

Report of Infrastructure to the Ordinary Meeting of Council held on Monday 15 February 2016

**IN2 – Private Road – 'Avoca Road' – Status and Maintenance**

IN2

**Private Road – 'Avoca Road' – Status and Maintenance**  
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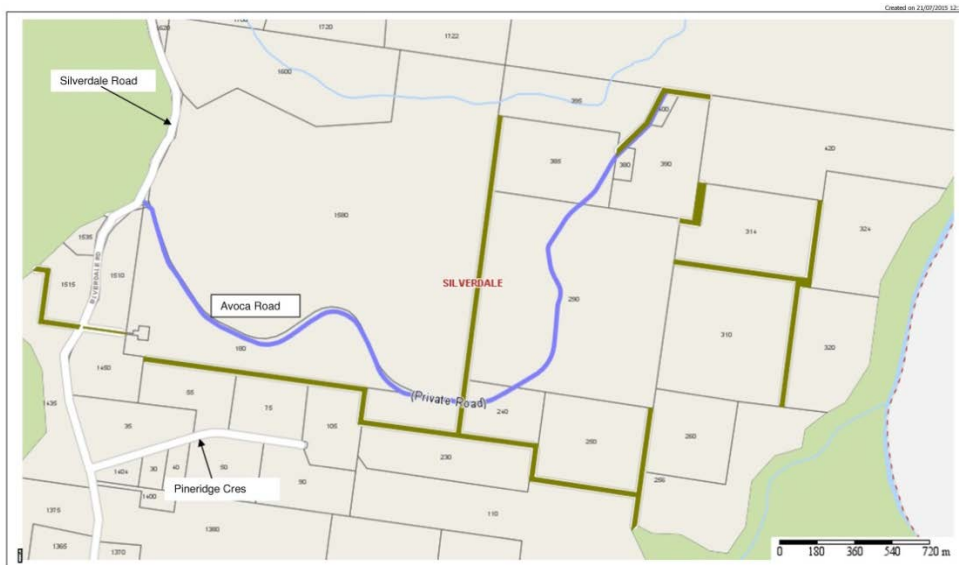
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**EXECUTIVE SUMMARY**

- This matter was considered at Council's Meeting of 21 September 2015 and was deferred subject to a further Councillor Workshop. This report follows the completion of the Workshop on 23 November 2015.
- A situation was created some time ago where a total of 17 lots gain access to Silverdale Road using a various Right(s) of Carriageway over private lands, including the private road known as "Avoca Road".
- As a result of previous Council resolutions, residents have expressed an expectation that Council has some responsibility for maintenance of the private road.
- The report sets out that "Avoca Road" is a predominately unsealed Private Road that was established by private agreement between the land owners in 1980. Accordingly, Council has no responsibility for the operation or maintenance of the road.
- This report recommends that no further maintenance be provided to 'Avoca Road' unless it is on a fee for service with full cost recovery basis.

**REPORT**

**Location of the Private Road known as "Avoca Road"**




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Projection: GDA94 / MGA zone 56  
 Date: 21/05/2015  
 Created By: Rod Gray

**Avoca Road – Right of Carriageway**  
 Private Road  
 Crown Road

Infrastructure

**IN2 – Private Road – 'Avoca Road' – Status and Maintenance**

A situation was created some time ago where 17 lots gain access to Silverdale Road using a "right of carriageway" over private lands (either directly or using other connecting private roads). The pavement is predominately unsealed and in mixed condition. Domestic garbage servicing currently takes place from Silverdale Road as the relevant property owners have not provided an indemnity for damage that may result from the collection contractor's vehicles that would allow the contractor to enter "Avoca Road".

A brief history of council involvement includes:

1. In 1992, Council offered to coordinate proposals to initially create public road reserve on the existing alignment and look at various levels of maintenance/construction funded by the property owners.
2. In April 1998, Council confirmed that it would maintain its commitment of grading the road once a year.
3. In 2002, Council resolved to undertake one off grading to allow easier access for water carts and emergency vehicles. This took place over three days in December.
4. In August 2004 it was resolved by Council, following a Notice of Motion, that "the status of Avoca Road be dealt with as business of an urgent nature." And then stipulated that the status of Avoca Road" be via memo to Councillors.
5. In 2004, in a memorandum to all councillors, it was detailed that "Council has plans to provide one day of grading which will cover about 1/3 of the length [of Avoca Road] or 1 kilometre of the road".
6. In January 2005 council received a petition (letter of commitment) signed by nine of the seventeen owners authorising them as a committee to "investigate the course of action" once Council's position in relation to dedicating this road was known.
7. Council's position has been maintained throughout this time that roads should be dedicated and formed before Council can assume full maintenance of them.

The current expectation by the landowners is for Council to spend two days per year undertaking maintenance grading on a portion of the total length inconsideration of reimbursement of costs for one of the days i.e. approximately \$12,000 of works with reimbursement of approximately \$6,000 (in 2015 dollars and no materials being purchased). This is not able to be justified as it is providing a service to a limited number of residents/owners who remain responsible for the maintenance of the private road.

**IN2 – Private Road – 'Avoca Road' – Status and Maintenance**

The terms of the Right of Carriageway provide benefit to each and every lot by burdening each and every other lot. Wollondilly Shire Council is not a listed beneficiary or party to the Section 88b Instrument that creates the Right of Carriageway.

Section 67 of the Local Government Act permits Council to reach agreement with an owner or occupier of private land to carry out work, provided it proposes to charge an approved fee.

**Additional Matters Raised on the Issue**

**Landowner Concerns/Assertions**

At a meeting with some of the affected landowners who access their properties via "Avoca Road" and subsequent correspondence several concerns and assertions were raised. These issues have been investigated, including sourcing additional legal advice as appropriate; and are summarised below:

1. *Given Council's previous works on the road that some form of precedence has been formed that overrides the requirements of the Roads Act and Local Government Act.*

As the requirements and responsibilities under the relevant Acts are clear, no precedence can be created beyond the requirements of the Acts. Any future works or directions to the owners of the private road remain at the discretion of Council.

2. *That council could be under some additional liability risk for the use of the road if it were to decide to cease all maintenance works.*

As undertaking works or issuing directions to the owners of the road is at Council's discretion, Council cannot be held liable for maintenance works that remain the responsibility of the owners of the lands and hence the road (as established in the 88b Instrument).

3. *That "Avoca Road" was registered with the Department of Land in 1978 and was hence approved by Council.*

The relevant Deposited Plans for the lands do not dedicate any land to council for the creation of a public road; further, the Right of Carriage way that describes the alignment and responsibilities for "Avoca Road" via a Section 88b Instrument and the resulting Deposited Plans were signed by the relevant land owners and registered in 1980. Hence the road remains a private road as described in the Deposited Plans and the Section 88b Instrument.

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It is acknowledge that the private road may be identified on some maps and labelled as "Avoca Road" by some agencies; however, Council has been advised that this has been allowed as a means of identifying a location and providing an individual address as private roads can be "named" for purposes of identification.

4. *That "Avoca Road" connects to a public road reserve as described on DP 610710 (1975) and hence "Avoca Road" must be maintained by Council to provide access between the two public roads.*

The road reserves identified in DP 610710 are Crown Road reserves (other than Silverdale Road), some of which are partially formed with the majority being unformed. As Crown Road reserves, they are remain the responsibility of the Crown and Council has no authority for operation and maintenance.

5. *As members of the public use "Avoca Road" to access the Sport Shooters Association of Australia shooting range without having to be a member of the Association that the road must be other than a Right of Carriageway.*

The Conveyancing Act 1919 establishes that a *Right of Carriageway provides "Full and free right for every person who is at any time entitled to an estate or interest in possession in the land herein indicated as the dominant tenement or any part thereof with which the right shall be capable of enjoyment, and every person authorised by that person, to go, pass and repass at all times and for all purposes with or without animals or vehicles or both to and from the said dominant tenement or any such part thereof"*

Accordingly, the landowner benefitting under the Section 88b Instrument can authorise other parties to use the Right of Carriageway to the limits of their own rights, at their own control and risk.

6. *The NSW Police enforce road rule on "Avoca Road" and hence it is a of different status to other private roads or right of carriageway*

The NSW Police can undertake various regulatory and enforcement functions on private or public lands in accordance with the various Acts that they are empowered under. The undertaking of regulatory or enforcement actions by the NSW Police cannot change the status or ownership of the lands on which the actions are being undertaken.

With respect to the application of the NSW Road Rules on "Avoca Road", the Road Rules 2008 allow for the application of the rules on a "road related area" and "Avoca Road" may be interpreted as a "road related area".

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7. *New landowners have acquired properties accessing "Avoca Road" and have accordingly and expectation of Council maintaining the road.*

As the requirements and responsibilities under the relevant Acts are clear, no precedence can be created beyond the requirements of the Acts. Any future works or directions to the owners of the private road remain at the discretion of Council.

Further, the legal status of "Avoca Road" should have been established by the acquiring parties through the normal conveyance process for the acquisition of land.

8. *That the current arrangement of one day free of charge grading per 12 months plus a second day by the owners can be regarded as equivalent to Council charging 50% of the normal fee, as allowed under the Local Government Act.*

As council has never established a fee under the Act, there is no fee to allow a discount to applied to.

**Legal Requirements for Council to undertake Private Works**

In order to undertake private works, Council must comply with:

The Roads Act 1993, Council as a designated Roads Authority may:

86 *Functions of council in respect of private roads:*

- (1) *A council may direct the owner of a private road (other than a classified road) to carry out such work as, in the opinion of the council, is necessary to prevent the road from becoming unsafe or unsightly or, if of the opinion that it is appropriate that the work should be carried out by the council at its own expense, may carry out any such work itself.*
- (2) *If there is more than one owner of a private road, the respective owners are liable to pay those expenses in such proportions as the council decides.*
- (3) *In deciding the proportion of expenses to be paid by the respective owners, the council must have regard to:*
  - (a) *the benefit that any particular land will derive from the work, and*
  - (b) *the amount and value of any work carried out in respect of the road by the respective owners or occupiers of the land.*

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Noting, that as a Local Government Authority, Council must also comply with the requirements of the Local Government Act 1993, namely Section 67 Private Works.

*67 Private works*

- (1) *A council may, by agreement with the owner or occupier of any private land, carry out on the land any kind of work that may lawfully be carried out on the land.*

*Note. Examples of the kind of work that a council might carry out under this section include:*

- *paving and roadmaking*
- *kerbing and guttering*
- *fencing and ditching*
- *tree planting and tree maintenance*
- *demolition and excavation*
- *land clearing and tree felling*
- *water, sewerage and drainage connections*
- *gas and electricity connections.*

- (2) *A council must not carry out work under this section unless:*

- (a) *it proposes to charge an approved fee for carrying out the work as determined by the council in accordance with Division 2 of Part 10 of Chapter 15, or*
- (b) *if it proposes to charge an amount less than the approved fee, the decision to carry out the work is made, and the proposed fee to be charged is determined, by resolution of the council at an open meeting before the work is carried out.*

- (3) *A council must include details or a summary of any resolutions made under this section and of work carried out under subsection (2) (b) in its next annual report.*

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- (4) *A report of work to which subsection (2) (b) applies must be given to the next meeting of the council after the work is carried out specifying:*
- *the person for whom the work was carried out*
  - *the nature of the work*
  - *the type and quantity of materials used*
  - *the charge made for those materials*
  - *the total of the number of hours taken by each person who carried out the work*
  - *the total amount charged for carrying out the work (including the charge made for materials)*
  - *the reason for carrying out the work.*

Section 356 for the financial assistance of others

356 *Can a council financially assist others?*

- (1) *A council may, in accordance with a resolution of the council, contribute money or otherwise grant financial assistance to persons for the purpose of exercising its functions.*
- (2) *A proposed recipient who acts for private gain is not ineligible to be granted financial assistance but must not receive any benefit under this section until at least 28 days' public notice of the council's proposal to pass the necessary resolution has been given.*
- (3) *However, public notice is not required if:*
- (a) *the financial assistance is part of a specific program, and*
  - (b) *the program's details have been included in the council's draft operational plan for the year in which the financial assistance is proposed to be given, and*
  - (c) *the program's proposed budget for that year does not exceed 5 per cent of the council's proposed income from the ordinary rates levied for that year, and*
  - (d) *the program applies uniformly to all persons within the council's area or to a significant group of persons within the area.*

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The Local Government Regulation (General) 2005 Section 217 for Additional information for inclusion in the annual report.

*217 Additional information for inclusion in annual report:*

*(a4) details or a summary (as required by section 67 (3) of the Act) of resolutions made during that year under section 67 of the Act concerning work carried out on private land and details or a summary of such work if the cost of the work has been fully or partly subsidised by the council, together with a statement of the total amount by which the council has subsidised any such work during that year,*

*(a5) the total amount contributed or otherwise granted under section 356 of the Act.*

**Other Considerations**

**Economic Value**

"Avoca Road" provides access to the private shooting facility operated by the Sporting Shooters Association of Australia within the land identified as 395 Avoca Road.

An estimate of the economic value of this activity has not been made available to Council at the time of this report.

It could be assumed that the visitation rates provided by the Association (approximately 1,180 visitors per months at 30 visitors/weekday and 150 visitors/weekend) indicates that there is a consistent and noticeable influx of visitors to the site that may be generating some direct (on site and in the Silverdale area) and indirect economic activity.

**Private roads & Council's Existing Responsibilities**

1. Discounting the section of Yerranderie Road that is within catchment lands, Council is currently responsible for approximately 43.5 km of unsealed roads servicing 195 dwellings.
2. There are approximately 32.4 km of private roads in the Shire where residents do not currently expect Council to undertake maintenance works.
3. The named section of "Avoca Road" is approximately 3.72 km long.



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4. There are approximately 2.8 km of other private roads running off "Avoca Road" that current records indicate have never been maintained by Council.
5. Property records indicate that at least 16 of the 17 properties serviced by "Avoca Road" have changed owners since the formation of the private Section 88b instrument.
6. In 2015, Council undertook a Special Rate Variation process to increase the funds available for the maintenance and reconstruction of its existing assets. "Avoca Road" was not included in the calculations of the cost projections for future maintenance needs.

**FINANCIAL IMPLICATIONS**

The recommendations of this report allow the application of an additional \$6,000 to the maintenance and repair of Council's public assets in lieu of the repair of private assets.

**CONCLUSION**

Though "Avoca Road" provides a critical access from the public road network, via Silverdale Road, for the 17 lots; it remains a private road that is not the responsibility of Council. Further, the allocation of restricted maintenance budgets and resources to the subsidised maintenance of a private road is inappropriate when the maintenance of public assets is currently under resourced.

**RECOMMENDATION**

1. That Council provide no further maintenance of the private road known as "Avoca Road" unless it is on a fee for service basis for full recovery of costs.
2. That the relevant property owners be advised of Council's decision.