

Local Governments and Private Rights of Way

By Trudi Firth

Many local governments have within their districts privately owned rights of way (**ROW**), often registered in the name of deceased estates. These private rights of way are often in disrepair, and local governments are requested by residents to take action.

Historically, many of the private ROWs were established in older freehold land subdivisions as laneways behind residential lots. Fee simple title to the private ROW usually remains in the name of the original subdivider, who has no further interest in the land. The landowners are long since deceased or are defunct development companies. The private ROW is often subject to implied easements under section 167A of the *Transfer of Land Act 1893* (**TLA**) in favour of the residential lots created by the relevant plan of subdivision.

If the local government can locate the beneficial owners of the private ROW, it can purchase the land and then choose to dedicate the private ROW as a public right of way or road or conduct a subdivision and sell the land to adjoining landowners. However, often locating the rightful owners can be challenging given that the private ROW may be registered to a deceased owner. It may be time-consuming and difficult to locate the current living beneficiaries of the deceased owners and, if necessary, obtain probate or letters of administration to transfer the title to the current beneficiaries.

Where it is not possible or practical to locate the beneficial owners, there are three main options available to local governments:

1. **Closure and Amalgamation** - One option is to request the Minister for Lands (**Minister**) to close the private ROW and amalgamate it into adjoining private properties. This option reduces local government oversight while resolving issues related to disrepair, but it requires the engagement and cooperation of adjoining property owners.
2. **Dedication of Private ROW** - Another option is to request the Minister to dedicate the private ROW in the Crown as a public ROW or public road. This option will ensure continued public use, but also shifts the financial and administrative responsibility to the local government.
3. **Maintain the Status Quo** - Lastly, local governments can decide to leave the private ROW as it is, taking no action. While this option avoids immediate costs, it does not address concerns raised by residents or prevent future issues.

Closure and amalgamation

A local government may request the Minister to close the private ROW (**Request**), pursuant to section 52 of the *Land Administration Act 1997* (**LAA**), and thereafter sell the fee simple interest in such land to adjoining landowners for subsequent amalgamation pursuant to section 87 of the LAA.

The section 87 power is only exercised in circumstances where the Minister considers that the parcel of land is unsuitable for retention as a separate lot, or subdivision and retention of the land as a separate lot is not considered suitable because of its geographic location, potential use, size, shape or any other good land use planning reason: section 87(2) of the LAA.

Section 87 of the LAA provides that, upon amalgamation of the parcel of Crown Land with the adjoining land, that parcel of Crown Land takes on the tenure of the adjoining land and becomes subject to any encumbrance of the adjoining land: section 87(5) of the LAA. For example, if the adjoining land is freehold land subject to a mortgage, the Crown parcel, on amalgamation, becomes freehold land and will also be subject to that mortgage.

Section 52(2) requires that any Request to the Minister be accompanied by:

- a plan of survey or sketch plan showing the subject land and approved by the WAPC; and
- copies of all objections lodged with the local government during the notice period described in section 52(3).

Prior to making the Request, pursuant to section 52(3), a local government must take all reasonable steps to give notice of the Request to the owner of the private ROW and the owners of the land adjoining the private ROW, and give such persons at least 30 days from the date of the notice during in which to lodge objections with the local government against making the request.

In addition to compliance with the requirements of section 52, the local government will also need to comply with Regulation 6 of the *Land Administration Regulations 1998* (**Regulations**). In general terms, a local government must:

- undertake a community consultation;
- consult with WAPC;
- discuss the proposed closure with landowners of the private ROW or take steps to locate the landowners or their executors;
- liaise with adjoining landowners;
- seek public utility service authority providers' agreement to the closure; and
- pass a resolution to close the road.

The Minister may in its discretion grant the Request, direct the local government to reconsider the Request or refuse to grant the Request.

Generally, private ROW closures will not be approved by the Minister unless the private ROW is to be amalgamated into adjoining land or is reserved with a management order to an appropriate management body.

Additionally, the Department's practice is that the closure of a private ROW pursuant to section 52 should not proceed without clear evidence that:

- arrangements have been made to protect or relocate any public utility services installed within the private ROW;
- reasonable objections by the landowner, adjacent property owners and owners of properties served by the private ROW have been satisfactorily addressed; and
- the future use of the land is resolved.

- Where adjoining landowners are interested in purchasing part of the closed road for amalgamation with their land, the local government should arrange, with adjoining landowners, for a survey plan showing the manner of allocation of the closed road with adjoining land. The survey plan must be prepared by a licensed surveyor and must be approved by the WAPC: s52(2)(a)(ii) of the LAA.

When the Department receives a local government's request and confirms compliance with its requirements, it seeks a market valuation from the Valuer General, which the Minister must consider. Exceptions to this requirement are set out in Regulation 12 and include where the closure is:

- part of an overall local government initiative to reduce crime or anti-social behaviour; or
- closure is part of a local government planning initiative which would be frustrated by market value pricing.

The Minister has discretion as to whether to close the private ROW. Where the Minister approves the closure, the Minister's approval is normally subject to and conditional upon:

- all adjoining owners agreeing to pay the purchase price, costs, and fees, and signing an Offer and Acceptance based on these terms.
- approval by the WAPC of the closure and amalgamation survey plan,
- all easements required by public utility service providers to be detailed and agreed, and
- all land the subject of the proposed closure being amalgamated into adjoining land.
- If the private ROW is not required for access purposes, requesting the Minister to close the private ROW pursuant to section 52 and amalgamate into the adjoining landowners may be a feasible option for the local government to pursue, particularly if the Minister agrees that the purchase price is nominal. However, the local government will need to be mindful that all landowners will need to participate in the process and sign the necessary documents. A delay or reluctance from one or two landowners may delay or prevent the completion of the whole process.

Closure of Private Road and conversion into Crown land as a public right of way or public road

Alternatively, it is open for the local government to request that the private ROW be closed and dedicated as a public ROW or public road. The benefit of conversion to crown land, is that the local government will then have care, control, and management of the land.

If the local government requires the land to be dedicated as a 'public road', there are two avenues that are available:

- if the private ROW has been used by the public for over 10 years: s56(1)(c) of the LAA; or
- if the private ROW has not been used by the public, dedication may be done by way of a two-step process: closure and conversion to Crown Land pursuant to section 52; and thereafter dedicated pursuant to section 56.

Before requesting road dedication under Section 56 of the LAA, the local government must fully meet the requirements specified in Section 56 and Regulation 8. In this regard, the local government must undertake the following tasks:

- identify the land and in particular:

1. whether it has been or is to be reserved or acquired for use by the public under local government's care, control, and management;
 2. whether the land already comprises a private ROW and a request has been made by either the freehold owner or a sufficient number of adjoining holders to local government requesting the dedication;
- whether the land is a private ROW that has been used by the public for an uninterrupted period of not less than 10 years;
 - where the land is freehold land, set out all of the steps necessary to identify the freehold owner/s and where possible, obtain the freehold owner/s' consent to the dedication. Where the freehold owner/s cannot be located, the local government should undertake and provide evidence of searches of relevant registers and records to try and locate the freehold owner/s;
 - undertake a community consultation in relation to submissions received on the dedication request.
 - prepare a survey plan to describe the dimensions of the proposed road;
 - consult and refer the proposal to public utility service authority providers and obtain their consent;
 - pass a resolution to dedicate the land as a road;
 - where the land is freehold but not a private road, local government must provide Minister for Lands with an indemnity against any claim for compensation in accordance with section 56(4) of the LAA.
 - where the land is freehold land and has been used as a private road for a period of not less than 10 years, local government must:
1. confirm that the public has had the uninterrupted use of the private ROW for a period of not less than 10 years;
 2. describe the section(s) of the public who have had the use of that land as a road; and
 3. prepare a description of how the private ROW is constructed.

We understand that the Department may not proceed with a s56 dedication, unless:

- all parties have agreed to the dedication of the land as a road and the procedure is non-contentious;
- the road is clearly constructed and maintained as a street in the traditional sense; and
- the land has been used as a road by a broad section of the public, and that use has not been obstructed by gates at any time during the 10-year minimum period.

The powers under sections 52, 56, and 87 are discretionary, and the requirements to satisfy the Minister will depend on the Department's practices and procedures. Early engagement between the local government and the Department is advised to ensure clarity and compliance with the requirements

Maintain the Status Quo

Closing a private ROW can be a lengthy and resource-intensive process, incurring costs for surveys, advertising, compliance, and locating beneficiaries. The local government may choose to maintain the status quo, but this could leave current issues unresolved, and the land might remain unmaintained, causing amenity problems.

Conclusion

For each private ROW, we recommend the following process:

1. Initial Review and Consideration

- Identify the owners and assess the possibility of contacting them.
- Evaluate the current use and purpose of the private ROW.
- Determine the best future use of the private ROW from a planning and amenity perspective.

2. Meet with the Department to discuss options and processes

3. Consider next steps

Review feedback from the Department and commence processes to satisfy the requirements of sections 52/Regulation 9, 56/Regulation 8 and 87/Regulation 12 (as applicable), and the Department, prior to making the formal request to the Minister.

The information contained in this article should not be relied upon without obtaining further detailed legal advice in the circumstances of each case. For any comments or questions on this article please contact Trudi Firth (tfirth@mcleods.com.au).

Liability limited by a scheme approved under Professional Standards Legislation.