,' Mr Cain added.

He said the flat could have been comfortably furnished with other items falling off trucks, utes and roof racks including:

1 air conditioner, 1 bath, multiple pieces of carpet, 7 chairs, multiple cushions, 1 desk, 1 fridge
3 mattresses and pillows, 1 set of pine drawers, 1 rug and 1 table.

CityLink CEO, Mr Brendan Bourke, said CityLink was regularly forced to close traffic lanes while response teams collected on-road debris and lost loads. Around 40 tonnes of debris is picked up from the 22 kilometres of CityLink road every month.

During 2004, CityLink lane closure times for debris collection were as short as one minute, and as long as 49 minutes.

'But the major concern is the danger falling loads represent to other vehicles and drivers on the road, and then the risk to staff who have to go into moving traffic to retrieve the debris,' Mr Bourke said.

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MEDIA RELEASE

DATE **EMBARGOED:**
Thursday 26th May

Manager of VicRoads Traffic Control Centre Keith Weegberg said several hundred incidents were reported last year where vehicles collided with debris that had fallen from another vehicle's load.

'While clearing debris comes at a cost to both VicRoads and CityLink, the community pays a significant cost in lane closures and delays due to congestion when there's a piece of debris on the road,' Mr Weegberg said.

'Under Victoria's Road Safety Regulations it is an offence to fail to secure a load,' Mr Weegberg said.

'Individuals can face fines of up to $1,000 and corporations up to $5,000 if they're travelling with unsecured or inappropriately secured loads.'

More than 150 penalty notices are issued by VicRoads each year, however Mr Weegberg emphasized this message is not about fines, but about raising awareness of the issue and making all roads across Victoria safer.

Statistics show December and January are the worst months for lane closures caused by debris, suggesting that holiday makers also have to hear this message.

If you are on CityLink and spot any debris, call **13 26 29**. On other roads across the state call VicRoads on **13 11 70** to report the incident.

100,000 'Lock Down That Load' stickers will be distributed through VicRoads, CityLink, the Transport Workers' Union and the Victorian Transport Association.

Ends.

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