

# HIGHWAYS IN TASMANIA

November 2010

## **Abstract**

This paper presents an overview of the law applying to the creation and ownership of highways in Tasmania, predominantly as it relates to State highways, but also with reference to local highways. It examines the general concepts of rights and restrictions of land ownership as well as the specific applications to highways and adjoining lands. Some apparent inadequacies of the law are also considered.

The paper was originally authored circa 1985 by Mr G J Donnelly, at the time Senior District Surveyor of the Department of Main Roads. While a significant proportion of the content has remained unchanged, it has been updated to reflect statute law and its administration applicable as at November 2010.

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## Introduction

Land law is recognised as one of the more 'static' branches of the law and consequently there is a limited availability of case law. The general principles, at common law, have long been established in the courts of equity although the concept of extent of ownership has changed significantly in interpretation from the nineteenth to the twentieth century. In addition, statutory law continues to place increasing restrictions on the rights and benefits which would otherwise accrue with land ownership. This has special application in the case of highways and adjoining lands on account of the statutory powers assigned to highway authorities to construct, control, protect and maintain highways, including matters of land acquisition, fencing, access and drainage. These controls may impose restrictions on adjoining lands due to the road widening provisions of approved subdivisions, limited access to highways and land drainage powers of the highway authority. The subdivision potential of land parcels may be restricted in cases where a road parcel reserved from a Crown grant (Reserved Road) does not coincide with a road in actual use.

In Tasmania the 'road authority' for State roads is the Minister for Infrastructure, the operational management being undertaken by the Roads and Traffic Division of the Department of Infrastructure, Energy and Resources. Its general powers of operation are provided by the *Roads and Jetties Act 1935* and the *Highways Act 1951*. Local Authorities are provided with similar powers over local highways by the *Local Government (Highways) Act 1982* and the *Local Government Act 1993*.

## General Concepts of Ownership

"Cuius est solum eius est usque coelum at ad infernos – Whose is the soil, his it is all the way to the heavens and to the lower depths".

The common law significance of land as a physical commodity was defined over a century ago as "whoever has got the solum, whoever has got the site, is the owner of everything up to the sky and down to the centre of the earth" (*Corbett v. Hill (1870) 39 L J Ch. 547, 549*), and further "everything on or under the soil, all buildings that you may erect on it, all mines that you may sink under it" (*Newcomen v Coulson (1877) 5 Ch.D 133, 142*).

This concept in the twenty first century is, however, subject to limitation by statutory law and comes increasingly under challenge at common law. For example, in *Commissioner of Railways and ors. v. Valuer General (1973) [3 All E.R,368]*, dealing with both air space and the sub-surface rights of an owner, the Privy Council judgment found in summing up that in none of the cases of the nineteenth century is there "an authoritative pronouncement that land means the whole of the space from the centre of the earth to the heavens; so sweeping, unscientific and impractical a doctrine is unlikely to appeal to the common law mind". It was added that the maxim used was "...a statement imprecise enough of the extent of the rights, prima facie, of owners of land".

## Restrictions of ownership

Crown grants of land are subject to the limiting provisions of the *Crown Lands Act 1976 S.16* in that gold, silver, copper, tin, or other metals, ore, mineral, or other substances containing metals, or gems or precious stones, or coal or mineral oil, are excepted from the grant. Land grants are limited to a depth of fifteen metres (S.54), although this does not restrict the right to sink wells for water below that depth, and are subject to the Crown's right of drainage over the land (S.16). Natural water, and chattels of unknown ownership not attached to the soil and found by another, are also exclusions of land ownership.

Ownership of the air space above the land surface is qualified by the *Air Navigation Act 1937* and unregistered wayleaves and easements under the *Electricity Wayleave and Easements Act 2000*. Apart from these exceptions, the surface owner does own the airspace above his land in the sense that, subject to building regulations, he is fully entitled to extend his occupation of the air, by building hi-rise developments for example. However, judgements in recent cases, including *Commissioner of Railways and ors. vs. Valuer General*, are interpreted to mean that an owner's rights extend only so far as is necessary for the ordinary use and enjoyment of his land.

Ownership involves a significant element of possession (the rules pertaining to adverse possession should be borne in mind) and it can be stated that ownership of the land surface extends just so far in each direction upwards or downwards vertically as the owner is able to bring and retain under his effective control.

## Creation and Ownership of Highways

At law a highway is defined not as a more important road but any way the public may use, whether it is a public road, a public street, a footpath, a bridge, a ferry or a public navigable river. The *Highways Act 1951 S.2* defines a highway as "a highway over land" while the *Roads and Jetties Act 1935 S.3* defines a road as "a public highway".

The modes of highway creation may be by common law, by reservation or acquisition of land followed by proclamation under various Acts, or by subdivision of lands.

### Creation at Common Law

At Common law, so called 'right-of-user' roads are created by:

- (1) dedication of the land comprising the road to the public, by a person competent to do so; and
- (2) acceptance by the public of the dedication.

Both elements are essential.

Dedication of a highway may be by deed, or may be inferred from unhindered long use by the public. Acceptance need not be formal but may be inferred from open and unobstructed usage. Repair and maintenance of the highway at public expense is one indicator of acceptance. The period of public usage is important, although there appears to be no fixed minimum period which must be proved to

justify an inference of dedication. In *North London Railway Co. v. Vestry of St. Mary, Islington (1972) 27 L.T.672*, use by the public for eighteen months was held sufficient to establish an intention to dedicate, while in *Folkestone Corporation v. Brockman (1914) A.C. 338*, a road which had been used by the public for eighty years was held not to have been dedicated. What is important is that the usage must be open, unconcealed and uninterrupted.

The dedication of a highway does not alter the ownership of the underlying land. The owner retains his legal right to all that is above and all that is below the ground, except for the capacity to limit "right of passage of the Queen and her people". The dedication of a highway to the highway authority is limited to the control, protection and maintenance of the highway as is necessary for, and consistent with, the maintenance of this right of passage. As long as a road exists the owner of the soil under it may do nothing to interfere with the road but, subject to this, he may exercise all rights of ownership not inconsistent with the public right of passage. This includes the right to win underlying minerals or to tunnel beneath the road for drainage or passageway. If road usage ceases then any rights or property vested in the highway authority re-vest in the owner, who resumes possession of the surface.

### Creation by Reservation

In the past Crown land has been set aside for road purposes by exclusion from Crown Grants of corridors marked 'Reserved Road'. Alternatively, any Crown land may be reserved by a Crown Land Order (*Crown Lands Act 1976 S.8*). The impact of these 'reservations' is that ownership of the land always remains in the Crown, unless transferred, by virtue of the *Limitation Act 1974 S.10* which precludes claims of adverse possession against the Crown in respect of land "reserved or set out as a road under any Act".

The reservation of land for road purposes does not, of itself, create a highway over that land (*Highways Act 1951 S.3*), although the *Crown Lands Act 1976 S.47* appears to give "free passage of any person ...." over any "track or reserved road on any Crown land". In practice, this is controlled by licence issued by the Crown Land Services Branch of the Department of Primary Industries, Parks, Water and Environment.

Whether land is reserved for road purposes or not, dedication through acceptance by the public, or for new roads, dedication by subsequent proclamation under the *Highways Act 1951 S.3* or the *Roads and Jetties Act 1935 S.7*, is required to create a highway.

### Creation by Acquisition of Lands

Land acquired for road purposes under the provisions of the *Land Acquisition Act 1993* vests in the highway authority for that purpose (*Land Acquisition Act 1993 S.19*). New alignments are generally dedicated through subsequent proclamation under the *Highways Act 1951* or the *Roads and Jetties Act 1935*. A declaration under seal from the highway authority under *Local Government (Building and Miscellaneous Provisions) Act 1993 S.106* may be required to give land road frontage where the land is separated from a highway by other highway authority land. The Crown's powers of acquisition are also provided by the *Crown Lands Act 1976 S.51*, and for local authorities by the *Local*

*Government Act 1993 S.176* and the *Local Government (Highways) Act 1982 Part IV*. All acquisitions must proceed under the provisions of the *Land Acquisition Act 1993*.

Land acquired under the *Land Acquisition Act 1993* vests in the Crown. However, the *Highways Act 1951 S.4* provides that the Crown may acquire a right "to pass and re-pass" over land and carry out works without the fee simple transferring to the Crown. If this action is pursued the position is identical to a situation at Common law whereby ownership above and below the surface area remains in the registered proprietor and the highway authority has surface rights only to control, protect and maintain the road "consistent with the purpose for which the right was acquired".

The *Land Acquisition Act 1993* provides for acquisition of land by agreement or compulsory process. In both situations compensation is payable by the Crown to the owner of the land concerned. The *Land Acquisition Act 1993 S.19* also provides that all estates, statutory reservations and dedications, excepting those specified in or created by the notice, are discharged by virtue of the notice of acquisition; and where the acquiring authority is not the Crown, excepting also those reserved to or held by the Crown.

## Creation by Subdivision

The subdivision provisions of the *Local Government (Building and Miscellaneous Provisions) Act 1993 Part 3* provide for the creation of highways by dedication using appropriate lot descriptions on a sealed plan. This applies to both new highways and widening of existing highways. Highways are deemed dedicated to, and accepted by the public when the sealed plan takes effect. Such dedication provides for the control, protection and maintenance of the street or highway by the highway authority for public use, but does not transfer title to the highway authority nor vest the soil or land in them as owner (*Municipal Council of Sydney vs Young (1898) A.C. 457*).

Ownership above and below the ground remains in the registered proprietor, and this appears to be an anomaly of law. It raises the question as to why the fee simple of a subdivision road should continue to vest in the subdivider and not transfer to the local authority, as surely all interests and indeed liabilities of the developer, have or should cease on completion of the subdivision. A situation can be envisaged where a company has been created for specific subdivision development, is wound up at completion, and yet continues to retain title to that portion of land being roads.

The exception to this situation is where a road reserve is dedicated by a sealed plan, in which case the title to the 'Reserve' lot issues in the name of the Crown (*Local Government (Building and Miscellaneous Provisions) Act 1993 S.98*).

A further problem appears to exist in respect of the provision of the *Local Government (Building and Miscellaneous Provisions) Act 1993 S.83* for road widening (where this is provisionally required by the local authority as a condition of approval of a sealed plan), perhaps not so much in the requirements for widening, although this in itself does create a restriction of ownership, but more importantly in the lack of a facility to remove the provision for widening from the title. Inevitably, the original provisional widening along a highway will not coincide with the actual widening requirements of the authority and may not, in fact, ultimately be required. The provisional widening however, remains on the title and requires the inconveniences and costs of amendment to the Sealed Plan under S.103 of the *Act*, for its removal. It is not unreasonable to suggest that some

simple mechanism should be available so that, following a highway reconstruction, the provisional widening which has not been required, may be removed automatically and at no cost to the registered proprietor.

In summary then, the two broad categories of highways are those which exist or are created at common law, and those which exist or are created by statutory provisions. Except in cases where the fee simple of the highway vests in the Crown, the existing system of highway 'ownership' might be considered as one of 'strata title rights'. Highway authorities have statutory powers for the control and maintenance of highways but are restricted by rights provided at common law. The registered proprietor of the fee simple, on the other hand, has common law rights above and beneath the highway but no rights to its surface. In these circumstances it is somewhat surprising that there have been so few cases of litigation relating to highways.

## Other Legal Aspects

### Highway Boundaries

The determination of boundaries depends on whether the highway was created at common law or under statutory provisions.

When highways are created at common law and there is an express dedication the boundaries are usually defined. In the case of an implied dedication they may or may not be fixed, but if not, and the road is fenced off from adjoining lands, it is presumed that all the land between the fences is dedicated, providing the width is not unusually great. The *Highways Act 1951 S.9* fixes highway boundaries at 2.5 metres clear of earthworks "in the absence of evidence to the contrary". A magistrate, however, may be called upon to define the boundaries of a local highway "where he thinks it ought to be, in the light of the evidence adduced before him" (*Local Government (Highways) Act 1982, S.17*).

When highways are created under statutory provisions the boundaries are normally defined by survey or by width of reservation from Crown grants. In the latter case the boundaries will remain nominally fixed at the reservation width (but subject to survey evidence of the boundaries) since there can be no adverse possession in such cases (*Limitations Act 1974 S.10*).

If a road is constructed in an alternative location to a road reservation the provisions at common law will apply to the road in use while the unused reservation remains vested in the Crown. It is argued that current law has some shortcomings in this regard. Under the 'old' *Crown Lands Act 1930 S.120AA (No. 1/1963)* offered a mechanism for a simplified exchange of roads in a situation where a reserved road did not coincide with the actual road in use, providing that the reservation was capable of redefinition. The obvious benefits to a registered proprietor were that his title was not further restricted by the 'additional' road and that full subdivision potential could be realised. A similar provision was not included in the *Crown Lands Act 1976*, although section 52 does enable exchange of land where the Crown land is under contract.

It is of note that in some limited circumstances where a property bounds a road there will be a presumption of common law that the fee simple ownership extends to the middle thread of the road

(*ad medium filum viae*). However, [Recorder of Titles Circular Memorandum No. 1/1999](#) concludes that it is unlikely that the *ad medium filum viae* rule applies in many cases in Tasmania.

Boundaries of a highway may have restrictions of access imposed on adjoining land owners. The *Roads and Jetties Act 1935* S.52A provides that a highway may be proclaimed a "limited access road" and S.52B provides for restriction of access to "a proclaimed place of access". This obviously is a restriction on the enjoyment of the ownership and S.52C provides that an owner at the date of proclamation, whose land is injuriously affected, is entitled to compensation. A problem still exists, however, for future purchasers. Implementation of limited access is achieved by proclamation, under S.9A of the *Roads and Jetties Act 1935*, of the intended line of highway. A copy of the Proclamation, together with a plan showing the route and a list of owners and titles affected, is lodged with the Recorder of Titles, who registers the Proclamation on the affected folios of the Register. If and when the Certificate of Title is produced to attend the registration of some other dealing the Proclamation is also recorded on the Certificate of Title. The extent of the limited access does not appear on the folio plan. The problem for future purchasers is that restriction of access is not clearly evident by title search and action should be taken to rectify this matter.

## Drainage

This aspect deals with the rights of drainage, onto and from public lands, and matters of easements.

Control of discharge of concentrated drainage and the prevention of sillage discharge, from adjacent lands onto a highway are provided by the *Roads and Jetties Act 1935* Ss.17B, 17C & 43, together with the right of the authority to make, cleanse and keep open all drains and watercourses which it considers necessary through any adjoining land (S.40). Compensation is payable to any owner or occupier who sustains any damage by virtue of this power. There is a further requirement that the ultimate discharge of water does not cause damage to any other owner. Similar controls and powers are provided to local authorities by the *Local Government (Highways) Act 1982* Ss.47 & 34.

Easements for the discharge of drainage may be obtained by purchase or reservation. Although it appears possible for a road authority to apply to the Recorder of Titles (*Land Titles Act 1980 Part IXB*) for the vesting of a drainage easement through adjoining land by right of uninterrupted use exceeding 15 or 30 years, depending on the case, this option is in practice not taken.

The matter of drainage and easements can represent a somewhat 'delicate' area and caution should be shown in dealing with these matters. Where doubts exist as to specific rights, the highway authority should undertake purchase of an easement as a safeguard against the possibility of future litigation.

## Fencing

The provisions of the *Boundary Fences Act 1908* do not apply to roads. The *Roads and Jetties Act 1935*, however, makes provisions that fences which have been temporarily taken down be well and sufficiently restored upon completion of road works (S.37), and that where a road has been deviated

it shall be well and sufficiently fenced by the road authority if required by the owner or occupier of the adjoining land (S.38). *The Land Acquisition Act 1993 S.58* requires that land acquired under the Act is to be fenced if required by the owner, providing that if the acquiring authority does not consider fencing of the new boundary to be justified the matter shall be settled by a Court of competent jurisdiction. A local authority may, where in a highway in a city or town there is a made footpath, require the owner of adjoining lands to provide or repair a fence between the footpath and the adjoining land (*Local Government (Highways) Act 1982, S.36*).

## Notice to Treat

The final aspect of the paper touches briefly on the provision and effect of a notice to treat. The *Land Acquisition Act 1993 Part 2 Div. 3* makes provision that in cases of compulsory acquisition an owner must be served with a notice to treat. The effect of the notice is that any compensation payable becomes fixed at the date on which the notice is served.

## Conclusion

This paper is not intended as a complete and absolute treatise of the law relating to the subject but does cover the major aspects which those practitioners and professionals involved with, or affected by highways are likely to come across, or up against, in the normal course of duty. Likewise, while some problem areas have been indicated, it is not claimed that these are all of the problems that exist. It is suggested that surveyors give serious consideration to the matters raised and take the initiative in bringing about necessary reforms.

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## Bibliography Notes

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