

# FOLEY'S | LIST

## WHEN IS A LANEWAY A PUBLIC HIGHWAY?

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Date: 1 September, 2016

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This paper was published in the *VPELA Review*, September 2016

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In this edition of VPELA Revue, the writer considers a decision of the Supreme Court of Victoria wherein the Court considers the legal status of a laneway. The laneway ran between two dwellings from a residential street to a pathway adjacent a railway line. The Court considered the inter-relationship between the Local Government Act, the Road Management Act and the common law.

## **WHEN IS A LANEWAY A PUBLIC HIGHWAY**

Roads!!!! Have you ever tried to work your way through this minefield!! What is the relationship between the legislation and the common law. How many types of roads are there? Is there such a thing as a road at common law? When is a laneway a road; when is a road a public highway; and when indeed is a laneway a public highway.

**Recent decision – Anderson & Anor v City of Stonnington & Anor [2016] VSC 374 (McMillan J)**



The Supreme Court of Victoria was recently charged with the task of deciding the legal status of a laneway. Why did it matter? The case was conducted on the basis of a comprehensive agreed statement of facts (par 7). That statement set out the history of the land from 1893. It is understood that in 1920 the Victorian Railways Commissioners granted an easement of carriageway to the then owner of the Plaintiffs' land, over land which comprised a laneway adjacent to the Plaintiffs' land.

Soon after, the title to the Plaintiffs' land was registered by the Registrar of Titles and the title designated the laneway as a road. In 2004, the Council registered the laneway as a laneway on its Register of Public Roads. It did not however declare the laneway to be a road pursuant to s 204 of the LGA (or s 11 of the RMA).

Various incidents in the laneway adjacent to their dwelling had caused the Plaintiffs to firstly seek to purchase the laneway; and subsequently to erect a fence to exclude the use of the laneway by the general public.

Declarations were sought by the Plaintiffs with respect to whether the laneway was:

a 'road' within the meaning of:

- (i) the Local Government Act 1989 (LGA);
- (ii) the Road Management Act 2004 (RMA);
- (iii) the common law;

and/or

a 'public highway' within the meaning of the common law.

The City of Stonnington and Victorian Rail Track (first and second defendants) successfully argued, and the Court agreed, that the laneway is a road under the relevant statutory provisions, and a highway open to the public at common law. How did the Court arrive at that position?

### **Agreed statement of facts**

The agreed statement of facts included:

7. (ff) The laneway has been used as a public pedestrian access to Lovers' Walk (*a pathway adjacent to the railway line behind the Plaintiffs dwelling*) without express leave or licence, which use is continuous and otherwise unexplained, since it was constructed as a laneway, or alternatively for a long period of time:

That fact subsequently became important in determining the status of the laneway.

### **Pyramid legislation**

According to the Court, there is a pyramid structure in legislation pursuant to which the status of roads is to be determined. At the top of the pyramid sits the LGA. The relevant provisions of the LGA refer to the relevant provisions of the RMA at the next level; which in turn refers to the common law which is the base upon which the legal pyramid is founded (par 60).

Local Government  
Act

Road Management Act

Common Law



The effect of this, according to McMillan J, was that if the laneway was a public highway at common law, then it was a road for the purposes of the legislation.

### **Common Law**

At common law, the term 'public highway' should be taken to mean all public rights of way, including those rights of way that may colloquially be described as 'roads' (par 29).

The Court observed that the terminology of the common law differs from that adopted by the statutes. Further, in both the LGA and the RMA, the definition of "road" is followed by definitions of "public highway" (which definitions differ in both Acts), and in the case of the RMA, "public road".

Whether the laneway was a public highway at common law would be determined in accordance with common law principles. The Court considered the colloquial meaning of road; the statutory meaning of road and the following statement of the law:

"At common law a highway was created when a competent landowner manifested an intention to dedicate land as a public road, and there was an acceptance by the public of the proffered dedication". (see Permanent Trustee Company of New South Wales Ltd v Campbelltown Municipal Council (1960) 105 CLR 401, 420).

The High Court in the Permanent Trustee case were considering whether a strip of land left in a plan of subdivision (which land was almost impassable) was a road or not. In that case, the fact that the plan of subdivision set out roads as open streets was to be construed as an invitation to the public to use the streets.

In terms of the common law then, McMillan J identified two concepts to be considered in determining whether a road is a public highway for the purposes of the common law:

- (1) – intention to dedicate land as a public highway either expressly or to be inferred from the conduct of the landowner; and
- (2) acceptance by the public by, for example, repeated and continued use of the relevant land as a way – that is, evidence of user.

### **Intention to dedicate**

The Court firstly considered the **intention** to dedicate land as a public highway, whether expressly or to be inferred from the conduct of the landowner. The intention to dedicate land as a public highway, it was said, did not need to be specific. The use of the land by the public (rather than the particular physical features of the land) '**as of right**' (that is, without force, secrecy or permission) was considered consistent with the dedication of that land to the public.

Referring to the twin requirements of dedication and acceptance, the Court continued:

“The rule remains that, for land to become a common law public highway, there must be an intention to dedicate it to the public as a way that must be accepted by the public for that purpose”. (par 33)

## **Can a road co-exist with an easement?**

At common law, a public highway can arise over land already subject to a private right of way. For example, in this case where an easement of way had been created over the laneway in favour of the Plaintiffs, that did not of itself prevent the laneway from being or becoming a public highway.

It is clear however in Schedule 5 Clause 14 of the RMA (no private right of way or easement on road) that a private right of way (including an easement) cannot develop or co-exist or be granted where there is already established a public right of way over the same land. In other words, whilst a public right can arise over land affected by a private right, the same is not the case with respect to a private right arising over land affected by a public right. Therefore, by virtue of this clause, all public rights of way exist to the exclusion of private rights of way to the extent that the two overlap.

This finding was relevant to the fact that the Plaintiffs enjoyed a private right of way over the laneway (the easement); but that did not mean that the laneway was not a road or that it had never become a highway under the common law (par 65).

## **Use of laneway**

The fact that the parties had accepted that the public had used the laneway without leave or licence, and in a manner that is otherwise unexplained, continuously for a long period of time (7 (ff) agreed facts) worked against the Plaintiffs. That statement reinforced the use of the laneway 'as of right'; and the public's acceptance of an intention to dedicate the laneway as a highway, which intention could be inferred from the second defendant's acquiescence in the public's use. (par 72).

The inevitable conclusion according to McMillan J was that the laneway was a public highway at common law. This conclusion it was said was supported by the fact that Council had accepted responsibility for the care and

maintenance of the laneway. This conclusion is questionable, given that no declaration had been made with respect to the laneway being a public highway under s. 204 of the LGA.

Whilst the common law does not recognize the term 'road' as a right of way that can arise over land, the common law does recognise the right of the public to pass and repass along a 'public highway'. The 'way' becomes a public highway because of the dedication and acceptance discussed above.

### **Legislation and the status of a common law public highway**



How was the common law position reflected in the legislation? Before considering the common law position, the Court had analysed the legislation (see table prepared by the author below).

McMillan J considered the definition of 'public road' (by reference to s 17 RMA) and the requirement (at S 17 (3) RMA) that the relevant road authority

'must register on its register of public roads a road in respect of which the road authority has made a decision that the road is reasonably required for general public use'. (par 23)

Footnote 18 to that conclusion states:

"under the RMA, the question of whether a road is a 'public road' is distinct from the question of whether a road is a 'public highway'. (*Note both terms are defined in s 3 RMA*). Whilst inclusion on a road authority's register of public roads automatically makes a road a public road by reason of the interaction between sections 17 (1) (e) and 17 (3), section 17 (5) makes clear that the removal of a road from an authority's register of public roads (or non-inclusion of the road on the register in the first place) does not affect the status of the road as a



public highway or the rights of the public to use the road as a public highway. “

The effect of s 17 of the RMA, according to McMillan J is that, by registering a road on its register of public roads, a road authority (including Council) makes the road a ‘public road’ for the purposes of the RMA, which in turn makes the road both a ‘road’ and a ‘public highway’ for the purposes of the LGA (par 25)

S 17 (1) (e) and (3) RMA together provide that a public road is a road the Council has decided is reasonably required for general public use; and a public highway under the LGA includes a public road under the RMA. Whether or not the Council passed a resolution with respect to the laneway being reasonably required for general public use is not discussed. It is arguable that the laneway was not so required. However, by virtue of the registration of the laneway by the Council as a public road, it became a public highway under that definition in the LGA.

### **Registration and dedication**

The question arises: in light of the Council’s registration of the laneway on its register of public roads, does that have the effect of changing the status of the laneway at common law. That is, for example, if the laneway had not been dedicated in the manner contemplated by the common law, or not used by the public (no evidence of acceptance of the dedication) would the registration of the laneway overrule the common law position.

Can the act of “dedication” at common law be inferred, or is something more required? Other than the creation of the easement in favour of the Plaintiffs’ land, there was no evidence of an intention to dedicate the laneway for public use. The Permanent Trustees decision, which was relied on by the Court to find that there was an intention to dedicate the laneway as a public road, was based on strip of land which had been laid out on a plan of subdivision.

Was the unfettered use of the laneway evidence of acquiescence by the owners of the laneway land (Victorian Railways) such that an intention to dedicate could be inferred. Could acquiescence translate into dedication. Her Honour referred to other decisions which involved questions of whether the lodging of a plan of subdivision, wherein roads were set out, constituted a dedication of such roads for use by the public. The conclusion was drawn that the "twin conditions of intention to dedicate and acceptance by the public" must be met.

"The delineation of land as a road on a map or plan of subdivision lodged with the titles office is evidence of an intention to allow the public to use the land as a road such that, where there has been sufficient use of the land as a road by the public to demonstrate acceptance, an inference may be drawn that the land was dedicated to the public for that purpose. Other facts particular to the case may be inconsistent with such an inference; for example, where the road is barred by a gate or fence". (par 39)

In the Anderson case, there was no plan of subdivision such as that considered in the earlier cases. Although the laneway was designated as a road on the title to the Plaintiffs' land, an employee of Victorian Railways had deposed to the fact that she was unable to locate any consents given to any person to use the laneway, other than with respect to the Plaintiffs. The Court construed this to mean that the public used the laneway 'as of right'; and that it reinforced the agreed fact of unhindered use (7 (ff)).

In support of this finding, the Court concluded that, given the particular facts of this case, dedication had been proved to satisfy the common law test because of the 'as of right' use of the laneway by the public.

"The common law has long considered evidence of use of land by the public 'as of right' as being consistent with the dedication of that land to the public, in circumstances where the words 'as of right' have taken on the meaning ..... use without force, without secrecy and

without permission. Put another way, use is 'as of right' if it cannot be explained by any other reasonable inference, for example, by an inference that the use was permitted by the landowner or an inference that the landowner did not know of the use". (par 70)

## CONCLUSION

"Given my finding that the laneway is a highway at common law, it must also be a road under the RMA. [86]. If the Council had exercised its power under s. 11 (1) of the RMA to declare the laneway a road (*and see s 204 LGA*), there would be no doubt as to its status as a highway at common law." [87]

In terms of the pyramid structure discussed by her Honour:

Under the **LGA** the laneway was:

a road (being a public road under the RMA – s. 3 LGA definition of road (ca))

a public highway (being a public road under the RMA – S.3 LGA definition of public highway (c))

Under the **RMA** the laneway was:

a road (which includes public highway – s.3 (1) RMA)

a public highway (a highway for the purposes of the common law - RMA s.3 (1));

a public road (RMA s.3 (1); and

s.17 (1) (e) which refers to s. 17 (3) – a road required for general public use)

### **At common law**

The laneway was a highway

By reason of dedication of the laneway evidenced by 'as of right' use by the public

*(Words in italics are the author's comments)*

NOTE: Definitions of the word "road" differ as between the Local Government Act 1989 (LGA) and the Road Management Act 2004 (RMA) (see table below). Definitions of "road" in other Acts also differ. For example, the Planning and Environment Act 1987 defines "road" to "include highway, street, lane, footway, square, court, alley or right of way, whether a thoroughfare or not and whether accessible to the public generally or not". The Land Act 1958, the Road Management Act 2004 and the Transport (Compliance and Miscellaneous) Act 1983 (there may be others) also have different definitions (relevant to the purpose of the particular Act). Both the Land Act and the Crown Land (Reserves) Act 1978 state that a road for the purposes of the particular Act

"is a road for the purposes of the Road Management Act 2004 but is a public road for the purposes of that Act only if the road is a public road within the meaning it has in section 3(1) of the Road Management Act 2004."

A "municipal road" is also defined in the RMA to be (inter alia) a road referred to in s 205 of the LGA. That section gives the Council the care and management of certain roads, including public highways vested in the Council; roads that are subject to a declaration under s 204, and roads the Council has agreed to have the care and management of. A public highway vests in the Council (Clause 1 (4) Schedule 5 RMA) upon becoming a road.

## TABLE OF DEFINITIONS

Local Government Act	Road Management Act
<b>S. 3(1)</b>	<b>S. 3(1)</b>
- <b>Road</b>	- <b>Road</b>
(a) a street	(a) any <i>public highway</i>
(b) a right of way	(b) any ancillary area
(ca) a <i>public road</i> under the Road Management Act 2004	(c) any land declared to be a road under Section 11 or forming part of a public highway or ancillary area
(d) a passage	
- <b>Public highway</b>	- <b>Public highway</b>
A road which is open to the public for traffic as a right, irrespective of whether the road is in fact open to traffic, and includes a road –	Any area of land that is a highway for the purposes of the common law
(a) Declared to be a public highway under section 204(1) ...	
(b) .....	
(c) Which is a public road under the Road Management Act 2004	
	- <b>Public road</b>
	a <a href="#">public road</a> within the meaning of <a href="#">section 17</a> ;
	<b>S. 11</b> <b>Power to declare and name a road</b>
	(1) A road authority may by notice published in the Government Gazette declare a road under this Act over— (a) any land owned by the road authority; or (b) subject to subsection (2), any land managed by the road authority.
	(4) A road declared under this section is dedicated to the public as a public highway within the meaning of the common law or any Act.
	<b>S. 17</b> <b>What is a public road?</b>
	(1) A road is a public road if it is— (a) a freeway; or (b) an arterial road; or (c) declared under section 204(1) of the Local Government Act 1989; or (e) a road to which subsection (3) applies; or
<b>S. 204</b> <b>Council may declare a road to be a public highway .....</b> (1 ) A Council may ... declare a road in its municipal district to be a public highway for the purposes of this Act.	(3) Subject to section 14(7), the relevant coordinating road authority must register on its register of public roads a road in respect of which the road authority has made a decision that the road is reasonably required for general public use. (Example A road set aside as a road in a plan of subdivision registered under the Subdivision Act 1988 is not a public road for the purposes of this Act unless and until a decision is made under subsection (3)).

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