

**TASMANIA**  
**LAW REFORM**  
**INSTITUTE**

# **Law of Easements in Tasmania**

FINAL REPORT NO 12

MARCH 2010

This Report has been funded by a grant of \$13,000  
received from the Law Foundation of Tasmania



# CONTENTS

About this Report.....	iii
Information on the Tasmania Law Reform Institute.....	iii
Acknowledgments.....	iv
Glossary .....	v
List of Recommendations .....	vii
<b>Part 1: Introduction .....</b>	<b>1</b>
1.1 Background.....	1
<b>Part 2: The Current Law in Tasmania .....</b>	<b>3</b>
2.1 What is an easement?.....	3
2.2 Express grant or reservation.....	4
2.3 Easements by implied reservation.....	5
2.4 Easements by implied grant .....	5
Implied statutory grant .....	6
<i>Wheeldon v Burrows</i> .....	6
By description .....	7
2.5 Common law prescriptive easements.....	7
2.6 Abandonment .....	9
2.7 Increased use and unity of title .....	10
2.8 The legislation that impacts on easements in Tasmania .....	10
<i>The Land Titles Act 1980</i> .....	10
Indefeasibility.....	11
<i>The Conveyancing and Law of Property Act 1884</i> and allied legislation.....	11
2.9 Variation and termination of easements under the legislation.....	12
2.10 Submissions .....	13
<b>Part 3: Key Areas for Reform.....</b>	<b>15</b>
3.2 The construction of easements.....	15
Submissions .....	16
Views of the Institute .....	18
Dispute Resolution Mechanisms.....	18
Submissions .....	19
Views of the Institute .....	20
3.3 Implied statutory grants – <i>Conveyancing and Law of Property Act 1884</i> s 6 .....	21
Submissions .....	21

Views of the Institute .....	22
3.4 Abandonment of easements .....	22
Can common law abandonment take place? .....	23
Submissions .....	23
Views of the Institute .....	25
Can the intention to abandon easements be satisfied cumulatively? .....	25
Submissions .....	26
Views of the Institute .....	26
3.5 Prescriptive easements .....	27
Unique Tasmanian provision on prescriptive easements .....	27
State based differences on prescriptive easements .....	28
The position in New South Wales on prescriptive easements .....	28
South Australia, Western Australia, and Victoria on prescriptive easements .....	29
Submissions .....	30
Views of the Institute .....	32
3.6 Novel easements .....	32
Is the list of possible novel easements closed? .....	33
The hurdles that must be overcome for the acceptance of novel easements.....	34
Submissions .....	35
Views of the Institute .....	35
Right to a view .....	36
Submissions .....	36
Views of the Institute .....	37
3.7 Should easements in gross be permitted? .....	38
The law relating to easements in gross in Tasmania.....	38
Is the rule prohibiting the general application of easements in gross sound?.....	38
Submissions .....	41
Views of the Institute .....	42
3.8 Does the current wording for short form easements in schedule 8 of the <i>Conveyancing and Law of Property Act 1884</i> meet modern needs? .....	42
Submissions .....	44
Views of the Institute .....	44
<b>Appendix A: Legislation .....</b>	<b>46</b>

## About this Report

The publication of this Final Report follows a consultation process that involved inviting and considering responses from interested parties and stakeholders. The consultation was facilitated by the release of an Issues Paper on this topic in February 2009. The Issues Paper discussed:

- The role and purpose of easements in property law;
- The current law in Tasmania in relation to easements; and
- The key areas of reform to the law of easements.

The Tasmania Law Reform Institute received a large number of responses to the Issues Paper, including 44 submissions from the general public. The following stakeholders, organisations and government agencies also made submissions in response to the Issues Paper:

- The Law Society of Tasmania Property and Commercial Law Committee;
- The Recorder of Titles;
- A member of the Tasmanian region of the Spatial Sciences Institute (SSI);
- A retired Assistant Recorder of Titles;
- Resource Management and Planning Appeal Tribunal (RMPAT); and
- Hydro Tasmania.

In developing these recommendations, the Tasmania Law Reform Institute has given detailed consideration to all responses received. We thank everybody who took the time and effort to respond.

This Report is available on the Institute's web page at:

[www.law.utas.edu.au/reform](http://www.law.utas.edu.au/reform). Alternatively, it can be sent to you by mail or e-mail.

Address:

Tasmania Law Reform Institute  
Private Bag 89  
Hobart TAS 7001

Inquires should be directed to Esther Newitt, on the above contacts or by telephoning (03) 62262069 or e-mail [law.reform@utas.edu.au](mailto:law.reform@utas.edu.au)

## Information on the Tasmania Law Reform Institute

The Tasmania Law Reform Institute was established on 23 July 2001 by agreement between the Government of the State of Tasmania, the University of Tasmania and The Law Society of Tasmania. The creation of the Institute was part of a Partnership Agreement between the University and the State Government signed in 2000.

The Institute is based at the Sandy Bay campus of the University of Tasmania within the Faculty of Law. The Institute undertakes law reform work and research on topics proposed by the Government, the community, the University and the Institute itself.

The Institute's Director is Professor Kate Warner of the University of Tasmania. The members of the Board of the Institute are Professor Kate Warner (Chair), Professor Margaret Otlowski (Dean of the Faculty of Law at the University of Tasmania), The Honourable Justice AM Blow OAM (appointed by the Honourable Chief Justice of Tasmania), Ms Lisa Hutton (appointed by the Attorney-General), Mr Philip Jackson (appointed by the Law Society), Ms Terese Henning (appointed by the Council of the University), Mr Craig Mackie (nominated by the Tasmanian Bar Association) and Ms Ann Hughes (community representative).

## **Acknowledgments**

This Final Report was prepared by Esther Newitt and Lynden Griggs. The initial research for the project was undertaken as a supervised research project by Kirsten Muskett (an undergraduate student enrolled at the Faculty of Law, University of Tasmania) under the supervision of Lynden Griggs. The Issues Paper was largely based upon Kirsten's research paper and prepared by Lynden Griggs.

The Institute would also like to acknowledge and thank all those who submitted responses to the Issues Paper.

# Glossary

- **Conveyance:** the common way in which an interest in land is transferred.
- **Dominant tenement:** the land that has the benefit (or advantage) of an easement.
- **Easement:** a right exercisable by one landowner over the land of a neighbour. A common example is a right of way.
- **Easements in gross:** an easement without a dominant tenement, that is, without land that has the benefit of the easement.
- **Freehold:** an interest in land of an uncertain duration (contrast leasehold estate). There are three freehold estates: the fee simple, the life estate and the fee tail. The fee simple is the largest estate known and the closest to what would be considered absolute ownership, the fee tail is where the estate would pass to lineal heirs, and the life estate is limited to the duration of the life of the holder.
- **General law (or old system title):** a system of land ownership based on the transference of deeds as the method of conveying an interest in land.
- **Indefeasibility:** the notion that a person's interest in land is subject only to such other estates and interests as are noted on the Register.
- **Landlord (or lessor):** the person who grants a leasehold estate.
- **Leasehold estate:** an interest in land of certain duration.
- **Lessee (or tenant):** the person occupying land under a leasehold estate.
- **Lessor (or landlord):** the person who grants a leasehold estate.
- **Old system title (or general law):** a system of land ownership based on the transference of deeds as the method of transferring an interest in land.
- **Negative easement:** an easement that restricts one landowner from doing something – such as removing a right of support given to a neighbouring landowner.
- **Positive easement:** an easement that allows one landowner to make use of another's land – such as a right of way.
- **Prescription:** the process by which an interest in land is gained by long standing use.
- **Profit à prendre:** the right to take something from the land of another. An example would be a right to remove gravel.
- **Restrictive covenant:** a promise made in a deed that prevents something from being done.
- **Seisin:** the possession of land by the holder of a freehold estate. By contrast, the tenant of land has possession, but not seisin. The term is of historical significance, but rarely has practical consequence.
- **Servient tenement:** the land that has the burden (or disadvantage) of an easement.
- **Tenant (or lessee):** the person occupying land under a leasehold estate.

- **Title:** in the context of land ownership, it can mean either ownership, or the transactions required to establish ownership.
- **Torrens system:** a system of land ownership based on registration. It was devised by Sir Robert Torrens. Torrens immigrated to South Australia in the 1840's to take up the role of Collector of Customs. The Torrens system is now the dominant system of land ownership in Australia, as well as many other nations (contrast general law, or old system title).

## List of Recommendations

### **Recommendation 1:**

That the law concerning access to easements by the dominant owner be clarified through the extension and modernisation of *Conveyancing and Law of Property Act 1884* Schedule 8 (short form easement schedule).

### **Recommendation 2:**

That the government agency administering the legislation produce educational material in order to promote public understanding of rights and obligations of land owners in relation to easements.

### **Recommendation 3:**

That the Resource Management and Planning Appeal Tribunal (RMPAT) be vested with all necessary powers to deal with disputes in relation to easements by way of inexpensive dispute resolution mechanisms, including mediation and conciliation, where possible and by formal adjudication where mediated solutions cannot be reached. These powers are to expressly include the power to adjust property rights of parties, and award compensation, where appropriate.

### **Recommendation 4:**

That s 6 of the *Conveyancing and Law of Property Act 1884* be amended to remove the possibility of easements being established through this provision.

### **Recommendation 5:**

That the common law requirements for abandonment of easements be codified.

### **Recommendation 6:**

That the government agency administering the legislation produce educational material concerning the abandonment, variation and termination of easements.

### **Recommendation 7:**

That successive non-use by the owners of the dominant tenement be a factor included in the principles contained within a codification of the law of abandonment.

### **Recommendation 8:**

That the codification of the requirement to claim a prescriptive easement should remain in the *Land Titles Act 1980*.

### **Recommendation 9:**

That the government agency administering the legislation publish guidelines on the meaning of 'serious hardship' as it relates to the claim of a prescriptive easement.

### **Recommendation 10:**

That in publishing the above guidelines, consideration be given to including purely financial reasons as a basis on which to establish 'serious hardship'.

### **Recommendation 11:**

That no changes to the current legislation be made in relation to novel easements and that an appropriate regulatory agency, such as RMPAT, be given jurisdiction to deal with disputes concerning such matters.

**Recommendation 12:**

That no changes be made to current legislation concerning a right to a view.

**Recommendation 13:**

That no changes be made to current legislation concerning easements in gross.

**Recommendation 14:**

That the government agency administering the legislation initiate steps to extend and modernise the short form schedule. That in any subsequent redrafting consideration be given to using the style of the Northern Territory short form schedule as a template for any modernisation.

# Introduction

## 1.1 Background

*1.1.1* This Report analyses the law in relation to one right/obligation attaching to land – that is the law in relation to easements in Tasmania. Easements operate to provide a benefit to one landowner (known as the dominant owner or, more formally, the dominant tenement) and impose an obligation on the burdened land (known as the servient owner or servient tenement). There are no readily available statistics on the use of easements over land in Tasmania,<sup>1</sup> nor in the other Australian states. However, English statistics indicate that approximately 65% of land in that jurisdiction are subject to, or have the benefit of an easement.<sup>2</sup> Whatever the exact percentage, it can safely be assumed that a very significant portion of properties in Tasmania has the benefit, or are subject to the burden of, an easement.

*1.1.2* Disputes about easements can have a huge emotional and financial cost to Tasmanians. This is highlighted by the way in which this project came to the attention of the Tasmania Law Reform Institute. In suggesting a review of the law of easements, a member of the public detailed the significant emotional, personal, and financial costs involved in a dispute about the use of a right of way. Ultimately, this dispute led the dominant owner to sell their property and move. Underlying this dispute is a stark reminder of the need for rights attaching to land to be easily identifiable and clearly understood. This was also highlighted in the responses to the Issues Paper received by the Tasmania Law Reform Institute from members of the public.

*1.1.3* Critical to the need for rights attaching to land to be identifiable and clearly understood is the notion of ‘title’. In land law, ‘title’ has two meanings. The first is that of ownership. If you have title, it may be more commonly expressed as owning the land. The second sense of ‘title’ relates to the transactions that will be used to prove ownership. In Tasmania, there are two title-based systems relating to land ownership; the dominant system is known as the Torrens system, the other is general law or old system title. The Torrens system is a system of land registration that exists in every Australian state whereby title is by registration.<sup>3</sup> This system is meant to convey such qualities as certainty, stability, and security to the transfer of land.<sup>4</sup> Whereas general law title requires the tracing of how land has been bought, sold, mortgaged etc., back to a ‘good root of title’,<sup>5</sup> Torrens title removed this dependency on what had occurred previously. The theoretical framework of Torrens title involves the surrender of land to the Crown upon the conveyance of the land, with the Crown then re-issuing the title to the purchaser. Because of this surrender, the purchaser is not then obligated to examine retrospectively what has occurred in the past. Costs for conveyancing are reduced (as the complexity is minimised), security of title (particularly for the purchaser) is enhanced, and certainty of title is promoted (through the creation of one document relating to the parcel of land – the certificate of title).

---

<sup>1</sup> Contact with the Land Titles Office in Tasmania indicated that it was not possible to ascertain easily the percentage of properties with easements attached to them.

<sup>2</sup> The Law Commission, ‘Consultation Paper No 186 – Easements, Covenants and Profits A Prendre, A Consultation Paper’ 28 March 2008 <<http://www.lawcom.gov.uk/docs/cp186.pdf>> (28 July 2009).

<sup>3</sup> *Breskvar v Wall* (1971) 126 CLR 376.

<sup>4</sup> See generally, Lynden Griggs, ‘To and From – But Not Across: The High Court – Easements, Torrens and Doctrinal Purity’ (2008) 15(3) *Australian Property Law Journal* 260.

<sup>5</sup> This is defined as ‘an instrument of disposition dealing with or proving on the face of it... the ownership of the whole legal or equitable estate in the property sold, containing a description by which the land can be identified.’ See Bradbrook, MacCallum and Moore, *Australian Real Property Law* (2002) [3.34], quoting from Voumard, [10080], which in turn cited *Re Lemon & Davies’ Contract* [1919] VLR 481. In Tasmania, s 35(1) of the *Conveyancing Law and Property Act 1884* provides that the search period is limited to 20 years, provided that the documents go back to a ‘good root of title’. For example, a conveyance of the legal fee simple some 18 years ago would not constitute a ‘good root of title.’ This would not meet the minimum requirement of a ‘good root of title’ at least 20 years prior to the transaction.

As noted, with general law or old system title, the purchaser is required to examine all instruments relevant to that land to establish a ‘good root of title’. In essence, title under general law is more akin to the second sense of the word ‘title’, whereas title under Torrens has more familiarity with the first use of the word ‘title’. The Tasmanian Torrens system has evolved from the *Real Property Act 1862*<sup>6</sup> and is now primarily encompassed in the *Land Titles Act 1980*. The *Conveyancing and Law of Property Act 1884* primarily governs general law land (though it does occasionally influence Torrens land), along with the *Registration of Deeds Act 1935*.

1.1.4 Easements are a vital land use management tool; they may well provide the only means of access to a particular property,<sup>7</sup> or the only means of maintaining the property.<sup>8</sup> Without such property rights the economic value attached to a piece of land can be significantly reduced, if not eliminated.<sup>9</sup> Easements also place a negative obligation on the servient tenement to refrain from doing something that would prevent the dominant owner from making use of the easement.<sup>10</sup> This Report addresses a number of problems associated with easements in Tasmania. First, it recommends that the law on access to an easement be clarified. Good neighbourly relations can be destroyed if the expectation of the dominant and servient owner in respect of use of the easement differ greatly. It is anticipated that a clearer delineation of when and how an easement can be used will eliminate much dispute that presently occurs. This Report further recommends that the laws surrounding the creation, variation and termination of easements be clarified and modernised where necessary.

1.1.5 The Report also considers the role that common law notions of abandonment and prescriptive easements ought to play in a Torrens system of land title. It recommends that such principles be permitted and that they should be codified in order to help ensure certainty in relation to their application. Finally, the Report examines the operation of novel easements (specifically wind and solar access easements) and easements in gross. It concludes that, while the list of possible easements should not be considered closed, mechanisms such as licences, leases, contracts, and planning schemes are a more appropriate way to manage these types of arrangements.

---

<sup>6</sup> S Petrow, ‘Responses to the Torrens System in Tasmania 1862 to 1900’ (1997) 5 *Australian Property Law Journal* 194, 194. This article covers the degree of hesitation in regard to the introduction of the Torrens system, which was far from widely accepted.

<sup>7</sup> For instance, with landlocked land see *Hanny and Anor v Lewis and Ors* (1998) 9 BPR 16, 205; BC9804581 per Young J, 11: that ‘[i]t is in the public interest that landlocked land be utilised’. Note that in this case the easement was not granted because another route was available and it was found that the easement would disturb the servient tenement’s privacy too much and no offer of compensation had been made.

<sup>8</sup> See *Bonaccorso v Strathfield Municipal Council* (2003) 127 LGERA 135 where an easement in favour of the council to maintain a water pipe was upheld.

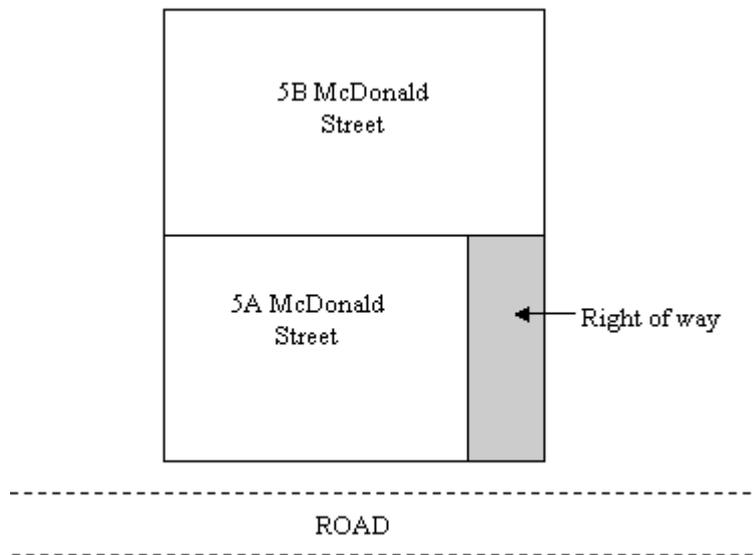
<sup>9</sup> Because land will not be able to be accessed or essential services such as water pipes will not be able to be maintained.

<sup>10</sup> *Spear v Rowlett* [1924] NZLR 801, 803.

# The Current Law in Tasmania

## 1.2 What is an easement?

1.2.1 An easement can be defined as ‘a right enjoyed by a person with regard to the land of another person, the exercise of which interferes with the normal rights of the owner or occupier of that land’.<sup>11</sup> Two common examples of easements are the right of way and a drainage easement. While an easement will interfere with the normal rights of the owner or occupier of the land, the easement cannot amount to exclusive possession.<sup>12</sup> The land that has the benefit of an easement is known as the dominant tenement. The land subject to the easement is known as the servient tenement. For example, on the following diagram 5B McDonald Street is the dominant tenement with the right of way (easement) over the servient tenement (5A McDonald Street). This easement enables the owners of 5B access to their property from the road.



1.2.2 It is also important to note that easements can be both positive and negative in nature. A negative easement will restrict what the owner of the land burdened by the easement (that is, the servient tenement) can do with their land in order to benefit the dominant tenement.<sup>13</sup> A positive easement will allow the dominant tenement to make some use of the servient tenement’s land.<sup>14</sup> An easement for support is an example of a negative easement. Such an easement limits the use the servient tenement can make of their own land so that support is not removed from the dominant land, such as through excavation and building works.<sup>15</sup> The most common form of positive easements are rights of way over the servient land or a drainage

<sup>11</sup> *Municipal District v Coles* (1906) 3 CLR 96, as cited in P Butt and P E Nygh (eds), *Butterworths Concise Legal Dictionary* (3<sup>rd</sup> ed, 2004) 142. This definition was accepted in *City Developments P/L & Anor v Registrar General and the NT & Others* (2000) 156 FLR 1.

<sup>12</sup> Wilson J in *Weigall v Toman* (2006) Q ConvR 54-659, [12] referring to Lopes LJ in *Reilly v Booth* (1890) 44 Ch D 12, 26 and at [17] referring to Upjohn J in *Copeland v Greenhalf* [1952] Ch 488, 498. Note, however, *London & Blenheim Estates Ltd v Ladbroke Retail Parks Ltd* [1992] 1 WLR 1278, 1286 per Judge Paul Baker QC, ‘A small coal shed in a large property is one thing. The exclusive use of a large part of the alleged servient tenement is another.’

<sup>13</sup> Butt and Nygh, above n 11, 292.

<sup>14</sup> *Ibid*, 333.

<sup>15</sup> *Ibid*, 292.

easement, the latter allowing the dominant tenement to install and maintain drainage pipes on the servient tenements land.<sup>16</sup>

1.2.3 The essential characteristics of an easement at common law are as follows:<sup>17</sup>

- (1) There must be a dominant and servient tenement;
- (2) The easement must accommodate the dominant tenement – this means that the easement must confer a real and practicable benefit on the dominant tenement.<sup>18</sup> While the dominant and servient tenement need not be touching (contiguous),<sup>19</sup> the easement must relate to the needs of the dominant tenement.<sup>20</sup> People other than the dominant owner may also derive a benefit from the easement,<sup>21</sup> and the fact that the easement increases the value of the dominant tenement is important, but is not decisive;<sup>22</sup>
- (3) The dominant and servient tenements must be owned by different people (though in practice this can easily be met by the use of various legal structures to ensure that formal legal ownership is in two different people); and
- (4) The right must be able to form the subject matter of a grant. In other words, the easements must not be expressed too widely or be vague,<sup>23</sup> nor can a mere right of recreation amount to an easement.<sup>24</sup>

1.2.4 Easements can be created by express grant or reservation, under statute, they may be implied or by prescription.<sup>25</sup>

## 1.3 Express grant or reservation

1.3.1 An express grant or reservation is where the parties representing the dominant and servient tenement agree to establish an easement over the servient tenement. That is, the servient tenement agrees to grant to the dominant tenement a right to use her or his land for a certain purpose, (a positive easement), or the right to restrict the servient tenement from doing something on her or his land, (a negative easement). Under the common law, when construing the words of an easement the court may look to ‘...the circumstances existing

<sup>16</sup> Ibid, 333.

<sup>17</sup> *Re Ellenborough Park* [1955] 3 All ER 667, 673 per Lord Evershed MR, CA – the four characteristics were adopted from *Dr Cheshire’s Modern Real Property*; Butterworth’s, *Halsbury’s Laws of Australia*, (at 10 December 2008) 355 Real Property, ‘V Easements, Profits, Rentcharges and Covenants’ [355-12020]. It is pertinent to note at the outset that under Torrens system legislation, unity of seisin will not extinguish an easement. See s 109 of the *Land Titles Act 1980*.

<sup>18</sup> *Huckvale v Aegean Hotels Ltd* (1989) 58 P & CR 163, 168.

<sup>19</sup> *Gas and Fuel Corporation v Barba* [1976] VR 755 – though the dominant and servient should be reasonably close.

<sup>20</sup> *R v Registrar of Titles; Ex parte Waddington* [1917] VLR 603.

<sup>21</sup> *Simpson v Mayor of Godmanchester* [1897] AC 696.

<sup>22</sup> *Re Ellenborough Park* [1956] 1 Ch 131.

<sup>23</sup> *Riley v Penttila* [1974] VR 547.

<sup>24</sup> *Mounsey v Ismay* (1865) 3 H & C 486; In *Re Ellenborough Park* [1955] 3 All ER 667, 674 Lord Evershed MR, CA stated, ‘...the cognate questions involved under this condition are: whether the rights purported to be given are expressed in terms too wide and vague a character; whether, if and so far as effective, such rights would amount to rights of joint occupation or would substantially deprive the owners of the park of proprietorship or legal possession...’

<sup>25</sup> A J Bradbrook, S MacCallum and A P Moore, *Australian Real Property Law* (4<sup>th</sup> ed, 2007) 756-757.

at the time when the grant was made and is not confined exclusively to the language used in the document.<sup>26</sup> An express grant of an easement by one co-owner can bind the other co-owners.<sup>27</sup>

## 1.4 Easements by implied reservation

*1.4.1* An implied easement by reservation is where it is assumed that a particular easement has passed with the conveyance of land. Two examples are commonly noted – easements of necessity and easements based on the intended use of the land.<sup>28</sup> Easements of necessity are generally linked to situations where part of a larger property is sold and the part sold becomes land-locked.<sup>29</sup> Under the common law, the creation of an easement of necessity is based on the presumed intentions of the parties and not on some ground of public policy.<sup>30</sup> That is, it is assumed the parties intended to create such an easement and its non-existence is presumed to be an oversight. An easement of necessity will not be lightly inferred, it must be ‘necessary’ to access the land not merely the easier route.<sup>31</sup> A right of way of necessity may, however, be granted where evidence is adduced addressing the difficulties of the alternate access to the land.<sup>32</sup>

*1.4.2* The other category of implied easements is intended easements based on use.<sup>33</sup> Where it is the common intention of the parties to a sale of land that the land will be used for a certain purpose,<sup>34</sup> the courts may imply, at common law, into the conveyance such easements as make the land fit for the intended purpose or use.<sup>35</sup>

## 1.5 Easements by implied grant

*1.5.1* Easements can also be created under the common law by an implied statutory grant,<sup>36</sup> implied via the doctrine of *Wheeldon v Burrows*<sup>37</sup> and arising from the description of land.<sup>38</sup>

---

<sup>26</sup> Bradbrook, McCallum and Moore, above n 25, 741; *Gallagher v Rainbow* (1994) 179 CLR 624, 639 per McHugh J, ‘In *Waterpark v Fennell*, Lord Wensleydale said: “The Construction of a deed is always for the court; but, in order to apply its provisions, evidence is in every case admissible of all material facts existing at the time of the execution of the deed, so as to place the Court in the situation of the grantor.”’

<sup>27</sup> *Hedley v Roberts* [1977] VR 282.

<sup>28</sup> Bradbrook, McCallum and Moore, above n 25, 757-758.

<sup>29</sup> *Ibid*, 757; this scenario occurred in *North Sydney Printing Pty Ltd v Sabemo Investment Corp Pty Ltd* [1971] 2 NSWLR 150, where a piece of land was retained with the intention that it form a part of the council’s car park but negotiations broke down and the developer was left with a piece of land-locked land. Here an easement was not implied because the intended use of the land did not need an access point because it was intended to extend the existing car park.

<sup>30</sup> Bradbrook, McCallum and Moore, above n 25, 757; *North Sydney Printing Pty Ltd v Sabemo Investment Corp Pty Ltd* [1971] 2 NSWLR 150, 157, where Hope J discusses the weakness of the authorities suggesting public policy forms the basis of easements of necessity. At 158 Hope J referring to the twelfth edition of *Gale on Easements* ‘[easements of necessity are]...easements which are incident to some act of the owners of the dominant and servient tenements without which the intention of the parties to the severance cannot be carried into effect’; Butterworth’s, *Halsbury’s Laws of Australia*, above n 17, [355-12165].

<sup>31</sup> Bradbrook, McCallum and Moore, above n 25, 757 refer to *Union Lighterage Co v London Graving Dock Co* [1902] 2 Ch 557 (CA) and *Manjang v Drammeh* (1991) 61 P & CR 194 (PC).

<sup>32</sup> Bradbrook, McCallum and Moore, above n 25, 757, referring to *Barry v Hasseldine* [1952] 1 Ch 835. In this case, the grantees land was not completely enclosed by the land of the grantor but an easement of necessity was still implied. The permission to access the land via the disused airfield had been withdrawn; the grantee was then permitted an easement of necessity over the grantors land.

<sup>33</sup> Bradbrook, McCallum and Moore, above n 25, 758, discussing *Re State Electricity Commission (Vic) and Joshua’s Contract* [1940] VLR 121, 173. In this case land was sold for the purpose of constructing an electricity substation ‘which necessarily involved the transmission of noise over neighbouring land. Mason J held that the Commission was entitled to have included in the transfer of the land it had purchased an easement of transmitting such noise as would arise from the proper use of an electricity substation.’

<sup>34</sup> The purpose intended must be particular and definite: Butterworth’s, *Halsbury’s Laws of Australia*, above n 17, [355-12170].

<sup>35</sup> Bradbrook, McCallum and Moore, above n 25, 758.

<sup>36</sup> *Conveyancing and Law of Property Act 1884*, s 6.

### ***Implied statutory grant***<sup>39</sup>

1.5.2 The *Conveyancing and Law of Property Act 1884*, s 6 provides as follows:

(1) A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, watercourses, liberties, privileges, **easements**, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, and any part thereof, or, at the time of conveyance, demised, occupied, or enjoyed with, or reputed or known as part and parcel of or appurtenant to the land or any part thereof.

(3) This section applies only if and as far as a contrary intention is not expressed in the conveyance, and has effect subject to the terms of the conveyance and to the provisions therein contained.

The intent of this section is to shorten conveyances, rather than change the substantive law. However, it has been held that the section does have the potential to convert what would otherwise be considered a licence given by a neighbour to use their land into an easement attaching to the dominant and servient tenements.<sup>40</sup>

### ***Wheeldon v Burrows***

1.5.3 *Wheeldon v Burrows* easements generally arise where land is held by one person and this person then sub-divides and sells the parcels. A purchaser of one of the lots of land may well argue that a quasi easement existed (for example, the original owner may have passed over the severed land with the new purchaser claiming that this amounts to a right of way) and that such an easement should be implied for the benefit of the severed land owner if certain tests are met.<sup>41</sup> The theoretical basis of the rule is that the grantor is not entitled to derogate from the grant.<sup>42</sup>

1.5.4 For a *Wheeldon v Burrows* easement to be implied the use of the right must be:

- (1) Continuous and apparent;<sup>43</sup>
- (2) Necessary for the reasonable use of the property; and
- (3) At the time of the grant the right must have been used by the owner of the whole for the benefit of the severed land.<sup>44</sup>

‘Continuous and apparent’ has been interpreted as something that could be seen on inspection of the property, that is, it must be relatively permanent and have some physical existence.<sup>45</sup> As Bradbrook,

<sup>37</sup> [1879] 12 Ch D 31; Bradbrook, McCallum and Moore, above n 25, 759.

<sup>38</sup> Bradbrook, McCallum and Moore, above n 25, 762.

<sup>39</sup> *Conveyancing and Law of Property Act 1884*, s 90B also provides for the creation of implied easements arising out of plans of subdivision. This applies to Torrens land – see *Conveyancing and Law of Property Act 1884*, schedule 4.

<sup>40</sup> See further [3.3.1] below.

<sup>41</sup> R Price and L Griggs, *Property Law in Principle* (2<sup>nd</sup> ed. 2008) 352.

<sup>42</sup> Butterworth’s, *Halsbury’s Laws of Australia*, above n 17, [355-12180].

<sup>43</sup> *Wheeldon v Burrows* [1879] 12 Ch D 31, 49 per Thesiger LJ.

<sup>44</sup> Price and Griggs, above n 41, 353 referring to *Wheeldon v Burrows*, *ibid*.

<sup>45</sup> Bradbrook, MacCallum and Moore, above n 25, 759; *Ward v Kirkland* [1967] Ch 194, 225 per Ungood-Thomas J: ‘But the words ‘continuous and apparent’ seem to be directed to there being on the servient tenement a feature which would be seen on inspection and which is neither transitory nor intermittent; for example, drains, paths, as contrasted with the bowsprits of ships overhanging a piece of land.’ Also at 225, Ungood-Thomas J cites *Cheshire’s Modern Real Property* (9<sup>th</sup> ed) which states, ‘there is no difficulty where there is a definite made road over the quasi-servient tenement to and for the apparent use of the quasi-dominant tenement...but the existence of a formed road is not essential, and if there are other indicia which show that the road was being used at the time of the grant for the benefit of the quasi dominant tenement and that it is necessary for the reasonable enjoyment of that tenement, it will pass to a purchaser of the later.’; *Stevens and Evans v Allan and Armanasco* (1955) 58 WALR 1, 13 per Wolff J, the right of way was marked out clearly on a plan of subdivision, in addition on sale the driveway was ‘pointed

MacCallum, and Moore explain, the second criterion does not import the same strict notions of necessity from easements of necessity; rather it means that the right must be reasonably necessary to enjoy the severed land.<sup>46</sup> If all of the above criteria are met then the quasi easement can pass to the owner of the severed land where the original owner retains the other piece of land and also in the situation where the original owner severs the land and sells it to two distinct owners, not retaining a portion for her or himself.<sup>47</sup>

### *By description*

1.5.5 Also existing under the category of implied grants are easements arising from the description of the land.<sup>48</sup> The seminal case on this species of easement is *Dabbs v Seaman*.<sup>49</sup> Easements by description can be described in the following terms:

If, in a conveyance or a contract of sale, land is described as ‘bounded by’ or ‘abutting on’ a road or street the grantor will be regarded as having agreed to grant to the grantee a right of way over the land forming the road or street.<sup>50</sup>

In *Dabbs*, land was sold to Mrs Dabbs’ predecessor in title with a description that it was bounded on one side by a lane 20ft wide. The court held that, as such, an easement could be implied.<sup>51</sup>

## 1.6 Common law prescriptive easements

1.6.1 There are also prescriptive easements under the common law, which, some argue, are based on an implied grant from the grantor.<sup>52</sup> Prescription is where an interest in land is gained ‘by long-standing use’.<sup>53</sup> Prescriptive easements can be both positive and negative in nature.<sup>54</sup> Initially, under English common law, to establish a prescriptive easement one had to show use from the beginning of legal memory (notionally recognised as the year 1189), however, this was held to be impracticable<sup>55</sup> and has never applied in

---

out as the way to the stables’ and, at 14, ‘physically the driveway has all the appearance of a way attached to the stables and horseyards and their appurtenants. Its design and appearance proclaim its purpose’.

<sup>46</sup> Bradbrook, MacCallum and Moore, above n 25, 760; *Wilcox v Richardson* (1997) 43 NSWLR 4, 8 per Meagher JA: the right need not be essential for the running of the shop; Per Handley JA at 14-15, the test is not whether the rights are necessary but whether the implied rights are necessary for the reasonable enjoyment of the property granted: ‘The difference is significant, because rights which are not necessary for the operation of a business may be necessary for its reasonable operation...’ At 15, – the test is not as strict as the test for an easement of necessity; *Daar Pty Ltd v Feza Foundation Ltd* (2001) 10 BPR 19,099; BC200107036 per Bryson J at [14] ‘...it is not a concept of absolute necessity but of strong probability, excluding the probability of an opposite intention.’

<sup>47</sup> Bradbrook, MacCallum and Moore, above n 25, 763; *Sunset Properties Pty Ltd v Johnston* (1985) 3 BPR 9185, 9188 per Holland J.

<sup>48</sup> Bradbrook, MacCallum and Moore, above n 25, 762; Price and Griggs, above n 41, 302.

<sup>49</sup> (1925) 36 CLR 538; Bradbrook, MacCallum and Moore, above n 25, 763.

<sup>50</sup> For a concise restatement of *Dabbs v Seaman* see Bradbrook, MacCallum and Moore, above n 25, 762.

<sup>51</sup> *Dabbs v Seaman* (1925) 36 CLR 538, 557-558 per Higgins J, ‘It is not pretended that Seaman ever agreed with the appellant to give any right of way – Seaman never made any agreement of any sort with the appellant. The appellant rests her claim on the fact that in the transfer of the acre to Smith, from whose trustee she purchased it, there appeared on the east of the land expressed to be transferred a strip of land shown within two parallel lines, and having the words “lane 20ft wide”.’

<sup>52</sup> B Edgeworth, ‘Easements, the Doctrine of the Lost Modern Grant and the NSW Torrens System: Recent Developments’ (Paper presented at Hotspots and Pitfalls in Property Law, University of New South Wales Faculty of Law, Centre for Continuing Legal Education, Sydney, 17 February 2005) 4-6 – unsure about where Prescriptive Easements are placed in the dichotomy, that they are based on implied grant is itself a fiction as prescriptive easements are really based on activity.

<sup>53</sup> Butt and Nygh, above n 11, 338.

<sup>54</sup> F R Burns, ‘Reforming the Law of Prescriptive Easements in Australia’ (Paper presented at the Real Property Teachers’ Conference, University of Tasmania, Hobart, 12-14 June 2007) 9.

<sup>55</sup> Halsbury’s, above n 17, [355-12200].

Australia.<sup>56</sup> In Tasmania, until the introduction in 2001 of s 138I of the *Land Titles Act 1980*, which repealed the *Prescription Act 1934*, prescriptive easements could also be granted.<sup>57</sup>

1.6.2 The doctrine of lost modern grant operates to presume that a grant must have been made if a dominant owner has made 20 years' use of the servient tenement without the servient tenement seeking to assert their rights over their land.<sup>58</sup> At common law, the following criteria were necessary to establish the existence of an easement by virtue of the doctrine of lost modern grant. The doctrine stated that use of the land must be:

- as if of right;
- not by force, secrecy or permission; and
- not by unlawful means.<sup>59</sup>

Under the common law the periods of use by several owners can be amalgamated to establish the requisite 20-year period.<sup>60</sup>

1.6.3 There is no national uniformity as to whether common law prescriptive easements can be gained over land based under the Torrens system of land registration<sup>61</sup> and whether certain categories of prescriptive easements have been limited or extinguished. For example, there is no clear national direction as to the availability of an easement for the flow of air (arguably critical if an easement supporting wind farms was sought to be created), with similar confusion about whether an easement of light (e.g. for solar generation) has been extinguished.<sup>62</sup> Confirmation exists of the applicability of common law prescriptive easements in Western Australia and Victoria.<sup>63</sup> In South Australia the elements of prescription have been changed by statute, and arguably impose a higher burden on a person seeking to establish a prescriptive easement whereby the periods of use of separate owners cannot be accumulated.<sup>64</sup> In New South Wales, *Williams v State Transit Authority of New South Wales and Ors*<sup>65</sup> recently held that prescription does not apply to Torrens title land in New South Wales.<sup>66</sup> The situation in Tasmania is that, while the *Land Titles Act 1980* s 40(3)(e) would have been wide enough to encompass common law easements by prescription, the *Land Titles Act 1980* s 138I(2) has since abolished the common law doctrine of lost modern grant. As such, common law prescription in respect of Torrens title land in Tasmania has been abolished and replaced by a statutory form of easement by possession. Section 138I and the subsequent sections of the *Land Titles Act 1980* are designed to establish a conclusive code for the creation of easements by possession, with s 138H indicating the applicability of this Part to both registered (or Torrens) land and unregistered (or general law or old system title) land. Transitional problems associated with this are discussed below.

---

<sup>56</sup> Burns, above 54, 7.

<sup>57</sup> Note both Western Australia and South Australia continue to use the *Prescription Act*.

<sup>58</sup> Bradbrook, MacCallum and Moore, above n 25, 765.

<sup>59</sup> P Butt, *Land Law* (5th ed 2006) 453-456.

<sup>60</sup> Bradbrook, MacCallum and Moore, above n 25, 767.

<sup>61</sup> Private land ownership in Tasmania comes under one of two systems. By far the major system is the Torrens system of land ownership where registration confers title. The other system, colloquially known as old system or general law title involves title transferring by passage of deeds, rather than registration.

<sup>62</sup> Bradbrook, MacCallum and Moore, above n 25, 764.

<sup>63</sup> *Ibid*.

<sup>64</sup> *Ibid*, referring to *Golding v Tanner* (1991) 56 SASR 482 (note the authors refer to *Goldberg v Tanner* but the citation given is for *Golding v Tanner*) and s 84 of the *Real Property Act 1886* (SA).

<sup>65</sup> *Williams v State Transit Authority of New South Wales and Ors* [2004] 60 NSWLR 286.

<sup>66</sup> Edgeworth, above n 52, 2-3.

## 1.7 Abandonment

*1.7.1* Presently controversial is the common law concept of abandonment by non-use and how this relates to registered or Torrens land.<sup>67</sup> Abandonment is effectively the opposite situation to prescription. Common law abandonment revolves around the intention of the owner of the dominant tenement, whereby ‘...the dominant tenement makes it clear that neither he nor his successors in title will make any use of the easement.’<sup>68</sup> A good example of this is the case of *Grill v Hockey*.<sup>69</sup> In that case a carriageway was not used for 17 years. At various times there was a shed built over the area in addition to several different gates that completely obstructed access. Furthermore, the original owner expressly asked the real estate agent upon sale not to promote the means of access as part of the property. Abandonment, however, was not found by the Court:

By reason of the use to which Mrs Anasson put the property, there was no real occasion for her to use the rights of carriageway, and by reason of the first plaintiff’s alternative means of vehicular access it was unnecessary for him to do so. In the circumstances the absence of any use or attempted use by them of the easements over a period of 17 years has little probative force. Furthermore the existence of the physical obstructions and their acquiescence therein during this period has little weight, having regard to the nature of those obstructions, none of which was of such a substantial and permanent kind as to give rise to a presumed intention that the rights would never be exercised again, and I would be of the same opinion if the corrugated iron which formed the eastern side of the shed on no. 179 had not been hinged but had been a fixed structure ...<sup>70</sup>

Thus the courts are unwilling to infer abandonment, even when the right has not been used for the required time and it is effectively put out of use by blockage.<sup>71</sup> In this regard, there appears to be a similarity in the legislative attitude expressed in the *Land Titles Act 1980*.

*1.7.2* The *Land Titles Act 1980* imports a restricted notion of statutory abandonment<sup>72</sup> and specifies a period of 20 years non-use as conclusive evidence that the easement has been abandoned.<sup>73</sup> Furthermore, the Act gives the Recorder discretion as to whether to extinguish the easement even though such conditions have been met.<sup>74</sup> Despite this exhibited intention of the legislature to restrict abandonment, legislation and recent case law in New South Wales has held that an easement can still be abandoned via common law principles even though it remains on the title.<sup>75</sup>

---

<sup>67</sup> Bradbrook, MacCallum and Moore, above n 25, 769.

<sup>68</sup> *Ibid*; see also Halsbury’s, above n 17, [355-1235].

<sup>69</sup> *Grill v Hockey* (1991) 5 BPR 11, 421.

<sup>70</sup> *Ibid*, 7.

<sup>71</sup> As an example, see *Treweeke v 36 Wolseley Road Pty Ltd* (1973) 128 CLR 274, where a right of way had been blocked by a largely impenetrable bamboo clump, a swimming pool and a fence and had been largely unused for 40 years but because intention to abandon was lacking this significant blockage was not sufficient to base a claim of abandonment on; Bradbrook, MacCallum and Moore, above n 25, 769.

<sup>72</sup> *Land Titles Act 1980* s 108(2)(c) the intention of the dominant tenement to abandon is not a prerequisite under the statute.

<sup>73</sup> See *Land Titles Act 1980* s 108(3).

<sup>74</sup> Bradbrook, MacCallum and Moore, above n 25, 770 referring to s 108(3).

<sup>75</sup> *Treweeke v 36 Wolseley Road Pty Ltd* (1973) 128 CLR 274; and see s 89(1) of the NSW *Conveyancing Act 1919* which is similar in form to the Tasmanian *Conveyancing and Law of Property Act 1884* s 84C. For an example of where the easement was found to be obsolete in New South Wales, (the equivalent legislation in Tasmania to the provision used in that case is s 84C(3) of the *Conveyancing Law and Property Act 1884*) see *Durian (Holdings) Pty Ltd v Cavacourt Pty Ltd* (2000) 10 BPR 18,099; [2000] NSWCA 28. The difference in elevation between the properties made the easement impossible to use and local government regulations had made the use unlawful.

## 1.8 Increased use and unity of title

1.8.1 At common law an easement may also be extinguished where the use of an easement increases markedly beyond that for which it was intended.<sup>76</sup> This common law tool is not directly included in the Tasmanian legislation.<sup>77</sup> Additionally, easements may be extinguished at common law by unity of title or seisin. This follows from the requirement that the dominant and servient tenement must be in different hands.<sup>78</sup> Once extinguished in this manner the easement cannot be resurrected if ownership is subsequently held by different people.<sup>79</sup> This method of termination is expressly excluded in respect of Torrens title land in Tasmania.<sup>80</sup> In the context of general law or old system title, s 9A of the *Conveyancing and Law of Property Act 1884* provides for what amounts to a suspension and re-creation of an easement that will be formed afresh when land that previously lost an easement on the unity of seisin is subsequently split.

## 1.9 The legislation that impacts on easements in Tasmania

### *The Land Titles Act 1980*

1.9.1 Most easements in Tasmania are created for land held under the *Land Titles Act 1980*. The *Land Titles Act 1980* s 105<sup>81</sup> is the general provision as to the creation of easements in Tasmania.<sup>82</sup> This section sets out who can create an easement, and the powers of the Recorder. Section 105(3) provides that in relation to registered land the Recorder will note the easement on the folio of the burdened and the benefited land. The *Land Titles Act 1980* s 106 provides that the register is evidence of easements. In addition to this, the *Land Titles Act 1980* s 109 provides an exception to the common law requirement that the servient and dominant tenements must be owned by different people.<sup>83</sup>

1.9.2 The issue of prescriptive or possessory easements has been clarified by the *Land Titles Act 1980* s 138I. This was enacted in 2001, and purports to highlight the primacy of the register over the common law for the acquisition of easements by prescription. Under s 138I(2) the doctrine of lost modern grant is abolished with s 138J then establishing the requirements to prove a possessory based (or what previously would have been known as a prescriptive) easement. Division 3 of the *Land Titles Act 1980* goes through the procedures for the vesting of an easement by possession under the *Land Titles Act 1980*. The person seeking to assert the easement must notify the servient tenement in writing under s 138K and the servient tenement may object, in which case the easement will not be registered unless the dominant tenement would suffer serious hardship, though what constitutes hardship, and when it will be considered serious is not defined.<sup>84</sup> Section 138L lists the requirements for an application to the Recorder for the easement to be registered; the

---

<sup>76</sup> See *Ray v Fairway Motors (Barnstaple) Ltd* (1968) 20 P&CR 261 (CA) in A Bradbrook and M Neave, *Easements and Restrictive Covenants in Australia* (2<sup>nd</sup> ed, 2000) 497-498; Bradbrook, MacCallum and Moore, above n 25, 771; Halsburys, above n 17, [355-12240].

<sup>77</sup> It is suggested this is the right approach to take. Excessive use is a common law tool of extinguishment like abandonment and as such should not be permitted to diminish the certainty of the register.

<sup>78</sup> Bradbrook, MacCallum and Moore, above n 25, 772.

<sup>79</sup> Halsburys, above n 17, [355-12245].

<sup>80</sup> Bradbrook, MacCallum and Moore, above n 25, 772 referring to *Land Titles Act 1980* s 109.

<sup>81</sup> The relevant sections of the legislation are attached in Appendix A.

<sup>82</sup> In terms of subdivisions one must have regard to *The Local Government (Building and Miscellaneous Provisions) Act 1993* (Tas) ss 87 and 99 – see Bradbrook and Neave, above n 76, 237.

<sup>83</sup> Bradbrook, MacCallum and Moore, above n 25, 738-739.

<sup>84</sup> As will be discussed, these sections place important limits on the statutory form of prescriptive easements.

common law is put into statutory form and the easement must not have been enjoyed by force or secrecy<sup>85</sup> and the use of the easement must not have been by agreement.<sup>86</sup>

### ***Indefeasibility***

1.9.3 Arguably, the other section that has primacy in Tasmania in terms of the extent and effect (but not ‘creation’) of easements is s 40(3)(e) of the *Land Titles Act 1980*. This section provides a very wide exception to indefeasibility<sup>87</sup> in regard to easements:<sup>88</sup>

(3) The title of a registered proprietor of land is not indefeasible –

(e) so far as regards –

(i) an easement arising by implication or under a statute which would have given rise to a legal interest if the servient land had not been registered land; and

(ia) an easement created by deed before the servient tenement became subject to this Act or the repealed Act; and

(ii) an equitable easement, except as against a *bona fide* purchaser for value without notice of the easement who has lodged a transfer for registration.

1.9.4 This section protects a large range of easements from a claim of indefeasibility of title by a registered proprietor, including easements of necessity,<sup>89</sup> prescriptive easements,<sup>90</sup> *Wheeldon v Burrows* easements<sup>91</sup> and includes easements created before the land became registered and after the land became registered under the Torrens system.<sup>92</sup> The legislation does not include easements created by general words as an exception to indefeasibility.<sup>93</sup> The Tasmanian exception to indefeasibility is much wider than that found in New South Wales, Queensland or South Australia.<sup>94</sup>

### ***The Conveyancing and Law of Property Act 1884 and allied legislation***

1.9.5 While the *Land Titles Act 1980* is the predominant piece of legislation in terms of easements in Tasmania, the *Conveyancing and Law of Property Act 1884* also has an important role to play. Section 138N of the *Land Titles Act 1980* seeks to prohibit the creation of easements in gross (i.e. without a dominant tenement in existence) in Tasmania; however, there is an exception to this general rule. Section 90A(1) of the *Conveyancing and Law of Property Act 1884* provides limited circumstances where an easement in gross can be created. The section is limited to being used in favour of the Crown, or any public or local authority.<sup>95</sup> In addition to these limited easements in gross, division 2 of the *Conveyancing and Law of Property Act 1884*

<sup>85</sup> *Land Titles Act 1980* s 138L(1)(b).

<sup>86</sup> *Land Titles Act 1980* s 138L(1)(c).

<sup>87</sup> A general discussion as to indefeasibility will not be undertaken in this paper. For a general discussion of indefeasibility, see Bradbrook, MacCallum and Moore, above n 25, chapter 4.

<sup>88</sup> *Ibid*, 774.

<sup>89</sup> *Ibid*, 758.

<sup>90</sup> *Ibid*, 764.

<sup>91</sup> *Wheeldon v Burrows* [1879] 12 Ch D 31.

<sup>92</sup> Bradbrook and Neave, above n 76, 256.

<sup>93</sup> *Ibid*, 257; see also the *Conveyancing and Law of Property Act 1884* (Tas) s 91.

<sup>94</sup> Bradbrook, MacCallum and Moore, above n 25, 774. In Victoria, Western Australia, and Tasmania, all easements that are validly created under the common law will fall under the exceptions to indefeasibility. The New South Wales, Queensland and South Australian legislation is much narrower than the legislation in Tasmania. These narrow exceptions to indefeasibility also exist in the Australian Capital Territory and the Northern Territory. Basically, to be an exception to indefeasibility under these states’ legislation, the easement must have been omitted or misdescribed thus some connection with the register is needed. See the discussion of New South Wales s 42(1)(a1) below at [3.5.7]-[3.5.9].

<sup>95</sup> Bradbrook, MacCallum and Moore, above n 25, 735.

provides for the creation of car parking easements,<sup>96</sup> with s 34G(1) stating that there need not be a dominant tenement.<sup>97</sup>

1.9.6 Easements can also be created by using certain terms that are defined in the *Conveyancing and Law of Property Act 1884* in the document setting out the easement. Section 34A of the *Conveyancing and Law of Property Act 1884* refers to schedule 8 where a list of short form words is given. The use of any of these words in an agreement for an easement will convey the meaning stated in the short form schedule. Several of the most commonly used easements are given meaning here, such as a right of carriageway, drainage, and footway.

1.9.7 In addition to these forms of creation under the *Conveyancing and Law of Property Act 1884* s 84J(1) allows the Supreme Court to impose easements to facilitate reasonable use of the land if such an imposition is consistent with the public interest.<sup>98</sup> This section does not apply to subdivisions.<sup>99</sup> Finally, a number of statutory provisions allow owners with less than the fee simple interest to grant an easement. For example a mortgagee,<sup>100</sup> trustee for sale,<sup>101</sup> and a tenant for life,<sup>102</sup> can all create an easement. Implied easements arising from plans of subdivision can also be created under s 90B of the *Conveyancing and Law of Property Act 1884*.

1.9.8 A number of other context specific statutes also have the potential to impact on the law of easements. Some of the more significant include the *Strata Titles Act 1998*, *Forestry Act 1920*, *Highways Act 1951*, *Electricity Wayleaves and Easements Act 2000*, *Building Act 2000*, *Settled Lands Act 1884*, *Settled Lands Act 1911*, *Local Government (Building and Miscellaneous Provisions) Act 1993*, *Water Management Act 1999*, *Environmental Management and Pollution Control Act 1994*, *Crown Lands Act 1976*, *Gas Pipelines Act 2000* and the *Land Use Planning and Approvals Act 1993*.

## 1.10 Variation and termination of easements under the legislation

1.10.1 Section 108 of the *Land Titles Act 1980* is a key provision in terms of the extinguishment of easements.<sup>103</sup> Section 108(2) gives the Recorder considerable power to extinguish easements in certain circumstances, and s 108(3) gives the Recorder the power to make a determination of statutory abandonment, whereby 20 years non use is *prima facie* evidence of such abandonment. Furthermore, the similarity of s 84C of the *Conveyancing and Law of Property Act 1884* to s 89(1) of the New South Wales *Conveyancing Act 1919* and the case of *Treweeke*<sup>104</sup> effectively import notions of common law abandonment into the Torrens system of land registration. Abandonment of registered easements will be discussed in more detail in Part 3.

---

<sup>96</sup> See Appendix A.

<sup>97</sup> See Appendix A.

<sup>98</sup> See the *Conveyancing and Law of Property Act 1884* Schedule 4 which sets out the provisions of the *Conveyancing and Law of Property Act 1884* which do not apply to land held under the *Land Titles Act 1980*. Section 84 is not included in this list therefore the section applies to Torrens title land.

<sup>99</sup> *Conveyancing and Law of Property Act 1884* s 84J(7)(a); *Land Titles Act 1980* s 110(4)-(12); Bradbrook, MacCallum and Moore, above n 25, 755.

<sup>100</sup> *Conveyancing and Law of Property Act 1884* s 21.

<sup>101</sup> *Trustees Act 1884* ss 16, 47.

<sup>102</sup> *Settled Land Act 1911* s 4.

<sup>103</sup> Bradbrook, MacCallum and Moore, above n 25, 769.

<sup>104</sup> *Ibid*, 771; for further support on the judicial reluctance to find abandonment see also the Victorian case of *Bookville v O'Loughlen* [2008] VSCA 27; BC200800866. Abandonment was not found despite the fact the owner of the dominant tenement had built a garage completely blocking the carriageway. The reason abandonment was not found was because the owner of the dominant tenement could have constructed a door in the northern wall of the garage permitting access to the laneway. For this reason, an intention never again to use the easement was not exhibited. Contrast *Durian (Holdings) Pty Ltd v Cavacourt Pty Ltd* (2000) 10 BPR 18,099; [2000] NSWCA 28 where the issue was whether the easement was obsolete. On the facts the court found that it was.

1.10.2 Under s 110 of the *Land Titles Act 1980* the Recorder may alter or terminate easements within a subdivision, if the consent of all persons in the subdivision is gained.<sup>105</sup>

1.10.3 Section 84 of the *Conveyancing and Law of Property Act 1884* gives the Recorder of Titles in Tasmania the power to extinguish or vary an easement; the powers of the Recorder in Tasmania are much broader than those in other states.<sup>106</sup> Under s 84F(1) of the *Conveyancing and Law of Property Act 1884* the Recorder may extinguish or modify an easement without recourse to the Supreme Court.

1.10.4 Tasmania and Queensland have broader grounds for extinguishment and modification than Victoria, New South Wales and Western Australia.<sup>107</sup> Compensation may be awarded where an easement is extinguished or modified in accordance with the legislation. Commonly however, no loss will arise from the extinguishment or modification for which compensation would be payable.<sup>108</sup> Tasmania is also unique in having a provision that allows the owner of the dominant tenement to apply to the Recorder of Titles for the title of all or part of the servient tenement.<sup>109</sup>

## 1.11 Submissions

1.11.1 The Tasmania Law Reform Institute received a total of 52 submissions in response to the Issues Paper. Of these, 44 were from members of the public. The remaining eight were from various stakeholders, organisations and agencies, including a member of the Tasmanian region of the Spatial Sciences Institute (SSI), the Recorder of Titles, the Law Society of Tasmania, Resource Management Planning and Appeals Tribunal (RMPAT) and Hydro Tasmania.

1.11.2 The submissions from the general public largely recounted personal experiences of disagreements between neighbours about the establishment and use of easements. These submissions tended to focus on issues relating to the rights and obligations of the owners of both the dominant and servient tenements. They also indicated that the lack of any form of inexpensive dispute resolution mechanism frustrated parties, and resulted in disputants either amassing considerable legal bills or leaving the matter unresolved.

1.11.3 A smaller number of submissions addressed the question of whether the law in relation to termination, variation and/or abandonment of easements ought to be clarified. These submissions also discussed the need for some kind of legislative direction or definition of the term ‘serious hardship’ and the need to extend and modernise the short form easement schedule.

1.11.4 Approximately a quarter of the general public submissions expressed an opinion about whether prescriptive easements should be permitted in a Torrens land system. It is interesting to note that there was an absolute division of opinion between submissions received from dominant and servient tenement owners. That is, all dominant tenement owners who responded to this question submitted that prescriptive easements should be permitted in a Torrens land system, whereas all the servient owners were opposed to the idea.

1.11.5 Very few general public submissions addressed questions relating to either the creation of novel easements or easements in gross.

---

<sup>105</sup> Bradbrook, MacCallum and Moore, above n 25, 769.

<sup>106</sup> Bradbrook and Neave, above n 76, 515.

<sup>107</sup> *Ibid*, 507; this is because the Queensland and Tasmanian statutes are based on reforms that occurred in England in 1969 which gave the Land’s tribunal greater scope to extinguish and modify easements, this wide power is reflected in the *Conveyancing and Law of Property Act 1884* s 84 which gives the Recorder in Tasmania very wide powers. In Victoria, New South Wales and Western Australia, only the Supreme Court has the power to vary or modify easements existing on title. Interestingly though, as Bradbrook and Neave point out at 507-508, there are hardly any Australian cases on statutory extinguishment or modification, suggesting the power is used infrequently.

<sup>108</sup> *Conveyancing and Law of Property Act 1884* s 84C.

<sup>109</sup> *Conveyancing and Law of Property Act 1884* s 84D – compensation may be payable to the servient owner.

1.11.6 There was considerable variance in the submissions that the Institute received from the various organisations and agencies. Some, such as the Recorder of Titles, felt that the law as it currently stands is adequate and only a small number of minor changes need to be made. These proposed changes included:

- developing an inexpensive dispute resolution mechanism;
- repealing s 6 of the *Conveyancing and Law of Property Act 1884*; and
- imposing a period of time for dominant owners of easements in existence because of long user to claim such rights.

1.11.7 Other respondents, including Hydro Tasmania, submitted that some areas of the law of easements, particularly those associated with the variation, termination and/or abandonment of easements would benefit from being clarified and codified. These respondents also supported the proposal to extend and modernise the short form easements schedule.

1.11.8 There was also some variation in opinion as to whether the creation of novel easements should be permitted. The Law Society submitted that there should be no preconceptions about what is a clear, practical and valid easement, while other organisations contended that easements of this nature have the potential to inhibit development and therefore such rights are better dealt with through the use of licences and contracts.

1.11.9 A large majority of respondents felt that an inexpensive dispute resolution mechanism would be of benefit and that RMPAT was the most appropriate body for this.

# Key Areas for Reform

1.11.10 The Issues Paper identified a number of areas that currently cause difficulties with easements. They are as follows:

- i) The construction of easements;
- ii) Implied statutory grants - *Conveyancing and Law of Property Act 1884* s 6;
- iii) Abandonment of easements;
- iv) Prescriptive easements;
- v) Novel easements;
- vi) Easements in gross; and
- vii) Short form easements.

## 1.12 The construction of easements

1.12.1 The construction of an easement and the rights and obligations of both parties in relation to an easement can cause problems and disputes between neighbours. These issues can become particularly problematic when neighbours are in dispute over obstructions placed over or on a right of way – for example, the servient owner may well seek to place a gate or fence across their land that inhibits the use by the dominant owner. Case law indicates that both the servient and dominant tenements are entitled to erect fences or gates on the land used as a right of way<sup>110</sup> though the question then becomes at what point does the interference substantially obstruct the easement.

1.12.2 Ultimately, the resolution of whether the interference is substantial will be context specific.<sup>111</sup> For example, in *Saint v Jenner*<sup>112</sup> it was alleged the dominant owners drove their cars at excessive speeds over the right of way. Speed traps were then installed by the servient owner, but this resulted in long-term damage to the right of way causing a substantial obstruction to its use by the dominant owner. Whilst damages were awarded to the dominant owners, an injunction for the removal of the speed traps was not granted. A speed trap was not of itself a substantial obstruction. It is also a question of fact whether the dominant owner has a duty to close a gate erected by a servient owner.<sup>113</sup> In addition, questions arise as to the rights of the dominant owner. For example, there is no firm principle as to whether the dominant owner is permitted to use a right of way to unload goods or to stop and pick up passengers.<sup>114</sup>

1.12.3 The recent Victorian Supreme Court case of *Mantec Thoroughbreds Pty Ltd v Batur*<sup>115</sup> demonstrates the difficulties that can arise in relation to the construction and interpretation of easements. The court found that it was not irrelevant to consider the surrounding circumstances or the presumed intentions of the parties at the time the easement was created when determining the scope of an easement. The High Court decision in

---

<sup>110</sup> See *Dunell v Phillips* (1982) 2 BPR 9517 (servient owner); *Gohl v Hender* [1930] SASR 158 (dominant owner).

<sup>111</sup> *Gohl v Hender* [1930] SASR 158.

<sup>112</sup> [1973] Ch 275.

<sup>113</sup> *Gohl v Hender* [1930] SASR 158 (duty imposed); *Powell v Langdon* (1944) 45 SR (NSW) 136 (not imposed).

<sup>114</sup> *Britel Developments (Thatcham) Ltd v Nightfreight (Great Britain) Ltd* [1998] 4 ALL ER 432; *Butler v Muddle* (1995) 6 BPR 13, 984.

<sup>115</sup> [2009] VSC 351.

*Westfield Management v Perpetual Trustee Company*<sup>116</sup> also highlights problems with the drafting and construction of easements. In that case, the easement provided that the servient tenement could ‘go, pass and repass’ at all times and for all purposes. The dominant owner sought to argue that this allowed them to use the easement to get to an adjoining property that they owned. The High Court’s view was that the use of the phrase ‘go, pass, and repass’ indicated that the purpose of the easement was simply to access the dominant tenement. The easement was not designed to allow access by the dominant owner to another adjoining property that they owned. If the easement had been intended to allow access to a more remote property, then the words ‘and across’ would have been added to the easement. According to the High Court, it was also not possible to use extrinsic material to assist in interpreting the meaning of the easement.

1.12.4 Three recent examples further highlight the type of problems that can occur with the construction of easements. In *Burke v Frasers Lorne Pty Ltd*<sup>117</sup> the right of way had been asphalt for many years. The servient owner of the land decided to replace this asphalt with reinforced turf. This was done as a planning parameter for the servient owner’s land required at least 50% of the land be reserved for deep soil landscaping. By changing the right of way from asphalt to reinforced turf, this requirement would be met. The use of reinforced turf would still allow the dominant owners access to their property – though the surface would be inferior to asphalt. Fraser Lorne (the servient tenement) submitted that as reinforced turf would still allow the dominant owners reasonable access, the substitution of asphalt with reinforced turf was of no consequence. The New South Wales Supreme Court refused to accept this. The dominant owner was entitled to construct a driveway. Provided this was not excessive, it was not then possible for the servient owner to substitute an inferior, though still reasonable access. In *Mantec Thoroughbreds Pty Ltd v Batur*<sup>118</sup> the dominant owner sought a declaration that he had the right to make improvements to the right of way that would allow all forms of farm vehicles, including large trucks and other machinery, to pass over the easement. The court found that while a dominant owner does have a right to undertake such improvements, this right is not unlimited. Any improvements or works are limited by what is reasonably necessary for the effective and reasonable enjoyment of the easement and cannot cause injury to the servient tenement.<sup>119</sup> The court also found that the right to deviate only arises when some form of obstruction is created by the servient owner. Ordinarily the dominant owner has no right of deviation onto another part of the servient tenement.<sup>120</sup> Another contemporary illustration of the type of problems that can occur is the Victorian Court of Appeal decision in *Boglari v Steiner School and Kindergarten*.<sup>121</sup> The Steiner School enjoyed a right of way over the land of the appellant. The appellant installed a gate across the right of way and on occasions, this gate was locked. The Steiner School was successful in its claim to have the gate removed. The question was one of reasonableness, with this to be determined by the context and factual parameters of the case. In the circumstances of this case, it was reasonable that there be no gate at all across the property. Furthermore, it was not an excessive use of the easement when used by delivery vehicles and the parents of 30 children.

## Submissions

1.12.5 Many of the submissions received by the Tasmania Law Reform Institute from the general public were concerned with a range of these types of issues. Both owners of dominant and servient tenements reported being frustrated by the lack of clarity around what constituted an obstruction of a right of way easement. Some servient owners complained that they were unable to fence or secure their property to their desired standard because it would inhibit or obstruct the dominant tenement’s access to the right of way. Some submissions identified how this would inconvenience their use of the land by allowing unwanted wildlife into their garden or by destroying their privacy.

---

<sup>116</sup> (2007) 81 ALJR 1887.

<sup>117</sup> [2008] NSWSC 988.

<sup>118</sup> [2009] VSC 351.

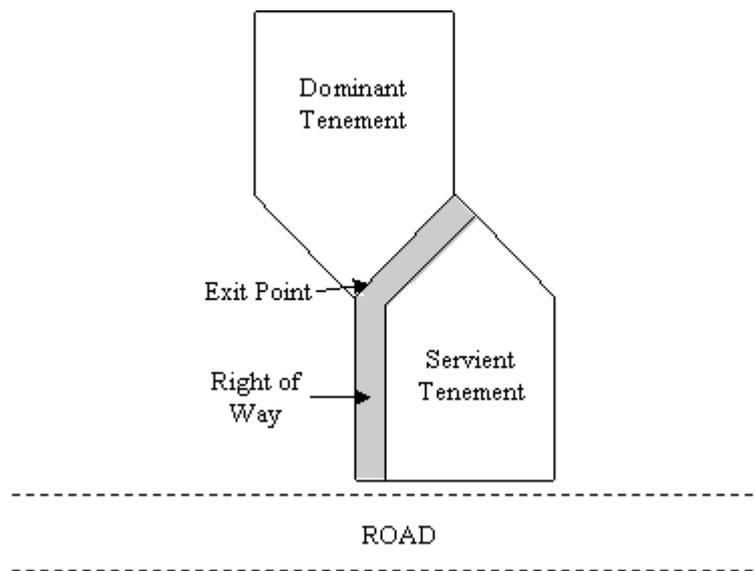
<sup>119</sup> *Ibid*, [92-94].

<sup>120</sup> *Ibid*, [118].

<sup>121</sup> [2007] VSCA 58.

‘...gates shouldn’t be erected which prevent access by dominant owners, but...the land is owned by the servient owner and he/she should have the right to fully enclose it to prevent animals wandering on to it, or for security reasons.’

1.12.6 One respondent described how he was unable to fence the length of his boundary because, according to his neighbour’s solicitor, it would ‘restrict the access for which (the dominant owner) was entitled’. Therefore, even though the dominant owner exited the right of way half way up the easement, the servient owner was required to keep the entire area open. A member of the Tasmanian region of the Spatial Sciences Institute (SSI)<sup>122</sup> commented that this situation is a common cause of disputes. The respondent submitted that access points could be lettered (or marked) for unambiguous identification, thus avoiding such disputes.



1.12.7 A number of other submissions expressed uncertainty about who was responsible for maintenance and who would be responsible if an accident occurred on the easement because it was not maintained to an adequate standard.

‘...if the neighbour does not wish to maintain the carriageway in proportion to usage then the onus falls on (the servient owner) to force him.’

‘I have a duty to maintain the right of way and road for my guests...However, if a neighbour’s guest or client was to injure themselves (while using the right of way)...am I also legally responsible or would some responsibility lie with the neighbours who refuse to contribute to the maintenance of the right of way?’

1.12.8 Several servient owners expressed concern that the dominant owners did not consider the right of way to be property of the servient tenement. Others complained that dominant owners would abuse the right to use the easement by driving at excessive speeds, vandalising property or using the land in a manner that suggested ownership (parking cars and caravans on it, planting gardens on it and cutting down trees that abut the easement). One respondent raised the exact issue that was considered in the aforementioned case of *Westfield Management v Perpetual Trustee Company*.<sup>123</sup> That is, whether a dominant owner may use a right of way that has been granted to access one particular property, to access another property they have an interest in.

<sup>122</sup> This respondent’s submission represented his personal views on the topic. His responses are not necessarily endorsed by the relevant professional body or institution and should not be considered to be the views of this Institution.

<sup>123</sup> (2007) 81 ALJR 1887.

1.12.9 While a large proportion of the general public submissions called for a clarification of the law on the rights and obligations of both parties in relation to easements, the submissions from some of the organisations and government agencies did not support this proposal. For example, the Law Society of Tasmania Property and Commercial Law Committee submitted that while there are a number of recognised problems with the current system, ‘the reform of the law regarding easements should not try to establish some grand and comprehensive “Napoleonic Code”...(because) the large ambit of issues which can arise (cannot) be sufficiently dealt with by codifying access to easements.’

1.12.10 The Recorder of Titles submitted that ‘...confusion over the use and effect of an easement should not arise if the wording of the easement is clear and conveys the agreement between the parties where it is created under the *Land Titles Act 1980* or the intention of the developer when it is created as part of a subdivision.’ The Recorder of Titles also asserted that confusion and disagreement between neighbours over easements is usually the result of poor or incompetent drafting.

1.12.11 In contrast, a retired Assistant Recorder of Titles argued that the law on access by the dominant owner is in need of clarification. He submitted that one way to clarify the process would be to ‘extend, re-write and modernise’ the short form easement schedule. He also suggested that the government could produce ‘easement education advice’ to assist in the clarification of such matters. A member of the SSI submitted that ‘...the law against access to an easement by the dominant owner should be clarified in order to force more precise drafting at the time of creation.’ This respondent argued that this would help define the expectations and limitation associated with the use of the right of way. He also suggested that the standard form (short form) of drainage easements needs to be revised. The respondent felt that the current wording, which limits the dominant owner from undertaking work that would cause ‘unnecessary damage to the said land’, is inadequate. A more appropriate restriction would be that the dominant owner must restore or ‘rectify’ the land (including replacing trees, shrubs and topsoil) to the standard that existed prior to the works being undertaken.

1.12.12 While some issues relating to confusion over the rights and obligations of dominant owner’s access to easements may be due to poor drafting, it does not appear that merely improving the drafting abilities of solicitors will be sufficient to resolve all problems that arise in this area. Although the Tasmania Law Reform Institute appreciates that trying to develop a Code that encompasses all situations that may arise in relation to easements is unrealistic, it does appear that some legislative changes need to be made.

### ***Views of the Institute***

1.12.13 The Institute agrees with the submission from a retired Assistant Recorder of Titles that the language of the short form easement schedule should be modernised and the schedule extended to encompass all commonly drafted easements.<sup>124</sup> The Tasmania Law Reform Institute also recommends that some form of educational advice (such as a brochure or short booklet) should be developed by an appropriate body to assist neighbours and parties in dispute to know their rights and obligations in regards to easements.

### ***Dispute Resolution Mechanisms***

1.12.14 Allied to this topic is the issue of whether an inexpensive dispute resolution mechanism should be available for disputes between dominant and servient tenement owners. This was a point emphasised in the aforementioned case of *Boglari v Steiner School and Kindergarten*.<sup>125</sup> In a decision where the order ultimately made was for the removal of the gate (or if this was not done, to pay the cost of removal amounting to \$875), litigation was commenced before a Magistrate, was then taken to the Master of the Supreme Court, to a single Judge and finally to the Court of Appeal. As was noted by the Victorian Court of Appeal,<sup>126</sup> it was most unfortunate that the matter could only be resolved by legal action and that, ‘this [was a

---

<sup>124</sup> The extension and modernisation of Schedule 8 is discussed in greater detail below at paragraphs 3.8.1-3.8.8.

<sup>125</sup> [2007] VSCA 58.

<sup>126</sup> [2007] VSCA 58, [16]-[17].

dispute] which could have been resolved by sensible discussion and agreement'. Legal costs associated with this litigation would have far exceeded the quantum of the judgment that was awarded. Accordingly, it may be desirable to include other options to resolve easement disputes between neighbours that do not involve formal legal proceedings.

1.12.15 By analogy, and possibly providing a model for inexpensive dispute resolution, mechanisms have been put in place to resolve matters more easily between strata unit holders and the body corporate. For example, in Tasmania, disputes relating to strata title are initially heard before the Recorder in accordance with the *Strata Titles Act 1998*. An appeal from the Recorder is to the Resource Management and Planning Appeal Tribunal. The current process for matters before the Resource Management and Planning Appeals Tribunal may also provide a model for the resolution of disputes involving easements. The process involves a directions hearing, mediation, and a hearing. There is then an appeal to a single judge. The Tribunal is familiar with property matters, and has institutional experience in dealing with landowners and resolving matters in an informal and flexible manner. Given the inevitable emotions attached to disputes of this nature, and that many easement disputes do not involve complex questions as to the construction of the law, a more informal system would seem ideally placed to achieve more cost-effective outcomes.

### **Submissions**

1.12.16 Over a third of the submissions received from the general public complained of having no inexpensive dispute resolution mechanism available when problems relating to easements arose. Either the matters were left unresolved, or parties had to pay considerable legal costs to have their disputes litigated. One respondent commented that they had been told by their legal counsel that their neighbours had no legal basis for their actions, the matter was relatively straight forward, would be resolved quickly and at minimal cost. However, the dispute took over 12 months to resolve and ended up costing the parties ten times the original estimate. Another respondent described how he or she felt unable to object to a demand that an access be turned into a road because of fear of the associated costs. This 'lack of access to justice' can exacerbate the stress, tension, and ill-feelings that already exist for parties involved in easement disputes.

1.12.17 Submissions from the Recorder of Titles, RMPAT and the Law Society all expressly supported the formal creation of an inexpensive dispute resolution mechanism within the legislation. They also supported the proposal that RMPAT would be the most appropriate body to conduct such hearings.

'...it is not infrequent that (easement) disputes end up before the Tribunal as ancillary to a planning issue which has been raised. The Tribunal is often called upon to mediate these disputes notwithstanding there is no formal jurisdiction under the auspices of the Resource Management and Planning Appeal Tribunal to rectify disagreements regarding easements... [RMPAT supports] the proposed recommendation of such disputes being referred to the Resource Management and Planning Appeal Tribunal. It would be preferable to ensure that the Tribunal is vested with full powers to bring into effect any resolution which is reached between the parties, as opposed to a purely review process.'

'Where disputes arise it is agreed that an inexpensive dispute resolution mechanism should be available and formalized within legislation. However, it should not involve the Recorder of Titles who is not appropriately resourced to undertake this task. There are other bodies, such as Resource Management and Planning Appeal Tribunal and the Civil Division of the Magistrates Court that are far better resourced and specialise in dispute resolution processes.'

'The Planning Tribunal is a logical dispute resolution mechanism for access rights, in particular because of its emphasis of mediation and speed of determination.'

1.12.18 Hydro Tasmania submitted that while it had not been engaged in many disputes regarding easements to date, it intuitively supported the creation of an inexpensive dispute resolution mechanism being introduced.

1.12.19 The public submissions, in conjunction with those from the relevant organisations and government agencies, indicate that the current dispute resolution options available to parties involved in a disagreement about easements are insufficient and unsatisfactory.

1.12.20 The New South Wales Government Attorney General's Department's ADR Blueprint Discussion Paper<sup>127</sup> highlights the intention of a number of jurisdictions to move away from traditional adversarial processes to more collaborative dispute resolution mechanisms. The discussion paper argues that ADR techniques can:<sup>128</sup>

- Put parties in control of their cases;
- Focus on the real issues rather than simply looking at parties' strict legal rights;
- Preserve (and/or potentially repair) the relationship between the parties;
- Deliver more flexible remedies than court; and
- Be less expensive and quicker than traditional methods.

These features of ADR techniques can help to increase the level of satisfaction of participants and their compliance with final outcomes.

1.12.21 Some strategies for expanding and further integrating the use of ADR methods proposed by the New South Wales ADR Blueprint discussion paper include mandating specific steps that must be taken before certain types of civil disputes commence (including attending mediation sessions)<sup>129</sup> and providing that the court is to take into account parties' attempts to engage in ADR when making orders as to costs.<sup>130</sup> It is proposed that the adoption of either of these steps would be appropriate in easement disputes.

### ***Views of the Institute***

1.12.22 The Tasmania Law Reform Institute recommends that parties involved in disputes about the creation and use of easements be directed to participate in ADR, specifically mediation, before commencing proceedings in the court system.<sup>131</sup> The Institute further recommends that RMPAT be invested with the necessary powers and jurisdiction to hear such matters and to bring into effect any resolution that is reached between the parties. These agreements should be drafted by parties' counsel and any creation, variation, or termination of an easement lodged with the Recorder of Titles as soon as practical. The Institute also recommends that RMPAT be vested with the power to make determinations, and where appropriate adjust the property rights of parties and award compensation,<sup>132</sup> in cases where mediation is not effective.

---

<sup>127</sup> Framework for the delivery of alternative dispute resolution (ADR) services in NSW (April 2009) ([www.leadr.com.au/documents/ADR-Blueprint-NSW-April09.doc](http://www.leadr.com.au/documents/ADR-Blueprint-NSW-April09.doc)) (accessed 24 June 2009).

<sup>128</sup> *Ibid*, 5.

<sup>129</sup> *Ibid*, proposal 9, 3.

<sup>130</sup> *Ibid*, proposal 15, 4.

<sup>131</sup> As opposed to arbitration or conciliation.

<sup>132</sup> As per the power awarded to the Supreme Court by s 84J of the *Conveyancing and Law of Property Act 1884*. An example of where such a power may be exercised by RMPAT is in relation to a right of way that is not sufficiently wide to allow the construction of a driveway. RMPAT may determine that the dominant tenement is permitted to increase the width of the right of way and, as a result, is required to compensate the servient tenement accordingly.

**Recommendation 1:**

That the law concerning access to easements by the dominant owner be clarified through the extension and modernisation of *Conveyancing and Law of Property Act 1884* Schedule 8 (short form easement schedule).

**Recommendation 2:**

That the government agency administering the legislation produce educational material in order to promote public understanding of rights and obligations of land owners in relation to easements.

**Recommendation 3:**

That RMPAT be vested with all necessary powers to deal with disputes in relation to easements by way of inexpensive dispute resolution mechanisms, including mediation and conciliation, where possible and by formal adjudication where mediated solutions cannot be reached. These powers are to expressly include the power to adjust property rights of parties, and award compensation, where appropriate.

## 1.13 Implied statutory grants – *Conveyancing and Law of Property Act 1884* s 6

1.13.1 The *Conveyancing and Law of Property Act 1884* s 6<sup>133</sup> has changed (contrary to intention) the substantive law. It has been held that the section has the potential to change a licence given by a neighbour to use their land into an easement attaching to the dominant and servient tenements. For example, in *Wright v McAdam*<sup>134</sup> a licence given by a landowner to a tenant to use a garden shed for the storage of coal was held, on the renewal of the tenancy, to be an easement. As was commented by Tucker LJ:

The result is that the defendant, through his act of kindness in allowing this lady to use the coal shed is probably now a wiser man... the decision in this case may tend to discourage landlords from acts of kindness to their tenants. But there it is: that is the law.<sup>135</sup>

A recent example of the operation of s 6 is where a landowner's permission to park became, on conveyance of the fee simple, an easement to park.<sup>136</sup> With the legislation not applying to Torrens land,<sup>137</sup> its impact is becoming less significant. However, with many judges having expressed disquiet at the operation of this section,<sup>138</sup> the issue is whether the creation of easements by this method should continue to be permitted.

### *Submissions*

1.13.2 The Tasmania Law Reform Institute did not receive any submissions from the general public that directly concerned s 6 of the *Conveyancing and Law of Property Act 1884*. This is most likely due to the fact that the vast majority of land in Tasmania is administered under the Torrens system (and therefore the *Land Titles Act 1980*). Only a very small proportion is still held under old system title and therefore it is likely that most people have not been exposed to the operation or affect of this section.

1.13.3 Despite this, two public respondents did make some comment about the operation of s 6 and whether it ought to be repealed or not. Both respondents felt that it is unjust that an informal verbal agreement between neighbours can pass as a right in the form of an easement to a new owner upon conveyance of the

<sup>133</sup> See above at 2.4.2 or Appendix A.

<sup>134</sup> [1949] 2 KB 744.

<sup>135</sup> [1949] 2 KB 744, 755.

<sup>136</sup> *Hair v Gillman* (2000) 80 P & CR 108.

<sup>137</sup> *Conveyancing and Law of Property Act 1884* s 91 and schedule 4. There are two major systems of private land ownership in Tasmania. The dominant system is known as the Torrens system, the other, general law, or old system title.

<sup>138</sup> For example, see Cross J in *Ashco v Horticulturist Ltd* [1966] 2 All ER 232, 239.

property. They felt that an ‘act of consideration’ by the owner of the servient tenement should not be turned into ‘an imposition’ on the servient tenement.

*1.13.4* Likewise, Hydro Tasmania submitted that s 6 of the *Conveyancing and Law of Property Act 1884* should be amended.

‘Hydro Tasmania is of the view that if it grants a licence to a land owner, that licence and the rights attached to it should automatically terminate upon transfer of the land...If Hydro Tasmania were to grant access rights in the interest of being co-operative with a like-minded neighbour it would not want to have those rights transferred to an unknown party without its express consent, especially as that transfer would result in the licence becoming a permanent and irrevocable easement.’

*1.13.5* The Recorder of Titles and the Law Society of Tasmania also agreed that s 6 should be repealed. The Recorder of Titles further submitted that any repeal would have to be made retrospectively. A member of the SSI submitted that s 6 could either be redrafted to avoid the possibility that an easement could be created through this provision or ‘...otherwise amended by omission of the words “or reputed to appertain to the land”’.

*1.13.6* A retired Assistant Recorder of Titles was the only respondent who thought that s 6 should not be repealed because it applies to ‘only a small proportion of ... land in Tasmania.’ While the Tasmania Law Reform Institute acknowledges that there is only a small amount of general law land left in Tasmania, it contends that this is not a valid argument for not amending s 6 of the *Conveyancing and Law of Property Act 1884*.

### *Views of the Institute*

*1.13.7* The Institute is of the view that s 6 operates, or has the potential to operate, in a manner that does not convey or reflect the intention of the parties who entered the original agreement. In fact, where a licence is ‘converted’ into an easement without any further consultation, it is the polar opposite of the original intention of the parties. It also has the potential to discourage acts of kindness or thoughtfulness between neighbours. For these reasons, the Institute recommends that s 6 of the *Conveyancing and Law of Property Act 1884* be appropriately amended.

#### **Recommendation 4:**

That s 6 of the *Conveyancing and Law of Property Act 1884* be amended to remove the possibility of easements being established through this provision.

## **1.14 Abandonment of easements**

*1.14.1* The Tasmanian *Land Titles Act 1980* provides for statutory abandonment via s 108(3):<sup>139</sup>

(3) Where it is proved to the satisfaction of the Recorder that any easement or *profit à prendre* has not been used or enjoyed for a period of at least 20 years, that proof is taken to be conclusive that the easement or *profit à prendre* has been abandoned.

By virtue of this section, and the *Conveyancing and Law of Property Act 1884* s 84C, the Recorder of Titles in Tasmania has discretion<sup>140</sup> to remove an easement from the register where it has not been used for 20 years; 20 years non-use is prima facie evidence that the interest has become obsolete.<sup>141</sup>

<sup>139</sup> See s 138X(2) for the powers of the recorder to make a vesting order.

<sup>140</sup> Section 84C(1) *Conveyancing and Law of Property Act 1884*.

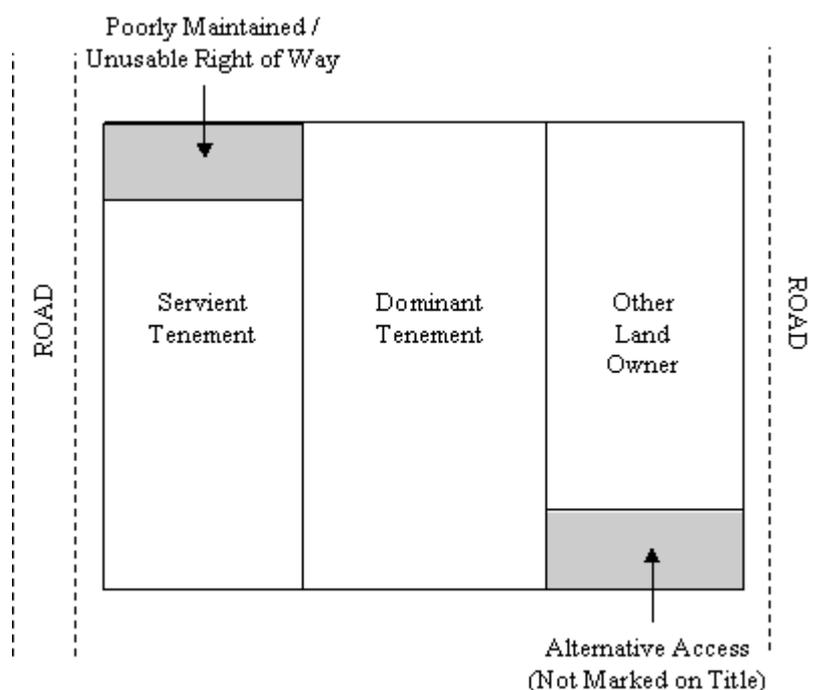
### ***Can common law abandonment take place?***

1.14.2 Arguably, the key issue in terms of the conflict between Torrens legislation and the common law is whether registered easements can be abandoned via common law principles even though they remain on the register.<sup>142</sup> There is a diversity of opinion as to whether common law abandonment should be able to extinguish registered easements.

1.14.3 In contrast to abandonment under the legislation, which is not in dispute, for abandonment at common law to occur some additional factors in excess of mere non-use for 20 years are required, such as intention to abandon and intent never again to revive the right.<sup>143</sup> As discussed above, the similarity of the Tasmanian legislation to the New South Wales legislation in this area illustrates that the case of *Treweeke* is likely to be followed and that common law abandonment applies to registered easements in Tasmania.<sup>144</sup>

### ***Submissions***

1.14.4 The Tasmania Law Reform Institute received a number of submissions that related to the issue of abandonment. Some recounted situations where access to land via an easement was restricted or completely prevented due to a lack of adequate maintenance of the easement. Although the dominant owner never formed any intention to abandon the easement, their inability to use the right of way meant that it was at risk of being revoked or removed from the register. For one dominant owner, this situation was compounded by the fact that their ‘alternative’ access was not marked on their title and the owners of that land were attempting to prevent or restrict their use of this entrance/access point. This could effectively cause this person’s property to become ‘landlocked’.



<sup>141</sup> Section 84C(3) *Conveyancing and Law of Property Act 1884*. This provision provides that 20 years non-use is prima facie evidence that the interest is obsolete. By contrast, s 108(3) of the *Land Titles Act 1980* talks of 20 years non-use as conclusive proof of abandonment.

<sup>142</sup> For a brief discussion of the common law principles of abandonment please see above at [2.5].

<sup>143</sup> P Butt, ‘Conveyancing and Property’ (2005) 79 *Australian Law Journal* 331-333, 332.

<sup>144</sup> See 2.9.1 above; see also Appendix A for a copy of the *Conveyancing and Law of Property Act 1884* s 84C and the NSW *Conveyancing Act 1919* s 89(1). *Treweeke v 36 Wolseley Road Pty Ltd* (1973) 47 ALJR 394 held that common law abandonment applied to s 89(1).

1.14.5 Another respondent described how the right to a drainage easement had been essentially ‘cancelled’ by the local council, which had given a neighbour permission to concrete a driveway and build a garage over the drainage easement. In this person’s opinion, the actions of the council and the neighbour equated to ‘forced abandonment’ of the easement.

1.14.6 Other submissions raised the opposite situation where once necessary easements had become redundant yet remained an encumbrance on their titles. One servient owner described how their property had a number of easements running across it, however these had not been used for a considerable period as an alternative council road had been constructed approximately 23 years ago. Despite this, the easements had never been formally terminated or removed from the titles.

1.14.7 A submission from a Hobart law firm recommended changing the period of non-use (to infer abandonment of an easement) from 20 years to 12 years so that it is in line with the period needed to support an adverse possession claim. The firm further recommended that an act on the part of the servient tenement owner, acquiesced to by the dominant tenement owner, which prevents the use of the easement and involves a degree of permanency, should also be used to infer an intention to abandon an easement. In order to protect the interests of the dominant tenement, the firm recommended including a provision that ensures that the dominant tenement must not suffer serious detriment due to the extinguishment of the easement.

1.14.8 Other submissions from the general public indicated a level of confusion around the laws and procedures for terminating or varying easements. Some respondents questioned whether easements could be terminated after their initial purpose has become obsolete (i.e. a suburban right of way that was created for access for a horse and cart to a neighbouring property). One respondent suggested that long-term variation to the use of an easement should be able to be registered with the Recorder of Titles by either the dominant or the servient owner. Another submission detailed a disagreement between neighbours as to who had to pay the fee to have the easement terminated and removed from the respective titles. This servient owner was adamant that as the dominant tenement had had the benefit of the easement over the period it had been in existence, they should be the party who has the burden of having its termination registered. Needless to say, the dominant owner did not agree with this logic.

1.14.9 A retired Assistant Recorder of Titles suggested that most easements are created when land is being subdivided. He believes that, often, too many are created during this period but left on the title because it is expensive and time consuming to have them removed. Accordingly, amending Part 3 of the *Local Government (Building and Miscellaneous Provisions) Act 1993* could help to rectify this situation. RMPAT proposed that rights of ways that are the sole means of access to a property should be immune from the operation of abandonment and termination presumptions.

1.14.10 Hydro Tasmania, like the Law Society of Tasmania, also submitted that the law on abandonment, termination, and variation of easements could benefit from some clarification. The Recorder of Titles, however, submitted that from their perspective, the legislative provisions of the *Land Titles Act 1980* were adequate.

1.14.11 There was also considerable divergence in opinion about whether common law principles of abandonment should apply to Torrens easements or whether it would be simpler to codify what are the requirements for abandonment. Hydro Tasmania submitted that codification of such requirements would be useful as it would assist parties to understand their rights. In a similar vein, the Law Society suggested the ‘complicated and uncertain’ rules surrounding abandonment should be replaced with statutory codification. The Recorder of Titles, on the other hand, argued that codification makes the law too inflexible and is not an appropriate reform for the law of easements.

‘Codification would only reflect the law at the point of time it was codified and [does] not contain sufficient flexibility to accommodate changes in the future without further ongoing legislative amendments. Codification could be a step behind legal developments in the law of easements.’

## *Views of the Institute*

1.14.12 The Tasmania Law Reform Institute recommends that the law on abandonment, termination, and variation of easements be clarified. Again, it may be of use to produce some form of advisory material that can be easily accessed by both servient and dominant tenement owners. The Institute also recommends that, as part of the process of clarification, the common law requirements for abandonment be codified. The Institute believes that this will help create certainty in relation to the laws and processes associated with abandonment of easements. The Institute does not believe that codification will necessarily inhibit flexibility in this area.

### *Can the intention to abandon easements be satisfied cumulatively?*

1.14.13 There is also some dispute about whether the intention to abandon an easement over 20 years can be satisfied cumulatively by successive dominant owners. This question is yet to be definitively answered by the courts. The New South Wales case of *Ashoil Holdings Pty Ltd v Fassoulas*<sup>145</sup> left open the question as to whether the intentions of successive owners could be accumulated under the Torrens system and whether the current owner of the dominant tenement must exhibit an intention to abandon. As discussed above, the intention needed for abandonment at common law is never to use the easement again. If the current dominant owner has simply not used the easement for a period of, for example two years, then arguably the evidence of intent to abandon is slight, even though the previous owners had similarly never used the easement, and may well have formed the intent to abandon.

1.14.14 In Victoria, *Riley v Penttila*<sup>146</sup> and Tadjell J in *Wolfe v Freijahs' Holdings Pty Ltd*<sup>147</sup> seem to suggest that the intent of predecessors in title can be examined and accumulated.<sup>148</sup> The matter has also been considered in South Australia in *Yip v Frolich*.<sup>149</sup> This case suggests that where the easement remains on title it remains enforceable even though it may have been abandoned at common law. Furthermore, the running of time for abandonment, where an easement remains on title, begins again each time the dominant tenement is sold.<sup>150</sup> Besanko J explained:

In my opinion, there is much to be said for the view that each time a transfer of the dominant land takes place, there is, by virtue of such transfer, evidence of an intention by the proprietor of the dominant land not to abandon the easement because the easement is registered on the title.<sup>151</sup>

1.14.15 South Australia has similar statutory provisions to those in Victoria, where the primacy of the register is maintained above the common law rules of abandonment. Tasmania, however, has similar legislation to that in New South Wales where, in certain circumstances, the common law arguably undermines the register in terms of abandonment.<sup>152</sup> This alignment of Tasmania to New South Wales means that theoretically, not only does common law abandonment apply to registered easements in Tasmania, but that time can also be accumulated over successive owners. Thus, even if the present dominant owner does not intend to abandon, if several successive owners have demonstrated an intention to abandon over a 20-year period, then the easement has been abandoned even though it may remain on the register.

---

<sup>145</sup> (2005) 12 BPR 23, 525.

<sup>146</sup> [1974] VR 547.

<sup>147</sup> (1974) 30 LGRA 79, 107.

<sup>148</sup> Bradbrook and Neave, above n 76, 495 – 496 referring to *Proprietors Strata Plan No 9968 v Proprietors Strata Plan No 11173* [1979] 2 NSWLR 605, 'where it was held that an easement is subject to abandonment where the land is under the Torrens system even though the easement remains on the register and the present registered proprietor of the dominant tenement has not contributed to the abandonment.'

<sup>149</sup> (2003) 86 SASR 162.

<sup>150</sup> *Ibid*, [80].

<sup>151</sup> *Ibid*, [57].

<sup>152</sup> In terms of the similarity of s 84C to s 89(1) of the New South Wales Act which gives the Recorder substantial powers to extinguish an easement.

## ***Submissions***

*1.14.16* One submission from the general public supported the argument that the abandonment of easements should be able to be satisfied cumulatively. This person reasoned that if an easement has not been used for over 20 years by successive owners it is stronger evidence that the easement has been abandoned than if only one owner ceased using the easement.

‘One dominant owner not using the easement may just be a personal preference. Several dominant owners not using it more strongly suggests the easement is no longer useful.’

The Law Society of Tasmania, the Recorder of Titles and a member of the SSI agreed with this line of reasoning.

*1.14.17* Other respondents were concerned that permitting a claim of abandonment based on successive non-use failed to recognise that property owners have different intentions for the use of their land. That is, while a previous owner may have had no intention to develop the land and therefore had no use for the easement, a subsequent owner may have bought the land with the intention to develop it in a manner that relies on the existence of the easement.

‘...it is feasible that a future owner may seek [to develop the land] and hence employ an easement that had remained otherwise unused.’

*1.14.18* Hydro Tasmania shared this opinion. It suggested that cumulative abandonment is undesirable as ‘...successive owners’ needs can only be speculated upon.’ However, it also suggested that if the current owner has no need for an easement, the easement might not be necessary for the use of the property.

## ***Views of the Institute***

*1.14.19* The Tasmania Law Reform Institute is inclined to support the arguments of the Law Society of Tasmania and the Recorder of Titles. Although in some situations it may appear inequitable to consider successive non-use when determining whether there has been abandonment of an easement, in many other situations it will help to promote and ensure the most productive use of the land. As stated by the Recorder of Titles, the issue of non-use is only one factor when considering a claim of abandonment. Therefore, the Institute recommends that successive non-use of an easement by the owners of the dominant tenement be a factor included in the principles outlined in a codification of the law of abandonment.

### **Recommendation 5:**

That the common law requirements for abandonment of easements be codified.

### **Recommendation 6:**

That the government agency administering the legislation produce educational material concerning the abandonment, variation and termination of easements.

### **Recommendation 7:**

That successive non-use by the owners of the dominant tenement be a factor included in the principles contained within a codification of the law of abandonment.

## 1.15 Prescriptive easements

*1.15.1* General notions in regards to common law prescription have been discussed above.<sup>153</sup> In brief, a prescriptive easement is gained through a period of use<sup>154</sup> where it is assumed that such use has been with the knowledge, and therefore implied consent, of the owner of the servient tenement. Upon such period of use being established by the dominant tenement it is presumed that the servient tenement made a grant to the dominant tenement and that the grant has been lost (the common law doctrine of lost modern grant). Therefore, the theoretical underpinning of prescription is that an implied grant has occurred. The question that must be asked is what role common law prescriptive easements should play in a registered land system?<sup>155</sup> That is, Torrens title land is based on the primacy of the register, whereas prescription, akin to abandonment, is founded upon notions of possession.<sup>156</sup> Whilst possession and registration may appear to be theoretically inconsistent with each other, there is no doubt that possessory easements give effect to the state of affairs that has existed, and which presently exists in respect of property. Also, given the historical origins and past importance of possessory interests, to deny them completely may result in a considerable injustice to individual parties.

### *Unique Tasmanian provision on prescriptive easements*

*1.15.2* In 2001, Tasmania became the first, and only State yet,<sup>157</sup> to legislatively proscribe the common law doctrine of lost modern grant and substantially re-enact certain elements of the common law notion of prescription in statutory form.<sup>158</sup> The system of easements by possession under s 138I of the *Land Titles Act 1980* has been succinctly summarised by Burns:

In order to be successful, applicants must provide evidence to the Recorder which is peculiarly consistent with the evidence necessary under the doctrine of lost modern grant. Briefly stated, the applicants must show that:

- They enjoyed the land as of right;
- The easement was not enjoyed by force, in secret, or by agreement;
- There was no unity of seisin between the dominant and servient tenements;
- The servient tenement owner knew or ought to have known of the enjoyment;
- The easement is not of a temporary nature; and
- They own the dominant tenement in fee simple.<sup>159</sup>

<sup>153</sup> See [2.5]-[2.53] above. For a concise summary of the law relating to prescriptive easements see Halsbury's, above n 17, [355-12200]-[355-12220] or Burns, above n 54, 7-9.

<sup>154</sup> Under the common law this is a 20 year period while under statute in Tasmania it is 15 years generally or 30 years if under a disability: see *Land Titles Act 1980* s 138J.

<sup>155</sup> As an interesting aside, the English Law Reform Committee has been suggesting abolition or at least extensive modification of prescriptive easements since 1966. See Law Reform Commission of Victoria, *Easements and Covenants*, Report No 41 (1992) 7.

<sup>156</sup> F R Burns, 'Prescriptive Easements in England and Legal Climate Change' (2007) March/April *Coveyancer and Property Lawyer* 133, 138-139.

<sup>157</sup> F R Burns, 'The Future of Prescriptive Easements in Australian and England' (2007) 31(3) *Melbourne University Law Review* 3, 16-17.

<sup>158</sup> *Land Titles Act 1980* ss 138I-138L. For example, s 138J 'a person who has used or enjoyed rights which may amount to an easement at common law...' for the periods specified under the legislation may apply to the Recorder under this division and s 138L(b) the easement must not have been enjoyed by force or secrecy. See *ibid*, 17 – Burns argues that 'the reference to "common law" in s 138J must mean the doctrine of lost modern grant.' The author of the present report suggests that s 138J read in light of s 138I(2) which abolishes the doctrine of lost modern grant cannot co-exist if the interpretation by Burns is strictly applied. As such, the author suggests that only certain elements of the common law notion of easements by prescription have been maintained such as that they must not be gained by force or secrecy and the doctrine of lost modern grant as a whole no longer exists as a conclusive stand alone doctrine. In sum, the principles of common law prescription have been adhered to but not the *doctrine* of lost modern grant.

<sup>159</sup> Burns, above n 157, 27 referring to the *Land Titles Act 1980* s 138L(1).

1.15.3 Importantly, however, under the statute the Recorder has discretion to refuse the dominant tenement's application<sup>160</sup> and the servient tenement must be given notice by the claimant before the application is made.<sup>161</sup> However, the abolition of common law easements of prescription under this legislation may not completely remove the matter from further consideration. In *Cook v Collection Corporation of Australia Pty Ltd*,<sup>162</sup> Master Holt (as he then was) was required to consider whether an easement that may have been acquired by long use could still be asserted some years after the repeal of the *Prescription Act 1934*, or the abolition of the doctrine of lost modern grant. As far as a claim under the doctrine of lost modern grant, the answer was yes.<sup>163</sup> An easement in existence prior to the abolition in 2001 of common law methods of acquisition remained despite there being no court order to support that entitlement. Given the uncertainty engendered by this position, consideration may well be given to abolishing outright any right to claim retrospectively a prescriptive easement other than in accordance with the present legislation, or to give dominant owners a set period (e.g. two years) by which they could apply for a declaration of an easement.

### ***State based differences on prescriptive easements***

1.15.4 The confusion in terms of the application of common law prescription to Torrens title land in the rest of Australia arises due to state based differences<sup>164</sup> in the application of prescription. This confusion has intensified with the recent New South Wales Court of Appeal decision in *Williams*.<sup>165</sup> Burns suggests that this case, combined with the direct abolition of certain prescriptive rights over time,<sup>166</sup> demonstrates that prescriptive easements '...have become less tolerated...'<sup>167</sup> As she explains, prescription developed in English law at a time when possession was the key factor in determining ownership and title was relative and defeasible.<sup>168</sup> This theoretical basis of possession is prima facie at odds with the tenets of the Torrens system, in particular the conclusiveness of the register.

1.15.5 The clearest state based comparison can be given by comparing the two extremes of the application of common law prescription as illustrated by the position in New South Wales and South Australia.

### ***The position in New South Wales on prescriptive easements***

1.15.6 Uncertainty as to the application of prescriptive easements to the New South Wales Torrens system has existed for as long as the Torrens system has operated in that State.<sup>169</sup> In *Delohery v Permanent Trustee Co of NSW*,<sup>170</sup> Simpson CJ held that the doctrine of lost modern grant should not be adopted in New South

<sup>160</sup> *Land Titles Act 1980* s 138L(3)(a); see Burns, above n 54, 15 '...Tasmanian legislation has abolished the doctrine of lost modern grant and re-enacted and adapted it subject to strict bureaucratic approval and oversight.'

<sup>161</sup> *Land Titles Act 1980* s 138K.

<sup>162</sup> [2007] TASSC 93.

<sup>163</sup> See the comments of his Honour at [2007] TASSC 93, [14]-[15]: 'The plaintiff's writ was not filed until 2 March 2007, almost six years after the repeal of the *Prescription Act*. The effect of this may be fatal to the success of the plaintiffs' *Prescription Act* claim as all of the events necessary to create the right had not occurred prior to the repeal. In particular, proceedings had not been commenced prior to the repeal. But this does not mean that the Court lacks jurisdiction to hear the claim. The difficulty does not exist so far as the claim for an easement under the doctrine of lost modern grant is concerned. Under that doctrine, as distinct from a claim under the *Prescription Act*, the relevant period does not need to be a period ending with the commencement of an action.'

<sup>164</sup> Burns, above n 157, 33-34. New South Wales and Tasmania are the only states to have undertaken substantial reform of prescriptive easements.

<sup>165</sup> *Williams v State Transit Authority of New South Wales and Ors* [2004] 60 NSWLR 286.

<sup>166</sup> See above, e.g. light and air; however note the uncertainty in relation to Tasmania since the 2001 enactment of s 138 – it is now unclear, with the abolition of the common law doctrine of lost modern grant in Tasmania, whether it is now possible under the statute to acquire prescriptive rights to light and air. See Burns, above n 54, 18.

<sup>167</sup> *Ibid*, 1.

<sup>168</sup> *Ibid*, 6.

<sup>169</sup> *Ibid*, 11-13.

<sup>170</sup> (1904) 4 SR (NSW) 1.

Wales.<sup>171</sup> On appeal to the High Court,<sup>172</sup> Simpson CJ was overruled. The result was that prescription became applicable to Torrens title land throughout Australia.<sup>173</sup> Following this High Court decision, certain prescriptive rights were statutorily limited or excluded by state legislatures to ensure development could continue uninhibited.<sup>174</sup>

1.15.7 In terms of New South Wales, it is suggested that the Torrens statute in that State excludes the operation of common law prescriptive easements over Torrens title land. Section 42(1)(a1) of the *Real Property Act 1900* (NSW) provides:

(1) Notwithstanding the existence in any other person of any estate or interest which but for this Act might be held to be paramount or to have priority, the registered proprietor for the time being of any estate or interest in land recorded in a folio of the Register shall, except in case of fraud, hold the same, subject to such other estates and interests and such entries, if any, as are recorded in that folio, but absolutely free from all other estates and interests that are not so recorded except:

(a1) in the case of the omission or misdescription of an easement subsisting immediately before the land was brought under the provisions of this Act or validly created at or after that time under this or any other Act or a Commonwealth Act...

1.15.8 Section 46 of the same legislation goes on to consider what is meant by ‘validly created’. Edgeworth explains that ‘a prescriptive easement created while the land has at all relevant times been held under the Torrens system does not come within the second part of s 42(1)(a1)’ as it is not validly created.<sup>175</sup> To be validly created, an instrument would have to be lodged for registration and registered and then somehow omitted or misdescribed by the Registrar.<sup>176</sup> Thus prescriptive easements arising after the land has been registered do not come within this section unless validly created.<sup>177</sup>

1.15.9 In the New South Wales case of *Williams*,<sup>178</sup> Mason P (with whom Sheller and Tobias JJA concurred) rejected the application of the doctrine of lost modern grant to the Torrens system.<sup>179</sup> Mason P asserted that applying the doctrine of lost modern grant to a title by registration system would be to ‘pile fiction upon fiction’ because title under the Torrens system arises only by registration, meaning the easement would have to be validly registered and then somehow lost.<sup>180</sup> *Williams* has arguably cemented the importance of the underlying principles of the Torrens system in New South Wales.<sup>181</sup>

### ***South Australia, Western Australia, and Victoria on prescriptive easements***

1.15.10 The South Australian case law was distinguished in *Williams* due to different legislative wording.<sup>182</sup> That is, the South Australian legislation does not expressly refer to the ‘validly created’ criterion and gives wide powers to the registrar to register interests.<sup>183</sup> Thus, common law prescription continues to apply<sup>184</sup> to

<sup>171</sup> See Burns, above n 54, 13 – this decision was based on the desire for New South Wales to be developed without encumbrance.

<sup>172</sup> (1904) 1 CLR 283.

<sup>173</sup> Burns, above n 54, 13.

<sup>174</sup> *Ibid*, 15 – for example prescriptive easements of light were extinguished.

<sup>175</sup> Edgeworth, above n 52, 9.

<sup>176</sup> *Ibid*, 10.

<sup>177</sup> This was established by Powell J in *Kosits v Devitt* (1979) 1 BPR 9231 and *Dewhirst v Edwards* (1983) 1 NSWLR 34; see Edgeworth, above n 52, 10.

<sup>178</sup> Butt, above n 59. Butt also considers the ramifications of *Williams* from 780.

<sup>179</sup> Edgeworth, above n 52, 13 – there were four primary reasons for this judgement that are discussed in this article.

<sup>180</sup> *Williams v State Transit Authority of New South Wales and Ors* [2004] 60 NSWLR 28, [129].

<sup>181</sup> Edgeworth, above n 52, 15.

<sup>182</sup> Edgeworth, above n 52, 14.

<sup>183</sup> *Real Property Act 1886* (SA) s 88: ‘Whenever any right-of-way or other easement appurtenant to land under the provisions of this Act over land also under its provisions shall hereafter be granted or created, the Registrar-General shall make such entry on the original and duplicate certificates for the dominant and servient lands as he thinks fit.’

<sup>184</sup> As elucidated in *Delohery v Permanent Trustee Co of NSW* (1904) 4 SR (NSW) 1.

land held under the Torrens system in South Australia.<sup>185</sup> South Australian courts are also willing to find a prescriptive easement based on an *in personam* claim.<sup>186</sup> Western Australia and Victoria, courtesy of their wide exceptions to indefeasibility of title, also allow common law prescriptive easements over Torrens title land.<sup>187</sup>

1.15.11 In effect, *Williams* determined that the Torrens legislation in New South Wales was not subject to common law notions of prescription. The Torrens legislation was found to exist outside the doctrine of lost modern grant and impose different requirements for the creation of easements. In addition to this it has been accepted through the indefeasibility exceptions in all states that certain unregistered interests can override registered interests, and in both Victoria and Western Australia prescriptive easements remain as a specific exception to indefeasibility.<sup>188</sup>

1.15.12 In general, the width of the Tasmanian Torrens legislation specifically in regard to s 40(3)(e), and the extensive powers of the Recorder in Tasmania, suggest, on the one hand, a broad reading of the legislation and corresponding recognition of common law easements of prescription. On the other hand, contrary to this recognition that interests can arise outside the register and be recognised by the Recorder is s 138I. Section 138I was introduced with a desire that the *Land Titles Act 1980* should govern prescriptive easements, not the common law.<sup>189</sup> The substantial use of common law language in s 138L, however, suggests that the desire to leave common law notions behind entirely is not as self-evident as first thought. Thus, despite Tasmania having a predominantly registered (or Torrens) land system the legislature does appear to have left room for this system to be assisted by common law notions not amounting to the doctrine of lost modern grant.<sup>190</sup>

## Submissions

1.15.13 There was an absolute division in responses from dominant tenement and servient tenement owners in respect of this topic. All submissions from dominant owners that addressed these issues supported the notion of prescriptive easements. These respondents saw no problem or contradiction with having prescriptive easements in a title by registration system of land law. They believe that the notion of right to the use of land through long user/possession is just as legitimate as having something registered on the title.

1.15.14 These dominant tenement owners also felt that the legislative requirements overly restricted their capacity to claim an easement based on possession. According to these people, the need to prove ‘serious hardship’ and a lack of clarity in relation to this term means that many claims are too difficult to establish or disputes are left unresolved. This was particularly frustrating for dominant owners who were denied (legal) access to their properties during this period, effectively rendering the land (temporarily) useless.

1.15.15 Dominant owners did not support the proposal of having a limited period in which dominant owners could claim or register their right to easements in existence because of long user. One dominant owner submitted that not only should there be no such time limit, there should in fact be a time limit for servient owners to raise an objection to such an easement.

‘[an objection to] an easement that has been in use continually for a long period without any [prior] objection...should be invalid.’

<sup>185</sup> As does the *Prescription Act 1832*: see Burns, above n 157, 15 – the position is the same in Western Australia.

<sup>186</sup> Burns, above n 157, 25.

<sup>187</sup> *Ibid*, 24 referring to the *Transfer of Land Act 1958* (Vic) s 42(2)(d) that ‘land will be subject to any easements however acquired subsisting over or upon or affecting land even though they are not specifically notified on the register’ and the *Transfer of Land Act 1893* (WA) s 68.

<sup>188</sup> Burns, above n 153, 36; *Transfer of Land Act 1958* (Vic) s 42(2)(d) and the *Transfer of Land Act 1893* (WA) s 68(3)(c).

<sup>189</sup> Section 138I(1); The Department of Primary Industries and Water, ‘Office Circular No 4/2001 Land Titles Amendment (Law Reform Act) 2000’ 12 April 2001 <<http://www.dpiw.tas.gov.au/inter.nsf/WebPages/JGAY-53D7WA?open>> (1 July 2009).

<sup>190</sup> Burns, above n 157, 27.

*1.15.16* In stark contrast, all servient tenement owners who made specific reference to these issues in their submissions were strongly opposed to the idea of prescriptive easements or easements based on possession. These submissions argued that only registered easements should be recognised.

‘... unless an easement is marked on title, it is not operative and does not exist.’

‘...no easement, no written agreement, no rights...’

*1.15.17* One servient owner suggested that the rules and requirements to mount a represented objection to an application for an easement based on possession were too hard and the process too expensive. This respondent was particularly frustrated that he was required to lodge such an objection even though the dominant owner had not formally lodged his application. He also believed that ‘...it would be of assistance for both the servient and the dominant to have hardship defined to allow both sides to assess the suitability of a claim.’

*1.15.18* The polarity of the responses from dominant and servient owners in relation to prescriptive easements demonstrates the strong emotions and opinions associated with this area of property law. Land owners are, understandably, protective of their property rights and eager to ensure that they are exercised to their full potential. Any perceived injustice or impediment to these is the cause of considerable consternation. This occurs irrespective of whether the party is the dominant or servient owner.

*1.15.19* The government agencies’ responses that address whether prescriptive easements ought to exist in a Torrens system all favoured their inclusion. The overwhelming justification for this view was that it ensures the best use and management of land is achieved. These submissions argued that to exclude prescriptive easements may in fact render land, especially that which is landlocked, useless.

*1.15.20* The Law Society of Tasmania submitted that the legislative requirements for claims to easements based on possession are overly restrictive and have ‘...taken away a tool to deal with minor encroachments and abandoned land’. The Law Society also believes that practitioners dealing with these types of disputes would be assisted if ‘...the parliament addressed what is meant by “serious hardship”’. It further submitted that the Recorder of Titles should not be making decisions or value judgments about issues such as whether the dominant owner will suffer serious hardship.

‘The Recorder should be a data manager and the judicial functions exercised by the recorder should be transferred to the Planning Tribunal.’

*1.15.21* Conversely, the Recorder of Titles considered the legislative requirements for claiming an easement by long user to have expanded the capacity of parties to make such a claim. The Recorder cited two main reasons for this:

‘...the current legislation is clearer as to what needs to be proven to establish an easement by possession... it [also] avoids resorting to the court with associated costs that may exclude potential applicants.’

*1.15.22* The Recorder of Titles also argued that the term serious hardship should not be legislatively defined as it cannot be measured in advance and is case specific. Whether a dominant owner would suffer serious hardship will depend on the ‘...essentials of each case and therefore cannot be simplified to measurements and boundaries.’

*1.15.23* Hydro Tasmania submitted that it is appropriate for a land owner to have the opportunity to object to applications for easements based on possession. It did not believe that this provision overly restricts the capacity of a dominant owner to claim such an easement but was of the view that some legislative direction in relation to the relevant terms would be of assistance.

*1.15.24* Hydro Tasmania further submits that if it is decided that the term ‘serious hardship’ is too subjective to define, then ‘...the decisions of the Recorder on the meaning of that term ought to be made publicly available to provide the public with some guidance as to what constitutes hardship.’ A retired Assistant

Recorder of Titles submitted that if the provisions relating to ‘serious hardship’ are to remain intact, the term needs to be defined in such a manner so as not to permit a person’s home or property to be effectively destroyed. That is, the definition should include a consideration of prohibitive costs associated with constructing an alternative access. Burns has also described the prospects of gaining a prescriptive easement under the Tasmanian legislation as unlikely and considers the enacted process ‘extreme’.<sup>191</sup> Should the current regime remain in its present form, it is very likely that legal practitioners will, on behalf of their clients, make far greater use of s 84J of the *Conveyancing Law and Property Act 1884*. Under this provision, the Supreme Court has jurisdiction to impose an easement on title where such an easement would facilitate reasonable use of the land and such a use would not be inconsistent with the public interest. Where the availability of easements by prescription has been eliminated or severely circumscribed, (such as in New South Wales and Queensland) the use of the equivalent to s 84J is not uncommon.<sup>192</sup> Should an order for an easement be imposed compensation is payable to the servient owner, unless special reasons determine otherwise.<sup>193</sup>

1.15.25 Both the Recorder of Titles and Hydro Tasmania submitted that a limitation period should be imposed on claims to easements by possession by dominant tenement owners. However both recognised that it is difficult, and impractical to determine how long this period should be. A member of the SSI submitted that dominant owners of long user easements should be given a limited time *after making the* application to claim such a right. The Law Society, on the other hand, argued that ‘...the length of use should strengthen, not weaken the claim by a dominant tenement owner of an easement by prescription’.

### *Views of the Institute*

1.15.26 The Tasmania Law Reform Institute supports the view that prescriptive easements should be permitted in Torrens system of land law. The Institute believes that the requirements to claim prescriptive easements should remain in the *Land Titles Act 1980*. Furthermore, in order to assist both dominant and servient owners in assessing whether there is a legitimate claim or defence to a prescriptive easement, the Institute recommends that guidelines on the interpretation of the term ‘serious hardship’ be made publicly available.

#### **Recommendation 8:**

That the codification of the requirement to claim a prescriptive easement should remain in the *Land Titles Act 1980*.

#### **Recommendation 9:**

That the government agency administering the legislation publish guidelines on the meaning of ‘serious hardship’ as it relates to the claim of a prescriptive easement.

#### **Recommendation 10:**

That in publishing the above guidelines, consideration be given to including purely financial reasons as a basis on which to establish ‘serious hardship’.

## 1.16 Novel easements

1.16.1 If novel easements were to be permitted it could drastically increase the number of easements available and create further exceptions to indefeasibility of title. If novel easements are not permitted future

<sup>191</sup> Fiona Burns, ‘The Future of Prescriptive Easements in Australia and England’ (2007) 31 *Melbourne University Law Review* 3, 14-17.

<sup>192</sup> The relevant provision in Qld is s 180 *Property Law Act 1974*; and in NSW, s 88K *Conveyancing Act 1919*.

<sup>193</sup> Section 84J(4) *Conveyancing and Law and Property Act 1884*.

development and arguably sustainable use of natural resources, including solar and wind energy, could be detrimentally affected.

### ***Is the list of possible novel easements closed?***

1.16.2 The New South Wales Land Titles Office is of the opinion that the list of easements is not closed.<sup>194</sup> The Victorian Law Reform Commission agrees, arguing that:

Existing and likely future technological developments must be taken into account in framing modern laws in relation to easements and covenants so that these developments can be used to the best advantage of the whole community.<sup>195</sup>

It has been generally stated<sup>196</sup> however, that while the list of positive easements remains open, the list of negative easements is closed.<sup>197</sup> That is, new easements that restrict ‘the use to which the servient tenement may be put’<sup>198</sup> can no longer be created. From a preliminary point of view this distinction is troublesome for novel easements such as solar and wind access and a right to a view. All of these rights may restrict the servient tenement building on their land so that the dominant tenement has an access channel for wind, sun, or views. In terms of wind and solar access however, these rights could also be turned into positive easements. For example, solar panels could be constructed on the servient tenement and a pipe or cable run underneath the land to the dominant tenement. The problem with this however, is that at some point a negative easement is involved, that is the solar panel on the servient tenement becomes useless if the (third party) adjacent owner develops their land and blocks the sun’s rays. Thus, whether or not solar and wind access easements and a right to a view can be created largely depends on this distinction between positive and negative easements and whether negative easements are closed. Examples of novel easements that have been recognised include:

- An easement to create noise;<sup>199</sup>
- An easement in a windbreak created by timber;<sup>200</sup>
- A right to bring goods into a shop through the main door of another shop;<sup>201</sup>
- A right to use to a neighbour’s kitchen;<sup>202</sup>
- An easement to use a toilet on the servient tenement;<sup>203</sup> and
- A right to pollute water of the adjoining land.<sup>204</sup>

<sup>194</sup> New South Wales Land Titles Office, *Review of Easements Discussion Paper* (1990) 3. This assertion is supported by reference to *Dyce v Lady James Hay* (1852) 1 Macq. 305, 312, 313 (as cited in New South Wales Land Titles Office Discussion Paper) where it was held that ‘the category of servitudes and easements must alter and expand with the changes that take place in the circumstances of mankind.’

<sup>195</sup> Law Reform Commission of Victoria, above n 155, 2.

<sup>196</sup> This proposition is not agreed with by all commentators in Australia: see Bradbrook and Neave, above n 76, 32 where five reasons are advanced for opening the list of negative easements in Australia amongst which is the fact that no Australian case to date has directly proscribed the continued creation of negative easements.

<sup>197</sup> Law Reform Commission of Victoria, above n 155, 5; The Law Commission, above n 2, [15.18], [15.33], in *Hunter v Canary Wharf* [1997] AC 655 the right to an easement pertaining to television reception was refused – it had been blocked by the development of a large building, arguably similar arguments could be used in terms of solar and wind access that has been blocked or diminished by development to deny their recognition.

<sup>198</sup> Butt and Nygh, above n 11, 292.

<sup>199</sup> *Re State Electricity Commission of Victoria and Joshua’s Contract* [1940] VLR 121.

<sup>200</sup> *Ford v Heathwood* [1949] QWN No. 11.

<sup>201</sup> *Wilcox v Richardson* (1997) 43 NSWLR 4.

<sup>202</sup> *Haywood v Mallalieu* (1883) 25 Ch D 357.

<sup>203</sup> *Hedley v Roberts* [1977] VR 282; *Miller v Emcer Products Ltd* [1956] Ch 304.

<sup>204</sup> *Kirkcaldie v Wellington City Corporation* [1933] NZLR 1101.

### 1.16.3 Examples of alleged easements which the courts have not accepted include:

- The right to hit cricket balls onto neighbouring properties;<sup>205</sup>
- The easement for protection from the weather;<sup>206</sup>
- The right to a flow of air,<sup>207</sup> or
- An easement to overhang branches of a tree.<sup>208</sup>

1.16.4 More recently, the New South Wales Court of Appeal in *Clos Farming Estates Pty Ltd v Easton*<sup>209</sup> held that an easement for a vineyard was not a valid easement. The respondents had purchased land from the appellant and entered into a number of contracts concerning potential viticulture enterprises to be carried out on part of the land. One restriction, referred to as the ‘Easement for Vineyard’, purported to give the appellant, as dominant tenement owner, the right to enter the burdened land and carry out and manage viticulture work. After a number of years, the respondents took steps to remove this easement and applied to the court for a declaration that the ‘Easement for Vineyard’ was not valid.

1.16.5 The New South Wales Court of Appeal agreed with the Supreme Court of New South Wales and found that the ‘Easement for Vineyard’ was not valid as it breached two of the four fundamental conditions for an easement as established in *Re Ellenborough Park*.<sup>210</sup> Specifically, the court found that the ‘Easement for Vineyard’ breached the second requirement that the easement ‘accommodate’ the dominant tenement and the fourth requirement that the right claimed must be capable of forming the subject matter of a grant. Their honours found that the rights purportedly conferred by the ‘Easement for Vineyard’ deprived the servient tenement from any real proprietorship over the land, thus making it invalid.<sup>211</sup> The court also found that the easement did not sufficiently accommodate the dominant tenement.

1.16.6 It is interesting to note, however, that their honours commented that it was not the novelty of this easement that was detrimental to the claim as ‘novelty alone is insufficient as bar to the recognition of the creation of an easement.’<sup>212</sup> This suggests that the New South Wales Court of Appeal also believes that the list of easements is not closed.

### ***The hurdles that must be overcome for the acceptance of novel easements***

1.16.7 The principal argument against solar, wind and right to a view easements relates to how the acceptance of these would restrict the development of the servient tenement,<sup>213</sup> and the intangible, amorphous nature of the right sought to be obtained. The strength of this argument, however, has not stopped the Law Reform Commission of Victoria recommending that solar access easements be created:<sup>214</sup>

... the potential gains in facilitating the development of solar energy collection given the current concern in relation to fossil fuel use, both as to stocks and effects, more than justify facilitating the means by which solar energy easements may be acquired. It is thought that any difficulties that

<sup>205</sup> *Miller v Jackson* [1977] QB 966.

<sup>206</sup> *Phipps v Pears* [1965] 1 QB 76; cf *Ford v Heathwood* [1949] QWN No 11.

<sup>207</sup> *Harris v DePinna* (1885) 33 Ch D 238.

<sup>208</sup> *Lemon v Webb* [1895] AC 1.

<sup>209</sup> [2002] NSWCA 389.

<sup>210</sup> *Ibid.*

<sup>211</sup> *Ibid* at [36].

<sup>212</sup> *Ibid* at [41].

<sup>213</sup> The Law Reform Commission Victoria, above n 155, 27.

<sup>214</sup> *Ibid.* This view is in line with *Commonwealth v Registrar of Titles (Vic)* (1918) 24 CLR 348: see Bradbrook, MacCallum and Moore, above n 25, 750. However, the law in this area is yet to be settled: see *Clos Farming Estates v Easton* [2002] NSWCA 389 and Bradbrook, MacCallum and Moore, above n 25, 750.

might arise in relation to property development raise issues that relate to the removal of these easements rather than their creation.<sup>215</sup>

Principally, the same argument could be made in terms of wind access – that is to generate alternative power sources.<sup>216</sup>

### ***Submissions***

*1.16.8* The Tasmania Law Reform Institute received only one public submission that addressed the question of whether novel easements ought to be permitted. The respondent supported the creation of wind easements and further submitted that solar easements should be permitted for the protection of light and heat as well as for the purpose of generating power.

*1.16.9* The Law Society of Tasmania argued that ‘any easement that is capable of enforcement by saying what can and cannot be done by the parties should be capable of creation and recognition.’ It also submitted that the class of easements should remain open and does not need to be restricted.

*1.16.10* In contrast, RMPAT submitted that allowing the creation and registration of novel easements has the potential to have a significant detrimental affect on development and town planning.

‘[H]istorically town planning regulation arose as a direct result of the inadequacy of private regulatory regimes (such as easements) to adequately manage the built environment and the use and development of land...Private individuals developing easements to constrain activity on land may unreasonably and unnecessarily constrict development on land.’

According to RMPAT, this situation is exacerbated by the fact that easements, and thus the subsequent constraints, are usually created in the absence of expert input or knowledge.

*1.16.11* In a similar vein, Hydro Tasmania submitted that the creation of novel easements, particularly wind easements, ‘has the potential to hinder development due to the fact that any use of the servient land has the potential to impact on the dominant tenement’. Hydro Tasmania argued that there may be more appropriate legal mechanisms to provide such benefits. It recommended that a licence scheme would be the preferred mechanism to administer and control such agreements. The submission from a member of the SSI supported this argument. He submitted that, in his opinion, novel easements are ‘...an unnecessary encumbrance and complication in the interpretation of titles.’ He further submitted that leases are a more appropriate alternative for conveying such rights as novel easements reduce future flexibility and potentially interfere with development options that are capable of approval in other jurisdictions.

*1.16.12* The Recorder of Titles did not express a strong view as to whether novel easements should be created or not. However, the Recorder submitted that no new legislation needed to be created for wind or solar easements as the current law ‘is wide enough for an adept drafter to create such an easement.’

*1.16.13* The Law Society of Tasmania, although stating that it did not express a final view on the matter, stated that creating specific legislation for a narrow issue such as wind or solar easements is ‘destined to create confusion’. It also stated that ‘dedicating special legislation to special interest groups creates distorted provision which do not reflect (the) general principles of land law’.

### ***Views of the Institute***

*1.16.14* The Tasmania Law Reform Institute recommends that the list of easements not be considered closed and novel easements be permitted. In order to avoid inhibiting reasonable development, the Institute also recommends that wind and solar access easements be permitted provided that they meet the principles

---

<sup>215</sup> The Law Reform Commission of Victoria, above n 155, 27-28.

<sup>216</sup> Bradbrook, MacCallum and Moore, above n 25, 750-751.

established in *Re Ellenborough Park*.<sup>217</sup> In all other situations, the Institute supports the proposal that licences and planning schemes are a more appropriate mechanism to control such rights. The Institute does not recommend that new legislation dedicated to wind and solar easements be created.

### ***Right to a view***

1.16.15 In order to create a valid easement, it has been held that the right claimed must not be too vague or indefinite in nature.<sup>218</sup> Bartier uses this criterion to reject the notion that a right to a view can be created;<sup>219</sup> comparing such a right to an easement for protection from the weather.<sup>220</sup> While it is submitted that a right to a view may be more nebulous than a right to solar or wind access<sup>221</sup> (because such access can be determined by their methods of collection, i.e. solar panels and wind turbines) this is not necessarily the case. A right to a view could be expressed in terms of an area of land the servient tenement is prohibited from building upon, and in practice is often protected by way of restrictive covenants limiting the height of buildings. A right to a view could perform a useful social purpose in an age of sprawling concrete jungles.<sup>222</sup> However, it is suggested that there are substantial hurdles placed on the recognition of a right to a view as a new category of easement. As detailed above, courts have shown hesitation in recognising novel easements. In contrast to solar and wind access easements, a right to a view has arguably less importance in terms of societal value and has a propensity to be vague. In addition to this, *Phipps v Pears* expressly states that there is no such easement known to law as a right to a view:

Suppose you have a fine view from your house. You have enjoyed the view for many years. It adds greatly to the value of your house. But if your neighbour chooses to despoil it, by building up and blocking it, you have no redress. There is no such right known to the law as a right to a prospect or view.<sup>223</sup>

### ***Submissions***

1.16.16 As with the question regarding wind and solar access easements, only one public submission made direct reference to the issue of right to a view. The respondent stated that she supported the idea of protecting such a right through the use of an easement; however she did not elaborate further. The lack of public responses in relation to both these issues suggests that either the public are not concerned about the creation of such rights or have not had any personal experience with such issues and therefore have not developed strong opinions about them.

1.16.17 The Law Society of Tasmania declined to submit a definitive answer in relation to the issue of whether a right to a view should be protected by an easement. On the one hand it recognised the right of property owners to create whatever novel easement or enter any arrangement they wished. On the other hand, the Law Society recognised that having restrictive easements of this nature can act as a ‘powerful tool in anti-development, which might not be in the community interest.’

1.16.18 Both RMPAT and Hydro Tasmania were opposed to the idea of allowing a right to a view to be protected through the use of an easement. Hydro Tasmania submitted that allowing a neighbour to obtain an easement that protected a view could be very detrimental to its business operations.

---

<sup>217</sup> See n 24 above.

<sup>218</sup> G Bartier, ‘Easements and Covenants’ (Paper presented at the NSW Young Lawyers Association: A Fresh Perspective, New South Wales, 20 May 2003) 5.

<sup>219</sup> *Ibid*, 5.

<sup>220</sup> In contrast, see the argument in Bradbrook and Neave, above n 76, 36 where the authors argue the right to protection from the weather may not be too vague. The authors compare such an easement to an easement for support.

<sup>221</sup> Wind access, however, may also be too vague: see *ibid*, 34 where the authors discuss the case of *Harris v DePinna* (1886) 33 Ch D 238, which declined an easement for a right to an undefined flow of air.

<sup>222</sup> The arguments in *Riley v Penttila* [1974] VR 547 are informative in this regard.

<sup>223</sup> *Phipps v Pears* [1964] 2 All ER 35, 37.

‘[Allowing a neighbour to] obtain easements prohibiting our business from constructing any infrastructure simply on the basis it might diminish the outlook from the neighbour’s land could be extremely prohibitive...(It could) potentially halt significant development and commercial enterprise in an area, prevent existing businesses or residents from expanding the infrastructure on their own land and stunt economic growth for surrounding businesses.’

1.16.19 Hydro Tasmania also submitted that such easements could cause considerable confusion in relation to what rights were granted and what behaviour was restricted by the easement. For example, it would raise questions such as:

- What constitutes the protected ‘view’, both in terms of subject matter and relative distance from dominant tenement; and
- What constitutes a breach (i.e. total obstruction of view or simply making it less aesthetically appealing).

1.16.20 Like Hydro Tasmania, RMPAT submitted that allowing a right to a view could unreasonably fetter undeveloped or partially developed land and work against good planning and environmental outcomes. RMPAT also submitted that permitting such easements would be unjust to the servient tenement.

‘It would be grossly unfair that a person, who proposed to construct a dwelling, which was permitted in all respects under the terms of a planning scheme, could be barred from undertaking such a development due to an implied easement establishing the right to a view for an adjoining landholder.’

1.16.21 RMPAT also expressed concern about the permanent nature of easements and the fact that they may remain on a title in perpetuity without any reference to advances in thinking or study in relation to built form and the environment. In contrast, planning schemes are required to go through a five yearly reassessment and review of the terms with the capacity to amend and alter restrictions and controls over construction and the built environment. For these reasons, RMPAT submitted that issues such as right to wind and solar access, as well as building and height restrictions, should be matters that are determined by the use of planning schemes.

### ***Views of the Institute***

1.16.22 The Tasmania Law Reform Institute recognises that it would be undesirable to close off the class of easements that can be created. As mentioned above, the right to wind and solar access may serve an important function in terms of the environment and sustainable energy production. However, the use of easements to create such rights does raise significant concerns. The Institute recommends that no change to the legislation is presently required and that current flexibility within the common law is sufficient to accommodate future novel easements. However, this recommendation is predicated on the creation or assignment of a regulatory agency with the necessary process flexibility and cost structures to enable timely consideration and resolution of applications and/or disputes.

1.16.23 In relation to the protection of a view, the Tasmania Law Reform Institute recommends that easements not be extended to encompass these rights. The Institute agrees with the submission of both Hydro Tasmania and RMPAT. The Institute recommends that planning schemes be the primary method of preserving such rights and controlling the height and other dimensions of buildings.

#### **Recommendation 11:**

That no changes to the current legislation be made in relation to novel easements and that an appropriate regulatory agency, such as RMPAT, be given jurisdiction to deal with disputes concerning such matters.

#### **Recommendation 12:**

That no changes be made to current legislation concerning a right to a view.

## 1.17 Should easements in gross be permitted?

*1.17.1* An easement in gross is an easement without a dominant tenement. The benefit of an easement in gross goes to the easement holder personally rather than to the holder's land.<sup>224</sup> As per the common law characteristics of an easement, an easement in gross cannot exist at common law as there must be both a dominant and servient tenement.<sup>225</sup> The requirement for a dominant tenement is said to go to the 'heart of the nature of an easement', as easements are a property right and as such must be linked back to property.<sup>226</sup>

### *The law relating to easements in gross in Tasmania*

*1.17.2* The *Conveyancing and Law of Property Act 1884* via s 34G<sup>227</sup> allows for easements in gross in the form of car parking easements. Arguably however, the reach of this section is limited by the conditions that can be placed on such an easement via s 34H, which can make the use of the easement and the obligations for its up-keep clear, thus eliminating some of the vagueness generally associated with easements in gross.

*1.17.3* The more general position in Tasmania is represented by s 90A of the *Conveyancing and Law of Property Act 1884*. Under s 90A an easement in gross can be granted under the terms of the legislation to a Crown, public or local authority with this section applying to Torrens title land.<sup>228</sup> That an easement in gross in Tasmania is limited to specified bodies is strengthened by specific pieces of legislation for different bodies such as the *Gas Act 2000* s 84A(3), the *Electricity Supply Industry Act 1995* s 51(3)(b), and by s 138N of the *Land Titles Act 1980*.<sup>229</sup>

138N. No easement in gross

Nothing in this Part is taken to confer a right to acquire an easement in a case where there is no land capable of benefiting from the easement.

This clear legislative intent to limit strictly the application of easements in gross in Tasmania is supported by the dearth of academic or judicial enquiry into whether easements in gross should be permitted.

### *Is the rule prohibiting the general application of easements in gross sound?*

*1.17.4* When an analysis behind the reasoning for easements in gross is undertaken there are grounds for criticising the rule against easements in gross.<sup>230</sup> Morgan argues that easements in gross are commercially,<sup>231</sup> socially, and environmentally<sup>232</sup> useful.<sup>233</sup> Furthermore, there is no present judicial authority in Australia

<sup>224</sup> A D Hegi, 'The Easement in Gross Revisited: Transferability and Divisibility Since 1945' (1986) 39 *Vanderbilt Law Review* 109, 110.

<sup>225</sup> Part of the four characteristics of an easement under *Re Ellenborough Park* [1955] 3 All ER 667.

<sup>226</sup> The Law Commission, above n 2, [3.3].

<sup>227</sup> This section applies to land held under the *Land Titles Act 1980* because it is not excluded under schedule 4 of the *Conveyancing and Law of Property Act 1884*.

<sup>228</sup> This section applies to Torrens title land under the *Land Titles Act 1980*, as its operation is not excluded via schedule 4 of the *Conveyancing and Law of Property Act 1884*.

<sup>229</sup> These sections are prospective only unlike in Victoria and New South Wales which are retrospective: see Bradbrook and Neave, above n 76, 10.

<sup>230</sup> The Law Commission, above n 2, [3.4]; A J McClean, 'The Nature of an Easement' (1966) 5 *Western Law Review* 32, 38.

<sup>231</sup> An example of an easement in gross being commercially useful may be a car-parking easement: see G Morgan, 'Easements in Gross Revisited' (1999) 28 *Anglo-American Law Review* 220, 223-224.

<sup>232</sup> Morgan, *ibid*, 224 suggests a car parking easement in gross may also be environmentally useful for things such as park and ride schemes.

<sup>233</sup> *Ibid*, 221.

examining the rule against easements in gross and it is suggested that the original formulation of the rule is based on weak authority that has simply been accepted over time rather than analysed.<sup>234</sup>

1.17.5 In particular, it has been suggested that the first characteristic of an easement, that there must be a dominant and a servient tenement, as accepted in *Re Ellenborough*, was itself based on a series of weak cases that did not consider the benefits and burdens of easements in gross.<sup>235</sup> In addition to this, easements in gross are widely accepted in the United States<sup>236</sup> and have been increasingly used for conservation<sup>237</sup> as well as the supply of energy or essential services.<sup>238</sup>

1.17.6 McClean suggests that the argument in support of easements in gross is relatively simple: ‘if to give effect to what is a socially desirable use of property it is necessary to have easements in gross why should such easements not exist?’<sup>239</sup> He proffers the example of a truck driver with a long route who wants to acquire a series of easements along the route at which he can park his truck.<sup>240</sup> Arguably, permitting such easements in gross would allow the servient tenement to make the best commercial use of her or his land while allowing the truck driver to have a safer and more comfortable route. Viewed simply, this scenario in particular does beg the question – if both parties are benefiting, why are easements in gross not recognised?

1.17.7 In the United States, the acceptance of easements in gross is such that these types of easements are as freely alienable and inheritable as any other easement.<sup>241</sup> Typical examples include easements in gross for ‘sewer lines, railroad corridors, oil and gas pipelines, water lines and rights of way’.<sup>242</sup> In *Village of Walbridge v Terry Carroll, et al.*<sup>243</sup> the appellants sought a declaration of the right of the village, its citizens and its businesses to use a right of way that ran along the side and behind a shopping mall that was owned by the respondents. Carroll argued that the easement, which was created by the previous owners of the mall, was granted only for the purpose of a fire lane and sought to restrict access accordingly. This argument was rejected by the court. The respondent also argued that the land claimed to be a right of way was an easement appurtenant to land donated for a park, therefore further restricting the use of the easement. The court also rejected this argument and found that because the parcel of land was not contiguous to land owned by the village other than the adjacent Main Street, nor was it contiguous to other property transferred, the right of way was an easement in gross and thus the respondents were prohibited from obstructing or preventing the use of the easement by the village for access to the shopping mall.

---

<sup>234</sup> Bradbrook and Neave, above n 76, 9.

<sup>235</sup> McClean, above n 230, 37-38.

<sup>236</sup> *Ibid*, 39.

<sup>237</sup> Morgan, above n 231, 223, 226.

<sup>238</sup> *Ibid*, 228-229.

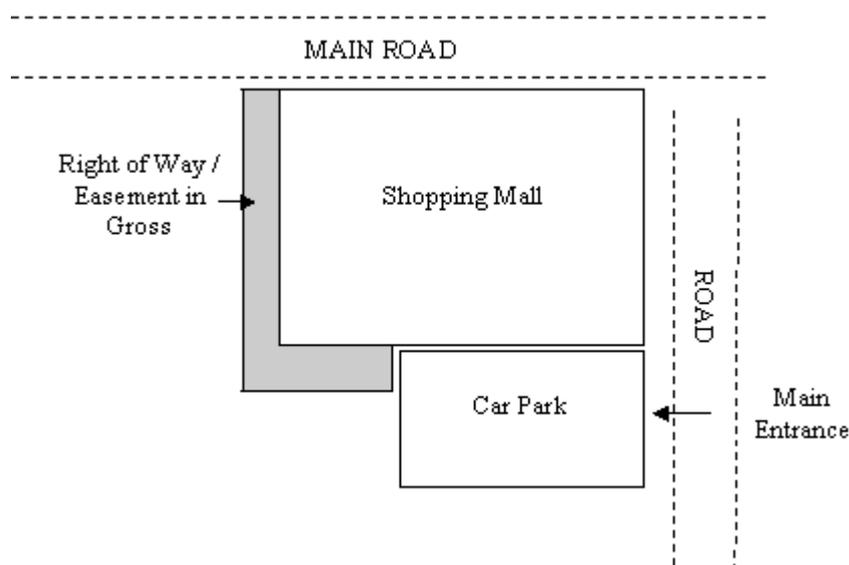
<sup>239</sup> McClean, above n 230, 40.

<sup>240</sup> *Ibid*.

<sup>241</sup> *Ibid*, 41.

<sup>242</sup> G Korngold, ‘Privately held Conservation Servitudes: A Policy Analysis in the Context of in Gross Real Covenants and Easements’ (1984) 63 *Texas Law Review* 433, 477.

<sup>243</sup> 172 Ohio App. 3<sup>rd</sup> 429; 2007 Ohio 3586; 875 N.E.2<sup>nd</sup> 144.



1.17.8 In recent years focus in the United States has been on state based legislation<sup>244</sup> used to establish what are known as conservation easements,<sup>245</sup> with examples such as:

- Prohibiting the accumulation of trash and unsightly materials;
- Prohibiting acts detrimental to water, soil, fish or wildlife conservation;
- Restricting the removal or destruction of trees; and
- Prohibiting outdoor advertising.

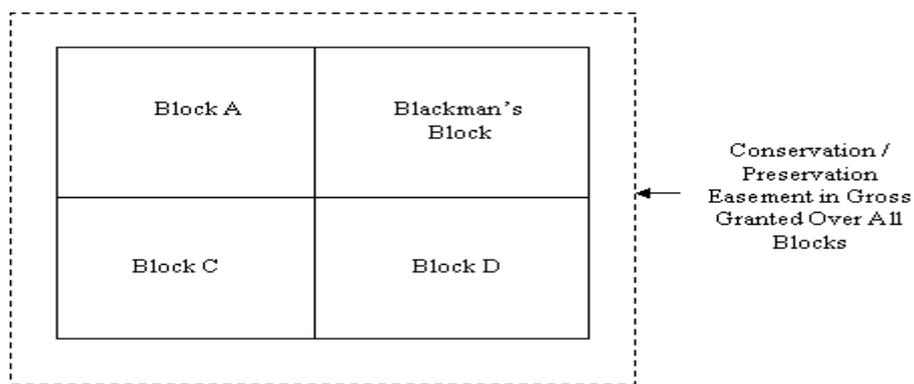
These conservation easements, which are essentially a negative restriction on the land prohibiting the landowner from acting in a way that would harm the environmental, ecological, open or scenic nature of the land, essentially move some ownership rights from the servient owner to another party – typically a non-profit or charitable organisation. These organisations then hold and enforce the easements for the public's benefit.<sup>246</sup> In *United States of America v Peter F. Blackman*,<sup>247</sup> the Supreme Court of Virginia found that a conveyance of a negative easement in gross by a private property owner to a private party for the purpose of land conservation and historical preservation was valid. The land had been the intended site of a prison, however there was considerable local opposition to the proposal. The citizens organised a non-profit group to obtain donations of easements over the concerned land for its conservation and preservation. In 2002, Blackman purchased a farm that was under one of the easements. He wished to renovate and partially demolish the building on the land. However, the court held that the preservation easement prevented him from doing this.

<sup>244</sup> An example is the Californian legislation which provides that 'the legislature further finds and declares it be the public policy and in the public interest of this state to encourage the voluntary conveyance of conservation easements to qualified nonprofit organisations'. California Civil Code § 815, cited in N A McLaughlin, 'Condemning Conservation Easements: Protecting the Public Interest and Investment in Conservation' (2008) 41 *University of California Davis Law Review* 1897, fn 14.

<sup>245</sup> See generally, G Korngold, above n 242; A M Merenlender, L Huntsinger, G Guthey and S K Fairfax, 'Land Trusts and Conservation Easements: Who is Conserving What for Whom' (2004) 18(1) *Conservation Biology* 65.

<sup>246</sup> McLaughlin, above n 244, 1899.

<sup>247</sup> 270 Va. 68; 613 S.E.2d 442; 2005 Va.



1.17.9 The appeal of a private based system, in addition to allowing easements in gross to be acquired by the Crown and other public authorities, is that it allows the community and private individuals the opportunity to autonomously control their own private property, reduces the cost of reliance on a centralised government intervention, and may help individuals meet personal goals. By analogy, legislation presently allows some fact specific interests to be associated with land ownership. These include private timber reserves (see *Forest Practices Act 1985*) and bush covenants (see *Nature Conservation Act 2002*). Accordingly, a more general provision allowing the community to mould easements in gross to meet contemporary needs may seem desirable.

### **Submissions**

1.17.10 The Tasmania Law Reform Institute received no public submissions in relation to easements in gross. The submissions from a number of the government agencies, including RMPAT and the Recorder of Titles, also did not address this issue in any depth.

1.17.11 The Law Society of Tasmania's submission was generally opposed to the concept of easements in gross. The main argument proffered for the restriction against the creation of such easements is that current rules protect the public interest in preventing the broadening or increase of easements limiting the potentially long-term appropriate development of land.

1.17.12 The Law Society also submitted that the notion of easements in gross conflicts with the perpetual characteristics of easements. The Law Society submitted that this characteristic is central to the notion of easements and enquired why an agreement that lacks this characteristic should allow 'one generation of land owners (to be) able to encumber land in perpetuity?'

1.17.13 A member of the SSI was strongly opposed to any extension of easements in gross to parties beyond what is already permitted (i.e. statutory authorities and the Crown). The respondent submitted that private easements in gross have no place in effective land management.

1.17.14 Hydro Tasmania also expressed concern about the creation of easements in gross. While recognising the benefits of such easements, including the potential to promote environmental and heritage conservation, Hydro Tasmania was concerned that easements in gross could unjustly burden the servient tenement owner.

'Hydro Tasmania foresees that if easements in gross were to be widely permitted, this could potentially 'open the flood-gates' for individuals concerned with environmental conservation to seek an irrevocable interest in the land of another individual or corporate entity, which would create obstructive prohibitions or burdensome obligations relating to the acts that the land owner could do on their property.'

1.17.15 Hydro Tasmania acknowledges that this class of easements would still need to be created by either grant or reservation, thus the pool of people seeking such easements is considerably narrower than 'the world at large'. However, Hydro Tasmania was concerned that the notions of implied grants or prescriptive

easements may confuse the issue of who could apply for an easement in gross to be registered. Hydro Tasmania, therefore, submitted that;

‘If easements in gross were to be permitted...the criteria for the grant or creation of such an easement would need to be very clear to prevent vexatious or troublesome claims of interest by individuals wishing to limit the behaviour of landowners upon their own property... [Any] legislation permitting individuals to seek to obtain the benefit of an easement in gross for conservation/heritage reasons ought to have to establish a clear, personal (meaning particular to that individual) connection and interest in the property and in the heritage conservation matter.’

### ***Views of the Institute***

*1.17.16* The Tasmania Law Reform Institute recognises the potential benefits of allowing easements in gross to be created. In particular, the Institute believes that easements in gross are effective in promoting environmental and heritage conservation. However, it also recognises the valid concerns raised by Hydro Tasmania and the Law Society. The Institute is of the view that, in many circumstances, particularly those involving private individuals as opposed to public entities, parties have contracts, leases and licences at their disposal to create the rights that easements in gross purportedly protect. In other situations, s 90A of the *Conveyancing and Law of Property Act 1884* provides sufficient scope for heritage and conservation easements to be created in favour of the Crown or of any public or local authority.

*1.17.17* For these reasons, the Tasmania Law Reform Institute recommends that private easements in gross should not be permitted. The Institute also argues that the benefits that would flow from such easements are capable of being established via alternative means such as contracts, licences and leases.

#### **Recommendation 13:**

That no changes be made to current legislation concerning easements in gross.

## **1.18 Does the current wording for short form easements in schedule 8 of the *Conveyancing and Law of Property Act 1884* meet modern needs?**

*1.18.1* A statutory short form easement is used to convey the meaning of certain words used in a conveyance; it is designed to simplify such dealings, to save time, and promote the consistent use of common terms.<sup>248</sup> The use of short form terms is voluntary and their meaning can be expanded by the particular grant in question.<sup>249</sup> That short form easements continue to play an important role in Tasmania, and with many Australian jurisdictions adopting this method, the English Law Commission commented that:

The facility of short form easements has proved to be extremely popular in those [Australian] States where they are available, short form easements comprising over 90 per cent of new easements created in South Australia and Tasmania, and 99 per cent in the Northern Territory.<sup>250</sup>

In consequence of this assessment, the English Land Registry has provisionally recommended adopting a similar format of short form easements.<sup>251</sup>

<sup>248</sup> The Law Commission, above n 2, [4.29].

<sup>249</sup> Schedule 8 applies to Torrens title land under the *Land Titles Act 1980* as it is not precluded by the *Conveyancing and Law of Property Act 1884* schedule 4.

<sup>250</sup> The Law Commission, above n 2, [4.28] referring to correspondence with relevant land services divisions of state governments.

<sup>251</sup> *Ibid*, [4.34].

1.18.2 Although Tasmania has a statutory list of short form easements (see Schedule 8 of the *Conveyancing and Law of Property Act 1884*), the Issues Paper questioned whether Schedule 8 is able to meet adequately the above features of such short form lists. In particular, questions were raised about whether the short form easement list, as it currently stands, is sufficiently extensive and the language used adequately modern. There was also some discussion about whether Schedule 8 should be amended so that it is more in line with the relevant schedules of other Australian states. The following table compares the short form schedules available in a number of States.

	Western Australia <sup>252</sup>	South Australia <sup>253</sup>	Northern Territory <sup>254</sup>	New South Wales <sup>255</sup>	Tasmania
Drainage	X	X	X	X	X
Sewerage	X	X	X	X	
Water Supply	X	X	X	X	
Electricity Supply	X	X	X	X	
Right of Footway	X			X	X
Right of Carriageway				X	X
For Services			X	X	
Gas Supply	X	X			
Transmission of TV signals by underground cable	X	X			
Party Wall Rights	X	X			
Eaves and Gutters	X	X			
Motor Vehicle Parking	X				
For Repairs				X	
For Batter				X	
For Drainage of Water				X	
For Overhang				X	
To Permit Encroaching Structure to Remain				X	
Right of Access				X	
For Removal of Support				X	
Bus Parking					X
Customer Parking					X
Employee Parking					X
Occupier Parking					X
General Parking					X
Service Parking					X
Vehicular Access Way					X
Pedestrian Access Way					X
Combined Access Way					X

<sup>252</sup> *Transfer of Land Act 1893* (WA) schedule 9A.

<sup>253</sup> *Real Property Act 1886* (SA) schedule 6. Note also that schedule 5 gives a definition of right of way.

<sup>254</sup> *Law of Property Act 2007* (NT) schedule 3.

<sup>255</sup> *Conveyancing Act 1919* (NSW) schedule 8. See also s 88A.

## ***Submissions***

1.18.3 The Tasmania Law Reform Institute received five submissions from the public that addressed the questions related to the short form easement schedule. All called for an extension and modernisation of the schedule, as they believed it will promote understanding of both servient and dominant tenement obligations and rights.

‘The short form of easements should be extended to allow both servient and dominant tenement owners to beware [of] the extent of the limitations and the encumbrances of each property – this could make the understanding simpler and lessens likely aggravation and litigation.’

‘Standard wording and simple interpretation would assist.’

‘The Tasmanian short form schedule should be in line with other states and the language should be modernised.’

‘Definitions that are useful to the layperson when establishing an easement or buying a property subject to one [should be available].’

1.18.4 A retired Assistant Recorder of Titles, the Law Society of Tasmania and a member of the SSI all commented on the benefits provided by Schedule 8 of the *Conveyancing and Law of Property Act 1884*.

‘Short form easements are a very useful tool. They create uniformity, certainty and save transaction expense.’

‘The Schedule of short form easements should be extended. There should be a library of standard short form easements and covenants.’

‘The present full form/short form easements in Schedule 8 of the *Conveyancing and Law of Property Act 1884* are of great benefit when preparing a transfer or a schedule of easements...[W]here there is no short form, an interpretation of an easement has to be constructed and inserted into the relevant document.’

1.18.5 These submissions also supported the proposal that the language of Schedule 8 be modernised and written in plain English.

‘The language of the short form easements should be in plain English... [The] existing medieval description of right of carriageway is a significant barrier to understanding.’

‘[If] the wording made better sense to the parties, there would be more understanding of who could, or could not, do what and when.’

‘The [short form schedule] should be as modern and clinical as possible.’

1.18.6 The Recorder of Titles, in contrast, submitted that while the short form schedule may provide some ‘assistance to new drafters’, it may also, due to a lack of detail, ‘be counter-productive in that disputes may arise over their intent.’ The Recorder of Titles also argued that there should not be any need to modernise the language in Schedule 8 if the ‘the legal education program adequately explains their meaning’. That is, as long as legal practitioners are adequately educated, there is no need to make the language used simpler or more accessible to the average property owner.

## ***Views of the Institute***

1.18.7 The Tasmania Law Reform Institute is inclined to disagree with the submissions from the Recorder of Titles. Schedule 8 consists of both short and full form descriptions of selected easements. This provides parties with a definitive reference point to assist them in their understanding of their rights and obligations in

regards to such easements. It seems probable that this information, especially when it is presented in simple, modern language, would assist in the early resolution of easement disputes.

*1.18.8* The Institute is also not persuaded by the argument that the language of Schedule 8 does not need modernising. This argument is too reliant on the presumption that parties will always seek to engage lawyers when any kind of disagreement arises and does not appreciate the fact that neighbours/laypersons may wish to, and should be able to, resolve such disputes without recourse to legal practitioners. As with the introduction of inexpensive dispute resolution mechanisms, reforming this area of easement law would help to save the time, money and stress associated with easement disputes. The Institute proposes that the language used in the Northern Territory legislation should be used as a template for the amended Tasmanian short form easement schedule.<sup>256</sup>

**Recommendation 14:**

That the government agency administering the legislation initiate steps to extend and modernise the short form schedule. That in any subsequent redrafting consideration be given to using the style of the Northern Territory short form schedule as a template for any modernisation.

---

<sup>256</sup> See Appendix A for the Northern Territory short form easement schedule.

# Appendix A

## Legislation

### *Land Titles Act 1980 –*

#### **40. Estate of registered proprietor indefeasible**

- (3) The title of a registered proprietor of land is not indefeasible –
  - (e) so far as regards –
    - (i) an easement arising by implication or under a statute which would have given rise to a legal interest if the servient land had not been registered land; and
    - (ia) an easement created by deed before the servient tenement became subject to this Act or the repealed Act; and
    - (ii) an equitable easement, except as against a *bona fide* purchaser for value without notice of the easement who has lodged a transfer for registration;

...

### *Division 9 - Easements and profits à prendre*

#### **105. Creation of easements**

- (1) An easement may be granted in or over registered land for the benefit of any other land –
  - (a) by the registered proprietor of a freehold estate in the land, by memorandum of transfer in the form approved under section 58; and
  - (b) by the lessee, by memorandum of lease in the form approved under section 64 –  
and registered under this Act.
- (2) A proprietor transferring or leasing registered land may in the transfer or lease –
  - (a) grant an easement in or over other registered land of which he is registered proprietor or lessee, for the benefit of the land transferred or the estate of the lessee under the lease; and
  - (b) reserve an easement for the benefit of other land retained by him.
- (3) The Recorder, when registering a memorandum of transfer or lease which grants or reserves an easement, shall record the grant or reservation upon –

- (a) the folio of the Register, or the registered lease, evidencing title to the land burdened by the easement; and
  - (b) where the land benefited by the easement is registered land, the folio of the Register or the registered lease which evidences title to the land benefited.
- (4) In a memorandum of mortgage or memorandum of encumbrance there may be expressed to be included as appurtenant to the land mortgaged or encumbered an easement over other registered land of which the mortgagor or encumbrancer is registered proprietor or lessee and in such a case the folio of the Register or registered lease of that other land shall be specified in the memorandum of mortgage or memorandum of encumbrance.
- (5) When an easement is expressed to be included in a dealing pursuant to subsection (4), the Recorder shall when registering the memorandum of mortgage or memorandum of encumbrance record particulars of the easement upon the folio of the Register or registered lease evidencing title to the land over which the easement is expressed to be included.
- (6) When the memorandum of mortgage or memorandum of encumbrance in which an easement is included pursuant to subsection (4) is registered, that easement shall be deemed to be an easement appurtenant to the land mortgaged or encumbered for the purpose of enjoyment, leasing, or transfer by the mortgagee or encumbrancee, or of foreclosure, and so that upon foreclosure in favour of, or lease or transfer by, the mortgagee or encumbrancee, that easement shall, unless expressly excluded, be created by the order for foreclosure or by the registration of the lease or transfer.
- (7) On application in writing for that purpose, the Recorder may record in the Register any easement over or appurtenant to registered land which the Recorder is satisfied has been recognized by an order of the Supreme Court.

#### **106. The Register as evidence of easements**

- (1) Subject to subsection (2), a statement in a folio of the Register to the effect that the land comprised in the folio has the benefit of an easement shall be conclusive evidence that the land has that benefit.
- (2) Subsection (1) shall not be construed so as to give effect as an easement to a right which is not recognized as an easement at common law.
- (3) An easement shall not be implied from anything appearing on a plan deposited with the Recorder after the proclaimed date.

#### **107. *Profits à prendre***

- (1) A profit à prendre may be granted by an instrument in an approved form, which shall indicate clearly the nature of the profit à prendre, the period for which it is to be enjoyed, and whether it is to be enjoyed –
  - (a) in gross or as appurtenant to other land; and

- (b) by the grantee exclusively or by him in common with the grantor.
- (2) The Recorder shall register the instrument referred to in subsection (1) –
- (a) by recording it on the folio of the Register or the registered lease which it burdens; and
  - (b) where it is appurtenant to registered land, by recording it on the folio of the Register or registered lease evidencing title to that land.

### **108. Release and extinguishment of easements and *profits à prendre***

- (1) Subject to subsection (4), an easement or profit à prendre which is recorded in the Register may be released wholly or partly by an instrument in an approved form and registered under this Act.
- (2) Subject to subsection (4), the Recorder, upon the application of a person having an estate or interest in land affected by an easement or profit à prendre, or of his own motion, may cancel the registration of the easement or profit à prendre, where it appears to his satisfaction that –
- (a) the period of time for which it was intended to subsist has expired;
  - (b) the event upon which it was intended to determine has occurred; or
  - (c) it has been abandoned.
- (3) Where it is proved to the satisfaction of the Recorder that any easement or profit à prendre has not been used or enjoyed for a period of at least 20 years, that proof is taken to be conclusive that the easement or profit à prendre has been abandoned.
- (4) This section has effect notwithstanding sections 28(14), 40(3)(e)(ia) and 151(1)(e).

### **109. Effect of unity of seisin on registered easements, &c.**

- (1) Registered easements and profits à prendre over or for the benefit of registered land are not affected by –
- (a) unity of seisin of that land and of other land appearing from the Register to have the benefit or burden of the easement or profit à prendre; or
  - (b) identity at any time of the legal owner of a profit à prendre in gross and the registered proprietor of the land burdened by the profit à prendre –
- unless the easements or *profits à prendre* are expunged from the Register as provided in subsection (2).
- (2) On the application of the registered proprietor in whom unity of seisin of the lands benefited and burdened by an easement or profit à prendre is united, or of the person who is both the legal owner of a profit à prendre in gross and the registered proprietor of

the land burdened by the profit à prendre, and proof to his satisfaction that the easement or profit à prendre would have been extinguished but for the operation of subsection (1), the Recorder shall expunge the easement or profit à prendre from the Register.

- (3) An easement or profit à prendre comprised in a sealed plan lodged under Part 3 of the *Local Government (Building and Miscellaneous Provisions) Act 1993* is to be dealt with under Division 5 of that Part.

#### *PART IXB - Possessory Title Division 1 - Preliminary*

##### **138G. Interpretation**

- (1) In this Part –

‘dominant tenement’ means land that is claimed to have the benefit of rights amounting to an easement;

‘servient tenement’ means land that is claimed to have the burden of rights amounting to an easement.

- (2) For the purposes of this Part, a person is taken to be under disability while –
  - (a) he or she is an infant; or
  - (b) he or she is incapable, by reason of mental illness, of managing his or her property or affairs.
- (3) For the purposes of, but without limiting, subsection (2)(b), a person is presumed to be incapable, by reason of mental illness, of managing his or her property or affairs –
  - (a) while he or she is subject to an initial order, a continuing care order or a community treatment order under the *Mental Health Act 1996*; or
  - (b) while a guardianship order or an administration order in respect of his or her estate is in force under the *Guardianship and Administration Act 1995*; or
  - (c) while the Public Trustee has under Part VII of the *Public Trustee Act 1930* the powers of the administrator of his or her estate.

##### **138H. Application to unregistered land**

The application of this Part extends to land which is not registered land.

#### *Division 2 – Right to acquire easements*

##### **138I. Abolition of common law rules**

- (1) This Division supersedes the rules of the common law for the acquisition of easements by prescription.

- (2) The rule of law known as the doctrine of lost modern grant for the acquisition of easements is abolished.

### **138J. Acquisition of easements by possession**

A person who has used or enjoyed rights which may amount to an easement at common law for a period of 15 years, or 30 years in the case of a person under disability, may apply to the Recorder in an approved form for an order in accordance with Division 3 vesting an easement in respect of those rights in him or her.

#### ***Division 3 – Procedure for vesting of easements***

### **138K. Applicant to notify owner of servient tenement**

- (1) Before lodging an application for an easement under this Part, the applicant must give written notice of the claim to the owner of the servient tenement and produce evidence satisfactory to the Recorder that he or she has done so.
- (2) The owner of the land may, within 30 days after receipt of the notice, lodge with the Recorder a notice of objection in an approved form against the easement claimed.
- (3) If the owner does not lodge a notice of objection, the Recorder must consider the application in accordance with this Part.
- (4) If the owner lodges a notice of objection, the Recorder may not consider the application unless he or she is satisfied that the applicant would suffer serious hardship if the application is not granted.

### **138L. Requirements for application**

- (1) In addition to the requirements of section 138K(1), an applicant for an easement under this Part must show that –
  - (a) during the relevant period, he or she has enjoyed the easement in the relevant land as of right; and
  - (b) the easement has not been enjoyed by force or secretly; and
  - (c) during the relevant period, the enjoyment of the easement has not been by virtue of a written or oral agreement made before or during that period unless the applicant can show that the relevant period commenced after any such agreement had terminated; and
  - (d) during the relevant period, there has been no unity of seisin of the relevant dominant and servient tenements; and
  - (e) during the relevant period, the owner of the servient tenement knew, or as a reasonable owner of land diligent in the protection of his or her interests ought to have known, of the enjoyment of the easement; and

- (f) the right for which the easement is claimed is not of a temporary nature; and
- (g) the applicant is the holder of an estate in fee simple in the dominant tenement or is under this Act or any other law entitled to such an estate as against the holder of an estate in fee simple in the servient tenement –

and the applicant must produce evidence from at least one other person in support of the easement claimed.

- (2) An application under this Division is, unless the Recorder otherwise directs, to be supported by a plan of survey, with field notes, of the land in respect of which the easement is claimed certified as correct by a surveyor registered and certificated under the *Land Surveyors Act 1909*.
- (3) The Recorder may –
  - (a) reject an application under this Division wholly or in part; or
  - (b) make such requisitions as to the easement claimed, or as to any other matter relating to the application, as he or she thinks fit.
- (4) At any time before the making of an order referred to in section 138J, the Recorder may reject the application, wholly or in part, if the applicant has failed within a reasonable time to comply to the Recorder's satisfaction with any requisition made by the Recorder.

### **138M. Tenants in common**

Where 2 or more applicants for an easement under this Part have interests in common, it is sufficient if one of them can show that he or she has complied with all the requirements of this Part.

### **138N. No easement in gross**

Nothing in this Part is taken to confer a right to acquire an easement in a case where there is no land capable of benefitting from the easement.

### **138P. Character of easement**

- (1) An easement that is vested under this Part –
  - (a) is to be in respect of a right that is capable of being granted as an easement under the common law or any enactment; and
  - (b) is to be capable of existing as an easement appurtenant to the dominant tenement or an ascertainable part of the dominant tenement; and
  - (c) is to be limited to the same character, extent and degree of use throughout the relevant period.

- (2) Where a person for whom an easement is vested under this Part has exercised additional rights for the period required under this Part, he or she is entitled to the grant of an additional easement in respect of those rights.

**138Q. Power of Recorder to make recordings, &c.**

On the vesting of an easement under this Part, the Recorder –

- (a) must make such recordings in the Register as he or she considers necessary to give effect to the easement and its effect on the dominant tenement and the servient tenement; and
- (b) may call in certificates of title, grants and duplicate registered dealings for making those recordings.

**138R. Abolition of claim for *profit à prendre***

After the commencement of the *Land Titles Amendment (Law Reform) Act 2001* a claim may not be made under this Part for a *profit à prendre*.

### ***Conveyancing and Law of Property Act 1884:***

#### **6. What is included in a conveyance of land**

- (1) A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all buildings, erections, fixtures, hedges, ditches, fences, ways, waters, watercourses, liberties, privileges, easements, rights, and advantages whatsoever appertaining or reputed to appertain to the land, or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land or any part thereof.
- (2) A conveyance of land having houses or other buildings thereon shall be deemed to include, and shall by virtue of this Act operate to convey with the land, houses, or other buildings, all outhouses, erections, fixtures, cellars, areas, courts, courtyards, cisterns, sewers, gutters, drains, ways, passages, lights, watercourses, liberties, privileges, easements, rights, and advantages whatsoever appertaining or reputed to appertain to the land, houses, or other buildings conveyed, or any of them, or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land, houses, or other buildings conveyed, or any of them, or any part thereof.
- (3) This section applies only if and as far as a contrary intention is not expressed in the conveyance, and shall have effect subject to the terms of the conveyance and to the provisions therein contained.
- (4) This section shall not be construed as giving to any person a better title to any property, right, or thing in this section mentioned than the title which the conveyance gives to him to the land expressed to be conveyed, or as conveying to him any property, right, or thing in this section mentioned further or otherwise than as the same could have been conveyed to him by the conveying parties.
- (5) This section applies only to conveyances made after the commencement of this Act.

...

#### **9A. Revival of easements, &c., on disunity of seisin**

- (1) Where –
  - (a) the seisin in fee simple is united of two parcels of land of which there was theretofore separate seisin in fee simple; and
  - (b) over or upon one of those parcels any easement or restriction then existed for the benefit of the other,

the provisions of this section apply when the seisin of the two parcels is to be disunited in fee simple.

- (2) There shall be implied, unless the contrary intention appears –

(a) in any contract of sale of either parcel which leads to the disunity a provision that it is sold –

(i) with all such rights and advantages as belonged to it; and

(ii) with all such burdens and disadvantages as belonged to it,

when it belonged to the predecessor in title of the person with whom seisin was united as mentioned in subsection (1); and

(b) in the conveyance of either parcel which effects that disunity –

(i) such grants and reservations as will create afresh the easements; and

(ii) such covenants, conditions and declarations of trust as will renew the restrictions,

to which the other parcel was subject for its benefit or it was subject for the other parcel's benefit, when it belonged to that predecessor.

#### **34A. Short descriptions of easements**

- (1) In any instrument purporting to create or evidence an easement the words set forth in the first column of Schedule 8 shall have the same effect as if there had been inserted in lieu thereof the words appearing opposite them in the second column of that schedule.
- (2) Public policy requires that such words be given their full effect notwithstanding the creation of easements to arise at indefinite future times.

...

#### **34E. Nature of parking easement**

- (1) A parking easement is an easement conferring –
  - (a) a right to park a vehicle in the parking bay delineated in the easement plan; and
  - (b) a right of vehicular access to, and egress from, the parking bay by a means delineated or described in the easement plan; and
  - (c) a right of pedestrian access to, and egress from, the parking bay by a means defined or described in the easement plan.
- (2) A parking bay may be defined by reference to boundaries in a horizontal plane or by reference to boundaries in both a horizontal and a vertical plane.
- (3) A parking easement may confer a right of exclusive occupation in respect of the parking bay.

#### **34F. Creation of parking easement**

- (1) Subject to the requirements of this Division relating to registration, a parking easement may be created in any of the following ways:
  - (a) by deed;
  - (b) as provided by section 105 of the *Land Titles Act 1980*;
  - (c) by a schedule of easements under section 87 of the *Local Government (Building and Miscellaneous Provisions) Act 1993*;
  - (d) by a plan or scheme registered under the *Strata Titles Act 1998*;
  - (e) in any other way approved by the Recorder.
- (2) A document under which a parking easement is created –
  - (a) must comply with any requirements as to its form imposed by the Recorder; and
  - (b) must set out the terms and conditions of the easement (although the document adequately complies with this paragraph if it uses a short form authorised by this Act); and
  - (c) must consist of, incorporate or be supported by a plan in a form approved by the Recorder –
    - (i) delineating the servient tenement and the parking bay and showing the position of the parking bay by reference to boundaries of the servient tenement; and
    - (ii) delineating or describing the means of vehicular access to, and egress from, the parking bay; and
    - (iii) delineating or describing the means of pedestrian access to, and egress from, the parking bay.
- (3) A parking easement cannot take effect unless the proposed use of the land for the parking of vehicles (and any related vehicular or pedestrian access) conforms with an approval under the *Land Use Planning and Approvals Act 1993*.

### **34G. Dominant and servient tenements**

- (1) A parking easement may, but need not, be related to a dominant tenement.
- (2) If a parking easement is related to a dominant tenement, the dominant and servient tenements need not be contiguous and a sufficient relationship exists between them if the parking easement is reasonably necessary for the lawful use or enjoyment of the dominant tenement (including a prospective use that has been approved under the *Land Use Planning and Approvals Act 1993*).

- (3) Unity of seisin in the dominant and servient tenements does not destroy a parking easement.

#### **34H. Conditions of parking easement**

- (1) A parking easement may be created on conditions –
  - (a) prescribing the classes of persons by whom vehicles may be parked under the easement; or
  - (b) prescribing the classes of vehicles that may be parked under the easement.
- (2) A parking easement may be created on conditions under which the easement operates for a specified period or periods or at specified times.
- (3) A parking easement may be created on conditions under which –
  - (a) obligations of maintenance and repair are imposed on either or both parties to the easement; or
  - (b) the proprietor of the easement is, or may be, required to pay charges or charges of a specified nature to the owner of the servient tenement; or
  - (c) charges may be made for the parking of vehicles in pursuance of rights conferred by the easement; or
  - (d) outstanding obligations are apportioned between the proprietor of the easement and the owner of the servient tenement on the termination or expiry of the easement.

#### **34I. Parking easement to run with land**

- (1) The benefits and burdens of a parking easement run with title to land.
- (2) The rights and obligations conferred or imposed under the conditions of the easement are enforceable by or against the owner for the time being of the servient tenement and, if there is a dominant tenement, the dominant tenement but, if not, the proprietor of the easement.
- (3) Despite subsections (1) and (2), if a parking easement is created over a leasehold estate in the servient tenement –
  - (a) the easement is not valid and binding against a mortgagee or encumbrancee of the servient tenement unless the mortgagee or encumbrancee has consented in writing to the easement; and
  - (b) the parking easement terminates on the expiry or termination of the lease.

### 34J. Variation of parking easement

- (1) Subject to the requirements of this Division relating to registration, a parking easement may be varied by a document in a form approved by the Recorder evidencing agreement between the proprietor of the easement and the owner of the servient tenement to the variation.
- (2) A variation to create a new parking bay, or alter the boundaries of an existing parking bay, or alter the means of vehicular or pedestrian access to the parking bay cannot take effect unless –
  - (a) the document making the variation consists of, incorporates or is supported by a plan in a form approved by the Recorder showing how the easement plan is affected by the variation; and
  - (b) if the variation would change the use of land, the change of use conforms with an approval under the *Land Use Planning and Approvals Act 1993*.

### 34K. Termination of parking easement

- (1) Subject to the requirements of this Division relating to registration, a parking easement may be terminated by a document in a form approved by the Recorder evidencing –
  - (a) agreement between the proprietor of the easement and the owner of the servient tenement to the surrender of the easement; or
  - (b) if the terms and conditions of the easement impose no obligations on the proprietor of the easement, the proprietor's unilateral agreement to surrender the easement.
- (2) If a parking easement was created for the benefit of a dominant tenement in order to conform with an approval under the *Land Use Planning and Approvals Act 1993* for the development or use of the dominant tenement, a document to terminate the easement cannot take effect unless the proposed termination also conforms with an approval under that Act.

### 34L. Registration

- (1) The creation, variation, expiry or termination of a parking easement is –
  - (a) if the easement relates to land subject to the *Land Titles Act 1980*, registrable under that Act; and
  - (b) if the easement relates to land that is not subject to the *Land Titles Act 1980*, registrable under the *Registration of Deeds Act 1935*.
- (2) The Recorder may register the creation, variation, expiry or termination of a parking easement on lodgment of a document in a form approved by the Recorder creating, varying or terminating the easement or evidencing its creation, variation, expiry or termination and, in the case of land subject to the *Land Titles Act 1980*, registration is to

be effected on the folio for the servient tenement and, if there is a dominant tenement, the folio for the dominant tenement.

- (3) Subject to subsection (4) –
- (a) a parking easement over land subject to the *Land Titles Act 1980* does not take effect until registration of creation of the easement; and
  - (b) if a parking easement is registered, the variation, expiry or termination of the easement does not take effect until registered.
- (4) A parking easement created by lease for a term of 3 years or less –
- (a) is not registrable under the *Land Titles Act 1980*; and
  - (b) takes effect without registration; and
  - (c) terminates automatically on determination of the lease.
- (5) Before the Recorder registers the creation, variation or termination of a parking easement, the Recorder may require production of evidence of any necessary approval under the *Land Use Planning and Approvals Act 1993*.
- (6) On registration of a variation to, or the expiry or termination of, a parking easement created by sealed plan or a strata or community titles scheme, the Recorder must, if it is appropriate to do so, amend the plan or scheme to reflect the variation, expiry or termination of the easement.

...

#### **74. Grants of easements by way of use**

- (1) A conveyance of freehold land to the use that any person may have, for an estate or interest not exceeding in duration the estate conveyed in the land, any easement, right, liberty, or privilege in, or over, or with respect to that land, or any part thereof, shall operate to vest in possession in that person that easement, right, liberty, or privilege, for the estate or interest expressed to be limited to him; and he, and the persons deriving title under him, shall have, use, and enjoy the same accordingly.
- (2) This section applies only to conveyances made after the commencement of this Act.

#### **84C. Discharge or modification of overriding interests**

- (1) On the application of a person having an interest in land subject to an overriding interest (not being an overriding interest having effect by virtue of a plan of subdivision) the appropriate tribunal may, by order, extinguish or modify the interest if it is satisfied –
  - (a) that, by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which it may deem material, the interest has become obsolete;

- (b) that the continued existence of the interest would impede a user of the land in accordance with an interim order or planning scheme, or, as the case may be, would, unless modified, so impede such a user;
  - (c) that the continued existence of the interest would impede some reasonable user of the land for public or private purposes, not being a user referred to in paragraph (b), or, as the case may be, would, unless modified, so impede such a user;
  - (d) that the persons of full age and capacity for the time being or from time to time entitled to the benefit of the interest have agreed, either expressly or by implication, to the extinguishment or modification of the interest; or
  - (e) that the proposed extinguishment or modification will not injure the persons entitled to the benefit of the interest.
- (1A) In the case of a parking easement, the appropriate tribunal may, by order, extinguish or modify the easement on any of the following grounds (which are in addition to those set out in subsection (1)):
- (a) the servient tenement has been destroyed or has been rendered incapable of being used for the purposes of the easement;
  - (b) the dominant tenement has been destroyed or has been rendered incapable of taking advantage of the parking easement;
  - (c) the easement was created for a particular purpose that no longer exists;
  - (d) the easement has expired or terminated, or has been terminated, under the conditions of the easement or under this Act.
- (2) An application may be made under this section in respect of any land notwithstanding that there may be uncertainty concerning the existence or nature of the overriding interest to which the application relates.
- (3) The fact that the rights conferred by an overriding interest are not being exercised and for the period of 20 years last past have not been exercised is prima facie evidence that the interest has become obsolete.
- (4) The power conferred by this section to modify an overriding interest includes power to create, in addition to the interest as modified or in substitution for that interest, a further overriding interest having the effect of restricting the user of the land in such manner, or creating such rights over the land, as appear to the tribunal to be reasonable in the circumstances, being an overriding interest that is capable of being created by the applicant and is accepted by him.
- (5) Without prejudice to provisions of subsection (4), an order under this section with respect to any land may contain all or any of the following provisions, namely:
- (a) A provision extinguishing all the overriding interests to which the land may be subject or all overriding interests of a particular kind to which it may be subject;

- (b) A provision extinguishing any overriding interest, or any overriding interest of a particular kind, that may have arisen from a particular instrument or from particular transactions or circumstances;
  - (c) A provision creating a like overriding interest as may be created as mentioned in subsection (4).
- (6) An overriding interest shall not be extinguished or modified under this section on the grounds referred to in subsection (1)(c) unless the tribunal is satisfied that the interest, in impeding the user of land, either –
- (a) does not secure to persons entitled to the benefit of the interest any practical benefits of substantial value or advantage to them; or
  - (b) is contrary to the public interest –
- and that money will be an adequate compensation for the loss or disadvantage (if any) that any such person will suffer from the extinguishment or modification.
- (7) An order under this section extinguishing or modifying an overriding interest may direct the applicant to pay any person entitled to its benefit such sum by way of compensation or consideration as the tribunal may think just to award under one, but not both, of the following heads, that is to say, either –
- (a) a sum to make up for any loss or disadvantage suffered by that person in consequence of the discharge, extinguishment, or modification; or
  - (b) a sum to make up for any effect that the interest had, at the time when it was imposed, in reducing the consideration then received for the land affected by it.
- (7A) If a parking easement is extinguished, the tribunal may also order the owner of the dominant or servient tenement to compensate the other to the extent necessary to achieve an appropriate apportionment of the costs previously incurred in connection with the easement.
- (8) For the purposes of this section a person shall be deemed to have the benefit of an overriding interest if he has an estate in land to which the benefit of the interest is annexed or is appurtenant or if there is vested in him any right exercisable on the contravention of, or failure to observe or carry out, any condition, covenant, prohibition, or restriction that constitutes, or forms an element of, that overriding interest.
- (9) In this section ‘interim order’ and ‘planning scheme’ have the same meanings as they have for the purposes of the *Land Use Planning and Approvals Act 1993*.

...

#### **84J. Statutory rights of user**

- (1) Subject to this section, where the Supreme Court is satisfied that to facilitate the reasonable user of any land (in this section referred to as ‘the dominant land’) for some

public or private purpose it is consistent with the public interest that a statutory right of user should be created over other land (in this section referred to as ‘the servient land’) it may, by order, impose upon the servient land, or on the owner for the time being thereof, an obligation of user or an obligation to permit the user of that land in accordance with the order.

- (2) A statutory right of user imposed under this section shall take the form of an easement, licence, or other right that may be created by act of the owners of the dominant land and the servient land or any of them.
- (3) An order shall not be made under this section unless the Court is satisfied that the owner of the servient land can be adequately compensated in money for any loss or disadvantage that he may suffer from the operation of the order.
- (4) An order under this section, unless the Court for special reasons determines otherwise, shall include provision for the payment by the applicant to such person or persons as may be specified in the order of such amount by way of compensation or consideration as in the circumstances appears to the Court to be just.
- (5) An order under this section is binding, to the extent the order provides, on all persons, whether of full age or capacity or not, then entitled or thereafter becoming entitled to the servient land or the dominant land, whether or not those persons were parties to, or had notice of, the proceedings on the order.
- (6) A statutory right of user has effect as if it were derived from the most effectual instruments made by the parties capable of creating the right, and may, accordingly, be extinguished or modified by act of parties.
- (7) A statutory right of user that affects any land within a plan of subdivision may not be created under this section unless –
  - (a) the applicant produces a certificate from the relevant council to the effect that the application does not contravene Division 3 of Part 3 of the *Local Government (Building and Miscellaneous Provisions) Act 1993*; or
  - (b) the Court is otherwise satisfied that there is no such contravention.

...

#### **90A. Easements in gross and easements and restrictions appurtenant to easements**

- (1) Notwithstanding any law or rule of law to the contrary, on and after the commencement of this section it shall be deemed to be possible and lawful –
  - (a) to –
    - (i) create; or
    - (ii) acquire by compulsory process –

in favour of the Crown or of any public authority or local authority constituted by or under any Act, an easement without a dominant tenement; and

(b) to make appurtenant to, or annex to, an easement another easement or the benefit of a restriction as to the user of the land.

(2) This section applies to and in relation to land that is subject to the *Land Titles Act 1980*, notwithstanding anything in that Act or in any Act amending that Act.

## SCHEDULE 8

### Section 34A

Short form	Full form
Right of carriage way	<p>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 authorized by him, 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.</p>
Right of foot way	<p>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 authorized by him, to go, pass, and repass on foot at all times and for all purposes without riding, draught, or pack animals, oxen, sheep, pigs, geese, or other livestock, or vehicles (other than bicycles, wheelbarrows, and baby-carriages) to and from the said dominant tenement or any such part thereof.</p>
Right of drainage	<p>A right of drainage (including the right of construction of drains) 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 for the purpose of carrying away stormwater and other surplus water from the dominant tenement or any such part thereof over or under the land herein indicated as the land over which the right is to subsist, and through all sewers and drains which may hereafter be made or passing under, through, and along the last-mentioned land and the right for every such person and his surveyors and workmen from time to time and at all times hereafter if he or they should think fit to enter into and upon the last-mentioned land and to inspect, repair, cleanse, and amend any such sewer or drain without doing unnecessary damage to the said land.</p>
Bus parking easement	<p>The right to park a bus for carrying passengers who are employees, customers or other invitees of the proprietor of the easement in the parking bay shown on the relevant easement plan (whether or not the bus is also taking passengers to other destinations).</p>
Customer parking easement	<p>The right for the proprietor of the easement to permit customers, clients, visitors or other invitees to park their motor vehicles in the parking bays shown on the relevant easement plan.</p>
Disabled parking easement	<p>The right for the proprietor of the easement to permit invitees of any class who are entitled under the <i>Traffic Act 1925</i> to use parking facilities provided for disabled persons to park motor vehicles in the parking bay shown on the relevant easement plan.</p>
Employee parking easement	<p>The right of the proprietor of the easement to permit employees or contractors to park their motor vehicles in the parking bays shown on the relevant easement plan.</p>
Occupier parking easement	<p>The right of the occupier of the dominant tenement to park a motor vehicle, or to permit another to park a motor vehicle, in the parking bay shown on the relevant easement plan.</p>
General parking easement	<p>The right of any occupier of the dominant tenement, or any person authorised by</p>

Service parking easement	such an occupier, to park in the parking bays shown on the relevant easement plan. The right of the proprietor of the easement to permit persons delivering goods, or providing services to the proprietor, to park in the parking bay shown on the relevant easement plan.
Vehicular access way	The right of the proprietor of a parking easement to use, or to permit others to use, the means of vehicular access delineated or described in the relevant easement plan for access to, and egress from, the parking bay shown on the plan.
Pedestrian access way	The right of the proprietor of a parking easement to use, or to permit others to use, the means of pedestrian access delineated or described in the relevant easement plan for access to, and egress from, the parking bay shown on the plan.
Combined access way	The right of the proprietor of a parking easement to use, or to permit others to use, the means of access delineated or described in the relevant easement plan for vehicular and pedestrian access to, and egress from, the parking bay shown on the plan.

***NSW Conveyancing Act 1919*****89 Power of Court to modify or extinguish easements, profits à prendre and certain covenants**

- (1) Where land is subject to an easement or a profit à prendre or to a restriction or an obligation arising under covenant or otherwise as to the user thereof, the Court may from time to time, on the application of any person interested in the land, by order modify or wholly or partially extinguish the easement, profit à prendre, restriction or obligation upon being satisfied:
- (a) that by reason of change in the user of any land having the benefit of the easement, profit à prendre, restriction or obligation, or in the character of the neighbourhood or other circumstances of the case which the Court may deem material, the easement, profit à prendre, restriction or obligation ought to be deemed obsolete, or that the continued existence thereof would impede the reasonable user of the land subject to the easement, profit à prendre, restriction or obligation without securing practical benefit to the persons entitled to the easement or profit à prendre or to the benefit of the restriction or obligation, or would, unless modified, so impede such user, or
  - (b) that the persons of the age of eighteen years or upwards and of full capacity for the time being or from time to time entitled to the easement or profit à prendre or to the benefit of the restriction, whether in respect of estates in fee simple or any lesser estates or interests in the land to which the easement, the profit à prendre or the benefit of the restriction is annexed, have agreed to the easement, profit à prendre, restriction or obligation being modified or wholly or partially extinguished, or by their acts or omissions may reasonably be considered to have abandoned the easement or profit à prendre wholly or in part or waived the benefit of the restriction wholly or in part,
- (b1) in the case of an obligation:
- (i) that the prescribed authority entitled to the benefit of the obligation has agreed to the obligation's being modified or wholly or partially extinguished or by its acts or omissions may reasonably be considered to have waived the benefit of the obligation wholly or in part, or
  - (ii) that the obligation has become unreasonably expensive or unreasonably onerous to perform when compared with the benefit of its performance to the authority, or
- (c) that the proposed modification or extinguishment will not substantially injure the persons entitled to the easement or profit à prendre, or to the benefit of the restriction or obligation.

***Northern Territory Law of Property Act 2007*****SCHEDULE 3****Section 157****Part A****Rights under a Right of Way**

The person entitled to the use or benefit of an easement or easement in gross of a right of way may, for all purposes, enter on and pass along or over the servient land with or without a vehicle.

**Part B****Purpose of and Powers under Other Easements or Easements in Gross**

Description	Purpose	Powers
1. Sewerage easement	Supplying a sewerage service to or conveying a sewerage service under, through or across the servient land.	To break the surface of, dig, open up and use the servient land to construct, lay down, take up, use, maintain, repair, relay or inspect pipes for the purpose of supplying or conveying a sewerage service and to enter the servient land at any time (with or without a vehicle or equipment) to do so.
2. Water supply easement	Supplying a water supply service to or conveying a water supply service through, under, on, above or across the servient land.	To break the surface of, dig, open up and use the servient land to construct, lay under, on or above the servient land, take up, use, maintain, repair, relay or inspect pipes for the purpose of supplying or conveying a water supply service and to enter the servient land at any time (with or without a vehicle or equipment) to do so.
3. Drainage easement	Draining water, sewerage or another effluent from, through, under or across the servient land.	To break the surface of, dig, open up and use the servient land to construct, lay down, take up, use, maintain, repair, relay or inspect drains or drainage pipes for the purpose of draining an effluent and to enter the servient land at any time (with or without a vehicle or equipment) to do so.
4. Electricity supply easement	Supplying an electricity service to or conveying an electricity service through, under, on, above or across the servient land.	To: <ul style="list-style-type: none"> <li>(a) break the surface of, dig, open up and use the servient land;</li> <li>(b) construct, lay under, on or above the surface of the servient land and use ducts, pipes, poles, conductors, cables wires and other works;</li> <li>(c) construct, lay under, on or above the surface of the servient land and use incidental or ancillary works for the transmission of electricity, including manholes and cable markers;</li> <li>(d) erect on or above the servient land and use poles, equipment for transforming electricity and incidental or ancillary works, including walls or other structures;</li> <li>(e) inspect, take up, maintain, repair, alter, remove, relay or replace works referred to in paragraphs (b), (c) or (d); and</li> <li>(f) transmit electricity by means of works referred to in paragraphs (b), (c) or (d),</li> </ul> for the purpose of supplying or conveying an electricity service and to enter on and pass along or over the servient land (with or without a vehicle or equipment) to do so.

5. Electronic communication easement	Supplying an electronic communications service to or conveying an electronic communications service through, under, on, above or across the servient land.	<p>To:</p> <p>(a) break the surface of, dig, open up and use the servient land;</p> <p>(b) construct, lay under the surface of the servient land and use ducts, pipes, conductors, cables wires and other works;</p> <p>(c) construct, lay on or above the surface of the servient land and use incidental or ancillary works for the transmission of an electronic communications service, including manholes and cable markers; and</p> <p>(d) inspect, take up, maintain, repair, alter, remove, relay or replace works referred to in paragraphs (a), (b) or (c),</p> <p>for the purpose of supplying or conveying an electronic communications service and to enter on and pass along or over the servient land (with or without a vehicle or equipment) to do so.</p>
6. Energy supply easement	Supplying gas, liquid fuels, water or other liquids capable of conveying energy to or conveying gas, liquid fuels, water or other liquids capable of conveying energy through, under, on, above or across the servient land.	To break the surface of, dig, open up and use the servient land to construct, lay under, on or above the surface of the servient land, take up, use, maintain, repair, relay or inspect pipes and incidental or ancillary works for the purpose of conveying gas, liquid fuels or liquids capable of conveying energy and to enter the servient land at any time (with or without a vehicle or equipment) to do so.
7. General service easement	Supplying gas, liquid fuels, water or other liquids capable of conveying energy to or conveying gas, liquid fuels, water or other liquids capable of conveying energy through, under, on, above or across the servient land.	To do any thing and take any action on the servient land that is described in this Column at items 1 to 6 inclusive.