

# ArchivesACT Research Guide

## COMMONWEALTH OF AUSTRALIA

CROWN SOLICITOR'S OFFICE,  
CANBERRA, A.C.T.

55/2557

14 April, 1959.

Your ref: 57/839

MEMORANDUM for -

The Secretary,  
Department of the Interior,  
CANBERRA, A.C.T.

### Roads and Public Places in the Australian Capital Territory

I acknowledge your memorandum of 28 May, 1958, in which you ask my advice on a number of questions concerning roads in the Australian Capital Territory. I shall deal with your questions seriatim, but, for the sake of convenience, I have in some cases divided your questions into parts.

#### (1) Dedication and opening of roads

Q. Could you please examine the position of roads already constructed in the Territory in both the city and rural areas? These roads include not only those which have been constructed by the Commonwealth, but also roads which were in existence at the date that the Territory was taken over from the State of New South Wales and have continued in use since that date.

Do these roads meet all the requirements for the classification of them as public highways? If they do not conform to the requirements of public highways, what must be contained in any legislation to remedy defects?

A. A highway is a thoroughfare which is opened to all the Queen's subjects and is a "dedication to the public of the surface of the land for the purpose of passing and re-passing the public generally taking upon themselves (through the parochial authorities or otherwise) the obligation of repairing it." (Rangeley v. Midland Railway Co. L. R. 3 Ch. 310). It is necessary to the conception of a highway that it should be open to all members of the public.

A highway cannot be created (except by statute) unless there has been a dedication either expressly or by presumption, by the owner of land of the right of passage over it to the public at large

and the acceptance of that right by the public. A dedication is a devotion to the use of the public.

Highways cannot, of course, be dedicated either to a limited class of the public or for a limited time.

As a general principle, no person other than the owner of the fee simple of land can dedicate land for the use of the public. Thus, the Commonwealth may dedicate a highway over Crown lands and the evidence required to establish the dedication by the Commonwealth is the same as is required in the case of a private owner.

A highway may be dedicated either -

- (a) by statute; or
- (b) by express terms; e.g. by a document;  
or
- (c) by presumption; e.g. by user.

(a) By statute -

No statutory authority appears to have been expressly given to the Commonwealth to construct, maintain and control roads in the A.C.T. By the Seat of Government (Acceptance) Act, the State of New South Wales surrendered to the Commonwealth that area of approximately 900 square miles which now comprises the A.C.T. The provisions of the Seat of Government (Administration) Act 1924 gave the Federal Commission power over "the control and management of Crown lands", and also over "the construction, maintenance and control of roads, bridges, culverts, levees, sewers, drains and water courses". This latter Act was repealed by the Seat of Government (Administration) Act 1930-1935, and no statutory right has since been given to any Commonwealth authority to construct and maintain roads.

I mention, in passing, that a road which is already in existence may be directly created a highway by statute and no act on the part of the public is needed to supplement the force of the statute.

(b) By express terms -

Any act, whether by deed or otherwise, which shows that the owner of land desires to give the public a right of passage over the land is effectual as a dedication. "If the owner of soil throws open a passage and neither marks by any visible distinction that he means to preserve all his rights over it, nor excludes persons from passing through it by a positive prohibition, he shall be presumed to have dedicated it to the public." - (R. v. Lloyd, 1 Camp. 260) - and the dedication is complete when the road is accepted by the public as such.

# ArchivesACT Research Guide

## (c) By presumption -

If the public have used a road without interruption for a long time, then the presumption arises that the road has been dedicated a highway. "The mere fact of the enjoyment of a public road for a great length of time ought to be permanently conclusive of such an intention to dedicate and it is immaterial to enquire in whom the soil was vested as owner." (R. v. East Wark, (1848) 11 Q.B. 877.) This presumption may be made whether the land belongs to the Commonwealth or a private owner.

The length of time during which the user must exist in order to raise a presumption varies with the circumstances. One must examine all material evidence available - for example, who has maintained and repaired the road - to ascertain whether there has been a continuous uninterrupted user to support a presumption of dedication. Although each case depends upon its respective circumstances, there are many reported decisions where period of four years uninterrupted user have been sufficient to raise this presumption.

Consequently, the question whether a road is a highway depends entirely upon the particular road concerned. However, I would say, generally, that roads taken over by the Commonwealth from the State of New South Wales by virtue of their long uninterrupted user by the public are now roads dedicated as highways. I refer particularly to the rural roads in the A.C.T., as it may be that the city plan has some bearing on whether roads in the city area have been dedicated as highways. Certain roads constructed by the Commonwealth in the Territory, other than those roads marked on the city plan - providing they have had a continuous uninterrupted user by the public for a reasonably long time - should, I think, be also classed as highways.

Q. Particular problems arise in relation to certain places. These include such thoroughfares as that in front of the Acton Offices leading to, and including the motor vehicle testing area, the front and rear entrances to the Albert Hall, and the access roads to other buildings both public and private, the road into Harman, and the R.A.A.F. Station at Fairbairn, and the road into and through R.M.C. Duntroon. The areas within the blocks of buildings at Civic Centre may also present peculiar problems.

In all these cases, it was intended that the roads should be private thoroughfares and not public highways. If, however, they could be taken to be public highways, how can the position be remedied? If they are private thoroughfares, what are the liabilities of the Commonwealth to any person using them? Would there be any difficulty in limiting these liabilities in law?

# ArchivesACT Research Guide

- A. The presumption of user can be rebutted by showing that the public user was not of right but merely by the permission or licence of the owner; in these circumstances, the Commonwealth. There can be no public right of way unless there has been a dedication of the way in question to the public by an owner able and intending to dedicate. The best evidence of dedication is, of course, an express grant. If there is no such grant, the fact of dedication can only be inferred from a consideration of all the circumstances of the case, the most important of which are the purpose and the extent of the user and the existence or non-existence of rights which might afford an explanation of user. It has been held that "in order to constitute a valid dedication to the public of a highway by the owner of the soil, it is clearly settled that there must be an intention to dedicate - there must be an animus dedicandi - of which the user by the public is evidence and no more, and a single act of interruption by the owner is of much more weight upon the question of intention than many acts of enjoyment".

Consequently, the Commonwealth may rebut by evidence that there has been a dedication of a road to the public. Such evidence would consist, if available, of the placing of restrictive notices on a road, the placing of a barrier across a road, or any act inconsistent with a dedication.

If the Commonwealth can adduce evidence of its intention not to create highways as regards these particular places - that is, if the Commonwealth could prove there was no animus dedicandi - then, of course, these places are not highways.

A highway cannot be dedicated for a limited time, although by statute a highway may be created to last only for a limited period. Consequently, once a highway has been dedicated, it will remain a highway until by statute it is closed or changed.

The question of the Commonwealth's liability in respect of a person using a private thoroughfare depends upon a number of factors. I assume you mean by a "private thoroughfare" a road over which the Commonwealth permits members of the public to travel as an act of grace only, the road not being a highway. The Commonwealth, as the owner of the land over which the private thoroughfare runs, is in the same position as regards liability as any private owner of land. An invitee - that is, a person who enters upon the private thoroughfare on the express or implied invitation of the Commonwealth for the purpose of some matter of common interest between him and the Commonwealth - is entitled to expect that, provided he takes reasonable care for his own safety and uses the thoroughfare reasonably, the Commonwealth will take reasonable care to prevent damage arising from any unusual danger of the thoroughfare of which it knows or ought to know.



# ArchivesACT Research Guide

A licensee - that is, a person who has a permission to use the private thoroughfare - takes the thoroughfare as he finds it. However, the owner of the thoroughfare must warn the licensee of any concealed danger which he knows is present in the thoroughfare.

A trespasser can expect no care or warning with regard to the dangerous state of the thoroughfare, except that the owner of the thoroughfare must not create dangers intentionally for him.

Generally, on the question of dedication I mention the provisions of section 54 of the Lands Acquisition Act which enables the Governor-General, by proclamation, to dedicate land vested in the Commonwealth for a public purpose.

(2)

## Future roads

- Q. In relation to roads which may be constructed in the Territory in the future, you may think some form of dedication is desirable so as to clarify the position in each case. If this is so, what are the necessary elements to be included in such legislation? Does the city plan as gazetted have any effect on the power to set aside a road for public purposes?
- A. I have mentioned previously that roads may be dedicated by statute. Whether you deem legislation desirable to dedicate roads in this manner is a question of policy and one for your Department to decide. However, I think that legislation could assist materially in avoiding some of the confusion that now exists. I would offer a suggestion, therefore, that a plan of the A.C.T. be prepared showing all existing roads. All those roads you desire to be public roads could be marked, and, by means of an Ordinance, the roads on the plan so marked would be deemed to be public roads. The Ordinance could also make provision for future roads to be included in the plan by means of a gazettal notice or otherwise.

By virtue of the provisions of section 4 of the Seat of Government (Administration) Act 1924, "the Minister shall publish in the Gazette a plan of the layout of the city of Canberra and its environs". A plan was prepared and published in the Gazette of November, 1925. The Seat of Government (Administration) Act 1924 was repealed by the Seat of Government (Administration) Act 1930, but by section 12A of the latter Act "the Minister may ... modify or vary the plan and the layout of the city of Canberra and its environs published in the Gazette.

However, a study of the original plan does not, in the absence of a legend, reveal any roads. The plan is a layout of the city only, and in my opinion, does not purport to create any public roads. I think that the plan could be used as some supporting evidence of the fact of the Commonwealth's intention to dedicate roads.

# ArchivesACT Research Guide

(3)

## Closure of roads.

- Q. The Roads and Public Places Ordinance provides at present for the temporary closure of roads. Do you envisage any particular obstacles which would have to be avoided in framing provisions covering the permanent closure of roads? What is the significance of a change in the city plan which involves the closure of a road? Would any complications arise in the case of roads constructed before the Territory was taken over from the State of New South Wales?
- A. At common law, once a road has been dedicated to the public it would require legislation to close that road. The Roads and Public Places Ordinance 1937, by virtue of the provisions of sections 4 and 5, enables the Minister, subject to certain conditions, both temporarily to close a road and also to provide for a temporary road in substitution for the road so closed. I cannot see any inconsistency in these sections with section 12A. of the Seat of Government (Administration) Act 1910-1947.

The provisions of section 12A. of the Seat of Government (Administration) Act 1910-1947 are not easy to interpret. The Minister may only modify the plan of the layout and may only construct future works in accordance with the plan. However, sub-section (4.) of section 12A. does say that "the Minister shall not depart from or do anything inconsistent with the plan of the city published in the Gazette with such modifications or variations as have been made prior to the date of the commencement of this section". It would seem that the only inference that can be drawn from sub-section (4.) is that any work to be done regarding Canberra's layout can only be done in accordance with the plan.

Consequently, if the plan is varied by a road being deleted from the plan, then the effect of such deletion is that the road as a road no longer exists.

As regards roads constructed before the Territory was taken over from the State of New South Wales, I assume that you refer to roads outside the area covered by the city plan. The general rules of dedication, as mentioned before, apply to such roads.

It follows from the above that a road included in the city plan cannot, in the absence of express legislation, be permanently closed. However, the road can be permanently closed by a variation in the city plan deleting the road.

Concerning roads outside the city plan, if they have already been dedicated to the public, it will need statutory authority to close them. This authority may be found in the New South Wales Public Roads Act 1902, in its application to the A.C.T.

11

# ArchivesACT Research Guide

(4)

## Footpaths.

- Q. There is in each of the leases of the properties in Civic Centre, which are included in the blocks known as Melbourne Buildings and Sydney Buildings, a clause in which the lessee agrees to construct a footway, to maintain this footway, and to permit the use of it by members of the public. Your attention is drawn to the notification of intention to auction certain of these leases, which notification was contained in Gazette No. 29 dated 19 March, 1927. This notice contained the following sentence: "Each lessee is required to permit pedestrian traffic over and through the arcade, except any portion thereof required for support in accordance with the building plan." It is this arcade which is referred to in the lease agreement as a footway. The Commonwealth provides another footpath outside the colonnades. Could you please advise whether, in view of the use of this footway on leased land by the general public as a footpath for pedestrian traffic using the public street, the Commonwealth could incur any liability to persons using it?
- A. On the information supplied concerning the arcade or footpath around Melbourne Buildings and Sydney Buildings, I do not think that the Commonwealth would incur any liability to persons using it. However, before expressing any definite opinion on this question, I should like to see a copy of one of the leases concerned.
- Q. In certain areas of the city there are footpaths running through grassed areas in public places outside the boundaries of public streets. Could you please advise the relationship between the Commonwealth and persons using the footpaths? If the liability of the Commonwealth is greater than that of a highway authority, would there be any difficulty in limiting this liability in law?
- A. As regards these footpaths, the position is still whether the Commonwealth has dedicated them to the public as highways. Similar rules as regards dedication apply alike to roads and footpaths. If the footpaths are not highways, the Commonwealth is in the same position concerning liability to persons using them as a private owner of land is in connexion with people using his land. If the footpaths are not in fact highways, you might think it desirable by Ordinance to declare them as such.

(5)

## Highway authority

- Q. In the opinion submitted in relation to Hamshare v. Lacey and the Commonwealth, counsel made certain observations as to the position of the Commonwealth as a highway authority. Would it be possible to constitute the Commonwealth or an individual department as a highway authority for the Territory? If so, what provisions must be made? Would it be possible to give to the legislation retrospective effect so as



# ArchivesACT Research Guide

to avoid the possibility of action being taken by any person for injury sustained prior to the making of the legislation? It may be that the provisions of the National Capital Development Commission Act 1957 would need consideration in relation to the matter.

- A. I can see no reason why an individual government department should not by statute be constituted a highway authority for the A.C.T. However, the highway authority, if appointed, would I think be limited to a certain extent by the implications of the city plan and possibly by the National Capital Development Commission.

The Commission may provide or arrange for the provision of roads within the A.C.T. in pursuance of its functions; that is, the planning, development and construction of the city of Canberra. Presumably, before the Commission constructed a road, it would assume control of the area over which the road was to be constructed. As controller or occupier of the road, at least until the Commission handed it over, I think the Commission could be liable to users of that road.

I mention that a highway authority is not liable for injuries caused to users of a highway by its own non-feasance - that is, non-repair to the surface - but only for any act of misfeasance by which the highway is rendered dangerous.

Although it is possible to give retrospective effect by legislation to a highway authority and to public highways, it is undesirable that this should be done. However, it is a matter of policy for your Department to determine.

## (6) Nature strips and plantations

- Q. The streets in most areas of Canberra are quite clearly defined. They are bounded by distinct property lines and are made up of the roadway, a footpath and a nature strip. There are, however, numerous exceptions; for example, Commonwealth Avenue, where the property lines are not apparent from the ground, and, in addition to the basic elements of a highway, there are plantations in the middle of the roadway. Could you please advise:
- Q.(a)(i) Whether the whole area from property line to property line, including nature strips, plantations etc., is included in a highway at law?
- Q.(a)(ii) If so, what is the extent of the highway when the property lines are not clearly apparent (as in Commonwealth Avenue)? and
- Q.(a)(iii) presuming that a highway is constructed to include a footpath, carriageway, etc., is there any limitation of the power of the highway authority to alter the structure of the highway - for example, to take away the footpath on one side and to include it as part of the carriageway?



# ArchivesACT Research Guide

- Q.(b) What is the liability of the Commonwealth to persons using:
- Q.(b)(i) Nature strips unprepared except for planted trees?
- Q.(b)(ii) Nature strips developed by the Commonwealth for purposes other than as a highway?
- Q.(b)(iii) Nature strips developed or maintained by private persons with the tacit approval of the Commonwealth?
- Q.(c) What is the liability of a private person to people using a nature strip which that person has developed, is developing, or is maintaining with the tacit approval of the Commonwealth?
- A.(a)(i) The width of a highway which has been dedicated, or is presumed to have been dedicated, is in all cases a question of fact. It has been reported that "in the first place, a highway may exist which is not metalled road at all; but generally a part is metalled and a part kept which is not hard road; and in general, when the highway is between two fences of the ground - that is, between the fences - it is presumably dedicated as a highway unless the nature of the ground or other circumstances rebut that presumption". (Easton v. Richmond Highway Board.)
- A highway is a thoroughfare which is open to all the Queen's subjects, and generally, where the nature of the highway permits, includes a right of vehicular traffic passing over it. I think that the very nature of nature strips and plantations would rebut any presumption of dedication in favour of a highway.
- A.(a)(ii) The extent of a highway being a question of fact depends entirely upon the individual circumstances of the highway concerned, but in general terms, assuming there has been a dedication, would include that area of the road, excluding plantations and nature strips, over which the public has enjoyed the right of passing and re-passing for a long period of time.
- A.(a)(iii) I have mentioned previously that once a highway has been dedicated to the public it remains a highway until closed by some legislation. That being so, in the absence of legislation, a piece of the highway cannot be taken so as to form a footpath. However, where a footpath as used in the sense of being that piece of land between property lines and the road proper has not been dedicated as a highway, I can see no reason why the footpath or a portion of it cannot be joined to the highway. As regards the portion added to the highway, it will still remain, in the absence of legislation or express dedication, a question of fact if and when it will be dedicated to the public as a highway.
- A.(b) Concerning nature strips, I assume that you refer to those portions of land owned by the Commonwealth and not leased by it to any person and which are either developed by the Commonwealth or developed by some person with the approval of the Commonwealth.

# ArchivesACT Research Guide

## A.(b)(i) and (b)(ii) -

The liability of the Commonwealth to persons using nature strips is, in my opinion, the same as is borne by a private owner of land to persons using that land.

## A.(b)(iii) and (c) -

The liability to members of the public would, of course, depend upon the particular circumstances of each case. However, in general, liability, in my opinion, would be the same as in (b)(i) and (ii) above, on the ground that the private person developing the nature strip would be presumed to be acting as agent for the Commonwealth in so doing. The private person would, in my opinion, be liable in some cases, particularly where the private person did some positive act not authorized by the Commonwealth whereby a passer-by might be injured; for example, digging and leaving a hole uncovered in the nature strip whereby a person passing by and without any negligence on his part would be injured.

## (7) Parking areas

Q. There are throughout the Territory various parking areas provided by the Commonwealth. These may be classified generally as follows:

### (a) Off street areas -

These include the area at Civic Centre bounded by London Circuit, and the area off Mort Street, the latter being constructed specially for the purpose.

### (b) On street areas -

These include -

- (i) those areas listed in the Second Schedule of the Motor Traffic Regulations;
- (ii) those which, though not covered by the Regulations, are specifically provided for use as parking areas - for example, at Garema Place, which is specially constructed even to the point of having laid out thereon special parking bays and areas set aside in the centre plots in Wentworth Avenue; and
- (iii) those areas which, though not specially prepared as parking areas, are used as such by motorists without objections being raised by the Department - for example, the plantation area in Limestone Avenue, immediately in front of the Ainslie Rex Hotel, and the similar area in Canberra Avenue immediately in front of the Hotel Wellington.

# ArchivesACT Research Guide

Could you please advise what duties and liabilities are incurred by the Commonwealth as a result of the provisions of the particular parking areas and as a result of the use of the other areas by motorists without objection by the Commonwealth. Would any difficulty be encountered in limiting these liabilities in law?

- A. Motorists must take parking areas as they find them, and, providing the parking areas do not constitute a traffic hazard and are not dangerous and are reasonably constructed for the use to which they are put, no liability attaches to the Commonwealth.

(R.L. ODLUM)  
Deputy Crown Solicitor (A.C.T.)

## PART I - THE COMMON LAW

It may be a useful introduction and explanatory background to this paper to outline the provisions of the Common Law with respect to highways.

### DEFINITION

Contrary to popular belief, a highway is not merely a major road. A highway comprises all portions of land over which every subject of the Crown may lawfully pass. The essential feature of a highway is that it should be open to all members of the public. So this definition excludes land over which a man may pass by virtue only of a licence personal to himself, or in the exercise of his right as the owner or occupier of that land.

### THE RIGHT OF THE PUBLIC IN A HIGHWAY

1st VIEW: Some cases describe the public's right in a highway as an easement of passage only - a right of passing and repassing. This definition would explain the prohibition against racing on the highway: motor speed trials held on the highway have been adjudged nuisance. Accepting this definition, there is no right on the part of the general public to hold meetings on a highway for a party can only justify passing along, and not being in, a highway.

2nd VIEW: A public road or highway is not an easement: an easement must be connected with a dominant and servient tenement. In the case of a highway, there is no dominant tenement and the law does not recognize an easement in gross. On this second view, a public road or highway is a dedication to the public of the occupation of the surface of the land for the purpose of passing and repassing. Of course, this definition excludes those activities mentioned in the first definition.



THE OWNER RETAINS OCCUPATION OF A HIGHWAY

Subject to this right of the public to pass and repass on the highway, the owner of the soil in general remains the occupier of it and, as such, may maintain trespass against any member of the public who acts in excess of his right. If a person is upon the highway for purposes other than its use as a highway, he is a trespasser.

CUL-DE-SAC

It used to be doubted that a cul-de-sac (or way closed at one end) could be a highway for it did not conform to the ideas of "passing and repassing" and, possibly "open to the use of all the public". However, expenditure of public money for repairing, cleaning, lighting etc., coupled with evidence of use, is strong evidence from which dedication may be inferred.

BRIDGES

A bridge which has been dedicated to and used by the public does not differ from an ordinary road in so far as the public right of passage. Similarly, a highway which crosses a river by means of a ford, or a public footpath which crosses a stream by means of stepping-stones, does not thereby cease to be a highway.

DEFINITIONS UNDER OTHER HIGHWAY ACTS

Under the Highway Act 1835, s.5:

"Highways mean all roads, bridges, carriageways, cartways, bridleways, footways, causeways, churchways and pavements."

By the Highways Act 1959, s.294

".....where a highway passes over a bridge or through a tunnel, that bridge or tunnel is to be taken for the purposes of the Act to be a part of the highway."

The 1959 definition, apart from including "tunnels" to mean highways, adopts the 1835 definition of a highway.

Common to all areas mentioned in the definitions is this idea of "passing and repassing". It is this concept of movement which distinguishes a highway from other public places such as a square, public courtyard or carpark. The definition of highway, road, street, etc. can vary widely, depending on the purpose the definition is to serve and that will depend upon the type of legislation in which the definition appears. In its ordinary popular sense, "street" means a way or road in an urban district with houses on both sides, or at least on one side. (per Lord Selbourne L.C. in Robinson v Local Board of Barton (1883) 8 App. Cas. 798). The Public Health Act 1875 extends the traditional definition of "street" with almost cavalier abandon:

"street includes any highway.....  
and any public bridge, any road, land,  
footway, square, court, alley or passage -  
whether thoroughfare or not".

Of course, the definition of street used in any Public Health Act must necessarily be used in a special, almost artificial sense, since such an Act must seek to define every possible passageway so as to enforce health regulations in every nook and cranny. A Highways Act or Public Roads Act serves a different purpose. It merely has to define highway in normally acceptable terms so as to protect the rights of the authorities and highway users.

The various statutes on highways appear to take this approach." They define highway, more or less in the terms of s5 of the Highway Act 1835, leaving the definition of "street" to the Common Law which, it is submitted, is correctly embodied in Lord Selbourne's definition in Robinson's Case.

RESPONSIBILITY FOR REPAIR

Prior to the 1870's the traditional burden of repair lay with private owners and authorities. There developed a new class of highway in the 1870's called a "main road" the introduction of which saw the burden of repair shift onto highway authorities - the county councils.

CREATION OF HIGHWAYS

A road may be created in three ways:

- (a) Statute;
- (b) Dedication - the grant, either express or implied, of a right of way to the public over private property;
- (c) Prescription - the vesting of a right by reason of lapse of time. It seems to be commensurate with "presumed dedication".

A. CREATION BY STATUTE

A road which is already in existence may be directly created a highway by Act of Parliament and no act on the part of the public is needed to supplement the force of the statute.

B. CREATION BY DEDICATION

With the exception of highways created under statute, no highway can be created except:

- (i) by dedication (express or presumed);
- (ii) by the owner of the land;
- (iii) of a right of passage over it;
- (iv) to the public at large;
- (v) the acceptance of that right by the public.

WHO MAY DEDICATE

The general principal is that no one but the owner of the fee simple may dedicate, because the right given to the public is a right in perpetuity.

C. PRESCRIPTION OR PRESUMED DEDICATION

Where there is no direct evidence as to the owner's intention, an animus dedicandi may be presumed. The length of time during which the use must exist in order to raise the presumption varies with circumstances. Six years has been held a sufficient time.

BOUNDARIES AND THE AREAS OF HIGHWAYS

The right of passage or way, unless there be evidence to the contrary, extends to the whole space between the fences. The public are entitled to use this entire area as a highway and are not confined to those parts which may be metalled or kept in order for the more convenient use of carriages and foot passengers. SED QUAERE: Does this definition allow vehicles to overtake on the unsealed portion of a road? The overriding provisions of s56 of the Motor Traffic Ordinance would seem to be paramount to the Common Law on this point.



PART II - APPLICATION OF THE COMMON LAW IN  
THE A.C.T.

A. CREATION OF ROADS

A road may be created by Statute or dedication - express, implied or presumed.

CREATION BY STATUTE

A highway can only be created under Statute by a Highway Authority. Under Section one of the British Highways Act 1959 the Minister of Transport and Civil Aviation is made the highway authority for certain roads. A borough council is created the highway authority for borough roads and a county council for council roads.

The question arises whether there is a Highway Authority for A.C.T. roads.

Section 14 (1) (d) of the Seat of Government (Administration) Act 1924 empowered the Federal Capital Commission to construct, maintain and control roads. The Federal Capital Commission, then, was a properly constituted Highway Authority. The Seat of Government (Administration) Act 1930, Section 4, repealed the 1924 Act and, thereafter, the Commonwealth was given no specific powers in respect of roads in the Territory. Therefore the Commonwealth is not in the ordinary position of an authority authorised by Statute to construct, maintain and control roads. There is only very slim authority in some old English cases to support the tenuous view that a highway authority can be presumed from all the circumstances. The better view, it is submitted, is that an Authority can only be created by Statute and a properly created Authority, only, can create roads by Statute. It would seem that there is no such Authority for the A.C.T. and roads and highways in the Territory cannot be created by Statute.

There are two disadvantages of not having any Highway Authority for the A.C.T. Firstly, where a highway is created by Statute, no act on the part of the public is needed to supplement the force of the statute. This question of acceptance by the public (which must be established where a road is created by dedication) could hinge on involved fact evidence. The creation of a highway by Statute dispenses with such evidentiary involvements. Similarly, the possibly complex question of animus dedicandi is dispensed with when a highway has been created by Statute.

The second disadvantage was re-stated by Dixon, J (as he then was) in Buckle v Bayswater Road Board (57 CLR 259 at 281.) His Honour pointed to the well-established principle that a properly appointed Highway Authority is only liable to an injured highway user for the Authority's misfeasance. Misfeasance is an active interference with the highway. Illustrations of misfeasance are the placing of obstacles or construction materials on the road or digging a hole in the road. An Authority is likewise liable for damage resulting from its negligence in the actual construction of a highway or in the actual making of repairs. An Authority is not liable for nonfeasance or for failure to repair a road which has been allowed to fall into disrepair. It matters not that the road was created by statute or dedication.

In the A.C.T., however, there is no properly appointed Highway Authority and it seems the Commonwealth is liable to a road user for those injuries resulting from both the misfeasance and non-feasance of the Commonwealth. It is probably stating the obvious to say that it is highly desirable, because of these wider liabilities attaching to the Commonwealth, to appoint a Highway Authority under any new legislation.

CREATION BY DEDICATION

In the absence of any Highway Authority for the A.C.T., a road in the Territory can only be created by a dedication - express, implied or presumed.

Any act which shows that the owner of land (the Commonwealth) desires to give the public a right of passage over the land is effective as a dedication. R v Lloyd stated the effect of a dedication in another way:

"if the owner of soil throws open a passage and neither marks by any visible distinction that he means to preserve all his rights over it, nor excludes persons from passing through it by a positive prohibition, he shall be presumed to have dedicated it to the public."

The dedication is complete when the road is accepted by the public as such.

Dedication need not be express; it may be presumed from the fact of the enjoyment of a public road for a great length of time. The length of time varies with the circumstances e.g. who has maintained and repaired the road. It would seem that those roads taken over by the Commonwealth from the State of N.S.W. in 1910 are, by virtue of their long uninterrupted user by the public, roads dedicated as highways. The same conclusion can be made with regard to rural roads but a slightly different position may apply to roads in the City Area.

It is doubtful that roads in the City Area have been created by express dedication under the City Plan. By Section 4 of the Seat of Government (Administration) Act 1924 the Minister was required to publish in the Gazette a plan of the layout of the City of Canberra and environs. This Act was subsequently

repealed by the Seat of Government (Administration) Act 1930 which empowered the Minister to vary the plan and layout of Canberra and environs. This plan does not purport, nor is it empowered, to dedicate roads to the public. It merely sets out the layout of Canberra (including roads). The plan may be varied in a prescribed manner. The result, it is submitted, is that the City Plan does not expressly dedicate public roads. However, the City Plan together with the other circumstances - long user of each individual road, the fact that the Commonwealth designed and continues to repair and maintain each road - raises a strong presumption of dedication.

The position would seem to be that the three categories of Roads in the A.C.T. - roads acquired by the Commonwealth from the State of N.S.W., rural roads and roads in the City Area are properly created public roads under the common law by presumed dedication. This finding is not altogether satisfactory for to determine whether a road in the A.C.T. is a highway reference must be made to circumstances surrounding each road.

The best solution would seem to be for the Commonwealth, by an Ordinance, to provide that all roads on the City Plan at a certain date shall be deemed to be public roads. Any future road inclusions on the Plan shall be deemed dedications of these additional roads. The roads will then have been created by express dedication and matters of interpretation to decide animus dedicandi and acceptance must no longer be examined. In this way the legislature will recognize the City Plan, inter alia, as the formal instrument by which public roads are dedicated.

#### Problem Areas

Other thoroughfares are not so easily classified as highways under the common law. Such areas are, for example: the roads into Harman, the R.A.A.F. Station at Fairbairn and R.M.C.



Duntroon; those parking areas and laneways behind buildings in Civic.

No roads in the A.C.T., it has been submitted, have been created by express dedication. The nature of these thoroughfares and an animus dedicandi can only be ascertained from all the circumstances which apply to each. It has been said that a single act of interruption by the owner is of much more weight upon the question of intention than many acts of enjoyment. Consequently, the Commonwealth may rebut a suggestion that a road has been dedicated to the public by appropriate evidence. Such evidence may be the placement of a barrier across a road or the placement of restrictive notices on a road. This would dispose of those roads into Harman, Fairbairn and Duntroon as "private thoroughfares" - roads over which the Commonwealth permits members of the public to travel as an act of grace only. The roads are not highways.

However other prima facie private thoroughfares may, in fact, be highways. Special mention is made of those lanes behind buildings in Civic e.g. the Melbourne and Sydney Buildings. The Commonwealth has erected parking signs to control traffic congestion in these spaces and such evidence supports an intention by the Commonwealth to dedicate these areas to the public. It is open to the Commonwealth to rebut this evidence and show the public may use these areas by an act of grace only. The example does tend to illustrate, however, the possible confusion and embarrassment in which the Commonwealth could find itself by its continued failure to expressly dedicate highways.

Finally, mention should be made of car-parks in the A.C.T. The common law definitions of a "highway" include streets, alleys, lanes, thoroughfares, bridges, footpaths etc. The common

activity on all these areas is "passing and repassing". That is the purpose for their existences - to provide a means of "passing and repassing". For this reason it used to be doubted that a cul-de-sac could be a highway. The main purpose of a car-park, axiomatically enough, is to park cars. It is only ancillary to this purpose that cars can pass and repass. Moreover it would be difficult to establish by evidence that the Commonwealth intended to dedicate a car-park as a highway.

#### B. PHYSICAL AREA OF A HIGHWAY

The physical area of a highway is a question of fact in each case. It is not restricted to those parts which are metalled or kept in order for the more convenient use of carriages or foot passengers. The whole part of any road is dedicated as the highway "unless the nature of the ground or other circumstances rebut that presumption." (Easton v Richmond Highway Board). Moreover, the cases show that a highway is meant for passing and repassing.

These two factors would support a finding that the very nature of nature strips and plantations in the centre of many Canberra roads would rebut any presumption that they are dedicated as part of a highway. On the other hand, and using the same sources of common law, nature strips adjoining a road and tended by a lessee (and in the absence of footpaths) would seem to be highways which are open to pedestrian members of the public. A lessee who tends a nature strip would appear to be an agent for the Commonwealth who, in turn, is liable for the non-feasance of its agent. However, if the lessee were to dig a hole and leave it uncovered, whereby a passer-by were injured, the Commonwealth would not be liable for the agent's act of misfeasance.

Along some major routes e.g. Belconnen way, areas are set aside as reservations where it is envisaged the route will

have to be widened at some later date. It may be useful to define a highway so as to include a term such as "areas set aside as road reserves" in the interpretation clause of any future highway legislation.

#### C. ROAD CLOSURES

The main power to permanently close a public road in the A.C.T. is to be found under S19 of Public Roads Act 1902. The common law only requires an intention to close a road, S19 providing a legislative expression of such an intention. However, that expression could be further strengthened by providing that any road deletions on the City Plan are conclusive that the road has been permanently closed.

PART III - N.S.W. LEGISLATION APPLICABLE TO  
THE AUSTRALIAN CAPITAL TERRITORY

PUBLIC ROADS ACT 1902

The purpose and scope of this Act seems to be succinctly summarised in the preamble:

"An Act to consolidate the Acts relating to the opening closing survey altering and improving of Roads and the alignment and alteration of the alignment of Streets in Municipalities."

It is submitted that the Act does not purport to extend beyond those boundaries stated in the preamble.

TERMS

The Seat of Government Acceptance Act 1909 by s.6 provides:

"Subject to this Act, all laws in force in the Territory immediately before the proclaimed day (1 January 1911) shall, so far as applicable, continue in force until other provision is made."

Taken as a whole, the Act was applicable to the needs and nature of the Territory as at 31 December 1910, notwithstanding that many of the terms used throughout the Act could not and cannot be equated with past and existing administrative machinery in the Australian Capital Territory. Although it seems an Act must be viewed in toto to decide its applicability under s.6 (and which view supports the applicability of the Act to the Territory) it is proposed to show that a number of the terms used throughout the Act are neither applicable nor interchangeable. Their continued use could cause problems of interpretation.

Terms such as Governor, Gazette, Minister, etc. cause no concern. They are clearly interchangeable with Governor-General,



Commonwealth Gazette, the Minister for the Interior etc. Synonyms are not so readily found for other terms.

In the preamble, and elsewhere throughout the Act, the term "municipalities" is used. In those sections where the word is used (ss18(2), 24, 27, 28(1)), liaison is envisaged between the Minister and the municipal council. Thus in s27 the Minister, on application by a municipal council, may survey and define streets. Can such a relationship be so easily found within the Department of the Interior?

Some other terms are not interchangeable: incomplete purchase, land agent, Department of Lands, Commissioner for Roads, Conditional Lease, local land board, Quarter Sessions. It could be argued that by deductive interpretation the equivalent and valid term, expression or procedure can be ascertained for the A.C.T. Further, it can be argued, where no equivalent term etc. existed in the Australian Capital either one of two approaches could be taken. Firstly, a very wide interpretation could be given to such terms, schemes etc. so that it will be rare that an A.C.T. equivalent cannot be ascertained. Alternatively, the term or machinery in the Act which can find no equivalent in the Australian Capital Territory is, to that extent, inapplicable.

However it is submitted that interpretative processes can often be costly, involved and uncertain. It may be of greater benefit to the Department if the terms and machinery in its legislation are more certain and less dependent upon the decisions of the Courts. It would seem, too, that a citizen of the Australian Capital Territory should be able to ascertain his rights and liabilities more directly and with more certainty without recourse to the Courts in the first instance.

CROWN LANDS

The expression is used throughout the Act and means "land vested in His Majesty and not permanently dedicated to any public purpose or granted in fee-simple or conditionally leased...."

A conditional lease, *semble*, is not the Crown Lease under which title most lands in the A.C.T. are held from the Commonwealth. So it would appear that when the expression "Crown Lands" is used throughout the Act it means land retained by the Commonwealth and also leased land. Freehold land would be excluded.

Examination of the relevant sections of the Act shows that the very wide definition assigned to "Crown Lands" does not carry any startling consequences. However, the Commonwealth may well be concerned that leased land under the Act should be included under the description of Crown Land. Such a definition is, at least, anomalous.

MINISTERIAL DISCRETION

The Act is studded with instances of ministerial discretion. No doubt, greater scope exists for this in New South Wales. In any case, some of the discretions in the Act do not directly affect the rights of the citizen; they merely facilitate the administrative machinery.

Thus under section 8(i) "....the Governor may after considering any objections....resume....so much land as he thinks necessary for the road....". The section directly affects the rights of a landholder or any other person affected who, admittedly, can object to the resumption. However the section does not provide for any formal machinery for the objection to be heard.

The Minister, it seems, must only consider an objection; he is not obliged to do more. A similar discretion appears in s8(6). It is all very well to say the Minister can be compelled to exercise his discretion properly by the writs of mandamus or certiorari. It remains that the section gives a very wide power to the Minister with only the common law checks upon him. It would be reasonable to spell out some procedures which the Minister must follow before he resumes land for road-making purposes and outline the aggrieved parties' method of appeal from any decision to resume.

Other examples of discretions appear at:

s19(1) - The Minister may close an unnecessary road and provides for objections from landholders, which must be heard under s20(1).

s20(3) - Under s20(3) the local board is to determine the value of the resumed land. No explicit avenue of appeal is provided.

Other examples of discretion can be found in ss17, 28(4).

Generally, the Minister's powers of discretion under the Act are wide. The act does not spell out any avenue of appeal from either an administrative or a ministerial decision; nor does it appoint any body to adjudicate a dispute.

#### MISCELLANEOUS

s26 provides for an application by a proprietor who desires an access road from an existing road to his property. The application is to a Court of Quarter Sessions, the aggrieved party having the right of appeal to the Governor whose decision shall be final. There is no provision of the type contained in the City Area Leases Ordinance 1936-1971 whereby the Minister's certificate of objection shall be an end to the matter. It can

be doubted whether s26 of the Act is, therefore, in the best planning interests of the Territory even though the final decision will rest with the Governor-General. It may be desirable to include a section similar to s11A(2)(b) of the City Area Leases Ordinance whereby an objection can be taken in the first instance by the Minister on the grounds that such a proposed access road would not be in the best planning interests for Canberra. One effect of such a protection would be to prevent "ribbon" development in the rural areas of the Territory.

Furthermore, s26(6) may place the cart before the horse. Would it not be more reasonable to provide an appeal from the Governor to the Courts rather than from the Courts to the Governor? This suggestion may have special validity in the legislative atmosphere of Canberra.

s29 of the Act provides that "no suit or action shall be maintainable against the Crown for injury or damage resulting from any alignment or alteration of alignment under this Act." Again, in the legislative atmosphere of the Territory, is such a section desirable?

#### THE PRACTICAL USE OF THE PUBLIC ROADS ACT 1902 IN THE TERRITORY

An example of the closure of an unnecessary road under s19 of the Act is given at folios 27-33 of 70/3153.

The procedure followed in that closure was:-

- (i) Approval by the Minister for the Interior and subsequent gazettal in both N.S.W. and Commonwealth Gazettes.
- (ii) A waiting period of one month when objections may be lodged.
- (iii) Approval by the Executive Council of the road closure.



(iv) Gazettal of approval.

It could well be argued that it is unnecessary for the closure of a road situated wholly in the Australian Capital Territory to be gazetted in both Commonwealth and N.S.W. State publications. There is nothing in the Act to suggest that such a double procedure is required. If some reason could be found for the redundant procedure then the procedure itself is cumbersome, unsatisfactory and not befitting an independent Territory.

LEASES ORDINANCE 1918-1958

It would appear that most withdrawals of land for road purposes are from rural leases, the great bulk of which are granted under the Leases Ordinance 1918-1958. Regulation 24 of the Leases Regulations provides:

"(1) The Minister, by notice in writing to the Lessee, may resume any portion of the land which is required for any public purposes of the Commonwealth:

Provided, however, that should the lease be for a term greater than five years a notification of such resumption shall be published in the Gazette.

(2) The Commonwealth may pay compensation in respect of any improvements effected by the lessee on the land resumed in pursuance of the last preceding sub-regulation."

Regulation 24 is substantially incorporated in Clause 3(g) of the standard rural lease.

There are several advantages of a Clause 3(g) withdrawal over the withdrawal provisions in the Public Roads Act 1902. Firstly, the clause does not specify detailed procedure to be followed before the closure can be made; this advantage is to the Commonwealth, of course - not to the lessee.

The second, less apparent, advantage of a clause 3(g) withdrawal is that the contractual nature of any lease gives either express or constructive notice to the lessee of the terms of the lease. It may be, then, that the Courts would interpret a lessee's right less strictly under the terms of a lease which the lessee has agreed, or is deemed to have agreed, to accept.

Thirdly, under Regulation 24 of the Leases Regulations, compensation is only payable for improvements whereas under the Public Roads Act 1902, compensation is payable for loss of land rights even where, it is suggested, land is held under a lease.

#### CITY AREA LEASES ORDINANCE 1936-1971

There is no clause under this Ordinance which provides for the resumption of land for public purposes. The Commonwealth must rely on the Public Roads Act 1902 or the Lands Acquisition Act 1955.

Procedurally, there is little to choose between either Act. Both Acts provide for compensation to an aggrieved landowner. The Lands Acquisition Act 1955, however, goes further, being more explicit about compensation and arming the landowner with the right of appeal to a Supreme Court or the High Court of Australia. It would seem more logical, all things being equal, to use the resumption clause in the Public Roads Act where the Commonwealth seeks to acquire land for the express purpose of constructing roads.

AMENDMENTS TO THE PUBLIC ROADS ACT 1902

Amendments to the Act after 1 January 1911 are deemed by the Seat of Government (Administration) Act 1919 not to apply to the Territory. It may be a worthwhile exercise to look at those amendments to decide whether there are any existing gaps, or improvements to be made in the original Act which applies to the Territory.

- (i) SECTION 6 - The term Chief Surveyor still stands in the Act as it applies to the Australian Capital Territory. Act No. 12 of 1923 deletes the term "Chief Surveyor" and inserts the term "Surveyor-General". The latter term would be more appropriate to the office in the A.C.T.
- (ii) SECTION 6A - Act No. 12 of 1923 s4 gave the Under Secretary for Lands power on behalf of the Minister to deal with such formal matters as may from time to time be prescribed.  
  
For the sake of convenience, such a section would be desirable in the legislation applying to the A.C.T. A glance at the relevant files shows the Minister's signature on all formal notices whereas it may be quicker to appoint a delegate as in N.S.W.
- (iii) SECTION 11 - Act No. 35 of 1937 deleted the "Mining Act 1874" and inserted "Mining Act 1906". This amendment has no relevance to the A.C.T.
- (iv) SECTION 12(3)(b) - Act No. 6 of 1912 s39 corrects a mistake in the sub-section, inserting the word "conditional" instead of "additional".
- (v) SECTION 12(10) - Act No. 6 of 1912 s39 adds the words "including a trustee not having power to sell." It

may be that such a loophole was worth blocking up in N.S.W. It seems that all freehold acquisitions in the A.C.T. will be completed within a year and the additional words may not have great relevance to a leasehold system.

- (vi) SECTION 13(b) - "The" is added before "Crown" by Act No. 35 of 1937, s3.
- (vii) SECTION 16(2)-Act No. 6 of 1912, s39 added two paragraphs to the Act.

"Compensation shall be made in all cases for the fencing of the road resumed if the owner so claims" and "Provided that the amount of such compensation shall not exceed the reasonable cost of fencing and shall be payable only in cases where the road resumed is within a legally enclosed holding."

The paragraphs were added following the decision in Real v Tumbarumba Shire Council 6 Aust Digest 869.

That case decided that the owner could not claim compensation for his fencing costs within the resumed area of land. The absence of the two paragraphs could limit the compensation claims of an A.C.T. landholder.

- (viii) SECTION 19(4) - "The Crown Lands Act 1884" is replaced by the "Crown Lands Consolidation Act 1913". Act No. 35 of 1937 s3.
- (ix) SECTION 26(4), (5) and (9) - "Chief Surveyor" is replaced by "Surveyor General".
- (x) SECTION 26(10) - No. 35 of 1937 s3 amends an error in the 1902 Act, the original version reading "Such road shall not be more than twenty feet wide in the



clear." Thus, in the Act which applies to the Territory, the landowner may apply to the Court for an access road to his land through the lands of another. However such access road, as it presently reads, must be more than twenty feet wide; of course, the legislature meant the opposite - the road must be less than twenty feet wide.

- (xi) SECTION 30(i) - "Chief Surveyor" is replaced by "Surveyor General". This amendment is made throughout the Act. It is arguable, on one hand, that any sensible interpretation would, to achieve sense from the relevant sections, insert the term "Surveyor General" where the term "Chief Surveyor" appears. On the other hand, it could be argued that, since N.S.W. deemed it expedient to explicitly amend the terms, that such a "golden rule" of interpretation cannot be applied. Therefore, a literal approach must be taken with the result that there is no Chief Surveyor in the A.C.T.; therefore those sections which contain that office are, to the extent that the Chief Surveyor performs some duty or authorizes some act, inoperative. In any case, as suggested before, an amendment to the Act would resolve any possible conflict.
- (xii) SECTION 34(i)-Act No. 35 of 1937 s3 amends "Land Court" and inserts Land and Valuation Court. The question is then raised: What is the A.C.T. equivalent of the local land board? More pertinently, to what judicial body of review does a land or valuation dispute lie under this Act?

It may be too facile to merely suggest the  
A.C.T. Supreme Court.

- (xiii) SECTION 36 - Act No. 35 of 1937 s3 replaces the original s36 with an expanded section which provides for more detailed procedure and through which a Regulation under this Act must pass.
- (xiv) PUBLIC ROADS (AMENDMENT) ACT 1923 - Section 7 of the Principal Act provides that "notice" must be given of a road opening both in the Gazette and some local newspaper. Watt v. Geddes (1936) 36SR 447 held the notice in that case was insufficient. The decision prompted the Public Roads (Amendment) Act 1923 which laid down those details which would constitute reasonable notice. The details to be included in a notice are:

Parish No.	Area	Parish Name
County Name	Reputed Owner	Occupier
Character of Holding	Width of land to be resumed	Area to be resumed.

Under the Principal Act, what constitutes "proper notice" is still uncertain.

#### MISCELLANEOUS PROVISIONS

##### 4 William IV No. 11 (1833)

This Act, from the wording of its preamble, purported to be a fairly extensive enactment as to roads and town streets. The Public Roads Act 1902 repealed most of its provisions and the remaining operative sections of the Act give power to workmen authorized by the Surveyor-General to enter land for road construction purposes.

These remaining powers could be most conveniently provided for under the terms of a lease.

MAIN ROADS ACTS (1858, 1871)

The Act of 1858 provided similar provisions to those contained in 4 William IV No. 11. The Act was only to apply to certain roads appearing in the Schedule to the Act. Furthermore, the Act provided funds for the upkeep of the specified roads were to be appropriated from Consolidated Revenue (and not from a Road Vote). Special Commissioners were appointed to maintain uphold repair fence and manage the specified roads.

35 Victoria No. 2-repealed the Schedule to 21 Victoria No. 8. The 1871 Act provided that another schedule would be proclaimed at some later date. It is submitted, however, that it would not affect the current state of affairs if a later proclamation did make mention of a road in the future A.C.T. The only two effects would be those mentioned in the last paragraph.

However the two Acts are superfluous, confusing and of no consequence to existing highway needs in the A.C.T. It is suggested that the two Acts be repealed.

SUMMARY OF PART III

It is a major feat of interpretation to work the provisions of the N.S.W. Acts into the present framework of the A.C.T. The legislation was principally designed for a freehold System. Moreover, amendments to the N.S.W. Roads Act since 1910 have highlighted anomalies in/<sup>a</sup>demonstrably incomplete Statute.

There is too much ministerial discretion under the Act and it seems that little use is made of the Act in the Territory. There are some advantages of incorporating those features of the Act which affect individual rights into the lease itself. For, although a wide discretion and the source of an apparent hardship may be frowned upon when contained in the delegated legislation of the A.C.T., notice would seem to

cure these defects when contained in the lease itself.

The repeal of the N.S.W. Act is advocated. ss7-17 of the Public Roads Act should be incorporated in the lease while the other provisions should be streamlined to the needs and administrative machinery of the Australian Capital Territory's leasehold system.



PART IV - ROADS AND PUBLIC PLACES ORDINANCE 1937-1959

The Ordinance defines "public road" more widely than at common law:

"Public Road" means any street, road, lane, thoroughfare, footpath, or place open to, or used by, the public". The inclusion of "footpath or place open to, or used by, the public" is an extension of common law definitions assigned to "public road".

This wide definition begs the question. Is an area of parkland which has not been dedicated as a park, a "public road" under the Ordinance. It seems the only sensible meaning that can be given to "place open to, or used by, the public" is by the application of an *eiusdem generis* interpretation. Thus "a place....." must be interpreted to mean an area of the same type as a road, lane, thoroughfare etc. It is questionable, then, that the additional words of "place open to, or used by, the public" serve any purpose for their ordinary meaning will probably be severely restricted by this *eiusdem generis* interpretation. Moreover, the application of an *eiusdem generis* interpretation to "public road" gives a sensible and logical explanation for the insertion of the wider term "public place" in the Ordinance.

Viewed as a whole, the Ordinance does not purport to repeal the Public Roads Act 1902. The table in the Ordinance makes no mention of the repeal of any part of the Public Roads Act 1902. The Ordinance only attempts to legislate for some miscellaneous matters which are not mentioned in the Act. Thus the Ordinance covers the construction of culverts, exhibition of advertisements or notices on Commonwealth property etc. - all matters which have been excluded in the Act. Elsewhere,

as in ss 4, 5, 11, the Commonwealth seeks to better legislate for temporary road closure, temporary road use and interference with alignment marks, respectively.

The conflict is:

Is the supposedly wider definition of "public road" in the Ordinance restricted to the Ordinance and the miscellaneous matters therein? Alternatively, does the Ordinance impliedly repeal the definition of "public road" in the Act and substitute the wider definition in its stead?

The conflict is made more real because the Ordinance does not specifically state that it repeals any part of the Public Roads Act. It is patently obvious, however, that ss 4, 5 and 11 repeal ss 22 and 31 of the Act. It is not so patently obvious, on the other hand, that s2 of the Ordinance repeals the definition of "Road" in the Act. It can be argued that the wider definition of "public road" in the Ordinance is more appropriate to the purpose of that Ordinance but it does not affect the definition of "Road" in the Public Roads Act. The answer to the conflict may be academic and of little consequence for whatever the correct interpretation it is doubtful that the Courts would assign to the definition of "Road" in the Ordinance the panoramic scope intended by the legislature. The definition would probably be restricted to traditionally defined thoroughfares and routes.

SECTION 3 The Public Roads Act 1902 provides for the re-alignment of roads. It is silent about the alteration of a public road level. Section 3 fills in this gap. The provision has special relevance to Canberra with its greater number of overpasses and fly-overs.

SECTIONS 4 AND 5 Section 21 of the Public Roads Act 1902 provides for the temporary closure of roads. The section does not provide an abbreviated procedure for temporary road use except after compliance with the general provisions of the Act requiring gazettal, notice, etc. Section 5 provides for temporary road use without the need for formal time-consuming procedures required by the Act. In cases of emergency the Minister may close a road temporarily or make a temporary road, without even the notice required under ss 4 and 5. Such a contingency was not anticipated by the Public Roads Act 1902.

SECTIONS 6 AND 7 The Public Roads Act 1902 is silent about the construction of drains to carry away surface water which causes damage to public places.

SECTIONS 8 AND 9 Under Section 8 it is an offence, inter alia, to "place an obstruction in, over or across any public place". By Section 9 the Minister may authorize a person to carry out some of those activities prohibited under Section 8 - placing a culvert, opening up a surface etc. However, Section 9 does not allow the Minister to permit any person to "place any obstruction in, over or across any public place". The Minister can only prosecute the offence under s8(c) or turn a blind eye to the activity. This gap is particularly obvious with the proposed development of plazas.

At the moment, then, the Minister cannot effectively authorize obstructions in any public place. Charity stalls, eating areas on footpaths, flower and ice-cream stalls in a plaza all spring to mind as uncondonable activities under Section 8 whereas the Minister may feel permission should be obtainable for some of these activities under Section 9.

SECTION 11 This section re-words Section 31 of the Public Roads Act 1902. The specific words "stakes" and "trenches" become the

more general phrase "any alignment or boundary mark". The section is wider than Section 31 of the Act, making it an offence to "....damage... any...notice board, public notice or other erection in or on any public place..."

SECTIONS 10, 12, 13 and 14 These sections are all additions to the Public Roads Act 1902.



PART V - A BASIS FOR REFORM?CONTROL OF ROADS ORDINANCE (NORTHERN TERRITORY) 1953-1959

This ordinance was introduced to repeal South Australian legislation as it applied to the Northern Territory. The Ordinance restricts its terms and administrative machinery to the situation in the Northern Territory. This may well be the best feature of the legislation.

"Road" is defined in the usual way to include streets, roads, courts, alleys etc. The Ordinance by s5 then goes on to legislate a number of common law features of a road. Thus a road shall include land which is, whether before or after the date when this Ordinance comes into operation:

- (i) dedicated as a road
- (ii) opened as a road under the Ordinance
- (iii) reserved as a road in Crown Land
- (iv) conveyed to and accepted by the Commonwealth as a road
- (v) a throughfare over Crown Land

These instances of "roads" would all be covered in the A.C.T. by common law as long as the animus dedicandi can be discovered. There is no disadvantage in embodying the common law in legislation, especially where a definition is concerned.

An interesting provision of the Ordinance is section 6. The provisions of the Lands Acquisition Ordinance and of the Lands Acquisition Act 1906-1936 are incorporated with the Ordinance.

Such a move in the A.C.T. would remove a number of difficulties discussed earlier: a greater degree of ministerial discretion would be permissible under the Lands Acquisition Act; the Act spells out in greater detail the aggrieved landowner's avenue of appeal against acquisition or unfavourable compensation. This suggestion - that the Lands Acquisition Act be used rather than the acquisition provisions in the Public Roads Act 1902 - does not mean that the Act should be used in preference to the third suggested scheme whereby the acquisition clauses are incorporated in the lease itself. It may be useful, however, to have an overriding alternative to the terms of the lease.

It is worthy of note that s7 of the Ordinance states that kerbs, gutters, footpaths, lamp posts, walls, chains etc. affixed to roads are vested in the Commonwealth. Such a conclusion can be quite easily reached under A.C.T. law. Again, there is no harm in spelling out these facts in any legislation.

s35 of the Control of Roads Ordinance raises an interesting problem. If the owner of a private street etc. maintains and repairs that private street, there is a presumption that the area is not a public road. The presumption is not easily displaced. Hence s35 provides that the presumption shall be displaced if the Administrator, on the request of the owner, declares the street to be a road under the Ordinance.

#### CONTROL OF ROADS

The National Association of Australian State Road Authorities in a recent publication "Road Legislation and

Practice" (1968) laments the absence of an element of "control" from existing highways legislation. The Association argues that the legislature is unrealistically turning a blind eye to true questions of road "control". It is logical, according to the Association, that Highways legislation should effectively provide against unnecessary road obstructions and road disrepair by laying down detailed maximum lengths, widths and weights of vehicles permitted to use public roads, and the maximum speeds for heavy vehicles.

The Control of Roads Ordinance devotes twenty-five sections to this aspect of Highway control. The Ordinance further attempts to preserve road surfaces by laying down requirements as to vehicle tyres and by requiring vehicles of certain weights and dimensions to travel along a public road only after a permit has been obtained.

A.C.T. law on this facet of road control is relatively silent. Condition 13 in the fourth schedule to the Motor Traffic Ordinance 1959 provides; "The Motor Vehicle shall not exceed eight feet in width, measured between its extreme projecting points." There is no mention of a maximum weight or length. This deficiency has been now recognized and it is intended to legislate for such controls in the near future. The legislation will be administered by Motor Traffic Branch.

The more logical place for these limitations and controls is in Highways legislation and not in Motor Traffic Law. It is the free flow of traffic on highways and surface deterioration of highways which cause concern - the relation of the vehicle to the road itself - more than the regulation of

vehicles inter se. Certainly Motoring Associations in Australia have advocated the inclusion of such controls in Highways legislation.

Undoubtedly Highways Legislation should be administered by Land Administration Branch. It may be asked, however, whether the Branch has sufficient technical resources of staff and equipment to administer this aspect of the legislation. On the other hand, it may not be feasible to have two Branches - Land Administration and Motor Traffic - administer the different aspects of the same Ordinance. Although problems are created, it is nevertheless suggested that the question of motor vehicle controls be incorporated in Highways legislation and not in Motor Traffic legislation even though the latter approach would be administratively less complex.



PART VI - SUMMARY AND RECOMMENDATIONSA. SUMMARY

There is no Highway Authority for the Australian Capital Territory. As a result, roads in the A.C.T. cannot be created by statute and, consequently, the Commonwealth leaves itself open to a greater number of negligence claims from injured road-users.

Most roads in the Territory have been properly dedicated as highways by presumption. However the circumstances surrounding each road must be examined to decide with certainty the nature of the road. The creation of a road by express dedication dispenses with evidentiary problems. Roads in the Territory could be created by express dedication retrospectively and, to this end, use could be made of the City Plan or a special Road Plan. The Plan could be similarly used as proof of a road closure.

The Commonwealth may feel that it should define "road" more widely to include road reservations and nature strips adjoining a road. There is no benefit to the Commonwealth in laying down road surface standards and road widths in any highway legislation. If such inclusions were thought desirable, they might be more properly included in regulations.

The Public Roads Act 1902 should be repealed. A similar blow should be dealt to other N.S.W. highway laws applying to the A.C.T. These laws were not designed for a leasehold system. The terms and machinery to which these Acts refer do not exist in the Territory. The Minister's discretions might be suitably modified to the restrictions on delegated legislation. Those section of the Acts which affect individual rights - resumption,

compensation, rights of appeal -- might be better incorporated in the terms of the lease itself.

Overall, the provisions of the Roads and Public Places Ordinance 1937-1959 are satisfactory although the definition of "road" under the Ordinance may not be as wide as the draftsman intended. The Minister's inability to permit an obstruction across a public place may require remedial action. The provisions of the Ordinance would, no doubt, be incorporated into any new highway legislation.

The Control of Roads Ordinance (Northern Territory) 1953-1959 is attractive for a number of reasons:

- (a) it was designed for the specific needs of the Territory. It is not merely "foreign" legislation adapted, as far as possible, to the needs of the Northern Territory. It is important that an A.C.T. Highway Ordinance is conscious of the Territory's leasehold system.
- (b) the Ordinance expands the usual definition of road and enacts common law features of a road;
- (c) by incorporating the Lands Acquisition Act 1906-1939 into the Ordinance, the landowners' rights of compensation on resumption are better protected.

However, the Ordinance's most striking departure from previous highway law is its road control provisions, which seek to ensure the more orderly use and more efficient care of the roads. Such controls are highly desirable in the A.C.T. They

should be part of a Highway Ordinance and not a Motor Traffic Ordinance. The whole Ordinance - including controls on vehicles - should be administered by Land Administration Branch

#### B. RECOMMENDATIONS

It is recommended that:

- (i) All existing highway law applicable to the A.C.T. be repealed.
- (ii) A comprehensive new Ordinance be introduced.
- (iii) The Ordinance appoint a Highway Authority which, most suitably, could be the Minister for the Interior.
- (iv) (a) Existing roads be created "public roads" by Ordinance.  
(b) Future roads be expressly declared "public roads".
- (v) The City Plan or a similar plan be used to effect the creations in (iv) and be proof thereof.
- (vi) The same Plan be proof that a road has been closed.
- (vii) "Road" be defined more widely to include nature strips and road reservations and those common law features of a road which are set out in the Control of Roads Ordinance.
- (viii) The new Ordinance restrict the Minister's discretion where it affects the rights of the individual.

- (ix) The Ordinance be specifically designed for the peculiarities of the A.C.T. leasehold system.
- (x) Some matters be incorporated in the lease itself: the fact that compensation shall be payable on resumption for certain specified interests; details of the procedure to be followed before resumption; the lessee's rights of, and avenues for, appeal; rights of entry onto leased land by the Commonwealth for road surveys or construction purposes.
- (xi) Attention be paid to the real effectiveness of the wide definition of "road" in the Roads and Public Places Ordinance 1937-1959.
- (xii) The Minister be empowered (under Section 9 of the Roads and Public Places Ordinance) to authorize obstructions across a public place.
- (xiii) Any new legislation contain road control provisions which specify maximum vehicle dimensions and tyre dimensions (with or without a permit).
- (xiv) The new Ordinance be administered, in toto, by Land Administration Branch.