

# STAKEHOLDER CONSULTATION IN ROAD ADMINISTRATION: A LEGAL PERSPECTIVE

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*The primary function of roads is to facilitate transport: roads provide a way for movement of people and goods from one place to another. However, roads are more than just a part of a transportation network: they are land which is open to and used by people for a variety of purposes. Not all uses are lawful, and not all stakeholders are organised, vocal or articulate, particularly in developing countries. Many uses need not conflict with other uses, but potentially do so.*

*For these reasons, road administration is a complex function, often requiring decision-makers to evaluate proposals in terms of multiple policy considerations. Good quality decisions are most likely to occur in a regulatory environment which mandates participatory decision making – a process in which stakeholders are identified and consulted and their views are taken into account.*

*The result of a poor decision making process generally is poor decisions, with consequent injustices, misallocation and wastage of resources and deficient action to improve road safety and road network performance.*

*In many countries road administration legislation provides little guidance to road administrators, being brief and lacking procedural detail. Two common failings are conferral of wide enforcement powers that have the potential to be used in a draconian way and imposition of requirements that are onerous and difficult to administer. At least, legislation should:*

- *set out administrators' objectives, preferably at a high level;*
- *impose specific consultation requirements for some decisions.*

*Effective stakeholder consultation is possible in road administration – even in developing countries – using an appropriate consultation tool.*

## INTRODUCTION

Roads<sup>1</sup> provide many important economic and social benefits to many people, not the least because they provide a way for the movement of people and goods from one place to

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<sup>1</sup> In this paper, “road” is used to mean the area of land between the property boundaries on either side of a carriageway, including footpaths. This can be indeterminate if there is uncertainty about the location of the property boundaries. The legislation of some countries creates an area called

another. However, they occupy a considerable amount of space, and their administration consumes considerable resources. Many deaths and injuries occur on them.

The most important function of roads is to form a transportation network – uses associated with transportation are therefore the primary uses of roads. Roads, however, have another characteristic which is also of great importance: they are land which is used by people for a variety of purposes. These secondary uses are significant – they include commercial activities, utility services (such as water and electricity supply), squatter accommodation, public recreation and even livestock agistment. However, not all uses are lawful and many are not planned or welcome by government agencies.

This multiplicity of uses makes roads complex places to administer. Roads are something of a beehive of activities, although, unlike bees, road users rarely share a common purpose. So, as a commercial goods vehicle travels along its journey from factory to port it will share the carriageway with school buses taking students to school, pedestrians walking to local shops and farmers taking agricultural equipment from one field to another. Along the way the vehicle will pass under electricity wires, over water pipes and across railway level crossings. Its driver is likely to stop to conduct a commercial transaction with a roadside trader (possibly attracted by a commercial advertisement displayed on the road), and its journey may even be interrupted by a public assembly using the road as a meeting place. These actors share a place, but they do not have common purpose.

This is not to say that each road user has a single objective. A commercial goods operator wants to get its consignment to its destination quickly, but it may be willing to compromise that objective in order to avoid cost or damage to the vehicle or its load. Further, the consignor, consignee, transport operator and the driver are likely all to have differing objectives relating to that vehicle movement. The driver, for example, might share the consignee's desire for speed if being paid by consignment, but not if being paid by time. A toll road might be attractive to the consignee if its use speeds up the journey, while its attractiveness to the operator will depend on whether there is a net cost saving.

Many uses need not conflict one with another, but often do – for example, where a utility service provider digs up a carriageway for routine maintenance of an underground pipe a week after, rather than a week before, the carriageway is resurfaced. Modifications to a footpath adjacent to commercial premises might be attractive, expensive and complimentary to the business conducted on the premises – but, unless correctly constructed, will be disruptive of pedestrian movement along that footpath. Regulatory authorities, if astute, act to ensure that uses are carried out in a way that minimises conflict of this type.

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the “right of way” which is a fixed distance on either side of the carriageway (for example, *Bhutan Road Act 2004*, s. 6). This avoids the problem of identifying property boundaries, but it is apt to include buildings which are not, in any sensible use of the term, part of the road. A controlled area, usually extending further still from the carriageway, is established in some countries (in Bhutan the “road control area” under the *Road Act 2004*, s. 6).

Further, any activity – or the manner in which an activity is carried out – potentially conflicts with regulatory objectives. So, a commercial vehicle movement must be carried out in a way that conforms to a series of regulatory requirements – road rules, route restrictions, mass and dimension limits and even restrictions on hours of movement. It might be able to operate in conformity with road rules, but without complying with environmental standards. Its driver might drive the vehicle from one place to another in conformity with rules about vehicle movement, but in breach of personal requirements about rest times, alcohol consumption and use of a seat belt.

### **Governance, management and administration**

The governance of a country comprises the traditions and institutions<sup>2</sup> by which the authority of the country is exercised (World Bank, 2009). Road governance is a form of governance – it is the exercise of the country's authority over the use of its roads. Road governance, as an exercise of government power, is regulatory in nature. A complication is that some powers exercised over behaviour on roads are obtained from the fact of land ownership – a body which owns a road has the powers that come with land ownership, such as exclusion of trespassers. These powers are potentially of importance if specific legislative power is inadequate, although they are not correctly described as governance – they are an exercise of the property rights which are rights conferred on any land owner, whether or not a government agency.

Road governance powers can be exercised in any of a number of ways by any of a number of persons or institutions. A police officer who arrests an itinerant trader on a road might do so at the request of the road authority or in exercise of powers conferred on the police and with no reference to the road authority. In either case it is an act of road governance.

By contrast, road management comprises road administration activities which are not regulatory – largely, the provision and maintenance of road infrastructure, activity co-ordination and infrastructure planning. Whichever entity performs these functions – and it is often an entity which also has road governance functions – that entity is a stakeholder for many road governance decisions. So, the one entity can be both regulatory decision maker and a stakeholder in respect of that decision. For example, a new law about vehicle mass being proposed by a body with road *governance* powers will have implications for the design and construction of roads for which a road *manager* is responsible.

Road governance and road management together comprise road administration. Often the various components of road administration are the responsibility of a single entity – but the function can also be divided between any number of entities. These can include private corporations operating under contract, in some cases exercising statutory powers such as toll collection (for example, in India under the *National Highways (Collection of Fees by any*

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2 “Institutions” here is used to mean rules, norms and values that shape behaviours (DFID, 2001, 5.1).

*Person for the Use of Section of National Highways/Permanent Bridge/Temporary Bridge on National Highways) Rules 1997).*

## **USES OF ROADS**

Roads are ways or paths between places used by vehicles, pedestrians and others (Oxford Australian Dictionary) with a specially prepared surface (Oxford Australian Dictionary) or, at least, which are identifiable (Wikipedia, 2010). Passage from one place to another, although only one of many uses that are made of roads, can be described as the primary function of roads for several reasons:

- roads are inherently available for transport use. In Australia the transport function is integrated into the definition of “highway”, which is defined to mean all those portions of land over which all members of the public may lawfully pass (Law Reform Commission of Western Australian, 1981, para. 2.6)<sup>3</sup>. Other important uses are made of roads, but not all of them occur on all roads, and not all are lawful;
- transport is an important activity, for social and economic reasons;
- roads, particularly main roads, are often administered by bodies which believe that transport function of roads is their *raison d’être*. This influences the manner in which roads are administered, which affects the manner in which the roads can be and are used.

In some legislation other uses appear to be largely overlooked. The Indonesian *Road Traffic and Road Transport Act 2009*, s. 1.27 goes so far as to define “road user” as being a person who uses a road for passage from one place to another, perhaps reflecting the scope of that Act. But in fact there is considerable diversity in the uses made of roads, only some of which are transport uses. It is not hard to understand why. Roads are easily accessible and are mostly in public ownership and control, so it can be relatively cheap and easy to place infrastructure on roads and to maintain it. Roads are frequented by the public, so uses (such as commercial uses) which benefit from public participation are attracted to roads. Roads are linear, so some uses, such as railway services along rail lines, unavoidably intersect with roads, at which point (for example, at railway crossings) there are two distinct uses of the one area of land.

A tabulation of road uses is appended to this paper.

## **HOW USES ARE REGULATED**

Government, through its agencies, exercises road governance powers in several ways:

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<sup>3</sup> This definition does not rely on actual or current use of the land, so land which is not used for any transport purpose – being fenced and with a large tree precluding any transit – can still be a “highway” (as found in the Victoria, Australia, Supreme Court decision *Bass Coast Shire Council v King* (1996) 92 LGERA 129).

1. By making laws. Some laws apply to behaviour that occurs only (or almost only) on roads, such as traffic rules. Others are of general application, but control behaviour that is perceived to occur on roads. In the United Kingdom the *Street Offences Act 1959* makes provision about loitering or soliciting in streets and public places for the purposes of prostitution. In Australia the term “street offences” carries a wider meaning. The A.C.T. *Crimes (Street Offences) Amendment Act 2007*, for example, dealt with disorderly or offensive behaviour in or near a public place or school. The common characteristic of “street offences” is that they typically, but not necessarily, occur on roads, but are not related to the transport function of the road network.

Laws applying to roads can be made by either the legislative branch of government (Parliament) or by the Executive Branch, under authority of laws made by Parliament – often road rules are made in this way. This can place road authorities in the position of devising and submitting for approval laws which will regulate their – the road authorities’ – behaviour. In those circumstances an authority can be expected to devise laws which will be suitable to its needs, even if they are not so suitable to the needs of others.

Law making is a conceptually distinct form of governance – although law making generally a precursor to law enforcement, many laws are made but not enforced. This is not to say that they are unimportant or ineffective. People comply with laws for a number of reasons, including a desire to be law-abiding and an expectation that the laws will be enforced (even if they are not). There can therefore be a substantial compliance level if a law is in force if it is publicised and still more substantial if others are seen to be complying with it (which enhances the normative effect of the law).

The process of law making should include stakeholder consultation. For primary laws (laws made by Parliament) this can, to some extent, be achieved through the political process. For secondary laws (made by executive government under authority of primary laws), which can often be characterised as implementation of policy determined by the Parliament, stakeholder consultation is important for ensuring that policies are implemented in the most cost-effective and socially appropriate way.

2. By enforcing laws. There are several forms of enforcement, which largely are based on criminal law.

Roads, of their nature, are places where there are patterns to behaviour: behaviour of one person is often similar to the behaviours of many other people – examples are violation of road traffic laws and roadside trading. Often infringements of the law are minor, so that the cost and delay of prosecution and court hearings is a considerable disincentive to law enforcement. The appropriate response to this problem is to devise simplified alternatives where the offence is not in dispute. In most places infringement notices are issued, giving the offender the opportunity to avoid a court hearing by paying an amount of money (which, in the interests of equity and avoidance of corrupt practices, should be a fixed amount: the amount should not be left to the discretion of the enforcement officer).

Another form of enforcement which occurs without court proceedings is self-help, where a road authority or the police take direct action by removal of offending structures and even by removal of offenders (such as roadside traders) from the roads.

Court-based enforcement can include fines (which sometimes are imposed as daily amounts, continuing to increase until the offending behaviour ceases) or imprisonment as well as orders specifically authorised by legislation such as driving licence suspension or cancellation, compensation payment for road damage orders for removal of structures.

Sometimes enforcement activity is of high visibility, with use of colourful cars or warning signs. The reason for this is that the enforcement agency generally has two parallel objectives – to detect offenders and to discourage behaviour which is unsafe.

Criminal prosecution decisions rarely require stakeholder consultation, but other forms of enforcement, such as removal of illegal structures from a road, might.

3. By exercise of statutory powers conferred on an agency: specific examples are temporary road closure, road realignment and removal of abandoned vehicles. The extent of stakeholder consultation required for these exercises of power depends on the empowering statute and the nature of the power being exercised. More generally, everything a statutory authority does is in the exercise of statutory power, so the terms of the statute are always relevant. If the empowering statute specifies that an objective of the agency is participatory decision making then this object affects everything the agency does.

Powers conferred on road authorities are often exercisable by the granting of permits and imposition of conditions on those permits. So, for example, an abutting property owner might be issued a permit to construct a connection on a road, subject to specific conditions about its design and location. Stakeholder consultation for decisions of this type is often limited to the individual directly concerned.

4. By contracts, licences and leases. A road administrator is often given rights of ownership or occupation of the roads it administers. As owner or occupier it might be empowered to allow, or conversely to refuse, structures to be placed on roads – not under any special legislation but because land owners, generally, can control the placing of structures on their land. The decision can be formalised by a lease or licence agreement. This power ultimately derives from the general laws of the country, but is better described as road management than road governance.

In entering agreements such as these road administrators are pursuing their objectives, in this case by subjecting themselves to the laws of contract and property. So, a road administrator might decide to lease (as lessor) of an area of land at the side of a motorway so that a restaurant can be built and operated there, charging a sub-market rental in exchange for a commitment by the lessee to operate the restaurant 24 hour a day. This intentional foregoing of revenue would occur because

the presence of 24 hour rest and refreshment facilities encourages long-distance drivers to take a break, reducing road collisions caused by driver drowsiness – and thereby helps in achieving the agency's objective of improving road safety. That decision – to enter into a lease – is just as capable of being the subject of stakeholder consultation as any other. In Victoria, Australia, for example, a local government is required to invite public submissions before grants a lease of for more than one year and with a value exceeding a specified amount (*Local Government Act 1989*, s. 190).

Road administrators often also enter into leases under which they are lessees of land. As legal entities they are given a general power to enter into leases for the purpose of achieving their objectives. Sometimes, however, specific statutory provisions attach consequences to arrangements of this type, so that the applicable law is a combination of property law and statute law. The UK *Highways Act 1980*, s. 87, for example provides for a highway authority to enter into agreements for creation of cattle grids or by-passes. The agreement (by force of the statute) is binding on subsequent owners of the land, but otherwise is not to confer rights or obligations on other people.

## **CRITERIA AND OBJECTIVES**

Road administration requires the exercise of discretions, which almost inevitably have policy implications. If a road rules are to be made, what should they say? If a law is to be enforced, should a warning be given first? How and when is the enforcement to occur? If encroachment onto a road is to be permitted, who is to be allowed to make the encroachment and what restrictions are to be applied?

Legislation does not and cannot predetermine all decisions to be made by road administrators. Nor would this be desirable – an administrator is more than a mere “transmission belt” for implementing commands expressed in legislation (Allars, 1990). Nor does it leave decisions to be made at whim or for reasons unrelated to good road administration. It takes a middle course – allowing discretion, but constraining decision-makers to apply relevant criteria, often expressed as taking into consideration relevant objectives.

The constraint of applying criteria applies even where the relevant legislation says little about what decision is to be made or how it is to be made. Under the California, USA, *Streets and Highways Code* s. 671.5 the Department of Transportation is required to consider applications for encroachment permits, and, if an application is refused, to furnish a detailed explanation for the decision. There is also provision for an appeal from the decision. The section does not specify criteria or objectives, but implicitly the “detailed explanation” must set out reasons which are relevant to the decision, and the appeal body would no doubt have reference to those reasons. The Manitoba, Canada, *Highways and Transportation Act CCSM c.H40* s. 14 takes a more draconian legislative approach to permits for planting trees near to a road, providing that the granting or refusing of a permit “is in the absolute discretion of the Minister”. But even with such a provision, the decision-maker (who apparently would

be the Minister's delegate rather than the Minister personally) should apply criteria relevant to the decision to be made.

## **Statutory objectives**

### *Various ways to express objectives*

In fact the criteria *are* often recorded in legislation, typically the legislation dealing with road administration, in any of several forms. These can appear as purposes or objectives of the legislation, or as objects or functions of the decision maker. The Roads Corporation of Victoria, Australia, for example, is required to have regard to the achievement of enumerated objects such as the efficient and safe movement of traffic (*Transport Act 1983*, s. 16(3)). This requirement applies to many decisions it makes in many circumstances.

Criteria can also be specified for particular decisions. A simple but clear example of a well-structured requirement for the decision-maker to take into account specified considerations is a requirement of the UK *Highway Act 1980*, s. 29, relating to public paths:

“In the exercise of their functions under this Part of this Act relating to the making of public path agreements and public path creation orders it shall be the duty of councils to have due regard to—

- (a) the needs of agriculture; and
- (b) the desirability of conserving flora, fauna and geological and physiographical features.”

### *High level criteria and width of discretion*

It is possible for decision-making criteria to be set at quite a high level, even for specific decisions of limited scope. An example is the example from the UK *Highway Act 1980* set out above – a seemingly mundane decision (creating a public path) is to be made having regard to high level concept (the needs of agriculture and conservation considerations).

For less specific legislative provisions, such as an organisation's performance objectives, high level criteria might confer discretion which is very wide, and little constrained by the views of legislators. It would be possible, for example, to set the road administrator the objective of poverty reduction. At one level lower, criteria might refer to one or more of the three main channels of poverty impact of roads (Gachassin et al 2010): the human capital channel (to facilitate provision of basic needs of the poor), the market access channel (to increase productivity by lowering transport costs) and the labour activities channel (to create employment). In rural Africa the application of such criteria may lead to the conclusion some roads should not be tarred (as found by Gachassin et al 2010): a conclusion that would be difficult to reach if the road authority's measure of success is kilometres of tarred road.

The decision about how high decision-making criteria should be set is affected by the administrative and legal system in which the decision is to be made – in some jurisdictions legislation is expressed in very general terms. It also depends on law-makers' assessment of the honesty and competence of the decision-maker.

### *Applying the criteria*

A decision maker cannot disregard statutory criteria for making its decision, nor can it take into consideration irrelevant criteria. For example a road administrator might have discretion whether to allow advertising notices to be placed on a road. It is likely to be relevant to consider whether the notices are unsafe or distracting to drivers, but it is likely to be irrelevant to consider whether (for example) the notices advertise imported products rather than domestically produced products.

In the exercise of road administration discretions considerations such as industry protection therefore are likely to be extraneous – unless, of course, the statute specifies that they are relevant. Personal profit or giving help to friends and relatives are not proper considerations anywhere, and are not specified in any legislation as being relevant – consequently, decision-making based on those considerations is not only corrupt, it is improper because it is based on being irrelevant considerations. It is said that an example of poor road governance is widespread corruption (Vincent, 2008): if so it can also be said, less dramatically, that an example of poor road governance is decision-making based on irrelevant considerations.

Other, perfectly proper, considerations, however, can still cause problems for road administrators if too rigidly applied. So, for example, a road administrator might make decisions intended only to maximise its performance by reference to specific measures such as the gTKP road governance benchmarks (described by Vincent, 2008) or the International Roughness Index. It would be possible for legislation to specifically mandate this – but most legislation is expressed more generally<sup>4</sup>. As a result, road administrators should consider alternatives. Specific benchmarks are likely to set out relevant and proper considerations – but nonetheless the road administrator should have its mind open to making decisions which take account of other factors and which do not necessarily produce the best benchmarks results. Indeed, in rural Africa, the best decision might be the one that produces the worst results for road roughness for local roads (assuming that untarred roads are rougher than tarred roads: see discussion above about a poverty reduction objective). Excessive adherence to technical standards without awareness of opportunity cost would be a failure to exercise the discretion which has been conferred on the decision-maker.

Some road administrators have a large number of functions, and correspondingly possibly will be influenced by many considerations. Local government bodies, in particular, are often

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<sup>4</sup> The Indonesian *Road Act 2006* s. 112 provides for minimum service standards relating to road condition and speed. The explanatory notes to the Act – but not the Act itself – refers to a specific measure of roughness (the International Roughness Index).

road administrators for local roads, or for components of arterial roads (such as footpaths and access roads). Local governments, as spheres of government, have many functions, from service provision to advocacy. In making decisions about road administration they must identify the objectives are relevant to that function, and derive decision-making criteria from them.

### *Competing and complementary objectives*

A system of road administration should produce outcomes which follow consideration and balancing of policy objectives. In a consultative process, input from stakeholders should be sought and considered. Failure to take these considerations into account is likely to result in poor decision making.

For road administrators, statutory processes and consultation requirements can appear inevitably to cause frustration and delay. There are two possible reasons for this—

- threat to achievement of a desired outcome. Consultation is inevitably in relation to a proposal: otherwise, there would be nothing to consult about. If the proposal is one that the road administrator itself has developed, there is an understandable tendency to feel ownership of the proposal – and a sense of threat when the proposal is criticised.

There can be a sense of a proposal suffering a “death of a thousand cuts”. A proposal (such as a road reconstruction) might be viable only if it achieves a desired rate of return on investment. Stakeholders who are consulted about the proposal might put forward proposals which individually seem reasonable, but which, together, would reduce the rate of return on the proposed investment to a level which is considered to be too low. An illustration of this would be a proposal to develop a road to become a restricted access road – a road which is available only to high-speed vehicles. Various stakeholders might argue for exceptions to the restriction for particular vehicles or for particular journeys. Those exceptions, together, would have a cumulative negative effect on average road speeds, thereby increasing transit times and therefore cost for other road users.

It should be remembered, however, that stakeholder consultation is a process: outcomes are for the decision-maker to determine. It is not a vote – the majority need not have its way and not all requests need be acceded to. One voice might be more persuasive than many voices if, on examination, stakeholders are putting forward proposals that, while apparently complementary, in fact are not.

- There can be a mismatch between organisational objectives and decision-making criteria. A mismatch of this type can be the result of poorly constructed legislation, or possible the outcome of the road administrator being inadequately aware of its co-ordination function. While a road administrator should not be seen as a circus ring master, there is inevitably an element of this in making decisions about road use.

The balancing of competing interests can indeed be a statutory mandate, as in the following example (*Victorian Road Management Act 2004*, s. 4):

“The primary object of this Act is to establish a coordinated management system that will promote safe and efficient road networks at State and local levels and the responsible use of road reserves for other legitimate purposes.”

If it seems a little derogatory to call this a ring master function, perhaps the term co-ordination function is better. The function, however described, can only be exercised well if there is a good understanding of competing objectives and competing uses, supported by an effective consultation process.

Not everything can be co-ordinated, however, and inevitably decisions need to be made which require a selection of an option which is not supported by one or more stakeholders. It is not always possible, at the end of a decision-making process, to ask “is everybody happy?” hoping for an affirmative response – in some circumstances there will be someone who is distinctly unhappy about the outcome.

## **WHOM TO CONSULT**

Many people are affected by road administration decisions, but it is not generally practicable to consult with them all – there are too many of them, the cost would be too high, and it would be inordinately time consuming. These factors – numbers, cost and delay – might suggest that public participation in road administration decisions is best achieved by widespread notification and then consideration of any responses received: the more the better. Widespread notification of a proposal may indeed be possible at low cost and with little delay, but, without more, it carries the risk of producing distorted outcomes. Some groups (particularly, socio-economically disadvantaged groups) are not likely to respond to a general call for submissions. Merely inviting public comment is likely to lead to input which is not representative and which therefore fails to include important perspectives. A proposal affecting bus operations is likely to attract, in many countries, a submission from a bus operators association and possibly from individual bus operators as well. However, the voices of bus users and others affected by a proposal (such as itinerant traders who sell drinks and food to bus travellers) may not be heard: in which case, the invitation to make submissions will not have produced effective consultation. In Africa women in rural areas make most road journeys by foot, within their village (Turner and Fouracre, 1995, p. 83). If stakeholder consultation occurs in Africa using a process in which women, or if women's interests, are not adequately represented road administrators are likely to make decisions which inadequately address the needs of local pedestrians.

This is not to say that public participation is not possible and should not be invited by public notification, but its limitations should be recognised.

For these reasons there should be consultation targeted at “stakeholders” in addition to any public notification and general calls for submissions. Specific stakeholders can be sought out, giving the potential to ensure that all voices are heard, not just those that are the loudest. Stakeholder-based public consultation, if well managed, is consistent with a comprehensive acceptance of a participatory democracy model of administrative law based on *interest representation* (Allars, 1990).

A stakeholder is a person who is specially affected by a proposal: it is not enough to have the same interest as the public at large, nor is it enough to hold an opinion on the proposal. In Victoria, Australia the *Subordinate Legislation Act 1994* s. 6 identifies groups who should be targeted for consultation (in relation to proposed regulations) as:

“any sector of the public on which an appreciable economic or social burden may be imposed ...”

Under that formulation the impact may be economic or social, and it should be “appreciable”. The formulation does not, however, recognise the possibility of a beneficial impact – for example, a property owner might wish to express support for a road deviation. DFID (DFID, 2001, 5.4), more correctly identifies stakeholders as any person, group or institution with an interest in a policy outcome – whether beneficial or otherwise.

For any particular decision by a road administrator almost certainly some stakeholders will be road users, although not all decisions affect all road users. The tabulation at the end of this paper is a guide to identifying not only those who are stakeholders but the nature of their use, and hence the manner, if any, in which a proposal might affect them. A proposal to modify an urban footpath, for example, will affect pedestrians (and others), but probably not commercial goods transport operators.

Often some stakeholders are not road users – these are people whose special interest in road administration decisions arises for a reason other than road use. Regular members of this group are likely to be government agencies which construct or maintain roads or which have policy responsibilities in relation to road use (such as road transport, road safety or access for the disabled).

It may be that some people will be stakeholders because they are affected by the impact of a proposal not on their own activities, but on the activities of other people who are road users. Examples are consignors or consignees of goods and purchasers of goods which have been transported by road. Others may be affected by road administration decisions without in any sense being transport users – examples are hospitals which tend those who have been injured in road collisions.

## HOW TO CONSULT

### The form of a legislative requirement to consult

A road administrator, like anyone else, is required to comply with the law. A specific obligation such as the following (from the UK *Highways Act 1980*, s. 26(3)) must be complied with:

“A local authority shall, before exercising any power under this section, consult any other local authority or authorities in whose area the land concerned is situated.”

It is not difficult to “consult” – a phone call would suffice – and compliance is verifiable. However, to what end? There is a risk that a bare provision such as this will produce a “check box” approach to consultation, achieving nothing more than minimal compliance with the specific legislative obligation. Effective consultation requires the exercise of many judgements about timing, methods and scope, none of which is addressed by a bare legislative provision such as this. A requirement to “consult” is better than no provision at all as it ensures that the issue will be addressed, and, if the provision is being well administered, that there will be effective consultation. However, it is better still if the provision sets out at least minimum requirements for consultation.

A possible legislative approach is to set out consultation requirements using performance standards, without being highly prescriptive about how the consultation is to occur. This encourages the road administrator to devise ways – perhaps not thought of by the legislators – to achieve those standards. Such a provision might apply to specific consultation processes, such as giving notice of an environmental statement (under the UK *Highways Act 1980*, s. 105B) (emphasis added):

“Notice of the environmental statement must be published so as to ensure that members of the public who are likely to be concerned are given a reasonable opportunity to express their opinion before the Secretary of State decides whether to proceed with the construction or improvement to which the assessment relates.”

It might alternatively be expressed more generally. A generalised consultation requirement for making subordinate legislation (laws made by the Executive Government under authority of an Act of Parliament) applies under section 6 of the *Subordinate Legislation Act 1994* of Victoria, Australia. Stakeholder consultation is to be in accordance with published *Guidelines Under Section 26* (Victorian Government Gazette 6 January 2005, p. 40) which specify consultation requirements as including the following:

- seeking the views of other agencies at an early stage;
- preliminary consultation with focus groups and briefing sessions with key stakeholders;
- notification of peak industry bodies, possibly using issues papers;

- identification of any sector of the public likely to suffer an appreciable cost, burden or disadvantage, and consultation with that sector, for example business groups, community groups and special interest groups.

If an agency is required only to “consult”, it has a choice of consultation techniques to use. If the requirements are more specific those requirements must be complied with: but even if so there is usually discretion about how to do so, and there is usually scope for exceeding the minimum requirements of legislation. The agency, in making decisions of this type, should be given guidance: for these reasons, objectives and principles are important even if legislation is quite prescriptive.

### **Effective consultation within resource and time constraints**

The quality of an administrative decision depends greatly on the process by which it is made: generally a consultative process produces improved decisions. There are always constraints of time and resources, so quality of process inevitably is compromised. This is a universal problem, but it is particularly a problem in developing countries where commonly there are:

- large numbers of informal arrangements, particularly involving occupation and use of land;
- few representative organisations, such as motoring organisations or public transport user groups;
- limited resources on the part of decision-makers, making it difficult to use expensive publicity techniques such as explanatory material, advertising and use of electronic communications;
- large numbers of people affected by proposals, many of whom are inarticulate and poorly educated.

One response to problems of resource and time constraints is to limit the number of decisions which require consultation.

A second response is to ensure that consultation is founded on effective communication. For road administration decisions, there are two important and related fundamental propositions which apply to any consultation process, and which can affect not only the efficiency and effectiveness of the process but even the validity of its conclusions:

1. there should be a proposal – without this, there is nothing to consult about;
2. decision-making criteria should be identified and explained – so that people who make submissions can address those criteria. If submissions are made which ask the road administrator to make a decision based on irrelevant considerations frustration or error are the likely results. If the road administrator accedes to the submission its decision will be based on irrelevant considerations and therefore will be potentially invalid. If the road administrator does not accede to the submission the submitter may become dissatisfied. The problem is lessened if the road administrator explains not only the decision which it makes but also the reasons for it.

A third response, within the parameters of applicable legislation, is to ensure that an appropriate consultation technique is used. There are many techniques available for public participation in decision making generally (IAP2a, 2010), although some of these are likely to be difficult to apply to road administration decisions, especially road administration decisions in developing countries. In selecting from the range of techniques that are available (within the constraints of legislative prescription, time and resources) an agency should consider what it is trying to achieve – its “public participation goal” (IAP2b, 2010). Is this goal predominantly to obtain input into the development of a proposal, or is the proposal well developed and capable of imminent implementation if positive responses are received? If the former, techniques which collect information and ideas, such as focus group discussions, may be suitable: if the latter widespread newspaper advertising and formal responses may be more suitable.

### **The prelude to consultation: notification**

Notification is not itself a form of stakeholder consultation, but it is a prelude. There is generally little point in publicising a proposal unless it is for the purpose of inviting stakeholder submissions about the proposal. Further, there is little point inviting submissions unless the proposal is explained, whether in the notification itself or at another place identified in the notification.

The means of giving notification should vary according to circumstances. If many people are potentially affected, newspaper advertising is appropriate – an example is road discontinuance (*Victorian Road Management Act 2004*, s. 12). In some circumstances individual notification is more appropriate, for example where the proposal is to dispose of an apparently abandoned vehicle (the *Victorian Road Management Act 2004* sch. 4, cl. 4 requires a road authority to take reasonable steps to identify and notify the vehicle owner).

Newspaper notification is generally not difficult – a requirement to place notice in a newspaper circulating in the area<sup>5</sup> is not difficult for a road authority to comply with. Similarly, it is not difficult for a road authority to place a notice on its website<sup>6</sup>. For road authorities in developing countries, however, the difficulties can be considerable if there are poor records of addresses or poor postal services. This problem can arise for notification of property owners, property occupiers, vehicle owners and vehicle drivers. There are other difficulties, too, in developing countries:

- in areas of high population density a proposal affecting roads may impact on very large numbers of people, such as property owners, lawful and unlawful property occupiers and roadside traders;

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<sup>5</sup> An example of this approach is notice of an environmental impact assessment under the UK *Highways Act 1980*, 105B(7) (“at least one local newspaper circulating in the area in which the project for the construction or improvement of the highway is proposed to be situated”).

<sup>6</sup> The UK *Highways Act 1980*, s. 105B(7) (environmental impact assessment).

- provision of information by internet is potentially ineffective if stakeholders have low literacy or internet access.

Means of effective notification can be devised if the proponent has sufficient time, resources and commitment to the process. Not all are expensive, nor need be time consuming. Public meetings are an effective way of publicising proposals, as can be individual meetings with key stakeholders. Targeted meetings have the advantage that information can be provided which is relevant to the stakeholder – not all aspects of a proposal are likely to be of interest to all stakeholders. Issuing of leaflets and placing of notices in public places can also be effective.

There are other reasons for stakeholder notification by road administrators (that is, besides notice of a proposed decision): two reasons are provision of information to road users about an activity that is to take place, and notification to infrastructure owners of planned works which may affect the infrastructure<sup>7</sup>. These other forms of notification can create channels of communication which can also be used for notification of proposed decisions.

### **Submissions to the decision-maker**

The least-complicated approach to consultation is for the decision-maker to seek the opinions of others before it – the decision maker – makes a final decision. This can occur in response to a legislated obligation to “consult”, or it can be undertaken by a road administrator as an act of good quality administration. An example of a provision for submissions to the decision-maker is the UK *Highways Act 1980*, s.105B, under which submissions may be made about implementation of a project which is the subject of an environmental impact assessment.

For this form of consultation to be effective:

- there must be a proposal;
- the proposal must be notified to stakeholders in a way that gives them opportunity to make comment – that is, time to make comment and a means of making comment which is practicable. This can include seeking out stakeholders who might not otherwise be aware of the notification;
- the decision-maker must be willing to consider submissions and to be influenced by them.

The problem with this form of consultation is that it can be passive: it relies on stakeholders (and others) to avail themselves of the opportunity. This can produce outcomes in which the views of the well organised, well educated and affluent are overrepresented. Many road users, particularly in developing countries – and, there, particularly pedestrians, squatters and itinerant traders – have a low socio-economic profile. They may be reluctant to come forward if (as will often be the case) their activities are unlawful: and if they do they are likely to have limited ability to articulate arguments.

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<sup>7</sup> *Victorian Road Maintenance Act 2004*, cl. 8 of Schedule 7 to the Act.

For these reasons, road administrators should actively seek out stakeholders and their representative groups, even where the statutory obligation appears to be minimal.

### **Consultation committee**

In some circumstances the number of stakeholders is quite small, making it possible to establish consultation techniques which are not costly and are interactive. This can be achieved by one-on-one meetings between officers of the agency and representatives of a stakeholder. It is also possible to devise a small group consultation forum in which several stakeholders can not only make submissions but engage in dialogue with the decision maker and with each other.

One of the more important interactions for road administrators is with bodies which install and maintain infrastructure in the road reserve – mainly telecommunications, water, gas, sewage, electricity and public transport. The interaction is important for road administrators, which would much rather that a road is dug up one week before it is resealed than to have a road damaged one week after. It can also be important for other road users – railway administrators would much rather that resurfacing of a road at a railway crossing was timed to avoid peak train movement times. However, although much legislation addresses the issue of non-road infrastructure it is often structured in a way that leaves administrators to devise ways of making it effective. The Indian *Control of National Highways (Land and Traffic) Act 2002*, s. 38, for example, requires permission when work is undertaken on non-road infrastructure on a road, potentially (and unrealistically) requiring individual permission for each action involving non-road infrastructure. This would be onerous, time consuming and unlikely to be complied with, particularly where urgent work is required. For issues such as these it seems desirable to limit the number of individual decisions which are required by permitting work on a road to be undertaken without the need to obtain a permit in some cases such as where works do not cause road damage or require road closure, where a specified code of conduct is observed or where an agreement has been made between the body responsible for maintaining the infrastructure and the road authority<sup>8</sup>. It is better to limit the number of approvals required than to degrade the quality of consultation or to encourage the requirement to be disregarded.

Stakeholder consultation of this type can be facilitated by establishment of a specialist standing committee, as a vehicle for consultation, although not itself a forum for consultation with the stakeholders whose staff participate as committee members. The distinction relates to the position of the committee members. Members of an advisory committee should endeavour to carry out the work of the committee as an adviser to the decision maker (or possibly as a delegate of the decision maker), whereas participants at a consultation session

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<sup>8</sup> In Quebec, Canada, *An Act Respecting Roads*, R.S.Q. c. V-9 has a Chapter (Chapter IV) dealing with agreements. One provision (s. 36) provides that the Minister may enter into an agreement with a person supplying telecommunications or power transmission or distribution services concerning the installation and maintenance, upon the right of way of a road, of the equipment and material necessary for supplying such services.

represent their organisations and make representations to the decision maker on behalf of their organisations. A standing advisory committee has been constituted under the Victorian *Road Management Act 2004*, s. 31. The Infrastructure Reference Panel comprises 16 members appointed by the Minister of Transport, on various nominations – for example, one on the nomination of the Minister administering electricity legislation and another on the nomination on the Minister responsible for water legislation. Its functions include (under s. 32) (emphasis added):

“to act as the vehicle for consultation with, and obtaining advice from, relevant stakeholders, [...]”

Advisory bodies have been created for broader purposes too. The Indonesian *Road Traffic and Road Transport Act 2009* s.13 provides for a Road Traffic and Road Transport Forum to be constituted with the functions of inter-agency co-ordination, bringing about cohesive planning and resolving problems relating to road traffic and road transport. Its membership is to comprise representatives of road construction agencies, road operators, academics and the people. Possibly a body such as this could operate as a forum for discussion between agencies: however, despite the ambitious scope of its membership, its internal discussions are not likely to be effective as a means of stakeholder consultation on any specific proposal. If a body such as this is used by a road administrator as means of seeking out and obtaining external views (that is, external to the forum) its function will be to act as a delegate or representative of the road administrator.

### **Hearing by a third party**

Consultation requirements of importance to road *planners* – those who plan new roads or major road deviations, as distinct from those who administer existing roads – relate to acquisition of land for proposed roads. There are two distinct phases in this:

1. The decision whether a road should be constructed at the proposed location. There are potentially two considerations for this decision – whether construction of a road is warranted at all and whether the proposed location is the correct location for it;
2. Subsequent decisions about land acquisition, particularly timing and compensation.

Neither is a road administration decision and arguably neither belongs in road administration legislation. The first decision is an issue of land use planning and can be dealt with under land use planning legislation: the second decision is a compensation issue and can be dealt with under land acquisition and compensation legislation. However, the issues have an obvious connection to roads (that is, land acquisition is a prelude to road construction), so they can also be dealt with in road administration legislation.

The location of the provisions is likely to affect their content. If the preliminary question “should the road be built where proposed?” is seen as a land use question it is likely to be dealt with in a manner similar to other land use questions. A decision of this type, under the laws of the jurisdiction, may require that a specified procedure be followed (such as public

notification and public hearings conducted by an expert planning committee) and that the decision be made by reference to land use planning criteria. In this sense, road use is just one of several possible forms of land use.

Almost invariably the creation of a road entails compulsory acquisition of land, or at least negotiated acquisition in the context of possible compulsory acquisition. In general, the “gatekeeper” question for a compulsory acquisition is whether the land is required for a public purpose: this is not a particularly difficult issue for road construction as “road use” is generally assumed to be a public use. However, again, there may be procedures which are generally followed if the decision is characterised in this way: in particular, there may be procedures to be followed for acquisition and independent adjudication as to the amount to be paid.

## **LEGISLATION AND ADMINISTRATION: SOME CONCLUDING OBSERVATIONS**

Legislation is often difficult to make or amend, particularly high-level legislation (Acts made by Parliament) which must await their place in the queue of political priorities just to be introduced for consideration. This is followed by Parliamentary debate and approval, which can be a protracted process. There is risk in enacting legislation which is highly prescriptive about stakeholder consultation: the more prescriptive it is the more likely it is to require amendment as circumstances change or as procedures are refined over time. Legislation can create obstacles to effective administration and it can become outdated, costly to administer and unproductive.

The form and content of road legislation necessarily varies from one country to another. To some extent the variation is the product of the constitutional, administrative and legal system. Still, there should be some consistency of legislative approach to issues which are common between countries. If, for example, a road administrator has power to close a road to public traffic (temporarily or permanently) it would seem unreasonable for it to exercise that power without first advertising the proposal and consulting with affected property owners and other stakeholders. If the legislation provides no objectives and says nothing about the process which is to be followed the road administrator is doing more than the legislation requires. This is good administration, but poor legislation.

## **APPENDIX – ROAD USES**

Use	Examples	Comment
<b><i>Transport uses</i></b> Travel from one place to another (the primary purpose of a road)		
<b>Local transport</b>		

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Use	Examples	Comment
Pedestrian activity	People walking to work, shops or to catch a bus.	Pedestrian activity includes sitting, for example waiting for a bus.
Bicycle movement	Riding to work or school, bicycle riding for exercise.	There is considerable disparity between the socio-economic circumstances of these groups.
Movement with disability aids	Wheel chairs, walking frames, "seeing eye" dogs.	These movements are likely to have design implications for footpaths and road crossings.
Motorised local private transport	Cars, motor cycles, small buses, trams.	These movements require use of the carriageway. They generate demand for parking space.
Motorised local public transport	Buses, trams.	
<b>Other transport</b>		
Non-motorised transport	Horse-drawn public transport vehicles	Animal-based transport is characteristically slow-moving.
Private transport by motor vehicle	Cars, motor cycles	These uses in an urban area are sometimes discouraged (for example by a congestion tax) or made subject to a public transport priority principle of road administration.
Public transport using motorised vehicle	Buses, trams, taxis.	This use generates pedestrian activity, particularly at designated stops or taxi ranks.
Movement of agricultural machinery or animals	Specialised agricultural equipment (ploughs, hopper bins) moving from one part of a farm to another, cows going to be milked.	Slow moving, inconsistent with high speed traffic.  The timing is associated with the needs of primary (agricultural) industry, for example cows going to be milked twice daily.  For movements such as these the road is sometimes an impediment to industrial activity – all the more so if the road has restricted access.
Transport by small to medium size vehicles	Small vans	Often used for deliveries, making frequent brief stops.
Transport by large vehicles	Multi-axle articulated vehicles, trucks adapted for carrying containers.	Often long distance, and sometimes inter-district or international, journeys.
Railway uses	Railway level crossing, underground station, overhead railway	Railway uses are, for a road authority, similar to utility uses – but with one difference: like roads, they are part of a transportation network. There can be interconnection issues at railway stations.
<b>Ancillary uses</b> Uses associated with transport uses		
Roadside trading	Itinerant trading with wheeled cart, trading from makeshift	Traders are attracted by the presence of road users.

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Use	Examples	Comment
	stalls on footpath, petrol (gas) stations.	Generally established without legal authority.
Parking	On street vehicle parking, motor cycles parked on footpaths.	In developing countries there is often a parking attendant at each parking area. In developed countries parking is regulated by signs and meters, with associated law enforcement.
Rest for drivers	Road side rest areas, side of carriage way parking.	Driver rest is considered desirable for safety reasons (to minimise driver fatigue on longer journeys). There can be associated commercial agreements – for example, allowing a food vendor to operate within the rest area.
Fund raising	Begging, charity collections.	Regulation of fund raising activity has at least two possible objectives: road safety and prevention of fraud.
Law enforcement activity	Police patrols, traffic direction, parking supervision.	This use can extend to stopping of traffic, for example to check vehicle mass and dimensions or driver sobriety.
<b>Spillover uses</b> Uses associated with use of abutting land		
Extension of use of abutting land	Buildings intruding onto roads	Some jurisdictions respond to this by using a “controlled area” concept.
Uses designed for roads but serving functions related to abutting land	Restaurant tables, modified sidewalk areas used for hotel access.	These uses are often designed to benefit from passing trade, and can interfere with pedestrian movement.
<b>Road manager and utility uses</b> Provision of services by utilities and road managers		
Installation and routine maintenance of road and utility infrastructure	Installation of telecommunications cables, replacement of old water pipes, road surface repairs.	Co-ordination obligations applying to utilities should equally apply to road managers.
Emergency repairs to road and utility infrastructure	Burst water pipe, pole damaged by motor vehicle collision	This work requires specialised labour, and can arise at any time with no warning. It cannot be programmed, and is potentially disruptive to other uses.
<b>Public space uses</b> Uses associated with the land being physically available for uses which require space		
Makeshift accommodation	Shanty accommodation.	This mainly occurs in developing countries.
Temporary assembly	Public entertainments, assembly after a building fire drill, political gatherings.	Large stationary crowds, potentially interfering with traffic. Some assemblies are illegal in some countries, or require permits.
Flora preservation	The road side area on rural roads can provide a suitable environment for preservation	Land has these characteristics in low population rural locations. This use may require environmental protection, and may raise land management issues, including fire

Use	Examples	Comment
	of remnant native vegetation.	management.
Cattle agistment	Cattle can feed on grass on road side areas.	Land has these characteristics in low population rural locations. This use gives the name “the long paddock” in Australia, referring to the practice of moving cattle slowly from one place to another for the purpose of feeding.
Fire control	Use of road as a fire break (so that a fire does not cross from one side to the other).	This use is possibly inconsistent with the flora preservation objective (if vegetation must be removed to stop the spread of fire).
Use of air space	Buildings occupying airspace above roads, railway over-bridges	These uses sometimes occur under agreements, sometimes they are unlawful encroachments. This can also be a spillover use (for example, overhanging vegetation from a neighbouring property, overhanging buildings).

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