

KELLEHERS AUSTRALIA

In-House Briefing Memorandum

Road Law – Dedication Overview

In simplest terms, a highway is defined as a way over which all members of the public have the right to pass and re-pass. (*Cross and Bailey Cross on Local Government Law*). Whether land is a public highway is a technical area of law, but the key principles are that the land must have been dedicated by the original owner to the public and the public must have accepted that dedication.

At common law, once land becomes a public highway, it remains so regardless of changes to the registered proprietor of that land. Unless provided for by Statute, neither the public nor the municipality owns the soil of the highway or has a property right or title to the land. A road generally vests in the local council, unless located on Crown land, a freeway or arterial or in other agreed or limited circumstances (*Road Management Act* Sch 5, 1(4)-(6)). The municipal Council, as described by Barton J, has a public trust in the soil of the land (*Municipal District of Concord v Coles* (1905) 3 CLR 96 at [111]).

Australian context

Road Law in Australia was, in its early history, influenced significantly by English colonial practices. The question of dedication initially arose in relation to Crown land in New South Wales. It was decided that there was no evident reason why Crown lands in the colony should not have the same argument in law applied to cases involving their use, as was at that time made in England (*Turner v Walsh* 6 App. Cas. 636, Privy Council)

In some cases, the nature of the Australian landscape and its vast open spaces were considered to vary the nature of what could be considered a “user”. Blackburn J found it:

“difficult to apply the principles derived from English cases to conditions in the Northern Territory, where on one hand large tracts of unalienated Crown land can be relatively easily traversed without the knowledge of anybody except the person who traverses them, and where, on the other hand, a track made through the bush by a single vehicle, once made, can so easily be followed by a casual traveller some time afterwards.”

- (*Elizabeth Valley Pty Ltd v Fordham* (1970) 16 FLR 459 at [464])

Dedication

Dedication of a public highway can either be **express or implied**. Express dedication is an intention of the land owners, which is expressed in words, writing or some unequivocal act indicating intention to grant to the public. This intention can only be revoked prior to public acceptance and use. Implied dedication requires alteration to the use of the land, and an intention to dedicate may be inferred from public use (*Everingham v Council of Penrith* (1916) 16 Sr (NSW) 238).

A number of factors have been expressed in case law dealing with implied dedication. These include:

- Open and unconcealed public use to which the owner acquiesces (*Owen v O’Connor* (1964) NSW 1312);
- Length and nature of public use, with no minimum period (*City of Brunswick v Baker* (1916) 21 CLR 407 at [418]);
- Presumption against the landowner to show clearly no intention to dedicate land; notice is considered important evidence in favour of the owner (*Born v Huntley* (1886) 20 SLR 33).

Proving dedication, in Australia, can sometimes involve historical searches dating to the very earliest period of English settler colonialism.

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