



Victorian
Law Reform
Commission

PROPERTY LAWS

STATE ELECTRICITY COMMISSION
OF VICTORIA

CREATION OF EASEMENT

EASEMENTS AND COVENANTS

Consultation Paper

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Contents

Call for Submissions	4	Chapter 5: Recording and Registration of Easements	41
Terms of Reference	5	Registration and recording	42
Executive Summary	6	Easements under the Transfer of Land Act.....	43
Chapter 1: Introduction	9	Registered easements	43
The two-stage review of Victoria’s Property Laws	10	Notified easements	43
Review of the Law of Easements and Covenants.....	10	Easements on a registered plan of subdivision	44
Guiding aims and principles	10	Easements for utilities and other services	44
Preparation of this paper	11	Rights in the nature of easements.....	44
Submissions	11	Easements created at common law or equity	44
Structure of this paper	12	Registration of easements.....	45
Chapter 2: Functions of Easements	13	Deletion of recorded easements	45
Purpose and characteristics of easements	14	Recording or registration?.....	46
Essential characteristics	14	Chapter 6: Implied Easements	47
Classes of easements	14	The common law rules for implication of easements.....	48
Easements in Victoria.....	15	Easements of necessity	48
Creation of easements.....	15	Intended easements.....	48
Appurtenant to land.....	15	The rule in Wheeldon v Burrows	48
Easements in gross.....	16	General words imported into conveyances.....	49
Approaches in other jurisdictions	16	Non-derogation from grant	49
Are easements in gross needed?	17	Implication from the description of land	49
Chapter 3: Express Creation of Easements	19	Criticisms of common law implied easements	50
Express grant or reservation	20	Conflict with the Torrens system	50
Express subdivisional easements created by plan	21	Complex doctrines	50
Interpreting express subdivisional easements	22	Implied easements and the Torrens system	51
Private compulsory acquisition	23	Broad exception to indefeasibility	51
Acquisition of water access rights: section 235	23	Narrow exception to indefeasibility.....	51
of the Water Act.....	23	Implied subdivisional easements	52
Acquisition of easements under section 36	23	Section 12(2) of the Subdivision Act	52
of the Subdivision Act.....	23	Section 98 of the Transfer of Land Act.....	53
Analysis of court imposed	26	Limitations of implied subdivisional easements	54
easement provisions.....	26	Statutory reciprocal rights	54
Reform proposal	29	Party walls.....	55
Chapter 4: Easements for Utilities and Services	31	Support of buildings	55
The nature of utility and service easements.....	32	Rights of access.....	56
Creation of utility and service easements	32	Reform options	57
By compulsory acquisition.....	33	Option one: retain the current law.....	57
By agreement.....	33	Option two: introduce statutory rules for implication	57
Upon subdivision of the land	34	Option three: replace rules of implication	58
Rights in the nature of an easement.....	34	with court imposed easements.....	58
Information available to purchasers	35	Chapter 7: Prescriptive Easements	59
The register	35	Introduction	60
Vendor disclosure requirements	37	The common law rule	60
Information available from utility and service providers.....	38	Functions of prescriptive easements.....	61
		Torrens system.....	61
		Broad exception	61
		Narrow exception	61
		Abolition of prescription	62
		Personal right.....	62

Criticisms of prescription	63
Conflict with the principles of the Torrens system.....	63
Fairness and human rights	64
Indiscriminate mechanism.....	65
Discouragement of neighbourly toleration	65
Unnecessary in light of modern planning	65
Reform options	66
Option one: retain the current law.....	66
Option two: modify the law of prescription	66
Option three: replace precriptive easements with other mechanisms.....	69
Chapter 8: An Integrated Scheme for Creation of Easements	71
An integrated framework	72
Partial abolition of common law doctrines.....	72
Implied reciprocal rights	74
Subdivisional easements	75
Court imposed easements	76
Narrowing of the exceptions to indefeasibility	76
Chapter 9: Removal of Easements	79
Section 36 of the Subdivision Act 1988	80
The registrar's power of removal	81
Abandonment under Section 73	81
Unregistered easements	83
Adverse occupation	83
Reform options	83
Other common law mechanisms	85
Express release	85
Unity of estates	85
Chapter 10: The Role of Covenants	87
Development of the law of covenants	88
Covenants under common law.....	88
Enforcement of restrictive covenants in equity.....	89
Types of covenants.....	90
Perspectives on covenants and public planning	90
Covenants as complementary to public planning	91
Covenants as tools for public-private collaboration.....	91
Covenants as impediments to public planning	91
Covenants as a zone of local and individual autonomy	92
Covenants as unrepealable private legislation.....	92
Summary.....	94
Chapter 11: Covenants and the Register	95
The legal effect of recording a restrictive covenant	96
Recording of the benefit of the covenant	97
Covenants in other jurisdictions	98
Removal of covenants from the register.....	99

Chapter 12: Positive Covenants	101
Should positive covenants run with land?.....	102
Positive covenants in Victoria	103
Policy considerations	105
Should positive obligations run only under legislation?... ..	106
Positive covenants in England and the United States	107
Reform proposals.....	108
Options	109
Chapter 13: Freehold Covenants – A New Statutory Scheme.....	111
Issues with the current system	112
A new statutory scheme?	113
Examples in other jurisdictions	114
Overview of design issues in a statutory scheme	116
Chapter 14: Changed Conditions and Lapsing of Covenants.....	121
Background.....	122
Changed conditions.....	122
Large scale subdivision covenants	122
Reform options	123
Lapsing provisions in covenants	123
Time as a consideration in judicial removal	125
Summary of options	125
Chapter 15: Removal and Variation of Easements and Covenants under Planning Legislation.....	127
Overview.....	128
Planning scheme amendment.....	128
Planning permit.....	129
Easements.....	129
Restrictive covenants.....	130
Criticisms.....	131
Section 61(4) of the Planning and Environment Act 1987 ...	133
Background	133
Criticisms.....	133
Chapter 16: Removal and Variation of Easements and Covenants by Judicial Order	139
Section 84 of the Property Law Act.....	140
The threshold tests.....	140
Interpretation of the threshold tests.....	141
Relevance of planning considerations	142
Additional issues arising under Section 84	142
Possible criteria for a structured discretion	144
Background	144
Criteria from the existing threshold tests.....	145
Criteria derived from the common law and equity	145
Criteria from equivalent statutory tests in other jurisdictions.....	148
Combined list of potential Section 84 criteria	155
Questions.....	157
Glossary.....	161

Call for Submissions

The Victorian Law Reform Commission invites your comments on this Consultation Paper.

WHAT IS A SUBMISSION?

Submissions are your ideas or opinions about the law being reviewed. Submissions can be anything from a personal story about how the law has affected you, to a research paper complete with footnotes and bibliography. The Commission wants to hear from anyone who has experience with a law under review. It does not matter if you only have one or two points to make; we still want to hear from you.

WHAT IS MY SUBMISSION USED FOR?

Submissions help the Commission understand different views and experiences about the law it is researching. Information in submissions, along with other research and comments from meetings, is used to help develop recommendations. Once the Commission has assessed your submission it will be made available on our website and stored at the Commission where it will be publicly available.

PUBLICATION OF SUBMISSIONS

The Commission publishes public submissions it receives on our website to encourage discussion and to keep the community informed about our projects.

We try to publish as many submissions as possible. Please keep in mind that submissions containing offensive or defamatory content or that do not relate to the project will not be published and that private information of other people will be de-identified.

The views expressed in the submissions are those of the individuals or organisations who submit them and are not the views of the Commission.

HOW DO I MAKE A SUBMISSION?

Submissions can be made in writing or orally. There is no particular format you need to follow. However, it would assist us if you addressed the consultation questions listed in the paper.

Submissions can be made by:

- Online form: www.lawreform.vic.gov.au
- Mail: PO Box 4637, GPO Melbourne Vic 3001
- Email: law.reform@lawreform.vic.gov.au
- Fax: (03) 8619 8600
- Phone: (03) 8619 8619, 1300 666 557 (TTY) or 1300 666 555 (freecall)
- Face-to-face: please contact us to make an appointment with one of our researchers.

WHAT HAPPENS ONCE I MAKE A SUBMISSION?

Shortly after you make your submission you will receive a letter or email confirming it has been received. You are then asked to confirm your details by replying within seven days.

ASSISTANCE IN MAKING A SUBMISSION

If you require an interpreter, need assistance to have your views heard or would like a copy of this paper in an accessible format please contact the Commission.

CONFIDENTIALITY

When you make a submission you must decide how you want your submission to be treated. Submissions are either public, anonymous or confidential.

- Public submissions can be referred to in our reports, uploaded to our website and made available to the public to read in our offices. The names of submitters will be listed in the final report. Addresses and contact details are removed from submissions put on our website.
- Anonymous submissions can be referred to in our reports, uploaded to our website and made available to the public to read in our offices but the identity of the author will not be revealed.
- Confidential submissions cannot be referred to in our report or made available to the public.

Please let us know your preference along with your submission. If you do not tell us you want your submission treated confidentially we will treat it as public.

More information about the submission process and this reference is available on our website:
www.lawreform.vic.gov.au

**SUBMISSION DEADLINE
30 SEPTEMBER 2010**

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† Retired 30 June 2010

Terms of Reference

- 1) The Victorian Law Reform Commission is to review and report on the desirability of changes to Victoria's property laws in relation to –
 - a) the *Property Law Act 1958*; and
 - b) easements and covenants.
- 2) In conducting the review, the Commission should have regard to –
 - the aims of the Attorney-General's *Justice Statement 2*, in particular to simplify and modernise the law, and reduce the costs associated with the justice system;
 - relevant, contemporaneous reviews or policies in the field in other jurisdictions, both within Australia and internationally;
 - opportunities for harmonisation with laws of other Australian jurisdictions;
 - developments in technology, including the availability of electronic conveyancing;
 - the scope for reducing the administrative and/or compliance burden imposed on business and the not for profit sector, in line with the Government's Reducing the Regulatory Burden initiative; and
 - social and demographic trends and new approaches to planning and sustainable land use and risk in Victoria.
- 3) The purpose of the review is to ensure that the laws under review are transparent, accessible and support an efficient and effective system of property rights and transactions in Victoria.
- 4) In particular, the Commission should consider –
 - Any necessary changes to ensure that the *Property Law Act 1958* is certain, effective and up to date. This may include, but is not limited to, any reforms required to modernise and/or simplify the language in the Act, clarify meanings that are in doubt, remove obsolete provisions, or improve the overall functioning of the Act.
 - The operation of the law of easements and covenants broadly, and any beneficial changes to streamline planning processes and/or relevant property laws and practices, as well as options to facilitate simpler and cheaper processes. This should incorporate a consideration of the interrelationship, and opportunities for harmonisation and increased clarity across the rules, practices and Acts, including the *Transfer of Land Act 1958*, *Property Law Act 1958*, *Subdivision Act 1988* and *Planning and Environment Act 1987*, amongst others, that govern easements and covenants.

The Commission is also asked to report on any related issues that are identified during the course of the review and that may warrant further investigation.

The Commission is to report regarding the *Property Law Act 1958* by 30 September 2010, and to report regarding easements and covenants by 17 December 2010.

Executive Summary

The Victorian Law Reform Commission is reviewing Victoria's property laws. Earlier this year we issued a consultation paper on the *Property Law Act 1958*. This second consultation paper deals with the law of easements and freehold covenants.

An easement is a property right to make use of someone else's land without occupying it. Easements are often created to provide land with permanent access to utilities, essential services and communications passing over, under or through neighbouring land. They can also be used to allow neighbouring land to be used in a way that would otherwise be a trespass, such as passing over one property to access another.

Restrictive covenants are property rights that restrict the ways land may be used. They are widely used by developers to place restrictions on the use of lots in a subdivision, for the benefit of all other lots. Some restrictions are intended to make sure that new buildings and landscaping are completed in accordance with the original development plan and timetable. Other restrictions are intended to ensure that the use of lots in the future does not detract from the character and quality of the neighbourhood.

Restrictive covenants start off as agreements between the developer and the purchaser of each lot, but can be enforced against all subsequent owners and occupiers for an unlimited period of time. They are tools of private land use planning and don't always fit in with public planning policies.

Victoria's law of easements and covenants is based on English common law, overlaid with property, planning and subdivision legislation. This means that the overall law is very complex and has significant gaps and overlaps.

The rules for creating easements need to be simplified and consolidated. Easements may either be created expressly or they may be implied in the circumstances (these terms are explained in more detail in the main text). There are too many rules under which they can be implied. Victoria's system of expressly creating easements by plan of subdivision means that many of the common law rules of implied easements are no longer needed.

Although there are many ways of creating easements in Victoria, they cannot be imposed by a court. The introduction of court imposed easements in Victoria, such as already exist in many other states and territories, would allow some of the existing methods of creation to be abolished.

Under the common law rule of prescription, it is possible for a person who has been using another person's land for at least 20 years to acquire an easement over that land without paying compensation. The rule is useful in reducing disputes and upholding long standing expectations upon which somebody may have relied. It also creates problems. It creates a risk for purchasers because it is difficult for them to discover that an easement created by long use exists. It also allows property rights to be acquired over someone's land without consent, due process or compensation, which breaches human rights norms.

We propose replacing the common law rule of prescription with other procedures designed to provide similar benefits without the problems.

The relationship between easements and the Torrens system of registered title to land also needs to be simplified. There are too many ways of recording or registering easements, with varying legal consequences, and easements can affect land without appearing on the Torrens system register at all.

There is a need to make it easier for purchasers to find out about easements, including easements and similar rights held by public authorities for the purpose of providing utilities and essential services. One way of doing this is to reduce the types of easement that can exist without being recorded on the register.

Easements run with land. This means that they are a property right that attaches to land and can be enforced against successive landowners. In contrast, not all covenants run with land. Only restrictive covenants, which impose restrictions on land, are enforceable as property rights. Positive covenants, which impose obligations to do something – such as to repair property or to contribute towards its maintenance – do not run with land except where this is specifically permitted by legislation. A key question is whether positive covenants that run with the land should be imposed by private law agreement, rather than only where permitted by legislation. If so, some new rules would be needed.

Whether or not positive covenants imposed by private law agreement are allowed to run with land, we propose that the complex rules relating to freehold covenants should be replaced with a statutory scheme. Covenants would be statutory legal interests that run with land in the same way as easements do. The rules and terminology relating to easements and covenants would then be more consistent.

Another focus of the consultation paper is on problems with the current law on removal and variation of easements and covenants. Victoria is unusual in having a number of provisions for the removal or variation of easements and covenants under planning and subdivision legislation. There are conceptual and practical difficulties in using public planning law procedures to remove and vary private property rights.

We propose that the main means for removing and varying both easements and covenants should be by judicial order under section 84 of the *Property Law Act 1958*. Currently, section 84 applies only to covenants. It could be redrafted to specify more fully how and when this power should be used, and to include planning considerations.

The use of covenants to regulate large multi-lot developments raises a need for new means of removal or variation when circumstances change. Under existing laws, there are practical difficulties in negotiating to remove covenants that benefit very large numbers of owners, or getting the owners' agreement to an application for a judicial order. A new mechanism for removal is discussed: the 'sunsetting' or lapsing of new covenants after a specified time.

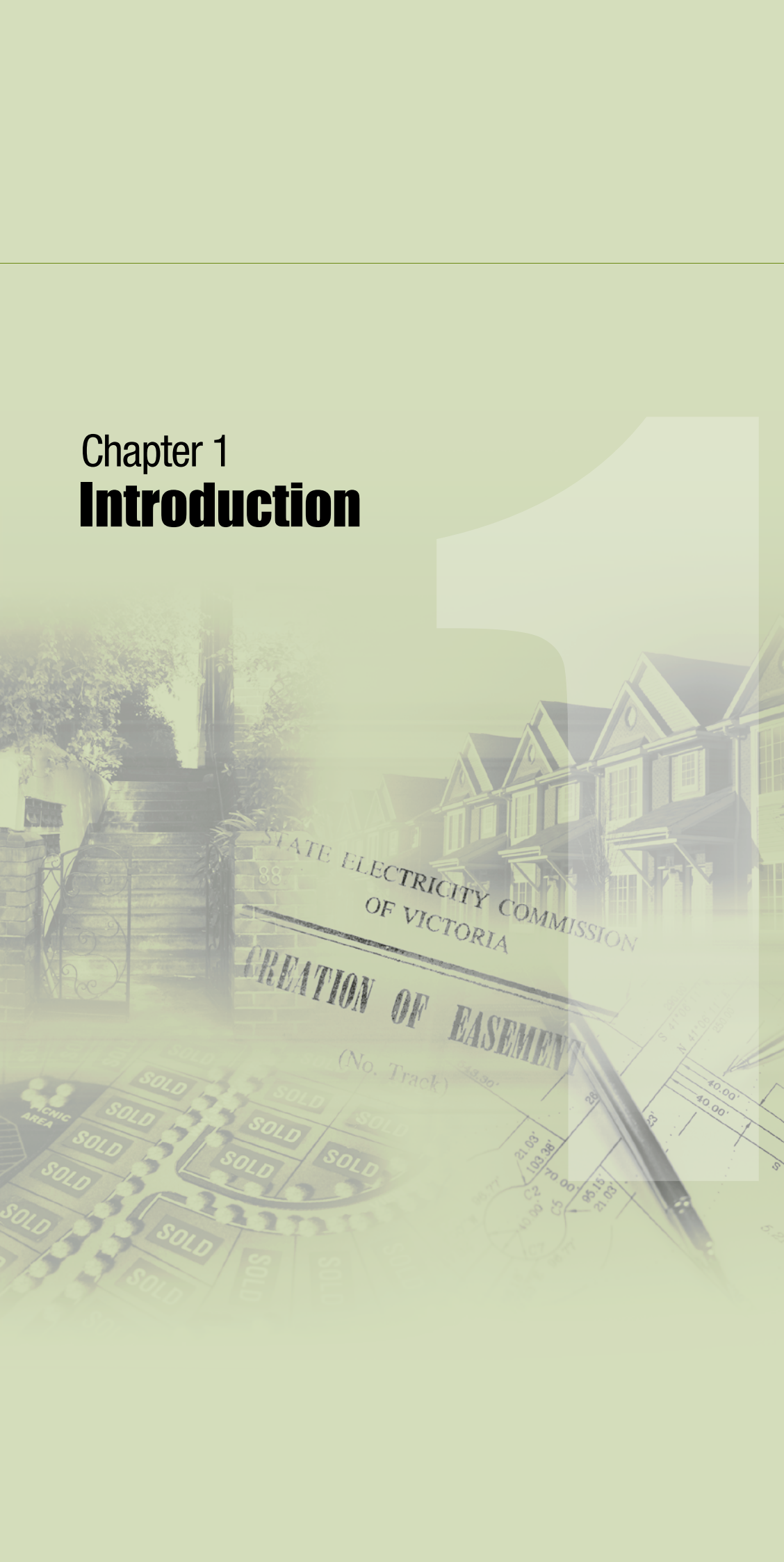
We are seeking submissions from the public on the issues raised in this paper, and particularly on the questions we ask, by 30 September 2010.

Chapter 1

Introduction

CONTENTS

The two-stage review of Victoria's Property Laws	10
Review of the Law of Easements and Covenants.....	10
Guiding aims and principles.....	10
Preparation of this paper	11
Submissions	11
Structure of this paper	12



THE TWO-STAGE REVIEW OF VICTORIA'S PROPERTY LAWS

- 1.1 In August 2009 the Attorney-General asked the Commission to review Victoria's property laws. Announcing the review, he said that the first stage would focus on the *Property Law Act 1958* (Property Law Act) and Victoria's property laws relating to easements and covenants. The second stage of the review will examine the *Transfer of Land Act 1958* (Transfer of Land Act).¹
- 1.2 The full terms of reference for the first stage of the review are set out on page 5. We expect the outcome of the first stage to influence the terms of reference for the second.
- 1.3 The first stage of the review has two components:
 - a review of the Property Law Act, for report by 30 September 2010; and
 - a review of laws relating to easements and covenants, for report by 17 December 2010.
- 1.4 We are undertaking each component separately. We published a consultation paper on the Property Law Act on 23 April 2010. This paper is about the second component: the law of easements and covenants.

REVIEW OF THE LAW OF EASEMENTS AND COVENANTS

GUIDING AIMS AND PRINCIPLES

- 1.5 To assist in developing and assessing proposals for reform of the law of easements and covenants, we have developed the following aims and principles.

Aims

- To simplify the law.
- To adapt the law to current and emerging needs.
- To reduce the administrative and compliance burden on business and the not for profit sector.
- To coordinate private property rights and public planning.

Principles

- Easements and covenants are regulated by markedly different sets of legal rules. The divergence came about largely (although not entirely) for historical reasons, and makes the law unduly complex. Easements and covenants should be subject to a single, coherent set of rules, except to the extent that their different purposes require separate provisions.
 - Easements and covenants should be created through simplified, streamlined processes, and the scope of the rights or restrictions created by them should be clear.
 - Purchasers should easily be able to discover the existence and scope of easements and covenants that burden the land.
 - Persons should not be deprived of their property rights without their consent, except in accordance with law and subject to being given notice and a right to object.
 - Easements and covenants are private rights that affect land use. In some circumstances, they can be created, modified or removed through public land-use planning decisions. The relationship between the private law of easements and covenants and public planning processes needs to be clear and accessible.
 - There should be a simple and inexpensive process for removing easements and covenants that have ceased to serve the purposes for which they were created.
- 1.6 These aims and principles are largely drawn from, and are consistent with, the terms of reference.

PREPARATION OF THIS PAPER

- 1.7 In the preparation of this consultation paper, we have been assisted by a consultative committee of experts in property law. The committee has provided valuable guidance on the identification and evaluation of the issues and reform options.
- 1.8 We have examined the history of reforms to Victorian law on easements and covenants, including the cases in which judges have interpreted relevant legislation.
- 1.9 In March 2009, the Department of Planning and Community Development released *Modernising Victoria's Planning Act: A discussion paper on opportunities to improve the Planning and Environment Act 1987*.² In December 2009 the Department released the Draft Planning and Environment Amendment (General) Bill. It received many public submissions on both the discussion paper and the Draft Bill, some of which discussed the law of easements and covenants.³ We have notified the people and organisations that made them that we will be taking the submissions on easements and covenants into account in our review.
- 1.10 This is not the first review of the law of easements and covenants in Victoria. A predecessor law reform body, the Law Reform Commission of Victoria, was given a reference on 1 May 1986 by the Victorian Attorney-General, the Hon Jim Kennan QC MP, 'to examine, report and make recommendations on...references in relation to land law'. In particular, the commission was asked to look at simplifying the rules governing easements and covenants; examine the desirability of replacing easements and covenants with a 'land obligation' as proposed by the English Law Commission; and consider whether rules for the extinguishment of easements and covenants could be simplified.
- 1.11 The commission reported to the Attorney-General in October 1992, and made a number of recommendations. The government did not respond to the report, which appears not to have been tabled in Parliament. We have taken account of the commission's findings and recommendations in our review.
- 1.12 Since 1992, there has been a great deal of law reform activity in other jurisdictions relating to the law of easements and covenants. Those which have issued law reform proposals in this area include: Tasmania,⁵ England and Wales,⁶ Ireland,⁷ Northern Ireland,⁸ Scotland,⁹ Western Australia,¹⁰ New Zealand,¹¹ New South Wales (NSW),¹² the Northern Territory,¹³ and Ontario.¹⁴ The American Law Institute has completed its Third Restatement on the Law of Servitudes,¹⁵ which reformulated the general principles of US law of easements and covenants.
- 1.13 The reviews, particularly those conducted in the United States and United Kingdom, have generated a stream of academic literature examining the law of easements and covenants from the perspectives of comparative law and legal theory. This has led to a change in the way of thinking about the law in this area. There is a greater emphasis on the functions served by particular rules, and whether those functions could be served by other rules with fewer problems.

SUBMISSIONS

- 1.14 Our research so far is only the beginning. The purpose of this paper is to encourage submissions about the issues we discuss and the questions we raise. Those submissions will guide our further research and consultations. We will then prepare a final report on the law of easements and covenants for the Attorney-General by 17 December 2010. Once tabled in Parliament, the report will be made publicly available.
- 1.15 We invite comments on this paper by 30 September 2010. For information about how to make a submission and our policy on publication, see page 4.

- 1 Attorney-General, 'Review to look at updating archaic property laws' media release, 15 August 2009, <www.premier.vic.gov.au/component/content/article/7808.html> accessed 22 March 2010.
- 2 A copy is available on the Department's website, at <[www.dse.vic.gov.au/CA256F310024B628/0/028BC635E993E2BACA25757D001C2BBA/\\$File/P+and+E+Act+Review+Discussion+Paper+Final.pdf](http://www.dse.vic.gov.au/CA256F310024B628/0/028BC635E993E2BACA25757D001C2BBA/$File/P+and+E+Act+Review+Discussion+Paper+Final.pdf)>.
- 3 Submissions are available on the Department's website for the review, at <www.dse.vic.gov.au/DSE/nrenpl.nsf/LinkView/300DEE310E06EC9FCA2574D60005024499FE6C07FF6B0199CA2572CF007BCEE9#key>.
- 4 Law Reform Commission of Victoria, *Easements and Covenants*, No 41 (1992).
- 5 Tasmania Law Reform Institute, *Law of Easements in Tasmania*, Final Report No 12 (2010).
- 6 Law Commission [England and Wales], *Easements, Covenants and Profits a Prendre: A consultation paper*, CP No 186 (2008).
- 7 Law Reform Commission [Ireland], *Report on Reform and Modernisation of Land Law and Conveyancing Law*, No 75 (2005); Law Reform Commission [Ireland], *Report on the Acquisition of Easements and Profits a Prendre by Prescription*, No 66 (2002); Law Reform Commission [Ireland], *Report on Land Law and Conveyancing Law: (7) Positive covenants over freehold land and other proposals*, 70 (2003).
- 8 Northern Ireland Law Commission, *Land Law Consultation Paper*, No 2 (2009).
- 9 Scottish Law Commission, *Report on Real Burdens*, No 181 (2000).
- 10 Law Reform Commission of Western Australia, *Final Report on Restrictive Covenants*, No 91 (1997).
- 11 New Zealand Law Commission, *A New Property Law Act*, Report 29 (1994).
- 12 New South Wales Law Reform Commission, *The Right to Support from Adjoining Land*, No 84 (1997).
- 13 Northern Territory Law Reform Committee, *Report on the Law of Property*, No 18 (1998).
- 14 Ontario Law Reform Commission, *Report on Basic Principles of Land Law*, (1996); Northern Territory Law Reform Committee, *Report on the Law of Property*, No 18 (1998).
- 15 American Law Institute, *Restatement (Third) of Property: Servitudes* (2000).

STRUCTURE OF THIS PAPER

- 1.16 The paper starts by outlining the general nature and characteristics of easements and the functions they serve. There are many ways that easements can be created, both on and off the Torrens title register. The different modes of creation and recording and their legal consequences are discussed in Chapters 3 – 8. With the exception of Chapter 4, the easements in this series of chapters are acquired by private parties over private land. Easements and similar rights acquired by public authorities for provision of services and utilities raise special issues, which are discussed in Chapter 4.
- 1.17 We raise a number of reform issues relating to the rules for creation of easements and their recording or registration. Since the options in the various chapters overlap, Chapter 8 draws them together to provide an integrated set of proposals for reform of the law relating to the creation of easements.
- 1.18 In Chapter 9, we discuss the limited provisions for administrative removal of easements by the Registrar. Broader mechanisms for the variation or removal of easements overlap with similar provisions for covenants. For this reason we leave them to the later chapters, turning next to the law of covenants.
- 1.19 Chapter 10 begins by raising questions and outlining different perspectives about the role and function of private land use regulation through covenants in relation to public planning. These issues underpin the consideration of reform issues relating to covenants in the following chapters.
- 1.20 In Chapter 11, we explain how restrictive covenants run with Torrens system land in Victoria and we discuss issues in relation to the legal effect of recording covenants on the register.
- 1.21 Chapter 12 discusses the question of whether the burden of covenants that impose positive obligations should be permitted to run with land, in the same way as restrictive covenants.
- 1.22 There has long been international agreement that a key problem with the law of covenants is its complexity. In Chapter 13, we propose the replacement of the common law and equitable rules relating to covenants with a new statutory property right, and consider some of the design issues that such a reform would pose.
- 1.23 In Chapter 14, we observe that changes in the way covenants are used are raising new difficulties in removing or varying covenants that are too widely drafted, or that no longer serve the intended purpose or are inconsistent with changed circumstances and requirements. We examine reform options from other jurisdictions for dealing with this problem.
- 1.24 Finally, Chapters 15 and 16 examine the principal methods for removing and varying easements and covenants. In Chapter 15, we identify significant problems in the provisions for removing easements and covenants under planning legislation. In Chapter 16, we propose that the existing provision for removal or variation of covenants by court order should be extended to easements, and that the criteria should be clarified and broadened.

Chapter 2

Functions of Easements

CONTENTS

Purpose and characteristics of Easements	14
Essential characteristics	14
Classes of Easements.....	14
Easements in Victoria.....	15
Creation of Easements.....	15
Appurtenant to land	15
Easements in gross	16
Approaches in other jurisdictions	16
Are easements in gross needed?	17

PURPOSE AND CHARACTERISTICS OF EASEMENTS

ESSENTIAL CHARACTERISTICS

- 2.1 An easement is a property right to use the land of another, without occupying it, for such purposes as the provision of access and the delivery of services.
- 2.2 Land is typically divided into lots, which can be owned and sold separately. To use the lots for purposes such as residential and commercial uses, the occupiers commonly need some accommodation from neighbouring lots. This is known as an easement. A common example of an easement would be a driveway across one lot allowing another lot access to a road. The lot over which the easement exists is called the 'servient land', and its owner is the 'servient owner'. The lot which benefits from the easement is called the 'dominant land', and its owner is the 'dominant owner'.
- 2.3 For a right to use the land of another to form an easement, it must have certain essential characteristics. These essential requirements are:¹
 - There must be dominant land and servient land.
 - The easement must accommodate the dominant land.²
 - The dominant and servient lots must not be owned and occupied by the same persons.
 - The right must be capable of being the subject matter of a grant.³
- 2.4 Additionally, the right must not amount to exclusive use of the servient land.⁴ For example, if an owner of land grants a neighbour the right to park in a lock-up garage on the land, the right could not be an easement if it excludes the owner from concurrently using the garage.⁵

CLASSES OF EASEMENTS

- 2.5 There are many uses of land that have been recognised by the courts as being capable of forming easements. The classes of easements are not closed, meaning that courts are still able to recognise new kinds of rights to use land as being easements, so long as they contain the essential characteristics noted above.⁶
- 2.6 There are several broad classes of land use which are accepted as capable of being easements and which are currently in wide use for a variety of purposes. These are:
 - easements of access or way;⁷
 - easements of light and air;⁸
 - easements of support;⁹ and
 - easements for the placement of objects on, above or under the servient land.¹⁰
- 2.7 Because the classes of easements are not closed, the purposes for which easements could be created and used are generally not limited.¹¹ Nonetheless, easements are primarily used to enhance the use or enjoyment of the dominant land by making limited use of the servient land. For example, an easement of right of way will allow people to enter and depart from the dominant land by a particular route, while an easement of support may provide the security necessary to construct a building.

EASEMENTS IN VICTORIA

- 2.8 The law of easements in Victoria derives from English law and is broadly similar to the law of other Australian jurisdictions. The rules that regulate easements are largely the rules of common law, but Victorian legislation has added new ways of creating, varying and extinguishing easements.
- 2.9 The introduction in Victoria of the Torrens system of registered title to land in 1862 had less impact on the law of easements than in most states, since easements do not have to be registered in Victoria. Because many easements are unregistered it is impossible to determine how many exist, and of what types.

CREATION OF EASEMENTS

- 2.10 There are many ways in which easements can be created. These can be divided into three categories:
- easements which are expressly created, such as in a transfer on sale (express easements);
 - easements which arise by implication (implied easements); and
 - easements which arise from 20 years use under the rule of prescription (prescriptive easements).
- 2.11 We deal with each of these three categories respectively in Chapter 3, Chapter 6 and Chapter 7. We also propose some new modes of creation to replace and simplify existing ones. In Chapter 5, we discuss the recording or registration of easements. Since the issues dealt with in Chapters 3–7 overlap, we bring the key proposals together in Chapter 8, as an integrated scheme of proposed reforms.

APPURTENANT TO LAND

- 2.12 Easements are not merely contractual rights, even if they are created by an agreement.¹² Once created, they are property rights attached to the dominant land. The legal term for this is that they are ‘appurtenant’ to the land. The right to use the easement can be exercised by anyone who derives title from the dominant owner. This means that when the dominant land is sold, the new owner acquires the easement along with the land. The new dominant owner can exercise the rights enjoyed by the previous owner without needing to enter into a new agreement with the servient owner.
- 2.13 Strictly speaking, the benefit of the easement does not attach to the land itself but to an estate or interest in the land. Usually this is the freehold estate, but if the easement is acquired by a tenant of the dominant land, it attaches to the tenant’s leasehold estate.¹³ If the tenant assigns the lease to another person, the assignee becomes the dominant owner, because the assignee ‘derives title’ from the tenant who first acquired the easement. For the sake of simplicity, we will speak of the ‘dominant owner’, except where the position of a tenant needs to be separately considered.
- 2.14 Just as the benefit of the easement runs with the dominant land, the burden of the easement runs with the servient land. A purchaser, mortgagee or tenant who derives title from the servient owner who granted the easement takes the land subject to the easement.¹⁴

- 1 *Re Ellenborough Park* [1956] Ch 131; *Riley v Penttila* [1974] VR 547; see further, Adrian Bradbrook and Marcia Neave, *Easements and Restrictive Covenants in Australia* (2nd ed) (2000) 3.
- 2 This requirement means that the easement must be for the benefit of the dominant land and be connected to its use. See eg, Peter Butt, *Land Law* (6th ed) (2009) 443.
- 3 To meet this requirement, the easement must be capable of being granted by deed. One of the primary requirements for this is that the easement not be too vague or indefinite. See eg, *ibid* 446.
- 4 *Re Ellenborough Park* [1956] Ch 131; *Riley v Penttila* [1974] VR 547; Bradbrook and Neave (2000), above n 1, 5.
- 5 Michael Weir, ‘Easements for Storage and Parking: Time for a rethink?’ Bennett Moses (ed) *Property and Security: Selected essays* Chapter 12, 251.
- 6 Bradbrook and Neave (2000), above n 1.
- 7 This class of easements would include rights of footway, carriageway and way to cross over the servient lot to get to the dominant lot.
- 8 This class of easements would allow access of light or air across the servient lot to certain parts of the dominant lot, usually to buildings.
- 9 This class of easements prevents changes to the servient lot, such as excavation, from removing support for buildings or other structures on the dominant lot.
- 10 This class of easements allows objects, such as overhanging roofs or sewage pipes, to extend from the dominant land into the servient land.
- 11 It is possible that the classes of negative easements are closed in Australia. See eg, Bradbrook and Neave (2000), above n 1, 31–2; *Phipps v Pears* [1965] 1 QB 76. Negative easements, such as easements of light, are easements that prevent uses of the servient land, rather than allow use of the servient land.
- 12 While many easements are created by an agreement or conveyance, there are other ways they can be created: see Chapters 3–7.
- 13 *Simmons v Dobson* [1991] WLR 720, 723 (Fox LJ); *Wall v Collins* [2007] EWCA Civ 444.
- 14 A tenant in possession can also grant an easement to an owner or occupier of neighbouring land: ‘Any individual can create an easement to the extent that it is consistent with her or his power of alienation. The fact that he or she may not hold an unencumbered fee simple estate is irrelevant’: Adrian Bradbrook et al, *Australian Real Property Law* (4th ed) (2007) 756. See also J Gaunt and P Morgan, *Gale on Easements* (18th ed) (2008) [3.04].



EASEMENTS IN GROSS

- 2.15 As noted above, for an easement to be created, there must be both dominant land and servient land, and the easement must ‘accommodate’ or benefit the dominant land.¹⁵ An easement benefits the dominant land if, for example, it provides a means of access to a road, beach or other facility or to the provision of services, enables a beneficial use of the dominant land, or benefits a business which is carried out on the dominant land.¹⁶
- 2.16 What the rule excludes is an easement that confers only a personal benefit on the holder.¹⁷ If, for example, a university student wishes to acquire the right to park on someone else’s land in order to shorten her travelling time to the university, the easement benefits her personally but does not benefit her in the use of land belonging to her. This is what is called an ‘easement in gross’.
- 2.17 There are different theories about why the common law does not allow easements in gross. One explanation is that where an easement confers only a personal benefit and does not enhance the use of other land, there is insufficient justification for creating property rights that burden land for an indefinite period.¹⁸ By prohibiting easements in gross, the law limits the duration of arrangements that are created for the more transient purpose of conferring personal benefits upon individuals.
- 2.18 Another function of the rule against easements in gross may be to prevent over-burdening of the servient land by limiting the class of people who can gain the benefit. Without the requirement of dominant land, the benefit of easements could be assigned, subdivided and shared among an unlimited number of people, all of whom would be entitled to use the servient land.¹⁹ As a leading English text observes:²⁰

The confinement of user to the dominant owner (and his agents or invitees) may, in some circumstances, serve the ecologically important purpose of protecting fragile land from excessive and damaging traffic.

- 2.19 The general approach in Australia is that easements in gross are recognised only under legislation. Where an authority that provides essential services requires an easement over land in order to pass through its lines, cables, or pipes, the legislation regulating the relevant industry usually empowers the authority to acquire an easement in gross. These easements are discussed in Chapter 4.

APPROACHES IN OTHER JURISDICTIONS

- 2.20 The general restriction on easements in gross has been questioned.²¹ The Ontario Law Reform Commission found that the rule was unjustified.²²
- 2.21 In the US, an easement in gross can be created and will be enforceable against subsequent owners of the servient land who acquire with notice of it.²³ American law generally permits the assignment of easements in gross if they are of a commercial character.²⁴ Easements in gross are now permitted in New Zealand,²⁵ where the benefit of the easement can be transferred,²⁶ and in the Northern Territory.²⁷ Tasmania allows car parking easements to exist as easements in gross.²⁸
- 2.22 It is likely that, even if easements in gross were permitted in Victoria, their use would be quite limited. In New Zealand, most easements are appurtenant to land rather than in gross.²⁹

2.23 In the US, most easements in gross are held by public authorities for the provision of services. As we have noted, Victoria provides for these easements by special legislation. A secondary use in the US is to enable private organisations concerned with heritage preservation and conservation to advance their purposes through land use agreements over private land.³⁰ Victoria has legislation providing for conservation, heritage and planning agreements with landowners.³¹ In the US, easements in gross are also used by homeowner associations to enforce restrictions and to collect dues.³² In Victoria, many of these functions can be performed by owners' corporations acting under the *Owners Corporations Act 2006* (Owners Corporations Act).³³

ARE EASEMENTS IN GROSS NEEDED?

2.24 It is difficult to find examples of easements in gross that would serve useful purposes not already provided for by legislation in Victoria. McLean suggests it should be possible to obtain an easement to land helicopters, and that a trucking company might wish to acquire an easement for the purpose of truck rest stops.³⁴ A right to erect advertising signs, other than for the benefit of a business conducted on nearby land, would also require an easement in gross.³⁵ Morgan proposes that an easement in gross for parking would be useful.³⁶

2.25 The Tasmania Law Reform Institute in its recent review of easements received no submissions from the public on the question of easements in gross.³⁷ Submissions from the Law Society of Tasmania and Hydro Tasmania expressed opposition to easements in gross, arguing that the current rule serves the public interest in preventing the over-burdening of land with interests that exist for an unlimited period of time.³⁸

2.26 The Institute accepted the force of these arguments, and also found that the benefits of easements in gross could be obtained through alternative means such as statutory provisions, contracts, licences and leases.³⁹ It recommended that easements in gross should not be permitted.⁴⁰

Should the current restriction on easements in gross be relaxed?

- 15 *Re Ellenborough Park* [1956] 1 Ch 131 (EWCA). The principles laid down in that case were adopted by Gillard J in *Riley v Penttila* [1974] VR 547, 557; see also *Gapes v Fish* [1927] VLR 88, 90; *Clos Farming Estates v Easton* [2002] NSWCA 389.
- 16 Cases in which an easement was held to accommodate dominant land where it benefited a business conducted on the dominant land include: *Copeland v Greenhalf* [1952] 1 Ch 488; *Moody v Steggles* (1879) 12 Ch D 261; *Clos Farming Estates v Easton* [2002] NSWCA 389.
- 17 In *Gallagher v Rainbow* (1994) 179 CLR 624, 633 it was said that an easement is 'no mere personal right' (Brennan, Dawson and Toohey JJ).
- 18 Brendan Edgeworth, 'The Numerus Clausus Principle in Contemporary Australian Property Law' (2006) 32 *Monash University Law Review* 387 394–5; Susan French, 'Design Proposals for the New Restatement of the Law of Property Servitudes' (1988) 21 *UC Davis L Rev* 1213, 1222.
- 19 Kevin Gray and Susan Gray, *Elements of Land Law* (5th ed) (2008) [5.1.25].
- 20 *Ibid* [5.1.25] referring to *British Columbia (Minister of Environment Lands and Parks) v Thomas* (1998) 161 DLR (4th) 74, 85.
- 21 Albert J McLean, 'The Nature of an Easement' (1966) 5 *U West Ont LR* 32; Michael F Sturley, 'Easements in Gross' (1980) 96 *Law Quarterly Review* 557; Ontario Law Reform Commission, *Report on Basic Principles of Land Law*, (1996) 140–6; Giles Morgan, 'Easements in Gross Revisited' (1999) 28 *Anglo-American Law Review* 220; Susan French, 'Towards a Modern Law of Servitudes: Reweaving the ancient strands' (1982) 55 *Southern California Law Review* 1261, 1308.
- 22 Ontario Law Reform Commission (1996), above n 21, 146–7.
- 23 Jesse Dukeminier and James Krier, *Property* (5th ed) (2002) 933.
- 24 *Ibid* 941; French (1982), above n 21, 1268.
- 25 *Property Law Act 2007* (NZ) s 291.
- 26 *Property Law Act 2007* (NZ) s 291(4).
- 27 *Law of Property Act 2000* (NT) ss 155, 156. See also *Land Title Act 2000* (NT) ss 91, 92(2).
- 28 *Conveyancing and Law of Property Act 1884* (Tas) s 34G.
- 29 Ontario Law Reform Commission (1996), above n 21, 145 citing GW Hinde, DW McMorland and PBA Sim, *Land Law* (1979) 655.
- 30 French (1982), above n 21, 1287–8.
- 31 See for example: Cultural Heritage Agreements under the *Aboriginal Heritage Act 2006* (Vic) ss 68–77; s 173 agreements under the *Planning and Environment Act 1987* (Vic); Land Management Notices under the *Catchment and Land Protection Act 1994* (Vic) ss 37–40; Land Management Co-operative agreements under the *Conservation, Forests and Lands Act 1987* (Vic) ss 69–72; *Victorian Conservation Trust Act 1972* (Vic) s 3A.
- 32 French (1982), above n 21, 1287–8.
- 33 *Owners Corporations Act 2006* (Vic) ss 18(2), 23, 138. These provisions are discussed in Chapter 12.
- 34 McLean (1966), above n 21, 40; Sturley (1980), above n 21, 559.
- 35 Ontario Law Reform Commission (1996), above n 21, 142. In *Clapham v Edwards* [1938] 2 All ER 507 it was held that a grant for advertising purposes, not being for the benefit of a business conducted on the dominant land, could not be an easement as the benefit is in gross.
- 36 Morgan (1999), above n 21, 224.
- 37 Tasmania Law Reform Institute, *Law of Easements in Tasmania*, Final Report No 12 (2010).
- 38 *Ibid* [1.17.11]–[1.17.15].
- 39 *Ibid* [1.17.16].
- 40 *Ibid* [1.17.17].

Chapter 3

Express Creation of Easements

CONTENTS

Express grant or reservation	20
Express subdivisional easements created by plan	21
Interpreting express subdivisional easements	22
Private compulsory acquisition	23
Acquisition of water access rights: section 235 of the Water Act	23
Acquisition of easements under section 36 of the Subdivision Act	23
Analysis of court imposed easement provisions	26
Reform proposal	29

Express Creation of Easements



- 3.1 This Chapter examines three of the different methods of creating easements expressly, and identifies reform issues and options. The methods of creation we discuss here are:
- by grant or reservation in an instrument (such as a deed, transfer or other written document) executed by the owners of the servient and dominant land;¹
 - by notation of an easement on a plan of subdivision (an express subdivisional easement); and
 - by private compulsory acquisition of easements by landowners under provisions which are unique to Victoria.
- 3.2 One means of express creation is left for a later chapter. Victoria has many statutes which authorise the compulsory acquisition of easements in gross by public bodies and utility companies. These easements are discussed in Chapter 4, which deals with easements for utilities and services.

EXPRESS GRANT OR RESERVATION

- 3.3 Creating an easement by 'grant' means that the servient owner grants the dominant owner an easement over his or her land for the benefit of the dominant land.
- 3.4 An easement is created by 'reservation' when a vendor conveys land to a purchaser but reserves an easement over that land, for the benefit of other land that the vendor owns.
- 3.5 In both cases, the easement is created by an instrument such as a transfer or deed, and may be recorded by the Registrar on the folios of the servient and dominant land. The effect of recording an easement is discussed in Chapter 5.
- 3.6 Problems can arise in interpreting instruments that are ambiguous or omit important terms. Even express easements that do not appear to be ambiguous on their face can give rise to difficulties of interpretation when unforeseen circumstances arise.
- 3.7 The terms contained in instruments vary considerably. They are often drafted on the basis of unstated assumptions that reflect the understandings and expectations of the original parties at the time the easement was granted. They may be unclear to people reading them many years later, particularly if the physical features of the land or the uses of the land have changed.
- 3.8 Following the decision of the High Court in *Westfield Management Ltd v Perpetual Trustees Co Ltd*,² easements must be interpreted by examining the terms of the instrument. Most other evidence showing what the original parties intended is excluded.³ The Court's ruling in *Westfield* represented a shift in interpretation, which increases the importance of clear and consistent drafting of easements.
- 3.9 The number of easements created by ambiguous or inadequately drafted instruments could be reduced in Victoria by introducing legislation which sets out standard wording. Statutes in other states specify standard form easements, which are effectively statutory definitions of particular types of easements. Although using them is not mandatory,⁴ standard form easements are adopted when creating the overwhelming majority of new easements in jurisdictions which provide for them.⁵
- 3.10 According to the Tasmania Law Reform Institute, at least 28 different types of easement are currently covered by standard form legislation in Australian jurisdictions.⁶ The most commonly adopted forms are for drainage, sewerage, water supply, electricity supply, gas supply, transmission of television signals by underground cable, party walls, eaves and gutters, right of footway and right of carriageway (vehicular access).⁷

- 3.11 Statutory standard form easements are useful because they save time and expense in conveyancing, make easements easier to understand, anticipate issues that may arise in the operation of the easement, and create more certainty as to the effect of the easements by standardising the wording.⁸ Recently the Tasmania Law Reform Institute recommended that steps be taken to extend and modernise statutory standard form easements in Tasmania.⁹ It made this recommendation partly on the basis that easements drafted in simple, modern language would assist in the early resolution of easement disputes.¹⁰
- 3.12 While Victoria has been slower than other states to adopt standard form easements, there is one example. Section 72(3) of the *Transfer of Land Act 1958* (Transfer of Land Act) provides that, when an easement is created using the term 'right of carriageway', the words will be interpreted as if they were the same as those contained in schedule 12 of the Act. The language of schedule 12 is rather convoluted, and appears somewhat outdated in its reference to pre-motorised means of transport. There are better examples of well-drafted standard form easements in the legislation of other states.¹¹

Should standard wording for particular types of easements be provided by statute? If so, which types?

EXPRESS SUBDIVISIONAL EASEMENTS CREATED BY PLAN

- 3.13 Most easements in Victoria are created upon approval or registration of a plan of subdivision or consolidation. Subdivision is the division of a larger parcel into smaller lots; consolidation brings together two or more lots to form a larger lot. For the purposes of this paper, we will refer only to subdivision.
- 3.14 Victoria has an integrated planning process under which a proposed subdivision requires planning approval and registration before any lots are sold.¹² The planning authority (usually the local council) sends the plan of subdivision to various 'referral authorities' such as water authorities, which can require that the plan include certain easements in gross or restrictions for the purpose of providing essential services.
- 3.15 Two different but overlapping statutory provisions enable the creation of subdivisional easements by plan of subdivision:
- section 12(1) of the *Subdivision Act 1988* (Subdivision Act); and
 - section 98 of the *Transfer of Land Act*.
- 3.16 A plan of subdivision must specify all proposed and existing easements burdening the land and describe the benefited land or parties.¹³ Section 24(2)(d) of the Subdivision Act states that the easements are created, varied or removed as specified upon registration of the plan.
- 3.17 Section 98 of the *Transfer of Land Act* states that the proprietor of an allotment of land shown on an approved or registered plan of subdivision is entitled to the following kinds of easements where shown on the plan as appurtenant to the allotment:

all such easements of way and drainage and for party wall purposes and for the supply of water gas electricity sewerage and telephone and other services to the allotment or the lot on over or under the lands appropriated or set apart for those purposes respectively on the plan of subdivision as may be necessary for the reasonable enjoyment of the allotment or the lot and of any building or part of a building at any time thereon.

- 1 *Transfer of Land Act 1958* (Vic) s 72.
- 2 (2007) 239 ALR 75.
- 3 The extent to which this decision has changed the approach to interpretation, and the limited scope for admitting extrinsic evidence, are analysed by Michael Weir, 'The Westfield Case: A Change for the Better?' (2009) 21 *Bond L Rev* 182.
- 4 Tasmania Law Reform Institute, *Law of Easements in Tasmania*, Final Report No 12 (2010) 61.
- 5 Law Commission [England and Wales], *Easements, Covenants and Profits a Prendre: A Consultation Paper*, CP No 186 (2008), 38, noting that over 90% of new easements in South Australia and Tasmania, and 99% in the Northern Territory, are standard form easements.
- 6 Tasmania Law Reform Institute (2010), above n 4, 62–3. The standard form easements are contained in: *Transfer of Land Act 1893* (WA) sch 9A; *Real Property Act 1886* (SA) sch 5, 6; *Law of Property Act 2000* (NT) sch 3; *Conveyancing Act 1919* (NSW) sch 8; *Conveyancing and Law of Property Act 1884* (Tas) sch 8; *Transfer of Land Act 1958* (Vic) sch 12.
- 7 Tasmania Law Reform Institute (2010), above n 4, 62–3.
- 8 Law Commission [England and Wales] (2008), above n 5, 38.
- 9 Tasmania Law Reform Institute (2010), above n 4, 65.
- 10 *Ibid* 65.
- 11 See eg, the 'right of carriageway' contained in *Conveyancing Act 1919* (NSW) sch 8.
- 12 See eg, *Sale of Land Act 1962* (Vic) s 9AA; *Planning and Environment Act 1987* (Vic) s 6, and generally, *Subdivision Act 1988* (Vic).
- 13 *Subdivision Act 1988* (Vic) s 12(1)(a) and (b).



- 3.18 Both provisions therefore operate to create easements that are shown on a plan of subdivision.¹⁴ Section 98 of the Transfer of Land Act creates specified types of easements, if they are shown on a plan of subdivision as being in favour of the dominant land and are reasonably necessary for the enjoyment of the land. It specifically creates rights in the dominant owner. Section 12 of the Subdivision Act, on the other hand, creates all the easements shown on a plan of subdivision. Therefore, it seems that section 12 generally has a broader application than section 98, insofar as it creates all easements shown on the plan, and allocates the burden as well as the benefit.
- 3.19 The Registrar's office advises that section 98 of the Transfer of Land Act was retained as a transitional provision in order to give continuing effect to easements that were created on plans of subdivision prior to the commencement of the Subdivision Act. Section 98 provides that easements that were created on approval or registration of a plan of subdivision are deemed to have been appurtenant at all times to the lot.
- 3.20 However, section 12 of the Subdivision Act states that easements that are specified or implied into a plan are in addition to those under section 98(a) of the Transfer of Land Act, while section 98(b) of the Transfer of Land Act does not apply to plans registered under the Subdivision Act. This appears to allow section 98(a) to continue to create easements over new registered plans of subdivision in addition to those created under section 12.
- 3.21 Since the overlap between section 12 of the Subdivision Act and section 98 of the Transfer of Land Act is confusing, some consolidation is required. In particular, it is problematic to have two provisions with concurrent operation which are similar in operation, but have potentially significant differences in wording. There should be only one provision that creates easements upon registration of future plans of subdivision. Any consolidating provision should be drafted with care to ensure that it does not narrow the scope of any rights already created under either Act.

INTERPRETING EXPRESS SUBDIVISIONAL EASEMENTS

- 3.22 As noted above, easements created by deed, transfer or other instrument are often difficult to interpret. Ambiguities can also arise in express subdivisional easements created by notation on a plan. For example, in *Mantec Thoroughbreds Pty Ltd v Batur*,¹⁵ the court was called on to determine the nature and scope of an easement noted on a registered plan. The easement had been marked on a diagram in the plan with the label 'E-1' and the word 'easement'. E-1 was further described in the plan as a 'way'. The dispute before the court related to the scope of the easement and particularly to which types of traffic the easement allowed over the servient land.¹⁶
- 3.23 To avoid ambiguities in easements created expressly by plan, we propose that statutory definitions or standard form easements be provided, linked to certain notations in a plan. For example, a statute could provide that an easement marked E-1 'easement' on a diagram in a plan of subdivision is a right of carriageway, expressed in a specified form of wording.

PRIVATE COMPULSORY ACQUISITION

- 3.24 Unlike property legislation in several other states, Victorian legislation does not provide for court imposed easements, which enable a landowner to acquire necessary easements on payment of compensation to the servient owner. Instead, Victoria has two unique provisions which set out what we describe as a process of ‘private’ compulsory acquisition, in that the landowner may acquire an easement without relying on the consent of the servient owner.
- 3.25 The provisions are section 235 of the *Water Act 1989* (Water Act) and section 36 of the Subdivision Act. Both provisions are of very limited application, and the procedures and criteria for exercising the powers are inadequately specified. Following our discussion below, we provisionally propose that these provisions should be replaced with broader provisions for court imposed easements.

ACQUISITION OF WATER ACCESS RIGHTS: SECTION 235 OF THE WATER ACT

- 3.26 Under section 235 of the Water Act, landowners can apply to compulsorily acquire rights of access to the land of another owner (the servient owner) for drainage, water supply or salinity mitigation. The applicant must first give notice to the servient owner, then apply to the Minister, who must appoint an authority to decide the matter. The appointed body must then decide whether the right of access should be granted, taking into account:
- whether any damage will be caused to the servient property; and
 - whether the owner can be fully compensated for any damage.
- 3.27 A decision made under section 235 can be appealed to the Victorian Civil and Administrative Tribunal (VCAT).¹⁷ Under section 236, for an agreement or a decision creating a right of access to have effect, it must be recorded by the Registrar. The rights of access are binding on successors in title and are therefore similar to easements.¹⁸
- 3.28 The drafting of section 235 is deficient in many respects. It provides an administrative rather than a judicial mechanism for the acquisition of access rights without consent of the servient landowner. There is no provision for applications to be heard by a suitably qualified person or body. Instead, the provision relies on Ministerial appointment of a determining ‘authority’ on a case-by-case basis. The procedures are rudimentary. The criteria for determining an application are inadequately specified. They refer only to whether damage may be caused and whether the servient owner may be fully compensated. There are no principles to guide the assessment of compensation if a right of access is granted.

ACQUISITION OF EASEMENTS UNDER SECTION 36 OF THE SUBDIVISION ACT

- 3.29 Under section 36 of the Subdivision Act, a landowner may compulsorily acquire an easement over another lot in their subdivision, or in the vicinity of their land, if granted leave by VCAT. The provisions for the acquisition and payment of compensation by an acquiring authority as set out in the *Land Acquisition and Compensation Act 1986* (Land Acquisition and Compensation Act) apply to the acquisition of the easement by a landowner.¹⁹
- 3.30 Before making an application to VCAT, the landowner must seek a written statement of recommendation from a council or referral authority, stating that it considers:²⁰
- that the economical and efficient subdivision or consolidation (whether existing or proposed) or servicing of, or access to, land covered...requires the owner of the land...to...acquire or remove an easement.*

14 The sections also create implied subdivisional easements not shown on the plan. These are discussed in Chapter 6.

15 [2009] VSC 351.

16 *Mantec Thoroughbreds Pty Ltd v Batur* [2009] VSC 351 [66].

17 *Water Act 1989* (Vic) s 235(6).

18 *Water Act 1989* (Vic) s 236(2).

19 *Subdivision Act 1988* (Vic) s 36(2)(a)(ii).

20 *Subdivision Act 1988* (Vic) s 36(1).



- 3.31 In making the recommendation, the council or referral authority must believe that the removal will not result in ‘an unreasonable loss of amenity in the area affected’. There is also a curiously worded provision which states that it is ‘the intention of Parliament’ that councils or referral authorities ‘should make an assessment of the engineering and amenity aspects of the matter’.²¹
- 3.32 A statement of recommendation can only be made by a council or referral authority when it is in the course of considering a proposed amendment to a planning scheme or an application for a permit, implementing an amendment to a planning permit, or imposing a condition in a permit.²² In deciding whether to make the recommendation, the council or referral authority is not required to notify anyone affected, nor hear objections.²³

PROBLEMS WITH SECTION 36

- 3.33 While section 36 provides a mechanism for enabling landowners to acquire easements, there are problems with the operation of the section. These include the procedural complexity, the narrow scope, the stringency of the test for making a recommendation, and the lack of criteria for the determination of an application by VCAT. There are also conceptual difficulties with the model of private compulsory acquisition and the use of the Land Acquisition and Compensation Act.

MULTI-STEP APPEALABLE PROCESS

- 3.34 The provision creates procedural complexity with the potential for multiple steps in different jurisdictions. Section 36(1) requires a statement of recommendation by the council or referral authority before an application can be made to VCAT. The requirement may be intended to prevent unmeritorious applications to VCAT, but its effectiveness as a screening mechanism is limited. A decision by a council or referral authority to either grant or decline to make a statement is reviewable by VCAT, which, on appeal, can choose to make the statement itself.²⁴ This means that, regardless of whether or not the council or referral authority makes the statement in the first instance, it is possible that the matter will be decided on appeal to VCAT.
- 3.35 An application under section 36 may result in several discontinuous hearings in different forums. An appeal from the decision of a council or referral authority will be heard by the Planning List of VCAT,²⁵ while an application for leave to acquire the easement will be heard by the Real Property List.²⁶ If leave to acquire an easement is granted and the owner of the servient land subsequently appeals the assessment, the appeal on compensation will be heard by the Land Valuation List.²⁷

NARROW SCOPE

- 3.36 Section 36, unlike provisions for court imposed easements in other states, does not apply to all property for which an easement might be needed. While the intent of the section may be to allow for the creation of easements pursuant to permit applications, there does not appear to be any compelling reason to limit the creation of easements to those instances where permits are sought. The section does not provide for cases where a permit is not required, such as where the landowner’s proposed use or development is permitted under the planning scheme without a permit requirement.
- 3.37 Additionally, the scope for requiring an easement is limited to the subdivision, consolidation, servicing of or access to the land. This formulation does not cover all situations in which a landowner may need to acquire an easement over other land. For example, an easement might be required to allow for the drainage of storm water from the dominant land over the servient land.²⁸ Such an easement may be necessary, but may not strictly be for access to or servicing of the land.

STRINGENT TEST

- 3.38 The test for the making of a recommendation under section 36 is framed in terms of the easement being 'required' for the economical and efficient subdivision, consolidation, servicing or access of the dominant land. In a leading decision interpreting section 36, it was held that 'required' means 'necessary or indispensable, rather than merely useful or desirable or convenient'.²⁹ Additionally it was held that the decision maker must be satisfied that both the economical and efficient use of the land require the easement.³⁰
- 3.39 The test is therefore relatively stringent, requiring that a use be necessary in both an economic and in an efficiency sense. For example, in *Barnett v Frankston* the Tribunal held that even where an easement is necessary for the efficient use of a business, the applicant would still need to establish that the business would not be 'economically viable' if the easement is not granted.³¹
- 3.40 This stringency might be beneficial in the sense that it limits easements to those strictly necessary for the economical and efficient use of the land, but it excludes easements for uses of the land that are beneficial but not strictly necessary. For example, improvements to the land by erecting buildings might be extremely economically beneficial, but neither necessary nor 'efficient'.
- 3.41 The tests do not directly address the impact of the easement on the servient land. The requirement is for the council or referral authority to believe that the removal or acquisition will not result in an unreasonable loss of amenity to the area. The analysis of the impact therefore focuses on the area rather than on the servient land. It also focuses on loss of amenity to the area rather than other direct forms of loss, such as economic loss, to the servient land.

LACK OF CRITERIA FOR VCAT DECISION

- 3.42 Even where the tests are met and the council or referral authority makes the statement of recommendation, this only allows the applicant to apply to VCAT for leave to acquire the easement. In other words, the tests are only a threshold requirement. The section provides no criteria, other than an implied general 'reasonableness' requirement, for the exercise of VCAT's discretion to grant leave to acquire the easement.³² The lack of statutory criteria makes it difficult for parties to assess their likelihood of success in an application before VCAT.

CONFLATING PLANNING AND PRIVATE LAW

- 3.43 There are problems with the basic conception as well as the drafting of section 36. It blurs the boundaries of property law and planning law, private law and public law. It casts private acquirers in the role of an 'acquiring authority' for purposes of the Land Acquisition and Compensation Act,³³ an Act which is designed for the acquisition of property by public authorities.
- 3.44 The requirement that the landowner obtain a statement of recommendation from a planning or referral authority gives those bodies a role in determining whether one landowner should be allowed to compulsorily acquire an easement from another. This tends to create confusion as to the nature of section 36, with some parties believing it to be part of the permit process.³⁴ It also means that the criteria for the decision are specified in terms of planning considerations, such as the amenity of the general area, rather than balancing the interests of the affected landowners.

- 21 *Subdivision Act 1988* (Vic) s 36(1AA).
- 22 *Subdivision Act 1988* (Vic) ss 36(1)(a), 36(1)(b), 36(1)(c).
- 23 *Subdivision Act 1988* (Vic) s 36(1AA).
- 24 *Clarcor Pty Ltd v Maroonah CC* [2003] VCAT 435 [15]–[16].
- 25 See eg, *JT Snipe Investments Pty Ltd v Hume CC* [2007] VCAT 1831.
- 26 See eg, *LoGuidice v Yarra CC* [2004] VCAT 1783; *Victorian Civil and Administrative Tribunal Rules 2008* sch 1, pt 2, cl 10.6.
- 27 See eg, *Palomero v Wyndam No 1* [1996] VICCAT 517; *Victorian Civil and Administrative Tribunal Rules 2008* r 5.01(4).
- 28 See eg, *Gordon v Shaheen* [2005] NSWSC 1328; *Khattar v Weise* [2005] 12 BPR 23, 235.
- 29 *JT Snipe Investments Pty Ltd v Hume CC* [2007] VCAT 1831 [14].
- 30 *Barnett v Frankston CC* [2005] VCAT 1985 [90].
- 31 *Barnett v Frankston CC* [2005] VCAT 1985 [90].
- 32 *JT Snipe Investments Pty Ltd v Hume CC* [2007] VCAT 1831 [14].
- 33 *Subdivision Act 1988* (Vic) s 36(2)(ii).
- 34 In *Zullaphella Pty Ltd v Stonnington CC & Ors* [1999] VCAT 200, s 36 was confused with a permit application that would allow for the removal of an easement under s 23 of the *Subdivision Act*. Section 23 resembles s 36 in the sense that both sections deal with permits and the creation, removal and variation of easements. Section 23 is a mechanical provision which simply gives effect to permits or planning scheme amendments related to easements and restrictive covenants. While the language of s 23 indicates that it covers the creation, variation or removal of easements and covenants, its primary purpose appears to be to allow the removal or variation of easements and covenants over servient land by the servient landowners.



COMPARISON WITH COURT IMPOSED EASEMENTS

- 3.45 As noted above, several Australian jurisdictions have legislation that empowers courts or tribunals, on application by a landowner, to order the grant of easements that are reasonably necessary for the use of the applicant's land.³⁵ The provisions serve a similar function to private compulsory acquisition under section 36 of the Subdivision Act, but differ substantially in their procedures, criteria and scope.
- 3.46 One difference is that the right to apply to VCAT for leave to acquire an easement under section 36 is generally confined to the context of a planning change or permit application, and requires a form of planning approval. An application for a court imposed easement in other states is not limited to a planning context and requires no prior approvals from authorities. If the applicant contends that the acquisition of an easement is necessary for a proposed use of the land or to obtain a planning permit, it is up to the applicant to present evidence showing why the easement is necessary.
- 3.47 Another difference lies in the criteria to be applied in determining an application to acquire an easement. For court imposed easements, the 'reasonable necessity' of the easement is generally balanced against the public interest, while for section 36 the 'strict necessity' of the easement is balanced against the amenity of the 'area affected'.
- 3.48 It would be possible to either modify section 36 to incorporate some of the mechanics of these provisions, or to replace the section entirely with a mechanism similar to those adopted in other jurisdictions. Section 36 has had a history of amendments, but none has addressed the basic design problems outlined above. It may, therefore, be beneficial to adopt a completely new mechanism which is based on the more inclusive, fully specified and tested models that exist in other Australian jurisdictions. The following paragraphs outline the general operation of the provisions.

ANALYSIS OF COURT IMPOSED EASEMENT PROVISIONS

- 3.49 Two features of court imposed easements created in other jurisdictions are that the application must meet criteria set out in legislation, and that the court must ordinarily order compensation for the servient owner if an easement is imposed. We discuss these features below. The Tasmania Law Reform Institute has noted that in jurisdictions where the right to prescription has been restricted or removed, the use of court ordered easement provisions is not uncommon.³⁶
- 3.50 In the discussion below, we use the term 'court imposed easements' in a generic sense to refer to the creation of easements by judicial order, without consent but subject to compensation. In this context, the term also includes such orders made by tribunals. We also use the term to include the creation of non-possessory use rights which run with land in the same way as easements, even if the legislation calls them a 'right of user', 'right of access' or some other term.

STATUTORY CRITERIA

- 3.51 The jurisdictions that have adopted a statutory mechanism for court imposed easements generally set out similar requirements to be met before an easement can be granted. For example, in NSW, the court³⁷ can only make an order imposing an easement over land where it is 'reasonably necessary for the effective use or development of other land that will have the benefit of the easement'.³⁸ In making such an order, the court must be satisfied that:³⁹
- (a) *use of the land having the benefit of the easement will not be inconsistent with the public interest; and*
 - (b) *the owner of the land to be burdened by the easement... can be adequately compensated for any loss or other disadvantage that will arise from imposition of the easement; and*
 - (c) *all reasonable attempts have been made by the applicant for the order to obtain the easement or an easement having the same effect but have been unsuccessful.*
- 3.52 There is clear authority under NSW case law that long use is a relevant factor in determining whether to grant an easement under section 88K.⁴⁰ In *Marshall v Council City of Wollongong*, Bryson J stated that:⁴¹
- I regard it as a relevant consideration, when acting under s 88K, that the plaintiff's application is made in circumstances which, subject to proof, could give rise to an easement by prescription under the Old System.*
- 3.53 In Queensland and the Northern Territory, the legislative provisions are substantially similar to section 88K of the NSW Act, though the requirements for prior negotiation differ. While section 88K(2)(c) merely requires unsuccessful reasonable attempts by the dominant landowner to acquire the easement, section 180 of the *Property Law Act 1974* (Qld) and section 164 of the *Law of Property Act 2000* (NT) require the servient landowner to have unreasonably refused the imposition of the easement. Thus, for example, refusal due to concerns about the danger that a right of way could pose to children may be found reasonable and provide grounds for refusing an application.⁴²
- 3.54 Unlike the NSW, Northern Territory and Queensland models, the Tasmanian model does not require the landowners to attempt to negotiate before an application for a court ordered easement may be made.

COMPENSATION

- 3.55 The provisions for court imposed easements usually include a default rule that the court will order the dominant owner to pay compensation to the servient owner. For example, in NSW the court is required to provide, in the order creating the easement, for payment of an amount of compensation that the court considers appropriate.⁴³ The court may determine that no compensation is payable because of the special circumstances of the case. Equivalent statutes in other jurisdictions similarly provide for the servient owner to be compensated.⁴⁴
- 3.56 In *Wengarin Pty Ltd v Byron Shire Council*,⁴⁵ Young J announced a series of factors to be used in determining the amount of compensation to be paid to the owner of the servient land under the NSW legislation. These are:⁴⁶
- the diminished market value of the land, including for the potential use to which the land could have been put;
 - associated costs that would be caused to the owners of the affected land;
 - compensation for insecurity and loss of amenities, such as peace and quiet; and
 - any compensating advantages for owners.

35 *Conveyancing Act 1919* (NSW) s 88K; *Land and Environment Court Act 1979* (NSW) s 40; *Conveyancing Law and Property Act 1884* (Tas) s 84; *Property Law Act 1974* (Qld) s 180; *Law of Property Act 2000* (NT) s 164.

36 Tasmania Law Reform Institute (2010), above n 4, 46.

37 Concurrent jurisdiction exists in the Supreme Court and Land and Environment Court, under *Conveyancing Act 1919* (NSW) s 88K and *Land and Environment Court Act 1979* (NSW) s 40(4) respectively.

38 *Conveyancing Act 1919* (NSW) s 88K(1).

39 *Conveyancing Act 1919* (NSW) s 88K(2).

40 See eg, *Owners Strata Plan 13635 v Ryan* [2006] NSWSC 221 [60]–[67].

41 *Marshall v Council City of Wollongong* [2000] NSWSC 137 [28].

42 See *Grittner & Grittner v Hadley* [2008] Q ConvR 54-707.

43 *Conveyancing Act 1919* (NSW) s 88K(4).

44 See *Property Law Act 1974* (Qld) s 180(4)(a); *Conveyancing and Law of Real Property Act 1884* (Tas) s 84(4); *Law of Property Act 2000* (NT) s 164(4)(a).

45 [1999] NSWSC 485.

46 *Wengarin Pty Ltd v Byron Shire Council* [1999] NSWSC 485 [26].

47 *Subdivision Act 1988* (Vic) ss 36(2)(a)(ii), 36(2)(b)(ii).



- 3.57 The procedure for assessing and awarding compensation for court imposed easements in other jurisdictions differs substantially from the private compulsory acquisition procedure in Victoria under section 36 of the Subdivision Act, where assessment of compensation is determined under the Land Acquisition and Compensation Act.⁴⁷ Under the court imposed easement provisions, the court which orders the creation of the easement has power to order the payment of compensation, and must do so unless it finds special circumstances. An advantage of this procedure, when compared with section 36, is that the acquisition of the easement and the assessment of compensation are determined in one forum in one consolidated decision-making process.

CRITICISMS OF COURT IMPOSED EASEMENTS

- 3.58 The statutory provisions for court imposed easements, particularly those in NSW and Queensland, have been criticised by academic commentators on several grounds. The criticisms have tended to focus on the statutory criteria and their interpretation by the courts, rather than on the soundness of the model.

IMBALANCE IN THE CRITERIA

- 3.59 Fiona Burns argues that the decisions of courts have tended to favour development and the creation of easements.⁴⁸ In her view, this occurs because the legislation is weighted in favour of the interests of applicants and gives inadequate consideration to the interests of servient owners.⁴⁹
- 3.60 Certainly, the chief consideration under the NSW Act is whether the easement is necessary for the dominant land.⁵⁰ This consideration must be balanced against the public interest and whether the servient landowner can be adequately compensated, but not against the interests of the servient landowner. The legislative criteria appear to embody a policy of allowing landowners to acquire necessary easements subject to payment of adequate compensation.
- 3.61 Scott Grattan has examined cases decided under the NSW legislation.⁵¹ In particular, he has looked at how judges apply the statutory criterion of 'necessity'. He finds that it appears to be developing as a cost-benefit analysis based on the preferences of the potential dominant and servient owners.⁵² He further argues that the courts have been looking at the objective preferences for use of the land rather than at the subjective desires of the actual parties involved. This focus on objective rather than subjective preferences means that some concerns of the servient landowner might be not given weight.⁵³ Similarly, it is possible that any non-economic motives of the dominant landowner might be ignored if the easement makes 'economic' sense.
- 3.62 If a provision for court imposed easements is adopted in Victoria, it may be desirable to adopt criteria that ensure that the interests of the servient owner are given appropriate weight.

REMOVAL OF COURT IMPOSED EASEMENTS

- 3.63 Where easements are acquired without the consent of the servient owner, there is a greater need to provide adequate mechanisms for removing them if they become onerous or obsolete. The Northern Territory makes special provision for removal or variation of court imposed easements; which under its legislation are termed 'statutory rights of user'.⁵⁴ Section 165 of the *Law of Property Act 2000 (NT)* states that the owner of dominant or servient land affected by a statutory right of user can apply for variation or removal if the right is no longer necessary for the reasonable use of the dominant land, or if some material change in circumstances has taken place since the order imposing the right was made.

REFORM PROPOSAL

- 3.64 We provisionally propose that section 36 of the Subdivision Act and section 235 of the Water Act be repealed and replaced with a more general provision for court imposed easements. The provision would be included in the *Property Law Act 1958* (Property Law Act) or in a new Act which replaces that Act.
- 3.65 The County and Supreme Courts already have concurrent jurisdiction in matters arising under the Property Law Act, except for Part IV (co-ownership of land and goods), which is vested in VCAT. If a provision for court imposed easements is enacted, jurisdiction to exercise the power may be vested in:
- the County and Supreme Courts;
 - the County, Supreme and Magistrates' Courts (within their jurisdictional limits);
 - VCAT; or
 - any combination of the above.

Should the provisions for the private compulsory acquisition of easements be replaced by a provision for court imposed easements?

If court imposed easements are introduced:

- (a) **what criteria should courts use in determining whether to order an easement?**
- (b) **which forums (courts and/or VCAT) should have jurisdiction to order an easement?**

48 Fiona Burns, 'Court Imposed Easements in the Australian Torrens System: Are the Rights of Servient Owners Adequately Protected?' in Moses (ed *Property and Security: Selected Essays* (2010) 225.

49 *Ibid* 247–8.

50 Scott Grattan, 'Courting Councils and Counselling Courts: Subjectivity and Objectivity in s88K Applications' (2005) 12 (2) *Australian Property Law Journal* 125, 126.

51 *Ibid*; Scott Grattan, 'The Name(s) of the Rose: Personality, Preferences and Court-Imposed Easements' (2004) 10 *Canterbury Law Review* 329.

52 See generally, Grattan (2005), above n 50.

53 *Ibid* 135–8.

54 *Law of Property Act 2000* (NT) ss 164–165.

Chapter 4

Easements for Utilities and Services

CONTENTS

The nature of utility and service easements.....	32
Creation of utility and service easements...	32
By compulsory acquisition	33
By agreement	33
Upon subdivision of the land.....	34
Rights in the nature of an easement.....	34
Information available to purchasers.....	35
The register.....	35
Vendor disclosure requirements	37
Information available from utility and service providers.....	38



- 4.1 Many of the easements that burden private land titles are utility and service easements. They are typically acquired by public authorities or private utility providers under statutory powers, for the purpose of providing essential services such as sewerage, water, power and communications. Like other easements, utility and service easements do not need to be registered in order to be enforceable.
- 4.2 In this Chapter, we discuss how these easements are created and whether buyers of land are likely to be aware of them. We seek comments about the extent to which there is a gap in the information that is readily available to owners and purchasers and put forward options for reform.

THE NATURE OF UTILITY AND SERVICE EASEMENTS

- 4.3 As discussed in Chapter 2, for an easement to be created at common law there must be both dominant land, which benefits from the easement, and servient land, which is burdened by it.
- 4.4 Utility and service easements are normally acquired in Australia under special statutory powers that allow for the creation of easements 'in gross'.¹ This means that it is unnecessary to show that any other land is benefited by the easement. The benefit goes to the easement holder instead.
- 4.5 This approach provides a simple and efficient means of ensuring that essential services can be delivered where required for the benefit of individual lot owners and the wider community. Easements in gross allow the service providers to install and maintain pipes, cables and other equipment across, through, on and above land owned by others without having to purchase it or negotiate a lease or licence with every current and subsequent owner.
- 4.6 Some jurisdictions, such as Tasmania, have a general provision in property law legislation allowing for the creation of easements in gross in favour of public authorities.² Victoria lacks such a general provision. Instead, various statutes dealing with the provision of utilities and services permit specified bodies (which may be public authorities or private providers) to hold easements in gross.³ For example, section 19A of the *Docklands Act 1991* provides that:
- any right in the nature of an easement or purporting to be an easement or an irrevocable licence is deemed for all purposes to be an easement even if there is no land vested in the [Docklands] Authority which is benefited by the right.*

CREATION OF UTILITY AND SERVICE EASEMENTS

- 4.7 There are three different ways in which utility and service easements may be created:
- by compulsory acquisition;
 - by agreement; and
 - upon subdivision of the land.

BY COMPULSORY ACQUISITION

- 4.8 Utility or service providers typically operate under legislation which authorises them to acquire an easement by compulsory process and deems them to be an 'authority' for the purposes of the *Land Acquisition and Compensation Act 1986* (Land Acquisition and Compensation Act).⁴ This means they must exercise their powers to compulsorily acquire easements in accordance with the procedures set out in that Act.⁵
- 4.9 The Land Acquisition and Compensation Act requires an authority that intends to acquire an easement to serve a notice of its intention on anyone who owns or controls an interest in the land.⁶ A copy of the notice must be given to the Registrar, who must record it on the folio for the land and make it available for inspection.⁷ Any associated document that was provided with the notice (such as a drawing of the proposed easement) must also be lodged with the Registrar.⁸
- 4.10 An owner who has received a notice cannot sell the land, or otherwise deal with it, without the authority's consent. If the land is offered for sale, details about the notice must be included in the vendor's statement that is given to the purchaser before the contract is signed.⁹
- 4.11 Two months after serving the notice of its intention to acquire the easement, the authority may then acquire it by publishing a notice of acquisition in the Government Gazette.¹⁰
- 4.12 Compensation is payable in accordance with the Act to everyone who had an interest in the land immediately before the notice of acquisition was published.¹¹

USE OF PRIVATE COMPULSORY ACQUISITION PROVISIONS

- 4.13 Instead of relying on its own powers of compulsory acquisition, a service or utility provider may rely on a developer acquiring an easement under the private compulsory acquisition provisions set out at section 36 of the *Subdivision Act 1988* (Subdivision Act).¹² The developer may be required, as a condition of the planning permit, to acquire easements over other land in the vicinity of a proposed subdivision, in favour of the utility or service provider, in order to ensure that essential services can be provided to the new lots.¹³
- 4.14 While this practice ensures that easements rendered necessary by the proposed development are created at the developer's cost, it is not clear how they can be created in favour of the utility or service provider. As discussed in Chapter 3, section 36 is not easy to understand or apply. We suggest that it would be preferable for the utility or service provider to use their own powers of compulsory acquisition and require the developer to indemnify them for the cost of compensating the landowners.

BY AGREEMENT

- 4.15 An authority that decides to negotiate with an owner rather than exercise its power of compulsory acquisition under the Land Acquisition and Compensation Act can do so. It must first issue the owner with a notice that it does not intend to acquire the easement by compulsory process, and provide information about the owner's rights and obligations.¹⁴ It is then unable to acquire the easement by compulsory process for 12 months.¹⁵
- 4.16 Because of the risk that acquisition could be delayed for up to 12 months if negotiations with the owner fail, utility and service providers usually initiate the compulsory process even if it is likely that the easement will be acquired by negotiation. An authority can still acquire the easement by agreement at any time between serving notice of its intention to acquire the easement and publishing a notice of acquisition.¹⁶

- 1 See Chapter 2 for an explanation of easements in gross.
- 2 See for example the *Conveyancing and Law of Property Act 1884* (Tas) s 90A, which provides that an easement in gross can be granted to a Crown, public or local authority.
- 3 See eg: *Electricity Industry (Residual Provisions) Act 1993* (Vic) s 43; *Gas Industry (Residual Provisions) Act 1994* (Vic) s 61; *Local Government Act 1989* (Vic) s 187A; *Major Transport Projects Facilitation Act 2009* (Vic) s 116; *Pipelines Act 2005* (Vic) s 97; *Rail Corporations Act 1996* (Vic) s 51; *Water Act 1989* (Vic) ss 130, 287Q; *Water Industry Act 1994* (Vic) s 55A.
- 4 See eg: *Local Government Act 1989* (Vic) s 187(1), (2); *Water Act 1989* (Vic) s 130(1), (2), (3); *Rail Corporations Act 1996* (Vic) s 13C(1), (2); *Gas Industry Act 2001* (Vic) s 143(1), (2).
- 5 *Land Acquisition and Compensation Act 1986* (Vic) s 4. See eg, *Local Government Act 1989* (Vic) ss 187, 187A; *Pipelines Act 2005* (Vic) Part 6 Div 2; *Water Act 1989* (Vic) ss 130(1)–(3); *Rail Corporations Act 1996* (Vic) s 13C.
- 6 *Land Acquisition and Compensation Act 1986* (Vic) s 6.
- 7 *Land Acquisition and Compensation Act 1986* (Vic) s 10(1), (2). See also *Transfer of Land Act 1958* (Vic) s 57, which places obligations on the acquiring authority to notify the Registrar of a notice of intention to acquire, and on the Registrar to record the notice and make it available for inspection, under any Act which authorises compulsory acquisition and requires such a notice to be served.
- 8 *Land Acquisition and Compensation Act 1986* (Vic) s 8(3).
- 9 *Sale of Land Act 1962* (Vic) s 32(2)(e).
- 10 *Land Acquisition and Compensation Act 1986* (Vic) s 19. The public authority may also acquire the easement by agreement any time after serving the notice of its intention to acquire: s 18(1).
- 11 *Land Acquisition and Compensation Act 1986* (Vic) s 30.
- 12 See Chapter 3 for a discussion of private compulsory acquisition under s 36 of the Subdivision Act.
- 13 See, for example, *Point Cook Developments Pty Ltd v Macedon Ranges 2005* VCAT 2873 (23 January 2006); *Pitt v Macedon Ranges SC* [2004] VCAT 1380 (14 July 2004); *Murone v Macedon Ranges SC* [2008] VCAT 1116 (10 June 2008).
- 14 *Land Acquisition and Compensation Act 1986* (Vic) s 7(1)(b).
- 15 *Land Acquisition and Compensation Act 1986* (Vic) s 7(2).
- 16 *Land Acquisition and Compensation Act 1986* (Vic) s 18.



4.17 Utility and service providers are otherwise normally empowered by statute to acquire all easements and property rights that they think are necessary for the purposes of the legislation under which they operate.¹⁷ This broad power enables them to create an easement by private agreement with the owner. Like other easements created by private agreement, subsequent owners of the property are not bound unless the agreement is by instrument in registrable form under section 45 of the *Transfer of Land Act 1958* (Transfer of Land Act) (in this case, a deed). The instrument does not need to be registered or noted on the title in order to be enforceable.

UPON SUBDIVISION OF THE LAND

- 4.18 A third way in which utility and service providers may acquire easements is when a proposal for a subdivision of land is referred to them as a 'referral authority' under the *Planning and Environment Act 1987*. When this occurs, they may require that an easement be reserved in the plan of subdivision.¹⁸
- 4.19 Many easements for the provision of services are created as subdivisional easements in this way. Their location is usually marked on the plan which is registered by the Registrar. A vendor of the land is required to disclose the existence of the easement to a purchaser before they sign a sale contract, and to append a copy of the registered plan.¹⁹
- 4.20 By operation of section 12(3B) of the Subdivision Act, there is implied over any road set aside on a plan of subdivision, in favour of the relevant public authority or council, 'all easements and rights necessary to provide water, sewerage, drainage, gas, electricity, telephone or any prescribed service' if the easement or right is consistent with the reasonable use of the land as a road. These easements and rights are not discussed in this paper because they apply only to public land.
- 4.21 We also do not discuss in this paper land set aside as a road on a plan of subdivision. The setting aside of land in this way by a private landowner is deemed to be dedicated for use by the public as a road.²⁰ If members of the public accept the landowner's offer of dedication by using the land as a road, it becomes a 'public highway' at common law.²¹ Public highways are distinct from easements.

RIGHTS IN THE NATURE OF AN EASEMENT

- 4.22 Utility providers do not need to create easements in order to exercise and enforce their rights over the use of land by current and subsequent owners.
- 4.23 The legislation under which the providers operate may permit them to enter any land to install, maintain or repair their equipment and facilities. They normally have to give the owner reasonable notice and comply with other statutory restrictions on how to exercise their powers but they do not require an easement to do so.
- 4.24 The legislation commonly makes it an offence to interfere with the equipment and facilities utility providers install under, on or over the land. For example, it is an offence to wilfully or by culpable negligence damage, or allow to be damaged, any meter, pipeline, burner, fitting, appliance or other apparatus belonging to a gas transmission or distribution company which is used in connection with the consumption of gas.²² Where such provisions are in place, the utility provider may decide not to create an easement.

- 4.25 Problems arise where assets are installed underground, no easement has been created, and no record of them has been made on the register. Purchasers acquiring a property with the intention of renovating it may be unaware of concealed assets, or how they may affect their plans. Even owners who have held the land for some years may not know about them, or realise the implications, until late in the process of building on the land.
- 4.26 Before water authorities were empowered to require developers to create easements for the provision of water and sewerage services, it was common practice not to create an easement. They considered the associated time and costs to the public purse excessive and impractical in view of the health benefits of installation, particularly when whole towns and suburbs were being sewered.²³
- 4.27 To protect and enforce their rights, the water authorities would instead rely on legislation which prohibits structures being built over or near their assets without consent.²⁴ The consent may include conditions that are binding on future owners.²⁵
- 4.28 Although this problem relates primarily to older properties, many thousands are affected, especially in regional cities and towns but also in older metropolitan suburbs of Melbourne. Furthermore, where utility and service assets are installed in circumstances other than in connection with a plan of subdivision, it is still common practice to avoid the time and expense of acquiring an easement and instead rely on the power to prosecute offenders for interfering with the assets placed under private land.

INFORMATION AVAILABLE TO PURCHASERS

THE REGISTER

- 4.29 The register contains information about a utility and service easement if:
- it has been compulsorily acquired;
 - it has been acquired by agreement and then registered; or
 - it is shown on a plan of subdivision.
- 4.30 Information about underground pipes or cables used in delivering utilities and other services is likely to be held on the register if it is included in a plan or other registered document or the Registrar has been notified under section 88(2) of the Transfer of Land Act, as discussed below.

EASEMENTS ACQUIRED BY COMPULSORY PROCESS

- 4.31 Whenever a public authority serves a notice of its intention to acquire land compulsorily, either in accordance with the Land Acquisition and Compensation Act or under any other statute, the notice must be lodged with the Registrar.²⁶ Once the land is vested in the public authority, the relevant folio on the register must be amended.²⁷
- 4.32 These requirements apply to easements.²⁸ In this way, all easements acquired by compulsory process are recorded on the register.²⁹
- 4.33 If the public authority acquires an easement by agreement after serving a notice of intention to acquire it compulsorily under the Land Acquisition and Compensation Act, it must still be recorded on the register.

- 17 For example: *Country Fire Authority Act 1958* (Vic) s 21; *Water Industry Act 1994* (Vic) s 55(1).
- 18 *Water Act 1989* (Vic) s 136; *Water Industry Act 1994* (Vic) s 61; *Rail Corporations Act 1996* (Vic) ss 13D(3), 51.
- 19 *Sale of Land Act 1962* (Vic) s 32(2)(b), (3).
- 20 *Bass Coast Shire Council v King* [1997] 2 VR 5, 18 (VCA).
- 21 *Bass Coast Shire Council v King* [1997] 2 VR 5, 18 (VCA).
- 22 *Gas Industry (Residual Provisions) Act 1994* (Vic) ss 151, 152.
- 23 Information supplied by former regional water authority employee, Mr Robert Ford.
- 24 *Water Act 1989* (Vic) s 148(1).
- 25 *Water Act 1989* (Vic) s 148(5).
- 26 *Land Acquisition and Compensation Act 1986* (Vic) s 10(2); *Transfer of Land Act 1958* (Vic) s 57(1).
- 27 *Transfer of Land Act 1958* (Vic) s 55(1).
- 28 *Land Acquisition and Compensation Act 1986* (Vic) (which applies to acquisitions of interests in land) s 3 – an interest in land includes an easement; *Transfer of Land Act 1958* (Vic) s 4 – ‘land’ includes any interest in land; *Interpretation of Legislation Act 1984* s 38 – ‘land’ includes easement.
- 29 An interest in land which has been acquired by agreement after the service of a notice of intention to acquire and before the publication of a notice of acquisition is treated as having been compulsorily acquired for the purpose of any matter subsequently arising under any other Act: *Land Acquisition and Compensation Act 1986* (Vic) s 18(3).



EASEMENTS ACQUIRED BY AGREEMENT

- 4.34 Easements created by utility and service providers by agreement may not be recorded on the title if the agreement was made outside of the operation of the Land Acquisition and Compensation Act. If so, a subsequent owner may not be aware of the easement, or the conditions under which it was created, and could damage equipment or otherwise interrupt or hinder the provision of services.
- 4.35 Nevertheless, the legislation administered by the public authority may require the private agreement to be recorded. For example, section 13C(4) of the *Rail Corporations Act 1996* provides that if an easement is acquired or extinguished by Rail Track Victoria (other than an easement compulsorily acquired), the Registrar must make the relevant recordings in the register.
- 4.36 Utility and service easements can also be shown on the register by a special recording on the folio relating to the land. Section 88(2) of the Transfer of Land Act provides that, where an easement or any other right affecting land is acquired under Victorian or Commonwealth legislation, the acquiring authority may notify the Registrar, and the Registrar may make a recording on the folio of the relevant land. Easements acquired by agreement fall within this category. Section 88(3) states that the recording does not give the easement or right any greater operation or effect than it had under the instrument creating it. The purpose of the recording is not to create or validate the easement, but to enable purchasers to discover it.

RIGHTS IN THE NATURE OF AN EASEMENT

- 4.37 As section 88(2) applies to any 'rights in the nature of a charge or an easement or any other right over or affecting land', it allows for a record to be made of assets on a property that have been installed and are maintained by a utility or other service provider exercising rights under legislation.
- 4.38 Once recorded, the information is available to anyone who conducts a title search in relation to the land. A purchaser is alerted to the presence of any concealed assets that could restrict or otherwise influence how the land is used, which trees are planted and where, or any works that may be envisaged. However, the benefit of recording is lost if the public authority fails to keep the information up to date.
- 4.39 Some rights in the nature of easements may not appear on the register because they are aligned with easements that have been created for another purpose. For example, section 89 of the *Electricity Industry Act 2000* allows for an easement for which an electricity transmission company is entitled to be used for a carriage service within the meaning of the *Telecommunications Act 1997* (Cth).
- 4.40 Sometimes a utility or other service provider places a caveat on the property, rather than creating an easement, to protect its interests. A caveat is a notice to the Registrar which forbids the registration of any instrument that is inconsistent with rights claimed by the caveator.³⁰ For example, an electricity corporation may lodge a caveat on a property to protect a substation that has been installed there.
- 4.41 While this also can alert a purchaser to the corporation's interests, and the corporation to any potential infringement of its rights, a broadly worded caveat can create difficulties in conveyancing. The purchaser may need to change the wording of the transfer, or negotiate with the utility provider to consent to the registration of the transfer. A caveat is not necessary where the utility provider's rights are directly protected by legislation under which it operates.

EASEMENTS CREATED UPON SUBDIVISION

- 4.42 As noted above, utility and service easements that are created as subdivisional easements (other than implied easements) are marked on the plan of subdivision which is lodged with the Registrar.

ACCESS TO THE REGISTER

- 4.43 The former Law Reform Commission of Victoria observed in 1992 that utility and service easements should be verifiable by a quick and reliable search.³¹ This has been achieved to the extent that it is now easier to access information about easements which have been recorded on the folio. As discussed below, it is also easier to find out information that the public authority is required, under its own legislation, to make available on request.
- 4.44 The folio and the information it contains is made available online by LANDATA. LANDATA is the business name and search service for Land Victoria and other property information. A service for the general public is available on the internet. Property professionals primarily use the services of information brokers, which in turn use the LANDATA system to perform searches.³²
- 4.45 A title search on LANDATA will provide a warning of any easements that are on the plan. It also directs the searcher to the plan and advises if there have been any dealings in the last 125 days. Instruments, including those creating easements, may be searched by instrument number. It is not possible to search by instrument type.
- 4.46 Not all instruments have been imaged. Those created after August 1999 can be downloaded immediately. Older instruments that are not available immediately can be requested for imaging on demand and delivered within 72 hours.

VENDOR DISCLOSURE REQUIREMENTS

- 4.47 Another important means of informing purchasers about easements and restrictions is Victoria's vendor disclosure provisions in section 32 of the *Sale of Land Act 1962* (Sale of Land Act).
- 4.48 Victoria has one of the most rigorous vendor disclosure regimes in Australia.³³ Before a purchaser signs a contract of sale, the vendor must provide a statement setting out all the particulars required by section 32(2) of the Sale of Land Act.
- 4.49 Section 32(2) is an extensive list. A number of the items would directly or indirectly reveal information about current or proposed utility and service easements. The most relevant is section 32(2)(b), which requires the vendor's statement to include:
- a description of any easement, covenant or other similar restriction affecting the land (whether registered or unregistered) and particulars of any existing failure to comply with the terms of that easement, covenant or restriction.*
- 4.50 In addition, section 32(3) sets out a list of documents that must be attached to both the statement and the contract. The list includes any registered or proposed plan of subdivision.³⁴
- 4.51 Section 32 plays an important role in ensuring that purchasers are advised of the existence of both registered and unregistered easements and restrictions before they sign the contract.
- 4.52 However, vendors are under no duty to disclose easements and restrictions of which they are not aware.³⁵ If the vendor is unaware of the existence of an unregistered easement, the vendor disclosure requirements will not help the purchaser.

30 Caveats may be lodged under the *Transfer of Land Act 1958* (Vic) s 89(1).

31 Law Reform Commission of Victoria, *Easements and Covenants*, No 41 (1992) 24.

32 Land Victoria has advised the Commission that more than 90% of the demand for titles information is met by information brokers; about 3% is met by the public search service on the internet; and the remainder is met by visiting the office in person.

33 For a comparison of vendor disclosure regimes, see Tasmania Law Reform Institute, *Vendor Disclosure*, Report No 5 (2004). See also Lynden Griggs, 'The Interrelationship of Consumer Values and Institutions to the Vendor's Duty of Disclosure' (2005) 11 *APLJ* 116; Sharon Christensen and W Duncan, 'Is it Time for a National Review of the Torrens System? The Eccentric Position of Private Restrictive Covenants' (2005) 12 *Australian Property Law Journal* 104.

34 *Sale of Land Act 1962* (Vic) s 33(2)(ba), (c)–(e).

35 This is the effect of s 32(7) of the *Sale of Land Act 1962* (Vic). Whereas s 32(5) of the Act says that a purchaser may rescind the contract if the vendor fails to provide all of the required information, s 32(7) provides an exception if the court is satisfied that the vendor acted reasonably and honestly.



- 4.53 A further limitation of section 32 is that, on a narrow view, it does not require the vendor to disclose where a public authority has a drain, pipe, cable or other structure on or under the land but has not acquired a statutory easement. Section 32(2)(b) requires disclosure of information about 'any easement, covenant or *other similar restriction affecting the land* (whether registered or unregistered)'. The term 'similar restriction affecting the land' is not defined but is likely to be interpreted narrowly because a penalty applies to a vendor who knowingly or recklessly does not comply.³⁶ For example, it may be confined to a matter which is specifically described in relevant legislation as a 'restriction'.³⁷ It follows that, even if aware of underground assets, the vendor is unlikely to breach section 32 by omitting to include information about them in the statement.

INFORMATION AVAILABLE FROM UTILITY AND SERVICE PROVIDERS

DIRECT FROM THE PROVIDERS

- 4.54 Purchasers and owners may contact the utility and service providers direct for any information that may be available in addition to that which has been recorded by the Registrar. The vendor's statement makes clear who the relevant providers are for the property.
- 4.55 Unlike other providers, water authorities have a statutory obligation to provide information of this type. Section 158(3) of the *Water Act 1989* (Water Act) requires a water authority constituted under that Act to provide, on request, a statement containing details of restrictions on the use of land arising from the performance of any of its functions under any Act. The statement must include details of encumbrances that affect the land and that would not be disclosed by a search of the register. A similar obligation is imposed by section 75(3) of the *Water Industry Act 1994* (Water Industry Act) on providers of water and sewerage services under licence.
- 4.56 As the delivery of energy, transport, communications and water services in Victoria has become more complex, and the regulatory structure more diverse, it is not as simple as it once was to identify the responsible provider. Victoria's water sector comprises 19 state-owned businesses: 16 water corporations constituted under the *Water Act*³⁸ and three state-owned companies established under the *Corporations Act 2001* that are holders of licences issued under the *Water Industry Act*.³⁹ The Victorian electricity industry was disaggregated in 1994. The poles, wire and equipment that deliver electricity to Victorians are currently managed by five electricity distributors under licence.⁴⁰ The former Gas and Fuel Corporation was disaggregated in 1997 into three gas distributors and related retailers, which were then sold. The communications sector, which is regulated by the Commonwealth, has similarly been disaggregated and privatised.
- 4.57 In view of the expansion, ongoing development and changing regulation of the utilities markets, it is helpful for purchasers and owners to be able to use a 'one stop shop' service that provides access to relevant providers. Such services are offered by LANDATA and Dial Before You Dig.

VIA LANDATA

- 4.58 LANDATA provides access not only to information recorded on the register but also to other information which affects how the land may be used. The LANDATA Title and Property Certificates service provides a facility for the general public to order information of this type online from the relevant public authority.
- 4.59 The information that may be ordered is broad ranging and useful to purchasers, giving access to details such as heritage restrictions, planned roads, contamination and flood levels. It is possible to use the LANDATA service to order a water service plan from the relevant water authority, containing information about water, sewerage and drainage service connections and associated easements on a property. Nevertheless, LANDATA does not provide access to information about the utilities and services provided by private corporations: electricity, gas and communications.

DIAL BEFORE YOU DIG

- 4.60 Dial Before You Dig Vic/Tas is a not for profit member-based association that was established to simplify contact with owners of underground assets. It has been operating since 1989, initially under the name of Melbourne One Call Service, and is now part of a national free inquiry service, overseen by the Association of Australian Dial Before You Dig Services.
- 4.61 The service aims to provide anyone intending to begin digging work with easy access to plans and information about underground services direct from the asset owners. Anyone intending to excavate can lodge a single inquiry and receive information within two business days about the nature and location of underground assets and instructions on how to protect them.⁴¹ Inquiries can be lodged with the service either online through a web-based inquiry system or by calling a national telephone number.
- 4.62 Members do not handle direct inquiries from customers about their underground assets. Instead, they direct the inquiry to the Dial Before You Dig service. It alerts all members that may have underground assets in the vicinity of the proposed excavation, who then compile the information they provide about their assets at the proposed excavation site. Members are charged for the service on a cost recovery basis.
- 4.63 Dial Before You Dig Vic/Tas was formed by Telecom Australia, Melbourne Metropolitan Board of Works, Gas and Fuel and the State Electricity Commission. It now includes many of the private corporations which provide services that those public authorities once did, including all electrical and gas distributors and owners of registered pipelines. Major telecommunication providers, many local councils and water authorities are also members. However, not all providers of utilities and services participate. Some local councils, water authorities providers and small internet providers are not members. They may also be a number of smaller, private underground asset owners that are not members, such as businesses with communication links between offices.
- 4.64 Although the Dial Before You Dig service is a voluntary, industry-based scheme, participation by gas and electricity distribution companies is now effectively mandatory. Electricity distribution companies in Victoria are required to operate under an electricity safety management scheme, approved by Energy Safe Victoria. Gas companies are similarly required to operate under an approved gas safety case. We are informed by Energy Safe Victoria that its practice is not to give approval unless the electricity or gas company is a member of Dial Before You Dig and has an adequate procedure for maintaining and updating a register of underground assets.

36 *Sale of Land Act 1962* (Vic) s 32(6).

37 In the *Subdivision Act 1988* (Vic) s 3, a 'restriction' is defined to mean a restrictive covenant or a restriction which can be registered or recorded by the Registrar under the *Transfer of Land Act*. See also *Planning and Environment Act 1987* (Vic) s 6A(1).

38 Melbourne Water Corporation; Gippsland and Southern Rural Water; Grampians Wimmera Mallee Water; Lower Murray Urban and Rural Water; Barwon Water; Central Highlands Water; Coliban Water; East Gippsland Water; Gippsland Water; Goulburn Valley Water; North East Water; South Gippsland Water; Western Water; Westernport Water; Wannan Region Water Authority.

39 City West Water; South East Water Ltd; Yarra Valley Water Ltd.

40 CitiPower; Jemena Electricity Networks, Powercor Australia, SP AusNet and United Energy.

41 Dial Before You Dig Vic/Tas *Service Guidelines for Victoria* Issue 1: March 2009 <www.1100.com.au/Aboutus/ServiceGuidelinesforVictoria.aspx> (accessed 28 May 2010).



- 4.65 The focus of the Dial Before You Dig service is on reducing the risk of injury to excavators and the public, and damage to underground assets. Nevertheless, it is being used by conveyancers to discover information about concealed cables and pipes that may affect a purchaser's decision to acquire land. During the 2009-2010 financial year, more than 160,000 inquiries were made to the service, of which the State Manager estimates less than one per cent were for conveyancing or planning purposes. While the information is free to excavators, some members charge for conveyancing and planning requests, and the response to these requests may take up to 10 days because the activities present no immediate risk to assets.
- 4.66 The service provides a valuable source of information to purchasers about underground assets within an easement or on private property, but it was not designed for this purpose and the information is limited to details of assets installed by or belonging to members. In many instances, the connections to the building are not included in the information provided, as these connections are the responsibility of the lot owner.
- 4.67 Importantly, there is no requirement to provide purchasers with this information at the time of purchase and, if an easement has not been created, no notice need be given that the land is burdened.
- 4.68 Even though the information is available from the utility and service providers, either directly or indirectly, purchasers and owners continue to be unaware of the existence of underground assets or, if they are aware, they may not understand their significance because they are not recorded on title.

Are the current arrangements sufficient to inform purchasers about the existence and location of utility and service easements and concealed structures?

Should public authorities be required to notify the Registrar of all agreements with landowners for the creation of utility and service easements?

Chapter 5

Recording and Registration of Easements

CONTENTS

Registration and recording.....	42
Easements under the Transfer of Land Act.....	43
Registered easements.....	43
Notified easements.....	43
Easements on a registered plan of subdivision.....	44
Easements for utilities and other services.....	44
Rights in the nature of easements.....	44
Easements created at common law or equity.....	44
Registration of easements.....	45
Deletion of recorded easements.....	45
Recording or registration?.....	46



- 5.1 In this Chapter, we discuss the ways in which easements are entered on folios in the register, and the legal consequences of the different types of entries.
- 5.2 Victoria's system of registered title to land, known as the Torrens system, is regulated by the *Transfer of Land Act 1958* (Transfer of Land Act) and administered by the Registrar. Each lot or parcel of land registered under the Act has its own folio in the register, on which details of the freehold ownership, leases, mortgages and other interests held in the land are entered. The folio is in effect the official record of the title to the lot and is known as the ordinary folio.
- 5.3 Not all privately owned land in Victoria is under the Torrens system. Lots that are yet to be brought under the operation of the system are called 'old system land' because property rights in the lots are regulated by the 'general law' of property that existed before the Torrens system was introduced. Special folios, called 'identified folios', may be created for these lots, but they remain subject to the rules of the old system rather than the Torrens system.
- 5.4 This Chapter focuses on the treatment of easements only in relation to land held in ordinary folios under the Transfer of Land Act. We consider whether the current different treatment of easements under the Transfer of Land Act and the common law is necessary or desirable, and how the current messy and inconsistent provisions for easements could be simplified.

REGISTRATION AND RECORDING

- 5.5 The Torrens system is a form of what is known internationally as a system of registered title to land.¹ The key feature of this system is that the register provides authoritative information about ownership of interests in lots. To achieve this certainty, the rule is that registration of an interest validates that interest, even if the instrument or the transaction would otherwise be invalid and ineffective.² In general terms, the registered interest cannot be annulled or set aside unless it was obtained through fraud.³ Even a forged instrument of transfer confers a valid title upon a purchaser who registers it.⁴
- 5.6 Registration also confers priority. To say that an interest has 'priority' means that it can be enforced against the holders of other property rights in the same lot. The rule of the Torrens system is that, with specified exceptions, a registered interest takes priority over interests not previously registered.⁵ One of the specified exceptions is that a registered owner does not get priority over any easement affecting the land, whether or not it is recorded on the folio.⁶ This means that any easement is enforceable against the registered owner of the servient land.
- 5.7 Sections 41–44 of the Transfer of Land Act are the provisions which confer validity and priority on registered interests in Victoria. This validating effect of registration is often called 'title by registration' or 'indefeasibility of title' or 'the conclusiveness of the register'.
- 5.8 By validating interests, registration provides a high degree of security to purchasers of the interests. It follows that registration can cause losses to third parties if it validates an interest which would otherwise be invalid. To prevent losses, the Registrar must examine each instrument lodged for registration, to ensure that it complies with common law rules, any rules in the Transfer of Land Act, and other statutes. Section 110 of the Transfer of Land Act provides for persons who sustain loss or damage by reason of an error in the register and certain other grounds to be indemnified. Registration is therefore based on legal examination and provision for compensation.

- 5.9 It is commonly overlooked that registered title systems incorporate within them a parallel system for recording interests.⁷ This is a system in which recording confers priority on the interest, but does not validate it. The general rule is that that recorded interests take priority over other interests not previously recorded.⁸ This rule of priority by date order of recording applies to the registration of deeds concerning old system land, under the *Property Law Act 1958* (Property Law Act).⁹ Interest recording is used for restrictive covenants and 'rights in the nature of easements' under section 88 of the Transfer of Land Act.¹⁰ The rule of priority by date of recording is also found in the caveat provisions of some Torrens jurisdictions such as Singapore and several Canadian provinces, in which caveats determine priority between unregistered interests.¹¹
- 5.10 The difference between registered title and interest recording systems is obscured by the tendency to use the terms 'registration' and 'recording' interchangeably in legislation.¹² To aid clarity, in this paper we reserve the term 'recording' for an entry in a register that affects only the priority of an interest (that is, its enforceability against the holders of other interests). We use the term 'registration' for a register entry that confers both validity and priority.¹³ In other words, 'registration' means an entry that gives the holder an indefeasible title free of all competing interests other than the statutory exceptions.
- 5.11 One might expect that all easements on the register would have the same legal status and effect, as either recorded or registered interests. In fact some easements are registered, some are recorded, and some are of uncertain legal effect. Many easements that run with land do not appear on the register at all.
- 5.12 We pose the questions whether easements should be registered or recorded, and whether unregistered easements should continue to be enforceable. In the next section, we begin by explaining the different ways that easements are dealt with under the Transfer of Land Act.

EASEMENTS UNDER THE TRANSFER OF LAND ACT

REGISTERED EASEMENTS

- 5.13 Easements can be created by registration of a transfer of the dominant land. Section 45(2) of the Transfer of Land Act provides that, on registration of a transfer, the transferee becomes the registered proprietor of the estate or interest set out in the transfer, 'with all rights powers and privileges thereto appertaining'. This indicates that the title vested by section 45 includes the benefit of any easement attached to the land. Section 42(1) confers upon the registered proprietor of 'land' indefeasible title to the land described in the relevant folio of the register. 'Land' is defined in section 4(1) to include 'any interest or estate in land' and is therefore broad enough to include an easement.

NOTIFIED EASEMENTS

- 5.14 An easement can be recorded on the folio to the servient or dominant land as a 'notified easement'. Under section 72 of the Transfer of Land Act, the Registrar may make a recording of an easement on the folio of the dominant and servient land if satisfied of its existence by a transfer, instrument, deed or written document, court order or award of an arbitrator or a legal practitioner's certificate.¹⁴ In *Riley v Penttila*,¹⁵ Gillard J held that the recording of an easement on the folio to the dominant land under section 72 is conclusive evidence of title to the interest for the purposes of section 41 of the Transfer of Land Act.

- 1 United Nations Economic Commission for Europe, *Guidelines on Land Administration* (1996).
- 2 *Transfer of Land Act 1958* (Vic) s 41.
- 3 *Transfer of Land Act 1958* (Vic) s 44.
- 4 Discussed in Joyce Tooher and Brian Dwyer, *Introduction to Property Law* (2008) 77.
- 5 This priority rule results from the combined effect of ss 34(1), 41 and 42 of the *Transfer of Land Act 1958* (Vic).
- 6 *Transfer of Land Act 1958* (Vic) s 42(2)(d).
- 7 Pamela O'Connor, 'Information, Automation and the Conclusive Land Register' in D Grinlinton (ed), *Torrens in the Twenty-first Century* (LexisNexis, Wellington, 2003) 249.
- 8 Some systems confer priority on an interest only if it was recorded without notice of an existing interest. This is called a 'race-notice' rule. Others confer priority strictly by date of recording without regard to notice. This is called a 'race' rule. There are often exceptions to the priority rule for interests which are not created by instrument.
- 9 *Property Law Act 1958* (Vic) s 6.
- 10 See Chapter 11. Recording under s 88 gives priority not by a statutory rule, but by operation of the equitable doctrine of notice.
- 11 *Land Titles Act 1995* ch 157 (Singapore) s 49; *Land Title Act* RSBC 1996 c 250 s 31 (British Columbia); *Real Property Act* RSM 1988 c R30 s 155 (Manitoba); *Land Titles Act* RSA 2000 c L-4 ss 135, 147 (Alberta).
- 12 See eg, the *Forestry Rights Act 1996* (Vic) s 8.
- 13 This terminology and meaning was proposed by Canada's Joint Land Titles Committee, *Renovating the Foundations: Proposals for a Model Land Recording and Land Registration Act for the Provinces and Territories of Canada* (1990) 8–9.
- 14 *Transfer of Land Act 1958* (Vic) ss 72(1), (2), (2B), (3). We understand the term 'notified' easement to mean one that is brought to the Registrar's attention in one of these ways.
- 15 [1974] VR 547. His Honour referred to entry on the certificate of title, which is now called the folio.



EASEMENTS ON A REGISTERED PLAN OF SUBDIVISION

- 5.15 Easements may be created by registration of a plan of subdivision. As we discuss in Chapter 6, under section 98 of the Transfer of Land Act the proprietor of a lot on an approved or registered plan of subdivision is deemed to have the benefit of specified easements where they are ‘necessary for the reasonable enjoyment’ of the lot. These implied easements include easements of way, easements of drainage, and easements for party walls, support, protection and the supply of utilities and services.¹⁶
- 5.16 It is unclear whether these easements are conclusive under section 41 of the Transfer of Land Act. Section 41 states that a folio is conclusive evidence that the registered proprietor has valid title to the land described in it. Section 98 does not specify the legal status of the easements created by plan, nor does it expressly provide for them to be recorded on the folios.
- 5.17 The easements created by section 98 are commonly recorded on the folio as ‘the easements (if any) existing over the same by virtue of section 98’.¹⁷ Since no particulars are given, it is necessary to consult the registered plan to discover what, if any, easements exist. Easements created under section 98(a) by the subdivision of land are shown on the plan, but easements created under section 98(b) by subdivision of a building are not.
- 5.18 In *Shelmerdine v Ringen Pty Ltd*,¹⁸ the Supreme Court was told that, as section 98 states that the registered proprietor is entitled to the benefit of the implied easements ‘in all respects as if such easements had been expressly granted’, the Registrar took the view that the easements could be recorded as ‘notified easements’ under section 72.¹⁹ The court found it unnecessary in that case to decide whether the creation of an easement by registration of a plan amounted to a recording of a notified easement under section 72.²⁰
- 5.19 There is no provision for payment of compensation by the dominant owner to the servient owner for subdivisional easements, as the developer owns both the dominant and the servient land at the time of subdivision.

EASEMENTS FOR UTILITIES AND OTHER SERVICES

- 5.20 Easements required for the provision of utilities and services such as water, sewerage and electricity may be acquired by compulsory acquisition under powers in particular statutes, or by agreement with landowners. Easements acquired in these ways are recorded in accordance with section 55(1) of the Transfer of Land Act. This class of easement is discussed in Chapter 4.

RIGHTS IN THE NATURE OF EASEMENTS

- 5.21 ‘Rights in the nature of easements’ acquired under a Victorian Act may be recorded by the Registrar on any relevant certificate of title under section 88(2) of the Transfer of Land Act. Section 88(3) provides that the recording of the right does not give it any greater operation than it had under the instrument that created it. In many cases the legal effect and enforceability of statutory rights is specified by other statutes under which they are acquired.²¹ Since recording under section 88(2) does not validate the rights, this is a *recorded* interest in our terms.

EASEMENTS CREATED AT COMMON LAW OR EQUITY

- 5.22 Easements can also be created by any express or implied method effective at common law or equity without any entry on the register or indeed any writing at all, and will bind successive registered owners of the servient land.²² This is because all easements, ‘howsoever acquired’, are express exceptions to the indefeasibility of the servient owner’s title, under section 42(2)(d) of the Transfer of Land Act. In Chapter 8 we discuss whether the scope of the exception should be narrowed, to make it easier for purchasers to discover easements affecting the land.

- 5.23 In Chapters 6 and 7, we examine the doctrines under which easements can arise by common law implication, statutory implication and prescription. We propose options for alternative mechanisms which would provide similar functional benefits, while minimising the number of easements which are effective without entry on the register.

REGISTRATION OF EASEMENTS

- 5.24 Registration requires examination by the Registrar to ensure that the easement complies with the common law or statutory requirements. For example, the law will not recognise as an easement an interest that gives the dominant owner exclusive possession of the servient land.²³
- 5.25 Recorded easements, compared to registered easements, are not subject to the same degree of examination by the Registrar, as they are only 'purported' interests or claims. Accordingly, registration of easements is more costly in terms of registry time and the possibility of compensation claims under section 110 of the Transfer of Land Act.
- 5.26 The costs of examination by the Registrar could be reduced if standard form easements were introduced, as proposed in Chapter 3.
- 5.27 One problem with registration of easements is that the common law rules relating to extinguishment of easements by operation of law are difficult to reconcile with the indefeasibility of a registered easement. At common law, an easement is extinguished by abandonment, and also by the unification of the dominant and servient land under common ownership and occupation (unity of estates). Problems arise where an easement is said to have been extinguished by operation of law, and subsequently there has been a transfer of the dominant land to another purchaser. On registration of the transfer, section 41 of the Transfer of Land Act provides that the folio is conclusive evidence that the new registered owner has title to the estates and interests shown in the folio.
- 5.28 For easements which are recorded or registered on a folio, the common law rules of extinguishment exist only as grounds for application to the Registrar for deletion of the entry under section 73 of the Transfer of Land Act.²⁴ Easements which are not registered or recorded are liable to extinguishment under the common law rules.
- 5.29 One solution to the inconsistent treatment of different easements is to abolish the common law doctrine of abandonment, and to make statutory provision in section 84 of the Property Law Act for judicial discharge of easements on the ground of abandonment or non-use for a specified period of time. These options are discussed in Chapter 9.

DELETION OF RECORDED EASEMENTS

- 5.30 The provisions for deletion of the recording of an easement are not consistent. Section 73 empowers the Registrar to delete from the register an easement which has been abandoned or extinguished, on application by a landowner. The section does not distinguish between registered and recorded easements. Section 73 is discussed in Chapter 9.
- 5.31 Section 88(2) provides for the entry of rights in the nature of an easement acquired pursuant to a statute, but there is no provision for removal of rights that are no longer required. There may be a need for a new provision, similar to the provision for deletion or amendment of recorded covenants that was added to section 88 in 2009.²⁵ The provision would empower the Registrar to remove or amend any rights in the nature of an easement which are recorded under section 88(2):

- 16 These easements are explained in Chapters 4 and 6.
- 17 *Riley v Penttila* [1974] VR 547.
- 18 [1993] 1 VR 315, 339–40.
- 19 *Shelmerdine v Ringen Pty Ltd* [1993] 1 VR 315, 339–40.
- 20 *Shelmerdine v Ringen Pty Ltd* [1993] 1 VR 315, 340–1.
- 21 See Chapter 4.
- 22 See Chapters 3 and 6, dealing with express and implied easements respectively.
- 23 *Re Ellenborough Park* [1956] Ch 131, 164; *Reilly v Booth* (1890) 44 Ch D 12, 26; *Harada v Registrar of Titles* [1981] VR 743; *Clos Farming Estates Pty Ltd v Easton* (2001) 10 BPR 18, 845.
- 24 *Bookville Pty Ltd v O'Loughlen* [2007] VSC 67 [54]; *Wolfe v Freijah's Holdings Pty Ltd* [1988] VR 1017, 1025; see also *Riley v Penttila* [1974] VR 547.
- 25 Section 88(1AC), inserted by *Land Legislation Amendment Act 2009* s 44(1).



- where the owner of the easement or right notifies the Registrar that the easement is no longer required;
- with the written agreement of all parties and their mortgagees to the release or variation of the easement;
- upon an order of a court; or
- upon registration or approval of a plan of subdivision or consolidation.

Are the provisions in the Transfer of Land Act for removal of recorded easements adequate?

RECORDING OR REGISTRATION?

- 5.32 The current provisions are confusing, with too many different ways of entering easements on the register: some with indefeasible effect, some as 'conclusive evidence'; some with neither; and some in a grey area.
- 5.33 Recording rather than registration of easements would offer the following advantages. First, it would eliminate the possibility that registration validates purported easements that lack the characteristics of easements or do not conform to the recognised categories of easement.²⁶ Second, it would avoid the conflict between the common law doctrines of extinguishment and the indefeasibility of registered easements or the conclusiveness of notified easements.²⁷ Third, it would promote a common approach to managing private and statutory easements and covenants. Since covenants are recorded in Victoria and in all other Australian jurisdictions except the Northern Territory, recording of easements would allow easements and covenants to be treated alike.
- 5.34 The main argument in favour of registration of easements is that it provides assurance to purchasers that an easement shown on the folio as appurtenant is enforceable. This avoids the need for purchasers to make inquiries beyond the register to assess the validity of the easement. Registration also upholds the expectation of purchasers that easements shown on title are valid and effective according to their terms.

Should expressly created easements be (a) registered or (b) recorded?

- 26 Although the categories of negative easement are not closed, only four types are clearly recognised by common law: rights to support; rights to air; and rights to water or light in defined channels.
- 27 This point is explained in Chapter 9.

Chapter 6

Implied Easements

CONTENTS

The common law rules for implication of easements.....	48
Easements of necessity	48
Intended easements	48
The rule in <i>Wheeldon v Burrows</i>	48
General words imported into conveyances	49
Non-derogation from grant.....	49
Implication from the description of land	49
Criticisms of common law implied easements	50
Conflict with the Torrens system	50
Complex doctrines	50
Implied easements and the Torrens system	51
Broad exception to indefeasibility.....	51
Narrow exception to indefeasibility.....	51
Implied subdivisional easements.....	52
Section 12(2) of the Subdivision Act	52
Section 98 of the Transfer of Land Act.....	53
Limitations of implied subdivisional easements.....	54
Statutory reciprocal rights	54
Party walls	55
Support of buildings.....	55
Rights of access.....	56
Reform options	57
Option one: retain the current law.....	57
Option two: introduce statutory rules for implication	57
Option three: replace rules of implication with court imposed easements	58



THE COMMON LAW RULES FOR IMPLICATION OF EASEMENTS

- 6.1 Most easements are created by plan of subdivision or by a transfer on sale. Vendors and purchasers do not always turn their minds to whether an easement is needed. In some circumstances, the common law will imply an easement that the parties have failed to create expressly.
- 6.2 There are two kinds of implied easement: easement by implied grant and easement by implied reservation. The rules for the creation of each kind of easement are discussed in this chapter.
- 6.3 An easement by implied grant is an easement over land retained by the vendor, for the benefit of the land sold to the purchaser. For example, if the vendor uses a driveway over the retained land to access the sold land, the purchaser may assume that he or she will be able to use the driveway to access the sold land.
- 6.4 An easement by implied reservation is an easement over the land sold to the purchaser for the benefit of land retained by the vendor. For example, a vendor may fail to reserve a right of access over the land sold, leaving the retained land without access to a road.¹ The rules as to when the common law will imply the reservation of an easement are more restricted than the rules for implied grant.
- 6.5 The common law doctrines of implication developed at a time when public planning, subdivision, vendor disclosure obligations and conveyancing were less developed than they are now. For this reason alone, they need to be reviewed to see if they are still required. If so, the multiple overlapping doctrines need to be consolidated. The doctrines are outlined in the following paragraphs.

EASEMENTS OF NECESSITY

- 6.6 Under the doctrine of necessity, the grant or reservation of an easement may be implied at common law. The easement must be 'absolutely necessary' for the use of the land, such as a right of way to access an otherwise landlocked parcel.² The doctrine relies on the actual or presumed intention of the parties rather than on public policy.³ Therefore, an easement will not arise, no matter how necessary, if it cannot be implied into the conveyance.

INTENDED EASEMENTS

- 6.7 Intended easements are easements that are implied on the basis that they are required to 'give effect to the common intention of the grantor and grantee' as to the use that will be made of the land.⁴ Such easements can either be impliedly granted to a purchaser or impliedly reserved by a seller when subdividing property. For example, a right of way to service a building might be impliedly granted where the grantor knew of a plan to construct the building on otherwise vacant land.⁵

THE RULE IN *WHEELDON V BURROWS*

- 6.8 Under the rule laid down in *Wheeldon v Burrows*,⁶ the grant of an easement will be implied in certain circumstances where the vendor enjoyed a 'quasi-easement' over the retained land before the sale. A quasi-easement is a use which would be capable of being an easement if the servient and dominant lands had separate owners.⁷ For example, the vendor may have accessed the sold land by a driveway across the retained land. Since the vendor at that time was simply exercising his or her rights as owner of both lots, no easement could exist until one of the lots passed to the purchaser.

- 6.9 The conditions under which a quasi-easement will be recognised as an implied easement on the sale of part of the land are:⁸
- at the time of the sale, the exercise of the quasi-easement was continuous and apparent;
 - the quasi-easement is necessary for the reasonable enjoyment of the land sold; and
 - at the time of the sale, the vendor used the quasi-easement for the benefit of the land sold.

GENERAL WORDS IMPORTED INTO CONVEYANCES

- 6.10 At common law, it was customary to include general words in documents of conveyance to cover several categories of property rights, including all of the easements that were being used on the land prior to the sale.⁹ In order to shorten the form of conveyances, legislation was enacted in England to deem these general words to be included in all conveyances.¹⁰ The English legislation was adopted in Victoria and is found in section 62 of the *Property Law Act 1958* (Property Law Act). The section provides that conveyances of land are deemed to include:
- all...privileges, easements, rights and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof.*
- 6.11 This means that any easements or covenants existing over a property will be deemed part of a conveyance, regardless of whether they are explicitly mentioned in a deed of conveyance or not. In addition, section 62 may also operate to convert revocable licences into easements.¹¹ Section 62 has been held to apply to transfers of land under the operation of the *Transfer of Land Act 1958* (Transfer of Land Act).¹²
- 6.12 Because of the perceived potential for the provision to operate in a way that does not reflect the intention of the parties, particularly where a licence is converted into an easement, a number of law reform bodies have recommended that provisions equivalent to section 62 be amended to remove the possibility that it might create easements.¹³ In our Consultation Paper on the *Review of the Property Law Act 1958*, we propose that the section be amended to make it clear that it does not operate to create in respect of or impose on any other land any easements, profits à prendre or similar obligations not previously subsisting.¹⁴

NON-DEROGATION FROM GRANT

- 6.13 Under the doctrine of non-derogation from grant, the vendor of land cannot use any retained land in a manner that would conflict with the intended use for which the land was sold.¹⁵ For example, if the vendor sells land to the purchaser so that the purchaser can erect a building on it, the vendor cannot thereafter withdraw support from the building.¹⁶ It is not clear if this is a separate doctrine of implication or a rationale for other doctrines such as the rule in *Wheeldon v Burrows*.¹⁷

IMPLICATION FROM THE DESCRIPTION OF LAND

- 6.14 Where the description of land in a conveyance implies access to a particular area then an easement will be implied granting a right of way to access that area. For example, where land is described in a grant as being 'bounded by' or 'abutting on' a road an easement granting a right of way over the road will be implied.¹⁸
- 6.15 Doubt exists, however, as to whether this doctrine is applicable in Victoria, due to a potential conflict with section 96(2) of the *Transfer of Land Act*.¹⁹ Section 96(2) states that 'mention of an abuttal in any folio of the Register shall not give title to the abuttal'.

- 1 The creation of landlocked lots is now very unlikely to occur in Victoria, due to rigorous subdivision and planning processes, but it has occurred in the past.
- 2 See generally, Peter Butt, *Land Law* (6th ed) (2009) 461–4.
- 3 *North Sydney Printing Pty Ltd v Sabemo Investment Corp Pty Ltd* [1971] 2 NSWLR 150.
- 4 Butt (2009), above n 2, 460.
- 5 Jonathan Gaunt and Justice Morgan, *Gale on Easements* (18th ed) (2008) 133 citing *Stafford v Lee* (1992) P. & C.R. 172.
- 6 (1879) 12 Ch D 31.
- 7 Under the rule of unity of estates, no easement can exist so long as the dominant and servient lots are owned and occupied by the same person.
- 8 Butt (2009), above n 2, 466.
- 9 Adrian Bradbrook and Marcia Neave, *Easements and Restrictive Covenants in Australia* (2nd ed) (2000) 93.
- 10 *Ibid.*
- 11 *Ibid* 94. In *Wright v McAdam* [1949] 2 KB 749, a licence given by a landlord to a tenant to use a coal shed was, on renewal of the lease, turned into an easement by force of s 62; see also *Hair v Gillman* (2000) 80 P & CR 108.
- 12 *National Trustees, Executors & Agency Co v Long* [1939] VLR 33.
- 13 Law Reform Commission of Victoria, *Easements and Covenants*, No 41 (1992) 13–16, Recommendation 5; Northern Ireland Law Commission, *Consultation Paper Land Law*, NILC 2 (2009) [10.20]; Ontario Law Reform Commission, *Report on Basic Principles of Land Law*, (1996) 146; Law Commission [England and Wales], *Easements, Covenants and Profits a Prendre: A Consultation Paper*, CP No 186 (2008) [4.102–4.104], [4.68–4.78], [6.21–6.30]; Tasmania Law Reform Institute, *Law of Easements in Tasmania*, Final Report No 12 (2010) 31–2, Recommendation 4.
- 14 Victorian Law Reform Commission, *Review of the Property Law Act 1958 Consultation Paper* (2010) 102.
- 15 Butt (2009), above n 2, 464.
- 16 *Ibid.*
- 17 Bradbrook and Neave (2000), above n 9, 101.
- 18 B J Edgeworth et al, *Sackville and Neave Australian Property Law* (8th ed) (2008) 1020.
- 19 Bradbrook and Neave (2000), above n 9, 109–10. The subsection traces back to the 1928 Act and appears designed to negate the acquisition of easements by abutments in a plan that was accepted by the High Court in *Dabbs v Seaman* (1925) 36 CLR 538; Stanley Robinson, *Transfer of Land in Victoria* (1979), 381–3.



CRITICISMS OF COMMON LAW IMPLIED EASEMENTS

- 6.16 The common law doctrines related to implied easements have been criticised on a number of different grounds. The individual doctrines themselves have been criticised as overlapping and unclear, and the overall notion of implied easements has been criticised as conflicting with the principles of the Torrens system.

CONFLICT WITH THE TORRENS SYSTEM

- 6.17 Implied easements are enforceable against all owners of the servient land even though they do not appear on the register. They fall within the exception to the indefeasibility of registered title in section 42(2)(d) of the Transfer of Land Act. This means that prospective purchasers may be unaware of the easements to which the land is subject. Peter Butt argues that:²⁰

the integrity of the Torrens system is undermined if rights are allowed to be created by implication only – especially in the case of easements, where the Act sets up a procedure for formal creation and registration.

- 6.18 A contrary view has been expressed by Fiona Burns, that the integrity of the Torrens system is not necessarily undermined by implied easements.²¹ She points out that implied easements were exceptions to indefeasibility under the original Torrens legislation; they were not fully considered by the architect of the system, Sir Robert Torrens; and that some of the implication doctrines, such as *Wheeldon v Burrows*, were still being developed when the legislation was first enacted.²² Burns argues that implied easements could be more fully integrated into the framework of the Torrens system by the creation of various statutory mechanisms, including court imposed easements.²³

COMPLEX DOCTRINES

- 6.19 Because of the way that the individual doctrines of implication developed at common law, they do not provide a coherent scheme. The Law Reform Commission of England and Wales has recently stated that:²⁴

The various methods of creation [of implied easements] have developed in a piecemeal, uncoordinated fashion. This has led to complexity and to unnecessary and confusing overlap. To be confident whether an implied easement exists, and to understand the nature and extent of such an easement, requires specialist knowledge.

- 6.20 This confusion as to the extent, nature and application of the various doctrines means that litigation concerning implied easements can be time consuming and expensive.²⁵ A party may need to address two or more different rules in order to show that an implied easement exists. As will be discussed below, it may be possible to reduce the number of rules under which easements can be implied, and to clarify those that remain.

IMPLIED EASEMENTS AND THE TORRENS SYSTEM

6.21 Under Victorian law, all easements 'howsoever acquired' are exceptions to the indefeasibility of the title of a registered proprietor.²⁶ Implied easements fall under this broad exception and will therefore exist over land even where they do not appear on the register. There are, however, marked differences among Australian jurisdictions in their treatment of implied easements under the Torrens system.

BROAD EXCEPTION TO INDEFEASIBILITY

6.22 Western Australia treats easements as broad exceptions to indefeasibility, in a similar manner to Victoria.²⁷ This broad exception likewise includes implied easements. Implied easements are specifically listed as exceptions to indefeasibility under the Tasmanian Act.²⁸

6.23 It can therefore be seen that in at least three Australian jurisdictions implied easements arising under each of the common law rules can be created and apply to Torrens system land even if they do not appear on the register.

NARROW EXCEPTION TO INDEFEASIBILITY

6.24 In other Australian jurisdictions, where easements are not treated as broad exceptions to indefeasibility, they are treated as exceptions to indefeasibility only under narrow circumstances. Typically, these exceptions will fall under two categories: omitted or misdescribed easements; or personal rights.

OMITTED OR MISDESCRIBED EASEMENTS

6.25 In NSW, South Australia, Queensland and the Northern Territory, interests that are omitted from or misdescribed on the register are exceptions to indefeasibility.²⁹ In certain circumstances, this exception may apply to implied easements.

6.26 The Queensland and Northern Territory exceptions to indefeasibility expressly include:

- implied easements that affected the servient lot before it was brought under the Torrens statute and which were never recorded; and
- easements that have been registered, but through a mistake no longer appear on the register.³⁰

6.27 The NSW exception also includes implied easements that were formed over old system land before it was brought under the Torrens system.³¹

PERSONAL RIGHTS

6.28 Even where an easement does not constitute an exception to the indefeasibility of the servient owner's title, it may be enforceable as a personal right against the servient owner. This is because indefeasibility of title does not protect the registered owner from an action enforcing personal or contractual obligations.³² A registered owner may be liable to an action in law or equity leading to an order requiring him or her to grant an easement to make good a contractual obligation or a promise or representation on which a neighbouring owner may have relied.³³

6.29 In South Australia, it is likely that these personal, or *in personam*, rights are able to form the basis of a claim for an implied easement. This approach is discussed in Chapter 7.

6.30 In NSW, it appears that enforcement as a personal claim is unavailable. While some earlier decisions indicate that *in personam* claims for implied easements might be valid in NSW, a recent decision of the Court of Appeal suggests that this is now unlikely.³⁴

20 Butt (2009), above n 2, 459.

21 See generally, Fiona Burns, 'Implied Easements and the Integrity of the Torrens System' (2009) 21 *Bond Law Review* 1.

22 *Ibid* 5–6.

23 *Ibid* 23–34.

24 Law Commission [England and Wales] (2008), above n 13, 55.

25 *Ibid*.

26 *Transfer of Land Act 1958* (Vic) s 42(2)(d).

27 *Transfer of Land Act 1893* (WA) s 68(3)(c).

28 *Land Titles Act 1980* (Tas) s 40(3)(e)(i).

29 *Land Titles Act 1994* (Qld) s 185(1)(c); *Land Titles Act 2000* (NT) s 189(1)(c); *Real Property Act 1886* (SA) s 69(d); *Real Property Act 1900* (NSW) s 42(1)(a1).

30 *Land Title Act 1994* (Qld) s 185(3); *Land Title Act 2000* (NT) s 189(3).

31 *Beck v Auerbach* (1986) 6 NSWLR 454.

32 *Frazer v Walker* [1967] 1 AC 569; *Breskvar v Wall* (1971) 126 CLR 376.

33 For an example of an easement being granted on the basis of estoppel, see *Crabb v Arun District Council* [1976] Ch 179.

34 Burns (2009), above n 21, 14–17; Marion McGuire, 'A New South Wales Perspective on Implied and Prescriptive Easements and the Rights in Personam Exception to Indefeasibility of Title' (2006) 12 *Australian Property Law Journal* 20; Lyria Moses and Cathy Sherry, 'Unregistered Access: Wheeldon v Burrows Easements and Easements by Prescription over Torrens Land' (2007) 81 *Australian Law Journal* 491.



6.31 In *Campbell v McGrath*,³⁵ the NSW Court of Appeal overturned a decision of the Supreme Court to recognise an *in personam* claim to an easement implied under the rule in *Wheeldon v Burrows*. While the Court ultimately held that the circumstances did not give rise to a personal equity, it was highly critical of the application of doctrines of implication to Torrens system land. In particular, it cited a decision not allowing an *in personam* claim involving prescription³⁶ and noted that:³⁷

If prescriptive easements are trumped by the indefeasibility provisions of the Real Property Act, logic requires that those provisions should apply to implied easements in the same way.

- 6.32 It may be possible to distinguish *Campbell v McGrath* from other cases where *in personam* claims for implied easements were accepted on the basis that *Campbell v McGrath* involved an implied easement that arose out of a simultaneous conveyance to both the dominant and servient owners.³⁸ This meant that the easement was being sought against a new registered proprietor who would not have seen the easement on the register, rather than against the developer who could be presumed to have granted it.³⁹
- 6.33 In Queensland and the Northern Territory, it is not clear whether implied easements based on *in personam* rights would be recognised or not.⁴⁰ The matter has not been judicially considered in either jurisdiction.

IMPLIED SUBDIVISIONAL EASEMENTS

6.34 Under Victorian law, there are currently two sets of provisions for implying easements over lots created on an approved or registered plan of subdivision. These are sections 12(2) and 24 of the *Subdivision Act 1988* (Subdivision Act) and section 98 of the *Transfer of Land Act*.

SECTION 12(2) OF THE SUBDIVISION ACT

- 6.35 Subject to some exceptions, section 12(2) of the Subdivision Act implies into plans of subdivision 'all the easements and rights necessary to provide' the following:
- support, shelter or protection;
 - passage or provision of water, sewerage, drainage, gas, electricity, garbage, air or any other service of whatever nature (including telephone, radio, television and data transmission);
 - rights of way;
 - full, free and uninterrupted access to and use of light for windows, doors or other openings; or
 - maintenance of overhanging eaves.
- 6.36 These easements are implied into the plan of subdivision so long as they are 'consistent with the reasonable use and enjoyment of the other lots and the common property'. It is possible to expressly note in the plan that some or none of these easements will be implied over the subdivision.⁴¹
- 6.37 Under section 24(2)(e) of the Subdivision Act, all easements or rights implied under section 12(2) of the Act are created upon registration of the plan of subdivision. Section 24(1) of the Subdivision Act provides that registration of a plan of subdivision occurs at the time when the Registrar records it.

- 6.38 While case law on the interpretation of section 12(2) is sparse, the term ‘necessary’ has been narrowly interpreted to mean essential, rather than substantially preferable.⁴² Whether an easement is essential depends on whether there is a feasible or reasonably available alternative.⁴³ In addition, the necessity for the easement would need to be more than as a matter of ‘mere convenience’⁴⁴ but not ‘absolutely essential’.⁴⁵
- 6.39 It is also possible that the ‘necessity’ for the easement could arise some time after the initial subdivision of the land. In *Gordon v Body Corporate Strata Plan 3023*,⁴⁶ it was held that an easement could be implied under section 12(2) for support of, passage through, or provision of services to, a building extension undertaken 32 years after the subdivision. Osborn J held that section 12(2) should be interpreted as operating prospectively and should not be governed by the circumstances existing at the time of subdivision.⁴⁷ However, in applying section 12(2) Osborn J did appear to look at what future development could be inferred to be within the contemplation of the subdivider at the time of subdivision.⁴⁸ In a subsequent decision, the Court of Appeal appears to have approved his interpretation.⁴⁹
- 6.40 The potential for implied subdivisional easements to bind unsuspecting purchasers of the servient land would increase substantially if section 12(2) of the Subdivision Act has prospective application. It is very difficult for purchasers to anticipate easements that may only become ‘necessary’ as a result of future development of the dominant land.
- 6.41 Although the prospective application of section 12(2) of the Subdivision Act accommodates changing uses of land, it does so at the expense of the servient landowner, who receives no compensation.
- 6.42 It would seem more appropriate to have a mechanism, such as the court imposed easements discussed in Chapter 3, where the competing interests of the landowners could be weighed, and compensation for the imposition of the easement granted.

SECTION 98 OF THE TRANSFER OF LAND ACT

- 6.43 Section 98 of the Transfer of Land Act implies the following easements where they are ‘necessary for the reasonable enjoyment’ of the land:
- easements of way;
 - easements of drainage;
 - easements for party walls, support and protection; and
 - easements for the supply of water, gas, electricity, sewerage, and telephone.
- 6.44 The owner of a lot shown on an approved or registered plan of subdivision is deemed under this section to have the benefit of these implied easements over appurtenant lots.⁵⁰
- 6.45 Section 98 is very similar to section 12 of the Subdivision Act, in terms of provisions for both express and implied subdivisional easements. As noted in Chapter 3, section 98 may have been retained only as a transitional provision following the commencement of the Subdivision Act, but it is not expressly limited in its application. It applies to subdivisions that have been registered since the commencement of the Subdivision Act.

- 35 (2006) 68 NSWLR 229.
- 36 *Williams v State Transit Authority of New South Wales* [2004] NSWCA 179.
- 37 *Campbell v McGrath* (2006) 68 NSWLR 229, 253.
- 38 For a discussion of this kind of easement see Butt (2009), above n 2, 469.
- 39 *Moses and Sherry* (2007), above n 34, 503–6.
- 40 *Burns* (2009), above n 21, 17–18.
- 41 *Subdivision Act 1988* (Vic) s 12(3).
- 42 *Body Corporate No. 413424R v Sheppard and Another* (2008) 20 VR 362 [74–81].
- 43 *Body Corporate No. 413424R v Sheppard and Another* (2008) 20 VR 362 [81–82].
- 44 *Body Corporate No. 413424R v Sheppard and Another* (2008) 20 VR 362 [58–63].
- 45 *Body Corporate No. 413424R v Sheppard and Another* [2007] VSC 203 [7]; upheld by *Body Corporate No. 413424R v Sheppard and Another* (2008) 20 VR 362.
- 46 (2004) 15 VR 557.
- 47 *Gordon v Body Corporate Strata Plan 3023* (2004) 15 VR 557 [28–31].
- 48 *Gordon v Body Corporate Strata Plan 3023* (2004) 15 VR 557 [52–53].
- 49 *Body Corporate No 41342R v Sheppard and Another* [2008] VSCA 118 [59–60].
- 50 Section 98 is the successor to similarly worded provisions in s 2 of the *Transfer of Land Act 1921* and s 212 of the *Transfer of Land Act 1928*: *Shelmerdine and Another v Ringen Pty Ltd and Another* [1993] 1 VR 315, 322–4; *Bowman v Taylor* [1934] VLR 34, 39–40.



6.46 There is substantial overlap between the two provisions, particularly in their application to implied easements. In at least one case it has been noted that the ‘necessity’ requirement in section 12(2) of the Subdivision Act should be read in the same manner as the phrase in section 98 of the Transfer of Land Act.⁵¹ The origin of the phrases ‘necessary to provide’ in the Subdivision Act and ‘necessary for the reasonable enjoyment’ in the Transfer of Land Act seem to derive from the use of the term ‘necessary’ in *Wheeldon v Burrows*.⁵² However, both provisions have been held to depart from *Wheeldon v Burrows*, in part because the statutes contain only part of the language from that case.⁵³

6.47 The test to determine whether an easement is ‘necessary for the reasonable enjoyment of the land’ has been interpreted to not require ‘strict necessity’ like the common law doctrine of necessity.⁵⁴ Instead, the Court of Appeal has said that the test has:⁵⁵

similar effect to the test which applies in determining what amounts to reasonable access to the dominant tenement, where the easement of way is created by an express grant, which does not indicate an access or inclusion point for the easement.

LIMITATIONS OF IMPLIED SUBDIVISIONAL EASEMENTS

6.48 Implied subdivisional easements are a useful device for ensuring that subdivided lots have essential easements, but they do not displace the need for other mechanisms for creating implied easements. The statutory provisions under which subdivisional easements are implied are not wide enough to cover all the situations in which an easement is required for the effective use of land. The easements do not arise where the land has been subdivided in the past without approval or registration of a plan of subdivision. Furthermore, they are limited to certain named types of easements, and only to those that are ‘necessary’. Some of the common law doctrines of implication do not require necessity since they are based on the presumed intentions of the parties.⁵⁶

STATUTORY RECIPROCAL RIGHTS

6.49 As we have discussed, implied subdivisional easements are useful but limited in their application. Other legislation in Victoria and in other jurisdictions creates statutory rights that serve the function of easements. They supplement the role of subdivisional easements in ensuring the efficient and effective use of land.

6.50 These statutory rights do not depend on the registration of a plan of subdivision but typically exist as reciprocal rights between landowners. For example, under current Victorian legislation owners of land have certain reciprocal rights in relation to fences under the *Fences Act 1968* (Fences Act). Under section 32 of that Act, a person engaged in constructing or repairing a fence can enter adjoining land to carry out work. This obviates the need for an easement allowing this kind of access.

6.51 Additionally section 14 of the Fences Act requires that the owners of neighbouring land share the expenses of repairing fences between their properties under most circumstances. This possibly overrides a common law rule that allowed ‘quasi easements’ to arise, either impliedly or prescriptively, where one party was solely responsible for the maintenance of the fence.⁵⁷

6.52 It would be possible to create several other categories of these statutory reciprocal rights in order to reduce the need for easements or to remedy issues with the common law rules. Other jurisdictions have adopted statutory reciprocal rights for party walls, support of buildings and temporary rights of access. These types of rights will be briefly examined below.

PARTY WALLS

- 6.53 Although there does not appear to be a precise legal definition of the term 'party wall', the term is generally taken to mean any one of the following:⁵⁸
- a wall divided longitudinally into two strips, each of which belongs to a neighbouring owner;
 - a wall divided in the same manner as above, but with each half subject to an easement in favour of the owner of the other half;
 - a wall belonging entirely to one of the adjoining owners, but subject to an easement or right in the other owner to have it maintained as a dividing wall; and
 - possibly, a wall of which the two adjoining owners are tenants in common.
- 6.54 Under section 88BB of the *Conveyancing Act 1919* (NSW), party walls contained in a plan lodged for registration will be construed as being intended to create cross-easements. Therefore, under NSW legislation, party walls created in a plan automatically exist as mutual cross-easements of support without the need for them to be created expressly, impliedly or by prescription. Similar legislation exists in South Australia, Western Australia, Tasmania and the ACT.⁵⁹
- 6.55 Victoria does not have legislation that expressly provides that party walls exist as cross-easements. However, section 12(2)(c) of the Subdivision Act provides that all easements and rights necessary to provide 'support, shelter or protection' will be implied into a plan of subdivision. This would probably cover party walls but only where they exist in a subdivision.
- 6.56 It would be possible to create a broader statute which created cross-easements of support in existing party walls as well as those found in plans of subdivision. This would extend the benefit of the legislation to instances where party walls exist on properties that do not have a plan of subdivision. It would also enable the clarification of the scope and nature of such easements rather than relying on the broadly worded implication provisions of section 12(2)(c) of the Subdivision Act.

SUPPORT OF BUILDINGS

- 6.57 There is a common law right to the support of land in its natural state, which does not depend on the creation of an easement. The common law right does not extend to the support of buildings on the land.⁶⁰ An easement for the support of buildings from adjoining land must be created in a manner recognised by law such as grant, implication or prescription.⁶¹
- 6.58 In Queensland, the common law right of support has been legislatively protected and extended to the support of buildings. Section 179 of the *Property Law Act 1974* (Qld) provides that:
- For the benefit of all interests in other land...there shall be attached to any land an obligation not to do anything on or below it that will withdraw support from any other land or building, structure or erection that has been placed on or below it.*
- 6.59 In NSW, a different approach has been taken. Section 177 of the *Conveyancing Act 1919* (NSW) creates a duty of care in relation to support of land. The section therefore creates a new action in negligence related to support of land.⁶² Although the language of section 177 is ambiguous, it has been interpreted as intended to apply to the support of buildings on adjoining land.⁶³

- 51 *Gordon v Body Corporate Strata Plan 3023* (2004) 15 VR 557 [29]; see also eg, *Body Corporate No. 413424R v Sheppard and Another* [2007] VSC 203 [7], [63] for an instance of s 98 precedent being adopted in a s 12 case.
- 52 *Bowman v Taylor* [1934] VLR 34, 40.
- 53 *Bowman v Taylor* [1934] VLR 34, 40–1; *Gordon and Another v Body Corporate Strata Plan 3023 and Another* (2004) 15 VR 557, [34–42].
- 54 *Boglari and Another v Steiner School and Kindergarten* (2007) 20 VR 1 [30].
- 55 *Boglari and Another v Steiner School and Kindergarten* (2007) 20 VR 1 [30].
- 56 For example, intended easements and those created by the rule in *Wheeldon v Burrows*.
- 57 Gaunt and Morgan (2008), above n 5, 46.
- 58 Robert Megarry and William Wade, *The Law of Real Property* (7th ed) (2008) 1309–10.
- 59 *Development Act 1993* (SA) s 61; *Local Government (Miscellaneous Provisions) Act 1960* (WA) ss 383–397; *Conveyancing and Law of Property Act 1884* (Tas) s 34B(a); *Common Boundaries Act 1981* (ACT) s 28.
- 60 Butt (2009), above n 2, 19–20.
- 61 Bradbrook and Neave (2000) above n 9, 190.
- 62 *Conveyancing Act 1919* (NSW) ss 177(1), 177(8).
- 63 *Piling v Prynew Nemeth* [2008] NSWSC 118 [55].



- 6.60 In Victoria, section 12(2) of the Subdivision Act states that easements of support are implied into all subdivisions. The section does not specify whether this includes easements of support of buildings and it is unclear whether it extends to the support of buildings on adjoining land. Section 12(2) is distinguishable from the NSW approach in that it specifically refers to easements and does not create a duty of care.
- 6.61 It would be possible to create an independent right to the support of buildings that existed outside the provisions of section 12(2) of the Subdivision Act. This would provide a benefit to buildings that exist on land that has not been subdivided, and would remove the need to clarify the extent of the provisions contained in section 12(2).

RIGHTS OF ACCESS

- 6.62 Some jurisdictions have legislation that allows for the creation of rights of access to carry out work on neighbouring land. This legislation can be specific to certain types of work, such as the Fences Act, or of more general application, such as the *Access to Neighbouring Land Act 1992* (Tas). The Tasmanian Act provides several grounds upon which a court can make an access order including: carrying out repairs or maintenance; replacing dead hedges, trees or shrubs; clearing or filling in ditches; and ascertaining the course of sewers and pipes.
- 6.63 Under the Tasmanian legislation, obtaining a right of access order would forestall the need to have an easement to access the neighbouring land. NSW has very similar legislation, which allows for the granting of access orders 'for the purpose of carrying out work on land owned by another person' that is adjoining or adjacent to the applicant's land.⁶⁴
- 6.64 In Victoria there are limited provisions dealing with a right of entry to carry out works. Under section 95 of the *Building Act 1993* (Vic) (Building Act) an adjoining landowner can enter neighbouring land to 'carry out protection work required by the building regulations' subject to some restrictions.⁶⁵ The provisions in the Building Act are very limited in scope and do not cover the majority of instances where access to neighbouring land might be necessary to carry out works.
- 6.65 It would be possible to adopt legislation that either allowed for temporary access orders, or that created a default position where access would be allowed for certain purposes so long as it had minimal impact on the land. For example, a landowner might be able to post notice of intention to temporarily enter neighbouring land in order to carry out works and be able to do so unless the neighbour objects.

Which, if any, statutory reciprocal rights should be adopted in Victoria?

REFORM OPTIONS

6.66 We present the following reform options with regard to implied easements. These options form part of the integrated scheme for the creation of all easements and will be re-examined in this context in Chapter 8.

OPTION ONE: RETAIN THE CURRENT LAW

6.67 It would be possible to retain the current common law doctrines related to implication and rely on the broad exception to indefeasibility in section 42(2)(d) of the Transfer of Land Act to give them effect. This would leave unaddressed the criticisms of the common law doctrines and the risk that unrecorded easements by implication pose for purchasers of the servient land.

OPTION TWO: INTRODUCE STATUTORY RULES FOR IMPLICATION

CODIFICATION

6.68 It would be possible to modify the doctrine of implication by replacing it with a statutory code, as Tasmania has done for prescriptive easements.⁶⁶ Although section 12(2) of the Subdivision Act and section 98 of the Transfer of Land Act already achieve a partial codification of the law of implied easements, they co-exist with the full range of doctrines under which implied easements can arise at common law.

6.69 Codification could clarify the scope and operation of the various common law doctrines of implication. Any overlap between the various doctrines could be identified and steps taken to reduce or abolish it.

6.70 If, as we propose, legislation were introduced to enable court imposed easements, the codified rules of implication could be incorporated as further tests for the court to apply. This would provide a clear mechanism for the creation of implied easements and enable compensation to be awarded to the servient owner where the court deems appropriate.

MODIFICATION

6.71 The Law Commission for England and Wales recently outlined several options for reform of the law of implied easements. It broadly categorised the common law doctrines of implication into two groups: those giving effect to the intent of the parties and those based on the necessity of the easement.

6.72 With regard to intention-based reforms, the Commission recommended that the approach not be based entirely on the actual intent of the parties. It instead proposed the following models:⁶⁷

- a presumption-based approach, with rebuttable presumptions arising in favour of easements of access and those necessary for known purposes; or
- a contractual approach, utilising contract law principles to imply terms into contracts, such as the obvious intent of the parties, business efficacy or standard terms, to imply grants of easements.

6.73 With regard to easements based on necessity, the Commission proposed the following models:⁶⁸

- a *de minimis* rule, limiting implication to those easements that are considered strictly necessary, such as access, support and drainage; or
- a 'necessary for reasonable use' rule, allowing implication of easements necessary for the reasonable use of the land, such as utilities and business access.

6.74 The 'necessary for reasonable use' model would therefore appear to be similar to section 12(2) of the Subdivision Act and section 98 of the Transfer of Land Act, though more widely applicable. It would be possible to adopt either or both models.

64 *Access to Neighbouring Land Act 2000* (NSW) s 7(2).

65 See generally, *Building Act 1993* (Vic) ss 84–100.

66 See Chapter 7.

67 Law Commission [England and Wales] (2008), above n 13, 58–62.

68 *Ibid* 63–64.



OPTION THREE: REPLACE RULES OF IMPLICATION WITH COURT IMPOSED EASEMENTS

- 6.75 We have seen that several jurisdictions have provisions for court imposed easements. The grounds for imposing easements under provisions of this type could be broad enough to cover many of the situations where implied easements currently arise at common law.
- 6.76 However, the underlying rationale for court imposed easements differs substantially from that which underlies the doctrines of implication. As noted above, the various models for court imposed easements all hinge on tests for 'reasonable necessity' and the easement not conflicting with the public interest. Implied easements, on the other hand, are not based on public policy but on the intent of the grantor and grantee.⁶⁹
- 6.77 Courts applying the NSW model for court imposed easements have tended to adopt an objective rather than subjective test when considering the reasonable necessity of a proposed easement.⁷⁰ This has meant that the courts have tended to view the 'necessity' as being related to objectively reasonable aims, such as increasing the value of the land, rather than the actual desires of the landowners.
- 6.78 If court imposed easements are adopted as an alternative to common law implied easements in Victoria, consideration would have to be given to whether the court should be required to consider the actual or presumed intent of the parties as well as the reasonable necessity of the easement.
- 6.79 Further questions relating to the issues and options discussed in this Chapter are set out in Chapter 8.

69 See eg, *Russell v Pennings* [2001] WASCA 115 [30].

70 See generally, Scott Grattan, 'Courting Councils and Counselling Courts: Subjectivity and Objectivity in s88K Applications' (2005) 12 (2) *Australian Property Law Journal* 125.

Chapter 7

Prescriptive Easements

CONTENTS

Introduction.....	60
The common law rule.....	60
Functions of prescriptive easements.....	61
Torrens system.....	61
Broad exception.....	61
Narrow exception.....	61
Abolition of prescription.....	62
Personal right.....	62
Criticisms of prescription.....	63
Conflict with the principles of the Torrens system.....	63
Fairness and human rights.....	64
Indiscriminate mechanism.....	65
Discouragement of neighbourly toleration.....	65
Unnecessary in light of modern planning.....	65
Reform options.....	66
Option one: retain the current law.....	66
Option two: modify the law of prescription.....	66
Option three: replace prescriptive easements with other mechanisms.....	69

INTRODUCTION

- 7.1 Prescription is an ancient legal principle under which certain types of property rights can be acquired by long possession or use, without a formal 'grant' of the right. Prescription underlies many rules of property law in English law and in European legal systems.
- 7.2 In Victoria, the 'long user' (use) of a right over neighbouring land can give rise to an easement for that use, under a rule of prescription known as the doctrine of lost modern grant.¹ Under a legal fiction, it is presumed that an easement has been granted but the documentation lost.² Since the doctrine of lost modern grant is the only rule of prescription under which easements can be acquired in Victoria, we simply call it 'prescription'.
- 7.3 The acquisition of easements by prescription is controversial in Victoria and in many other jurisdictions. In this Chapter, we discuss the functions served by the rule and the criticisms of it, and examine options for replacing, modifying or abolishing it.

THE COMMON LAW RULE

- 7.4 For an easement to arise by prescription, the use must have been continuous and capable of forming an easement at common law.³ The use must have been exercised 'as of right' and for a period of 20 years or more.⁴
- 7.5 It has been said that use 'as of right' means use 'as if of right'.⁵ For the use to be 'as of right' it must be without force, without secrecy and without permission.⁶ Whether use has been 'as of right' will be a question of fact to be determined by the court.⁷
- 7.6 In addition, the servient owner must have acquiesced in the use throughout the 20 year prescription period.⁸ To show acquiescence, it must be established that the servient owner had knowledge (or the means of acquiring knowledge) of the use, and had the power to prevent the use or sue the claimant and failed to do so.⁹
- 7.7 The requirement of acquiescence means that the owner of the servient land can raise a defence of lack of knowledge. For example, in *Sunshine Retail Investments Pty Ltd v Wulff*,¹⁰ Hedigan J found that an easement had not been acquired by prescription over rental property because the owners were not in possession at the time that the use occurred. Since they did not have a means of acquiring knowledge about the use, they did not acquiesce to it.
- 7.8 As the example shows, the requirement of acquiescence significantly limits the application of prescription. The defence of lack of knowledge could make it difficult to prove that an easement has been acquired where the use is hidden from view, such as where a building is supported by crossbeams into a building on adjacent land, or sewerage lines are placed underground.
- 7.9 It can sometimes be difficult to determine whether the owner of the land on which the use takes place has either acquiesced or impliedly granted a licence (permission) for the use. Use pursuant to an implied licence does not give rise to a prescriptive easement, as it does not satisfy the requirement of use 'without permission'.¹¹
- 7.10 The Law Commission for England and Wales has proposed that if prescription is retained in the law of easements, acquiescence should no longer be part of the test. It proposes that the test should simply be 20 years use 'as of right', without force, without secrecy and without permission.¹²

FUNCTIONS OF PRESCRIPTIVE EASEMENTS

- 7.11 Acquisition of easements by prescription may be justified on a number of grounds. Generally, prescriptive easements are seen as protecting reasonable expectations arising from long-standing use, particularly where there is a heavy reliance on the ongoing nature of the easement.¹³ This rationale explains the requirement of acquiescence, since the servient owner's acquiescence in the use for 20 years may have led the dominant owner to rely on continued use of the easement.
- 7.12 The doctrine has been justified because it limits 'rent-seeking' behaviour between neighbours.¹⁴ 'Rent-seeking' is behaviour that seeks to take unfair economic advantage of a monopoly situation, in this case by forcing the dominant owner to pay more for the easement than it is worth. Control of rent-seeking is of particular concern where deficiencies in conveyancing or planning systems result in land being sold without express creation of easements that are necessary for the use of, access to and servicing of the land.
- 7.13 Prescriptive easements also function as a mechanism for correcting omissions in conveyancing where an easement that was intended or presumed to have been created was not.¹⁵ Fiona Burns has also noted that the 'the doctrine has filled what would otherwise constitute a significant legal vacuum' when, amongst other things, express conferment of an easement is complex and expensive or where the dominant owner cannot otherwise rely on alternative bases for a claim to an easement, such as an implied easement.¹⁶
- 7.14 Much like limitation of action legislation, prescription creates a degree of certainty in rights after a set amount of time has elapsed, which tends to reduce litigation. It also discourages landowners from unduly delaying the enforcement of their rights. Delays in enforcement can result in evidence being lost with the passage of time.

TORRENS SYSTEM

- 7.15 Prescriptive easements arise through use. They are not documented or registered, so do not appear on Torrens title registers. Each Australian jurisdiction has its own 'Torrens' statute, and each contains a provision which states that a registered owner holds title free of all unregistered interests, except for specified classes of interests (known as 'exceptions to indefeasibility').
- 7.16 The states and territories are not uniform in their treatment of unregistered easements. There are three approaches in the Torrens statutes of the various jurisdictions. Prescriptive easements either fall under a broad exception to indefeasibility, fall under a narrow exception, or have been abolished entirely.

BROAD EXCEPTION

- 7.17 In Victoria and Western Australia, all easements are exceptions to indefeasibility.¹⁷ A prescriptive easement can be acquired over Torrens system land in the same way that it can over old system land, under the doctrine of lost modern grant.

NARROW EXCEPTION

- 7.18 In South Australia and NSW, easements do not constitute a broad exception to indefeasibility. Instead, they are exceptions to indefeasibility only where an easement has been 'omitted or mis-described' in a certificate of title.¹⁸ The exception is confined to prescriptive easements acquired over old system land before it was first registered under the Torrens system, or was previously on the register but was subsequently omitted or misdescribed.¹⁹

- 1 Law Commission [England and Wales], *Easements, Covenants and Profits a Prendre: A Consultation Paper*, CP No 186 (2008) 67–71.
- 2 Adrian Bradbrook et al, *Australian Real Property Law* (4th ed) (2007) 765.
- 3 Law Reform Commission [Ireland], *Report on the Acquisition of Easements and Profits a Prendre by Prescription*, No 66 (2002) 3–4.
- 4 Adrian Bradbrook and Marcia Neave, *Easements and Restrictive Covenants in Australia* (2nd ed) (2000) 120, 126–37.
- 5 *R (Beresford) v. Sunderland City Council* [2004] 1 AC 889 [72] (House of Lords, Walker LJ).
- 6 This is often formulated as '*nec vi, nec clam, nec precario*'.
- 7 Bradbrook and Neave (2000), above n 4, 126.
- 8 *Ibid* 134–7.
- 9 Fiona Burns, 'The Future of Prescriptive Easements in Australia and England' (2007) 31 *Melbourne University Law Review* 3, 8.
- 10 [1999] VSC 415.
- 11 Butt, 'Conveyancing and Property Law' (2004) 78 *ALJ* 162, 164–5; *R. (on the application of Beresford) v Sunderland City Council* [2004] 1 AC 889.
- 12 Law Commission [England and Wales] (2008), above n 1, 78.
- 13 *Ibid* 74.
- 14 *Ibid* 84.
- 15 *Ibid* 74.
- 16 Burns (2007), above n 9, 11.
- 17 *Transfer of Land Act 1958* (Vic) s 42(2)(d); *Transfer of Land Act 1893* (WA) s 68(3)(c).
- 18 *Real Property Act 1886* (SA) s 69(d); *Real Property Act 1900* (NSW) s 42(1)(a1).
- 19 Burns (2007), above n 9, 25.



ABOLITION OF PRESCRIPTION

- 7.19 In Tasmania, the doctrine of lost modern grant has been abolished and a statutory scheme for registering prescriptive easements has been substituted.²⁰ The mechanism for registering prescriptive easements is discussed further below.
- 7.20 In Queensland, the doctrine of lost modern grant was abolished in 1975.²¹ In contrast to Tasmania, it was not replaced in Queensland with a statutory equivalent, but court imposed easements were introduced at around the same time.²² Court imposed easements are also discussed below.

PERSONAL RIGHT

- 7.21 Even in jurisdictions where prescriptive easements are not statutory exceptions to indefeasibility, it is still possible that landowners acquiring a prescriptive easement would be able to enforce an easement against a servient owner who has been the registered owner for the entire prescriptive period. This is known as *in personam* enforcement, meaning that use for 20 years gives rise to an easement which is enforceable against the servient owner personally, but not against that owner's successors.
- 7.22 An example of how this might operate is found in South Australia. In *Golding v Tanner*,²³ the Supreme Court of South Australia held that a right of way could be acquired by prescription against an owner who had been the registered proprietor for the entire prescriptive period. The court said that if there had been a change in ownership of the servient land during the period, the doctrine would not have applied.²⁴
- 7.23 The NSW Court of Appeal has ruled out the *in personam* enforcement of easements in that state, based on its view that the doctrine of lost modern grant is inconsistent with the basic principle of the Torrens system. In *Williams v State Transit Authority of New South Wales*,²⁵ the Court of Appeal distinguished *Golding v Tanner* on the basis of differences in the wording of the South Australian and NSW legislation. It also took a different view on the underlying principle, stating:

*To reject incorporation into the Torrens system of the limited version of the doctrine of lost modern grant suggested by Golding is not to deny the effect of well established authorities...in support of in personam rights...such incorporation would...stretch the doctrine to breaking point, contradict basal principles of title by registration and displace long-established authority in this State.*²⁶

CRITICISMS OF PRESCRIPTION

7.24 There is a considerable body of writing critical of prescriptive easements, particularly from academic commentators and law reform bodies. There are four main criticisms of prescription:

- it conflicts with the principles of the Torrens system;
- it conflicts with notions of fairness and human rights;
- it is overly broad; and
- it is outdated in light of modern planning law.

Each of these criticisms is considered below.

CONFLICT WITH THE PRINCIPLES OF THE TORRENS SYSTEM

- 7.25 Under section 42(2)(d) of the *Transfer of Land Act 1958* (Transfer of Land Act), all easements ‘howsoever acquired’ are exceptions to indefeasibility. This means that under Victorian law prescriptive easements can exist over Torrens system land but do not appear on the register. The easements are difficult for purchasers to discover, particularly as the use may be intermittent and not observable on inspection of the land.
- 7.26 Vendors are required to disclose the existence of an easement before the purchasers sign a contract of sale.²⁷ If the vendor fails to disclose the easement, the dominant owner will still be able to enforce it against the purchaser as the servient owner.
- 7.27 Even if a purchaser is aware of the easement, its scope may be difficult to ascertain, since there is no document that sets out the terms. The scope of the easement depends upon its use during the prescription period.²⁸ There may be evidentiary difficulties in establishing the extent and nature of the use of the servient land during that time.²⁹
- 7.28 There is a policy argument that in a system of registered title, interests should not run with land unless they are registered or recorded on title.³⁰ The former Law Reform Commission of Victoria recommended that prescriptive easements be abolished, in part because of the conflict with the register.³¹ Other commentators have also criticised the law of prescription on this point.³²
- 7.29 The argument that prescriptive easements conflict with the Torrens system should not be overstated. Easements of all kinds have long been express statutory exceptions to indefeasibility and therefore form part of the overall scheme.³³ Easements, along with the other classes of express exceptions, have been intentionally created under the legislation or arise under other legislation.³⁴
- 7.30 If the acquisition of easements by long use is otherwise worth retaining, mechanisms could be introduced to enable them to appear on the register. As we have seen, under the South Australian model, prescription gives rise to a right enforceable by a personal action against the servient owner who acquiesced in the use throughout the prescription period. Provision could be made for an easement established through personal action in this way to be entered on the register.
- 7.31 Prescriptive acquisition under the doctrine of lost modern grant has also been criticised by the NSW Court of Appeal on the ground that the fiction of lost grant is inconsistent with the nature of the Torrens system as a system of ‘title by registration’.³⁵ The presumption of lost grant is merely a legal fiction, and can be abolished if the rule is otherwise useful. The Law Commission of England and Wales proposes a statutory reform in which prescriptive acquisition of easements would no longer rely on the fiction of lost grant, but solely on qualifying long use.³⁶
- 7.32 We suggest that the question of reconciling prescriptive easements with the Torrens register is a secondary issue. The primary issue is whether the prescriptive acquisition of easements should be retained or abolished.

- 20 See generally, *Land Titles Act 1980* (Tas) Part IXB.
- 21 *Property Law Act 1974* (Qld) s 198A; inserted by Act No. 57, 1975 s 17.
- 22 *Property Law Act 1974* (Qld) s 180.
- 23 (1991) 56 SASR 482.
- 24 *Golding v Tanner* (1991) 56 SASR 482, 490.
- 25 (2004) 60 NSWLR 286.
- 26 *Williams v State Transit Authority of New South Wales* (2004) 60 NSWLR 286, 300–1.
- 27 *Sale of Land Act 1962* (Vic) s 32(2)(b).
- 28 Law Reform Commission [Ireland] (2002), above n 3, 20–1.
- 29 Law Commission [England and Wales] (2008), above n 1, 72.
- 30 See eg, the often cited quote by Barwick CJ in *Breskvar v Wall* (1971) 126 CLR 376, 385 that ‘The Torrens system of registered title of which the Act is a form is not a system of registered title but a system of title by registration’.
- 31 Law Reform Commission of Victoria, *Easements and Covenants*, No 41 (1992) 21.
- 32 See eg, Burns (2007), above n 9, 23–4, 36–7; Lyria Moses and Cathy Sherry, ‘Unregistered Access: Wheeldon v Burrows Easements and Easements by Prescription over Torrens Land’ (2007) 81 *Australian Law Journal* 491, 500.
- 33 See eg, *Transfer of Land Act 1890* (Vic) s 74.
- 34 For these other categories see *Transfer of Land Act 1958* (Vic) s 42(2).
- 35 *Williams v State Transit Authority of New South Wales* (2004) 60 NSWLR 286, 300.
- 36 Law Commission [England and Wales] (2008), above n 1, 78.



FAIRNESS AND HUMAN RIGHTS

- 7.33 The operation of prescription has been criticised for allowing claimants to acquire a permanent proprietary right for nothing or by 'mere accident'.³⁷ It has been noted that this means that the rule arguably lacks 'any moral justification' for its operation.³⁸
- 7.34 Where the acquisition of the right is not by 'mere accident', the rule of prescription has been criticised as rewarding the dominant owners for what would otherwise be wrongful behaviour.³⁹ Furthermore, Brendan Edgeworth argues that replacing the doctrine of prescription with court imposed easements would reduce the incentives to trespass and the 'legalised theft that is permissible under the present law would be removed'.⁴⁰
- 7.35 The operation of the doctrine of prescription partially deprives owners of servient land of proprietary rights without compensation.⁴¹ This effective taking of a property right without compensation, just or otherwise, is arguably contrary to human rights.⁴²
- 7.36 It is unlikely that prescriptive easements conflict with the Victorian Charter of Human Rights and Responsibilities. Section 20 of the *Charter of Human Rights and Responsibilities Act 2006* provides that 'a person must not be deprived of his or her property other than in accordance with law'. Assuming that the acquisition of an easement by prescription is a partial deprivation of the servient owner's property rights, this mode of acquisition has long been permitted by Victorian law and may be considered to be 'in accordance with the law'.
- 7.37 It is nevertheless arguable that prescription conflicts with other international human rights statements. There has been judicial consideration of whether a related rule of prescription, the doctrine of adverse possession,⁴³ is incompatible with the *Human Rights Act 1998* (UK), which adopted the European Convention on Human Rights (ECHR) into UK law. Article 1 of Protocol No. 1 of the ECHR holds that every person is 'entitled to the peaceful enjoyment of his possessions' and that 'no one shall be deprived of his possessions except in the public interest and subject to the conditions provided by law'. This is, however, qualified as not interfering with a State's right to 'enforce such laws as it deems necessary to control the use of property'.
- 7.38 In *JA Pye (Oxford) Ltd & Ors v Graham and Ors*,⁴⁴ the House of Lords held that the doctrine of adverse possession was not inconsistent with Article 1.⁴⁵ The European Court of Human Rights subsequently heard the matter and held that the doctrine did violate Article 1. While this decision was later overturned by a narrow majority decision of the Grand Chamber, it does indicate that there are significant human rights concerns about the doctrine.
- 7.39 Prescriptive acquisition of easements, as opposed to adverse possession of land, does not give title to the land but only a limited right to use it. It is therefore arguably less onerous to allow prescription than it is to allow adverse possession, since it does not represent a complete taking. However, the rule allows the acquisition of a property right in somebody else's land without notice, due process or compensation, and the existence of an easement can significantly affect the use and development of the servient land.
- 7.40 One of the primary justifications for adverse possession is that it ensures that there is certain and enforceable title to land. It does this by allowing the long term possessors of land to obtain good title to land where the title is uncertain or where transfers have not been recorded on the register. This rationale does not apply to prescriptive easements, as the ownership of the servient land is rarely in issue.⁴⁶

INDISCRIMINATE MECHANISM

7.41 While prescription can serve a useful function in upholding reasonable expectations based on long use, the doctrine is poorly designed for the purpose. Brendan Edgeworth characterises it as an indiscriminate mechanism.⁴⁷

Legal doctrines concerning...prescription, invented at around the time of the blunderbuss, might be expected to be fairly indiscriminate in alternatively striking down, or affirming, strong and weak cases in equal measure.

7.42 In some respects, the doctrine's operation is too broad. One of the strongest justifications for the doctrine is that it upholds reliance based on long use.⁴⁸ While there is a requirement of acquiescence by the servient owner, there is no requirement of actual reliance by the dominant owner on the use.⁴⁹ Therefore, the dominant owner could receive a double windfall of 20 years wrongful use and a permanent property right without demonstrating any reliance or need for the use to continue. If the purpose of the doctrine is to protect reliance, it does not necessarily follow that the protection should take the form of a property right that runs with the dominant land and benefits future owners.⁵⁰

7.43 In other ways the doctrine is too limited. The requirement of acquiescence by the servient owner limits the value of prescription in upholding expectations arising from long use. As noted above, where the use is difficult to detect, such as crossbeams of support for buildings adjacent to a boundary, or underground pipes, drains or cables, the servient owner may be able to assert lack of knowledge (and therefore no acquiescence) to defeat the claim to a prescriptive easement.

DISCOURAGEMENT OF NEIGHBOURLY TOLERATION

7.44 Acquiescence by the servient owner is the basis of prescription,⁵¹ but tolerance of a neighbour's incursions might be explained by other factors. For example, acquiescence in some cases might have more to do with a desire to be a good neighbour and avoid conflict than to legitimise a use.⁵² Indeed, the Law Commission of England and Wales noted that prescription may actually operate to penalise altruism and 'good neighbourly' attitudes.⁵³

7.45 Alternatively, conduct deemed to be acquiescence might simply reflect the difficulty in disrupting the encroaching use. For example, it is hard to imagine what reasonable steps can be taken to prevent the accrual of a prescriptive easement of support of a building.⁵⁴ In such cases it is likely that 'often the acquiescence will be a fiction not a fact'.⁵⁵

UNNECESSARY IN LIGHT OF MODERN PLANNING

7.46 The underlying factors which drove the development of the doctrine in the 19th century were the lack of planning regulation coupled with advances in the understanding of the dangers associated with overcrowding and lack of sanitation.⁵⁶

7.47 Under current Victorian planning processes, easements are created in a far more ordered and comprehensive manner than in the 19th century when the doctrine of prescription was being developed. Councils and providers of essential services as 'referral authorities' examine subdivision proposals and can require that easements be created for access and servicing of each lot. Existing and proposed easements must be shown on plans of subdivision.⁵⁷

7.48 As we discussed in Chapter 6, certain kinds of easements can be implied where they are necessary.⁵⁸ This level of planning decreases the need for owners to rely on common law mechanisms for the creation of easements other than by express grant. As noted by Moses and Sherry:⁵⁹

Highly regulated modern systems of planning greatly reduce the likelihood that land will be developed without necessary easements being created.

37 Law Reform Commission [Ireland] (2002), above n 3, 20.

38 Ibid 20.

39 Brendan Edgeworth, 'Adverse Possession, Prescription and their Reform in Australian Law' (2007) 15 *Australian Property Law Journal* 1, 23.

40 Ibid.

41 Law Commission [England and Wales] (2008), above n 1, 73.

42 See generally, Lynden Griggs, 'Adverse Possession, Prescription and Human Rights' (2008) 8(2) *Queensland University of Technology Law and Justice Journal* 286.

43 Adverse possession is a doctrine that allows a wrongful possessor of land to acquire title to it where the possession has been without force, without secrecy and without consent for a set period of time. It is a rule of 'negative prescription' which operates to extinguish titles, while the doctrine of lost modern grant is a rule of 'acquisitive prescription' which operates to create easements.

44 [2001] Ch 804.

45 Griggs (2008), above n 42, 289–91.

46 Law Reform Commission [Ireland] (2002), above n 3, 20.

47 Edgeworth (2007), above n 39, 25.

48 Peter Jaffey argues that the key justification theory in property law is the 'reliance principle', which upholds the assumption of persons that they will have the benefit of a property right when they have acted in reliance on it in accordance with background principles of law: Peter Jaffey, *Private Law and Property Claims* (Hart, Oxford, 2007) 79.

49 Ibid 14.

50 Law Commission [England and Wales] (2008), above n 1, 73.

51 *Dalton v Angus* (1880-1) LR 6 App Cas 740, 773–4.

52 Michael Hernandez, 'Restating Implied, Prescriptive, and Statutory Easements' (2005) 40 *Real Property, Probate and Trust Journal* 75, 109.

53 Law Commission [England and Wales] (2008), above n 1, 73.

54 Moses and Sherry (2007), above n 32, 499.

55 Colin Sara, 'Prescription - what is it for?' [2004] *The Conveyancer* 13, 16 citing *Dalton v Angus* (1881) 6 App. Cas. 740, 817.

56 See generally, Moses and Sherry (2007), above n 32, 491.

57 *Subdivision Act 1988* (Vic) s 12.

58 *Subdivision Act 1988* (Vic) s 12(2); *Transfer of Land Act 1958* (Vic) s 98.

59 Moses and Sherry (2007), above n 32, 500.



REFORM OPTIONS

7.49 The doctrine of prescription has often been criticised, particularly in its application to Torrens system land. However, as noted above, it has also been justified as serving useful functions. Our approach emphasises functional rather than doctrinal issues. We seek to identify the functions that prescription serves and evaluate alternative mechanisms for delivering similar outcomes.⁶⁰ In the following paragraphs, we discuss three main reform options:

- Retain the current law, under which the doctrine of prescription applies to Torrens system land and prescriptive easements are enforceable against purchasers of the servient land as exceptions to indefeasibility.
- Replace the common law of prescription with a statutory scheme for obtaining easements by vesting order and recording. The easements would cease to be exceptions to indefeasibility, and would not affect a purchaser of the servient land until the easement is recorded.
- Abolish the law of prescription and the exception to indefeasibility, but provide other mechanisms such as court imposed easements and statutory reciprocal easements.

OPTION ONE: RETAIN THE CURRENT LAW

- 7.50 Victoria could retain the law related to prescriptive easements and rely on the current broad exception to indefeasibility under section 42(2)(d) of the Transfer of Land Act for all easements, or substitute a more narrowly defined exception for prescriptive easements. This would preserve the benefits of prescription listed above.
- 7.51 Retaining the current law would fail to address the difficulties that prescriptive easements create for purchasers of the servient land, the objections to them based on human rights, and their tendency to discourage neighbourly toleration of trespassing.

OPTION TWO: MODIFY THE LAW OF PRESCRIPTION

- 7.52 The second reform option for Victoria is to remove the status of prescriptive easements as exceptions to indefeasibility, and replace the common law of prescription with a statutory scheme.
- 7.53 Under this model, an owner who can show long use of another person's land can still acquire an easement by vesting order and recording, but the easement would not affect a purchaser of the servient land until it is recorded. The traditional requirements for acquiring a prescriptive easement, or a modified version of them, would furnish the statutory requirements for obtaining a vesting order.
- 7.54 The jurisdictions discussed below have legislated for a model of this kind, or have issued law reform papers proposing such a scheme.

TASMANIAN MODEL

- 7.55 Under the Tasmanian model, the common law of prescription has been statutorily abolished.⁶¹ In its place is a provision empowering the Recorder to make a vesting order for creation of an easement. If a vesting order is made, the Recorder must record the easement in the register.⁶²
- 7.56 Under section 138J of the *Land Titles Act 1980* (Tas), a landowner who has for 15 years enjoyed rights that amount to an easement may apply to the Recorder for a vesting order. Section 138L sets out the requirements that the applicant must show. They are substantially similar to the common law requirements for prescription, such as 'use as of right' and 'without force, secrecy or permission'.
- 7.57 Prior to making an application, the landowner must notify the servient owner in writing, after which the servient owner has 30 days to lodge an objection.⁶³ If an objection is lodged the Recorder cannot consider the application unless satisfied that the 'applicant will not suffer serious hardship'.
- 7.58 One problem with the Tasmanian provisions is that the Act does not currently define the term 'serious hardship', which is likely to be in issue in most cases. In a recent report, the Tasmania Law Reform Institute noted that several submissions had highlighted this as a problem and recommended that the term be clarified by guidelines made by the administering agency.⁶⁴

FIRST ENGLISH MODEL

- 7.59 Currently the *Prescription Act 1832* (Eng) (Prescription Act) provides an alternative means of creating a prescriptive easement, which does not rely on the doctrine of lost modern grant. The Act provides that use of land for either 20 or 40 years can give rise to an easement.⁶⁵ As at common law, such use must be as of right and without interruption.⁶⁶ Of the Australian states, only South Australia and Western Australia adopted the Prescription Act.⁶⁷ Tasmania adopted a similar statute in 1934 but repealed it in 2001.⁶⁸
- 7.60 The Prescription Act has been consistently criticised for being poorly drafted and hard to interpret.⁶⁹ The Law Commission for England and Wales recently recommended consolidating the statutory and common law means of creating prescriptive easements into one simplified mechanism. The proposed mechanism would have as essential components qualifying use by the claimant for the duration of the prescriptive period and registration of the easement.⁷⁰
- 7.61 The Law Commission recommended that qualifying use by the claimant should still be without force, secrecy and permission but no longer require acquiescence by the servient landowner. The Law Commission believed that the focus of prescription should be on the use of the land, not on the conduct of the servient landowner.⁷¹ Adopting similar reforms in Australia would mean that lack of knowledge of the use would no longer provide a defence to prescriptive easement claims, as occurred in *Sunshine Retail Investments Pty Ltd v Wulff*.⁷²

60 For an early example of a functional analysis of the law of easements see Susan French, 'Towards a Modern Law of Servitudes: Reweaving the Ancient Strands' (1982) 55 *Southern California Law Review* 1261.

61 Section 138I(1) of the *Land Titles Act 1980* (Tas) states that the statute overrides the common law rules of prescription, while s 138I(2) abolishes the doctrine of lost modern grant.

62 *Land Titles Act 1980* (Tas) s 138Q.

63 *Land Titles Act 1980* (Tas) s 138K.

64 Tasmania Law Reform Institute, *Law of Easements in Tasmania*, Final Report No 12 (2010) 45–7.

65 *Prescription Act 1832* (Eng) s 2.

66 Law Commission [England and Wales] (2008), above n 1, 69.

67 See Bradbrook and Neave (2000), above n 4, 139.

68 See Burns (2007), above n 9, 15.

69 See eg, Law Commission [England and Wales] (2008), above n 1, 68–9; Jonathan Gaunt and Justice Morgan, *Gale on Easements* (18th ed) (2008) vii.

70 Law Commission [England and Wales] (2008), above n 1, 77.

71 *Ibid* 78.

72 [1995] VSC 415, in which a claim to the acquisition of an easement by prescription failed because the servient land was at all times occupied by the tenants, and the absentee owner had no knowledge of the user and could not therefore be said to have acquiesced in it.



IRISH MODEL

- 7.62 Under the Irish model, the common law doctrine of prescription has been statutorily abolished and replaced with a statutory scheme.⁷³
- 7.63 Under section 35 of the *Land and Conveyancing Law Reform Act 2009* (Ir), a court can order the creation of a prescriptive easement where it is satisfied that there was a 'relevant user period' immediately prior to the application. 'Relevant user period' is defined as use as of right and without interruption by the person claiming to be the dominant owner for at least 12 years.⁷⁴
- 7.64 The Irish model incorporates the common law of prescription, rather than statutory criteria modelled on it as in the Tasmanian provisions.
- 7.65 Where an easement acquired under the Act by prescription has not been used for 12 years it will be extinguished.⁷⁵ The same rule applies to easements acquired by prescription before the Act commenced.⁷⁶ This means that it would be easier for servient owners to remove prescriptive easements under this model than under current Victorian law.⁷⁷

SECOND ENGLISH MODEL

- 7.66 Recent amendments to the law of adverse possession in the English *Land Registration Act 2002* could be extended to the law of prescription.⁷⁸ While they rely on different theoretical underpinnings, both doctrines have similar requirements in terms of use as of right, without secrecy, without force and without permission for a specified period of time. The legislation basically introduces a 'veto rule' under which the registered owner can object to a claim by an adverse possessor and defeat it in many cases.
- 7.67 The Law Commission for England and Wales considered, but declined to recommend, similar provisions for prescriptive easements. The Law Commission observed that prescriptive easements are generally 'less serious' for the servient owner than adverse possession.⁷⁹ In England, adverse possession usually operates against owners who are not in possession of the land, while servient owners are generally in possession and are therefore likely to exercise their veto. The Law Commission was also concerned that to give servient landowners a veto would encourage rent-seeking behaviour.⁸⁰

OPTION THREE: REPLACE PRESCRIPTIVE EASEMENTS WITH OTHER MECHANISMS

- 7.68 The doctrine of prescription could be entirely abolished, if other mechanisms were provided to enable landowners to acquire needed easements. The statutory implied reciprocal easements that we propose in Chapter 6 would partly satisfy any need left by the abolition of prescriptive easements. A new provision for court imposed easements would provide the 'backstop' where an easement is needed that has not been created by a plan of subdivision, cannot be acquired by negotiation, and is not a statutorily implied reciprocal easement. The legislation in other states and the Northern Territory for court imposed easements is discussed in Chapter 3.
- 7.69 Court imposed easements offer many advantages over common law prescriptive acquisition of easements. Their use would remove an incentive to trespass, since long standing use would no longer be the sole consideration in obtaining an easement.⁸¹ The focus would be on the necessity for the use. Unnecessary uses of neighbouring land would no longer be able to ripen into prescriptive easements.
- 7.70 Similarly, those easements which were granted would be only be as broad as the necessity dictated, rather than being potentially overbroad, as they are under the doctrine of prescription. Court imposed easements would also be more certain in scope since they are defined by the court order and not by the nature of the use during the prescription period.
- 7.71 Another important distinction between court imposed easements and prescriptive easements is the ability of the court to award compensation to the servient owner. The availability of compensation for a court imposed easement addresses concerns that prescriptive acquisition is an uncompensated taking of a proprietary right.
- 7.72 Adoption of court imposed easements as a partial replacement for the doctrine of prescription would also achieve a degree of harmonisation between Victoria and the majority of other Australian jurisdictions which already have such provisions.

Should the acquisition of easements under common law prescription be abolished? If so, what provisions for acquiring easements should replace prescription?

73 *Land and Conveyancing Law Reform Act 2009* (Ir) ss 34–39.

74 *Land and Conveyancing Law Reform Act 2009* (Ir) s 33.

75 *Land and Conveyancing Law Reform Act 2009* (Ir) s 39.

76 *Land and Conveyancing Law Reform Act 2009* (Ir) s 39(2).

77 See Chapter 9 on removal and variation of easements.

78 *Land Registration Act 2002* (Eng) schedule 6.

79 Law Commission [England and Wales] (2008), above n 1, 83.

80 *Ibid* 84.

81 Edgeworth (2007), above n 39, 23.

Chapter 8

An Integrated Scheme for Creation of Easements

CONTENTS

An integrated framework.....	72
Partial abolition of common law doctrines	72
Implied reciprocal rights	74
Subdivisional easements	75
Court imposed easements.....	76
Narrowing of the exceptions to indefeasibility	76

An Integrated Scheme for Creation of Easements



AN INTEGRATED FRAMEWORK

- 8.1 In this Chapter, we draw together reform proposals from Chapters 2–7, to propose an integrated framework of reforms relating to prescriptive, implied, subdivisional and court imposed easements. The purposes of the proposals are:
- to streamline and rationalise the common law doctrines under which easements can be created informally;
 - to enable landowners to obtain easements that are necessary for the reasonable use of and access to their land;
 - to minimise the risks to purchasers of allowing unrecorded or unregistered easements to run with land; and
 - to protect human rights by enabling owners to apply for compensation where an easement is acquired over their land by another person without their consent, other than on a reciprocal basis.
- 8.2 The framework proposes various means of creating easements or rights in the nature of easements. These easements or easement like rights would either appear on the register, be universal rights created by statute, or be enforceable only in contract. Where these mechanisms fail to provide for the acquisition of easements that are reasonably necessary for the use of the land, or where changing needs require the acquisition of new easements which cannot be obtained by negotiation, landowners would be able to apply for court imposed easements.
- 8.3 Under this framework, many of the issues that arise with regard to the common law doctrines would be avoided. In particular, it would substantially reduce the types and number of easements that would exist off the register. Additionally, by adopting reform measures based on the statutory schemes that exist in other states, particularly with regard to court imposed easements,¹ the reforms would promote the harmonisation of Victorian law with the law of other Australian jurisdictions.

PARTIAL ABOLITION OF COMMON LAW DOCTRINES

- 8.4 In Chapters 6 and 7 we discussed problems with the operation of the doctrines of implication and prescription. We noted difficulties with the scope of the doctrines, with the confusing ways in which they overlap, and with the risks they present for purchasers where they result in the creation of easements that do not appear on the register. We also noted that the doctrines serve some useful functions, and proposed that they should be replaced with other provisions that would serve similar functions while avoiding the problems.
- 8.5 In particular, we think it would be possible to create a framework in which the common law doctrine of prescription is abolished and its functions substantially taken over by reciprocal implied rights, subdivisional easements and, as a last resort, court imposed easements. These statutory mechanisms are discussed below.
- 8.6 In relation to implication, we suggest that implication rules are of two broad types. The first type is based on necessity.² The second type are those based on the intention of the vendor and purchaser, or at least the reasonable expectations of the purchaser, where the easement may not be strictly necessary.

- 8.7 The 'necessity' basis for implication is largely encompassed by the provisions for implied subdivisional easements in sections 12(2) and 24 of the *Subdivision Act 1988* (Subdivision Act) and section 98 of the *Transfer of Land Act 1958* (Transfer of Land Act), at least so far as relates to land subdivided since those provisions (or predecessor provisions) commenced.
- 8.8 Most of the implication doctrines appear to be based on the intention of the parties to a transaction, or at least the reasonable expectations of purchasers. The intention or expectation based doctrines still serve a useful function in protecting purchasers who fail to obtain an express grant of easements which they reasonably expected to get over land retained by the vendor.

ENFORCEMENT OF IMPLIED EASEMENTS THROUGH PERSONAL ACTION

- 8.9 We propose that claims to implied easements based on intention or expectations arising from transactions should be made only against the vendors or grantors, and only for so long as they retain a sufficient interest in the servient land. What this would mean is that if June buys land from Greg in circumstances where an implied easement would arise at common law, June can enforce the claim against Greg so long as he retains the land over which the easement is claimed. If June succeeds in her claim, Greg may be ordered to grant an express easement, which June can record or register. Greg's successors in title will take subject to the easement only if it has been ordered by a court on June's application and recorded or registered.
- 8.10 In the language of property lawyers, this amounts to proposing that implied easements would be enforceable against registered owners only *in personam*. Actions *in personam* are contrasted with actions *in rem*. To say that registered owners are liable to claims *in personam* means that actions can be brought against them arising from their own contracts, promises or other dealings. Those actions, if successful, may result in the creation of property rights. For example, if a registered owner is sued in contract for failing to complete a contract of sale, the result may be that he or she is ordered to transfer the land to the plaintiff. An action in contract is an action *in personam*, even though the outcome may affect property rights, for example, where the owner is ordered to 'specifically perform' the contract by transferring the title.
- 8.11 Currently, claims to implied easements are enforceable *in rem*. Actions *in rem* can be brought against anyone who interferes with property rights, even if they are strangers to the transaction from which the rights arose. In the example given above, if the law allows June to enforce her claim to an implied easement against a person who has bought the servient land from Greg, the action is *in rem*.
- 8.12 It is the enforcement of implied easements *in rem* that currently creates risks for all purchasers, since implied easements are enforceable without recording and may be difficult to discover. What we are proposing is that June should be able to enforce her claim against Greg while he still retains the servient land, but should not be able to enforce it against a purchaser from Greg unless she had obtained a court order for the creation of an easement and recorded or registered it before the transfer.

- 1 See, *Conveyancing Act 1919* (NSW) s 88K; *Land and Environment Court Act 1979* (NSW) s 40; *Conveyancing Law and Property Act 1884* (Tas) s 84; *Property Law Act 1974* (Qld) s 180; *Law of Property Act 2000* (NT) s 164.
- 2 Such as implied subdivisional easements. Recent case law suggests that the common law implication of easements on the basis of 'necessity' actually rests upon the actual or presumed intention of the parties: *North Sydney Printing Pty Ltd v Sabemo Investment Corp Pty Ltd* [1971] 2 NSWLR 150 (a case involving implied reservation of an easement).

An Integrated Scheme for Creation of Easements



8.13 One way in which the above proposals might be implemented would be to replace the intention based common law doctrines for implication with provision for court imposed easements on similar grounds. This could be achieved in one of two ways:

- The reasonable expectations of the purchaser could be incorporated into court imposed easement legislation as a separate test for the imposition of easements. Such a test could be framed in terms of the 'reasonable expectations of the purchaser at the time of sale where the easement is sought over land retained by the vendor'.
- Alternatively, it would be possible to codify the common law doctrines of implication and incorporate them as grounds for the grant of a court imposed easement. They could be codified either by retaining them in substantially the same terms as they currently exist or, as proposed by the Law Commission for England and Wales,³ codified as presumptions or as implied contractual terms. For example, there could be a presumption that, where the vendor has transferred only part of his or her landholdings in the area and both parties were aware that the sold land would be put to a particular use:⁴

it shall be presumed that the parties intended that the land transferred or retained should have such rights as are reasonably necessary to give effect to the intended use.

REPLACEMENT OF PRESCRIPTION

8.14 In Chapter 7, we discussed a number of problems with the common law doctrine of prescription, and also noted that it provides certain benefits. It may have a function in quieting disputes, where a servient landowner might otherwise seek to disrupt a long standing use of the land. It might also save costs by allowing easements of a minor or unobtrusive nature to be preserved where the cost of recording or registering them is out of proportion to the perceived need.

8.15 We propose that prescription as a means of acquiring an easement be replaced by alternative statutory mechanisms to ensure that the needs traditionally served by prescriptive easements can be obtained by other accessible means. The statutory mechanisms would include express and implied subdivisional easements, supplemented by the introduction of reciprocal implied rights in the nature of easements, and court ordered easements.

IMPLIED RECIPROCAL RIGHTS

8.16 In Chapter 6, we discussed a second mechanism for the creation of easements under the consolidated statutory approach. This method involves the provision of a wider range of implied reciprocal rights, such as a right of access to neighbouring land to maintain a party wall. As with rights of access provided under the *Fences Act 1968*, they would be defined as statutory rights rather than easements, but would obviate the need to rely on prescription or other doctrines for that purpose. Because they would be universal rights set out in legislation, they would be discoverable by purchasers. Because they are reciprocal, no compensation would be required.

SUBDIVISIONAL EASEMENTS

EXPRESS SUBDIVISIONAL EASEMENTS

- 8.17 As noted in Chapter 3, Victoria has a comprehensive framework for the creation of easements upon subdivision of land. This framework operates in two different ways. It creates easements that are expressly noted on plans of subdivision when they are registered. It also implies certain kinds of easements into approved or registered plans of subdivision where they are necessary.
- 8.18 This means that land that has been subdivided should have the easements necessary for the subdivisions marked on the plan of subdivision. Owners cannot sell part of a lot without going through the process of subdivision.⁵ Systematic processes for planning and subdivision greatly diminish the need to rely on the doctrines of implication and prescription, since most easements that are necessary are expressly created on subdivision. For provisions which are necessary but are not of sufficient importance to mark on the plan, an easement may be implied. The mechanisms for the creation of easements expressly shown on plans of subdivision should therefore be retained as part of the proposed easement framework.

IMPLIED SUBDIVISIONAL EASEMENTS

- 8.19 As noted in Chapter 6, even where easements have not been expressly created, they can be implied into subdivisions where they are deemed necessary. These implied subdivisional easements substantially replace the implied easement of necessity, as far as subdivided land is concerned. The main disadvantage is that implied subdivisional easements do not appear on the register and can therefore trap unwary purchasers.
- 8.20 It could be possible to replace implied subdivisional easements entirely with court imposed easements. This would mean that the process for creation of new easements over subdivisions would be more certain, relying on a court order rather than on implied 'necessity'. It would also mean that there would be a mechanism for compensating the servient landowner for the new easement. The difficulty with this proposal is that there are minor easements which are reasonably necessary for the use of subdivided lots but for which it would be uneconomic to apply for an order.
- 8.21 Instead of completely replacing implied subdivisional easements, it could be possible to limit them to instances where the easement is sought against the vendor or grantor over land retained by him or her but not against subsequent purchasers for value. This would be similar to the personal right application of common law easements outlined above. Problems could arise, however, where the grantor is the developer, who sells the servient lot to the owners who will occupy it. The window of opportunity for enforcing the right against the developer might be small, and the need for the easement may not be apparent until the servient lot is occupied.
- 8.22 Alternatively, it could be possible to retain the current legislation for implied subdivisional easements and allow these easements to be an exception to the indefeasibility of registered title. It may be that the function of the easements in quieting disputes over minor easements outweighs the problems presented by their absence from the register.
- 8.23 If the current provisions for implied subdivisional easements are retained, consideration should be given to amending them to provide that the circumstances that give rise to the 'necessity' for the easements are those in force at the time of the subdivision. Where the necessity arises after subdivision, perhaps due to redevelopment, it would be necessary to apply for a court imposed easement.

3 Law Commission [England and Wales], *Easements, Covenants and Profits a Prendre: A Consultation Paper*, CP No 186 (2008) 57–9.

4 *Ibid* 58–9.

5 *Sale of Land Act 1962* (Vic) s 8A. There are limited exceptions to this rule.

An Integrated Scheme for Creation of Easements



COURT IMPOSED EASEMENTS

- 8.24 Where easements that are necessary for the use of land are not available under any of the other provisions and cannot be acquired by negotiation, a provision for court imposed easements is proposed. The court imposed easement mechanism would therefore not be the primary means of creating easements, but a last resort.
- 8.25 Such a mechanism might be needed where, for example, a landowner against whom contractual or personal rights have accrued is no longer the owner of the land, or where a need has arisen for an easement over a subdivision some time after the initial subdivision. While it may currently be possible to imply the 'necessity' of such easements under a broad reading of section 12(2) of the Subdivision Act, court imposed easements would enable the payment of compensation to the servient landowner and would further require a balancing of the respective interests of the dominant and servient landowners.

NARROWING OF THE EXCEPTIONS TO INDEFEASIBILITY

- 8.26 Victoria and Western Australia have the widest exception to indefeasibility for off register easements. All easements 'howsoever acquired' are currently exceptions to indefeasibility.⁶ This means that easements created under common law doctrines such as prescription and implication can exist over land without appearing on the register. It also undermines the incentive for dominant owners to register or record easements, further diminishing the provision of information about easements affecting lots. Many of the reform measures mentioned above are aimed at limiting the application of the various means of acquiring easements in order to reduce the likelihood of easements existing 'off the register'.
- 8.27 In order to complete these reforms it is suggested that the 'easements' exceptions to indefeasibility should be narrowed. Only specified classes of easement should fall within the exception.
- 8.28 The jurisdictions which have narrow exceptions for easements all make provisions for easements which are 'omitted or misdescribed' on the register.⁷ This term has been found ambiguous, since it is unclear 'by whom' the easement is omitted or misdescribed, and whether the omission or misdescription must have occurred when the lot was first registered, or at any time.
- 8.29 The clearest example of the exception is found in section 185 of the *Land Titles Act 1994* (Qld), which provides that an easement that has been 'omitted from, or misdescribed in' the register is an exception to indefeasibility.⁸ Unlike legislation in some other jurisdictions, 'omitted' is then further defined to mean:⁹
- (a) *the easement was in existence when the lot burdened by it was first registered, but the easement particulars have never been recorded...*
 - (b) *the easement particulars have previously been recorded...but the current particulars...do not include the easement particulars, other than because the easement has been extinguished...*
 - (c) *the instrument providing for the easement was lodged for registration but, because of an error...has never been registered.*

8.30 In Victoria, an exception along the lines of the Queensland provision would mean that easements that were omitted from or misdescribed in the folio of the servient land when the folio was first created would continue to bind the land.¹⁰ It would also mean that easements that were previously on the folio but have subsequently been omitted or misdescribed would continue to exist. Dominant owners would continue to be protected from loss of easements due to clerical errors, as servient owners would not be able to rely on the indefeasibility of their titles to defeat the easement.

Does the scheme proposed in this Chapter meet the needs for easements currently served by the rules of implication and prescription?

Should the exception to indefeasibility in section 42(2)(d) of the Transfer of Land Act be confined to:

- (a) easements omitted or misdescribed by the Registrar;**
- (b) statutory implied subdivisional easements;**
- (c) court imposed easements;**
- (d) easements or rights in the nature of easements created under statute; and**
- (e) claims to easements enforceable against the registered proprietor by personal action?**

6 *Transfer of Land Act 1958* (Vic) s 42(1), (2) (d); *Transfer of Land Act 1893* (WA) s 68(1), 69.

7 *Land Titles Act 1994* (Qld) s 185(1)(c); *Land Titles Act 2000* (NT) s 189(1)(c); *Real Property Act 1886* (SA) s 69(d); *Real Property Act 1900* (NSW) s 42(1)(a1).

8 *Land Titles Act 1974* (Qld) s 185(1)(c).

9 *Land Titles Act 1974* (Qld) s 185(3).

10 In Victoria, this means when either an ordinary or a provisional folio is created.

Chapter 9

Removal of Easements

CONTENTS

Section 36 of the Subdivision Act 1988	80
The registrar's power of removal	81
Abandonment under Section 73	81
Unregistered easements	83
Adverse occupation	83
Reform options	83
Other common law mechanisms	85
Express release	85
Unity of estates	85



- 9.1 The removal of easements raises reform issues. Two ways of removing easements are by planning scheme amendment and by planning permit. Since these methods apply to covenants as well as easements, they are reserved for later discussion in Chapter 15. The discussion in this Chapter is confined to methods of removal that are used solely for easements. These are:
- removal or variation of easements by what we call ‘private compulsory acquisition’ under section 36 of the *Subdivision Act 1988* (Subdivision Act), and
 - removal of abandoned or extinguished easements by the Registrar under sections 73 and 73A of the *Transfer of Land Act 1958* (Transfer of Land Act).
- 9.2 We also discuss in this Chapter problems with the way that the common law rules for the extinguishment of easements interact with provisions of the Transfer of Land Act which validate registered interests.

SECTION 36 OF THE SUBDIVISION ACT 1988

- 9.3 Section 36 of the Subdivision Act allows an owner of servient land to apply to VCAT for leave to remove an easement or right of way over their land or other land in the vicinity. Unlike other mechanisms contained in the Subdivision Act, section 36 does not apply to covenants.
- 9.4 Section 36 provides a method of private compulsory acquisition for the creation as well as the removal or variation of easements. Similar procedures apply to all functions. The procedure for the acquisition of easements under section 36 is described in Chapter 3 at 3.29 to 3.48.
- 9.5 Before applying to VCAT for leave to remove an easement under section 36, the servient owner must apply for a planning permit and a statement from a council or referral authority.¹ The statement must state that the council or referral authority believes that the removal is required for economic and efficiency reasons and that the removal will not result in ‘unreasonable loss of amenity in the area affected’.²
- 9.6 In Chapter 3, we discuss a number of problems with section 36, including its procedural complexity, the inadequacy of the criteria for decision making, the limited circumstances in which the provision can be used, and the unsuitability of applying the *Land Acquisition and Compensation Act 1986* to private acquisition or removal. These comments also apply to the use of section 36 as a mechanism for removing easements.

Should the mechanism for removal of easements under section 36 of the Subdivision Act be retained in its present form?

THE REGISTRAR'S POWER OF REMOVAL

ABANDONMENT UNDER SECTION 73

- 9.7 Prior to 1954, the common law rule that easements could be extinguished by abandonment did not apply to Torrens system land.³ The *Transfer of Land Act 1954* introduced a new provision, now found in section 73 of the Transfer of Land Act. It provides that a registered proprietor can apply to the Registrar to delete an easement from the register if the easement has been abandoned or extinguished.
- 9.8 It is very hard to use section 73 to remove easements, for two main reasons. First, it is extremely difficult to establish abandonment at common law. Secondly, the registration of a transfer of the dominant land may revive previously abandoned easements.
- 9.9 Each of these issues will be discussed below and reform options presented.

COMMON LAW ABANDONMENT

- 9.10 At common law, the servient owner has the burden of proving that the easement has been abandoned.⁴ To determine whether an easement has been abandoned, the court will look at the intention of the dominant owner.⁵ For intention to abandon to be established, the dominant owner must have 'demonstrated a fixed intention never at any time thereafter to assert the right himself [*sic*] or to attempt to transmit it to anyone else'.⁶ This has been taken to require knowledge of the easement by the dominant owner.⁷
- 9.11 It has been consistently acknowledged that intention to abandon is therefore very difficult to establish.⁸ In *Shelmerdine v Ringen Pty Ltd*,⁹ Brooking J stated that:¹⁰
- The cases – one only has to consider Treweeke's Case – show how hard it is to establish abandonment notwithstanding what might appear to the layman to be a strong case for abandonment.*
- 9.12 Obstruction of access to an easement does not necessarily establish that the dominant owner intended to abandon it. In *Treweeke v Thirty Six Wolsely Road Pty Ltd*,¹¹ the High Court held that a right of way had not been abandoned despite being obstructed by a vertical rock face, bamboo and other impassable vegetation, a pool that was constructed over parts of it, and being fenced off by both a wire and an iron fence.
- 9.13 A recent Victorian decision held that an easement of carriageway had not been abandoned, despite the erection of a garage wall obstructing it. The application failed partly because it would have been possible for the dominant owner to insert a door into that wall at some future time.¹² In making the ruling, Kaye J distinguished between cases such as *Treweeke*, where a servient owner had obstructed an easement with the dominant owner's acquiescence, and the case at hand, where the dominant owner had created the obstruction.¹³
- 9.14 At common law, non-use alone will not be sufficient to prove abandonment.¹⁴ Even though section 73(3) of the Transfer of Land Act states that 30 years of non-use or non-enjoyment of an easement 'shall constitute sufficient evidence that such easement has been abandoned', it does not alter the common law meaning of abandonment.¹⁵ In *Wolfe v Freijah's Holdings Pty Ltd*, Tadgell J held:¹⁶
- any non-user for a period of time is relevant, but not necessarily decisive. S 73(3), a purely evidentiary provision, enables the servient proprietor making the application to rely on 30 years' non-user or non-enjoyment in order to make out a prima facie case of abandonment, but no more.*

- 1 *Subdivision Act 1988* (Vic) s 36(1)
- 2 *Subdivision Act 1988* (Vic) s 36(1)
- 3 *Wolfe v Freijah's Holdings Pty Ltd* [1988] VR 1017, 1023 (Tadgell J).
- 4 *Bookville Pty Ltd v Ross Brendan O'Loughlen* [2007] VSC 67 [18].
- 5 *Bookville Pty Ltd v Ross Brendan O'Loughlen* [2007] VSC 67 [15].
- 6 *Tehidy Minerals Ltd v Norman* [1971] 2 QB 528, 553.
- 7 *Shelmerdine v Ringen Pty Ltd* [1993] 1 VR 315, 338, 339.
- 8 See eg, Lynden Griggs, 'The Common Law Abandonment of Easements on Torrens Land: Can it be Done, and, if so, Should the Intent of Predecessors in Title be Taken into Account?' (2007) 14 *Australian Law Journal* 162, 163.
- 9 [1993] 1 VR 315.
- 10 *Shelmerdine v Ringen Pty Ltd* [1993] 1 VR 315, 339.
- 11 (1973) 1 ALR 104.
- 12 *Bookville Pty Ltd v Ross Brendan O'Loughlen* [2007] VSC 67, subsequently upheld on this point in *Bookville Pty Ltd v Ross Brendan O'Loughlen* [2008] VSCA 27.
- 13 *Bookville Pty Ltd v Ross Brendan O'Loughlen* [2007] VSC 67 [24].
- 14 Jonathan Gaunt and Justice Morgan, *Gale on Easements* (18th ed) (2008) 528.
- 15 Adrian Bradbrook and Marcia Neave, *Easements and Restrictive Covenants in Australia* (2nd ed) (2000) 490–1.
- 16 [1988] VR 1017, 1024.



9.15 In *Wolfe*, the 30 year period in section 73 was taken to mean the 30 years directly prior to the section 73 application, rather than any 30 year period during the life of the easement.¹⁷ In that case, an easement of way had been obstructed and unused for over 40 years before the dominant land was acquired by the plaintiff. Tadjell J said that the Registrar must consider whether any registered owner during the 30 year period immediately prior to the application had expressed any intention to use the easement. Because the plaintiff had shown such an intention on becoming owner of the dominant land, the Registrar had to take the intention of the new owner into account.¹⁸

9.16 Where there have been successive owners during the 30 year period, the transfer itself might operate as evidence of a lack of intent to abandon. For example in *Yip v Frolich*, Beskano J stated:¹⁹

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.

SECTION 73 AND TORRENS SYSTEM LAND

9.17 Another issue is the extent to which common law abandonment applies to easements over Torrens system land.

9.18 As explained in Chapter 5, many easements are not registered but are recorded as 'notified easements' on the folio of the dominant or servient land under section 72 of the Transfer of Land Act. If an easement is recorded on the folio of the dominant land, section 41 provides that the folio is conclusive evidence that the registered owner of the lot has the benefit of the easement.²⁰

9.19 In *Wolfe v Freijah's Holdings Pty Ltd*,²¹ it was held that an easement would effectively be extinguished only when it is deleted from the register as a result of a successful application under section 73.²² This means that an abandoned easement remains enforceable until it is deleted from the register.²³

9.20 At common law, once an easement is abandoned it is abandoned forever.²⁴ It was initially thought that this could mean that abandonment of an easement by a prior owner might be grounds for removal of the easement under section 73.²⁵ However, in *Bookville v Ross Brendan O'Loughlen*,²⁶ Kaye J said that each time the dominant land was transferred, title to the land together with any easement appurtenant to it was conferred on the new transferee by registration.²⁷ The registered interest of the dominant owner could not be affected by any previous abandonment of the easement by a previous owner.²⁸ Section 73 allows removal of an easement that has been abandoned by the currently registered dominant owner.²⁹

9.21 It follows that an easement that has been abandoned at common law can be revived upon registration of a transfer. The revival could be problematic in cases where an easement has been unequivocally abandoned at common law and changes have been made to the servient land in reliance on the abandonment. For example, permanent structures could have been built over an abandoned right of way.

9.22 Other jurisdictions have taken different approaches to this conflict between common law abandonment and Torrens indefeasibility. In NSW, under section 89 of the *Conveyancing Act 1919* (NSW), the court is empowered to modify or extinguish easements considered to have been abandoned by 'the persons...for the time being or from time to time entitled to the easement'.³⁰ The provision has been judicially interpreted as giving a discretion to determine that the easement has been abandoned by the current owner or a past owner, even if the easement was on title at the time of transfer.³¹

9.23 Recent decisions in NSW have been less clear on the significance of the actions of the current owners of the dominant land. For example, in *Ashoil Holdings Pty Ltd v Fassoulas*,³² Handley JA stated that:

However these cases may leave open the question whether it is necessary, when the dominant tenement is under the Real Property Act, to establish that the current registered proprietor, as one of the persons for the time being entitled, has also abandoned the easement.

9.24 The unsettled nature of the law in this area points to an underlying tension in the Torrens system between the common law rules and the effect of the Transfer of Land Act in validating registered interests. Legislation is needed to clarify the status of easements that are no longer valid at common law but which remain on the folio for the dominant land.

UNREGISTERED EASEMENTS

9.25 The variety of ways that easements are created and dealt with by the Registrar, and the inconsistent legal treatment of registered and unregistered easements so far as abandonment is concerned, make the law in this area unduly complex.

9.26 As discussed in Chapter 5, not all easements are recorded on the folio to the dominant land in such a way that they are deemed to be conclusive under section 41 of the Transfer of Land Act. There are also many easements which are not registered or recorded at all, but which run with the land and are enforceable against an owner of the burdened land by force of section 42(2)(d) of the Transfer of Land Act. While it does not appear that there are any cases on point, it seems that the common law of abandonment would apply to these easements.³³ There is nothing in the Transfer of Land Act that would revive an unregistered easement that has been abandoned.³⁴

ADVERSE OCCUPATION

9.27 An easement of right of way that has been ‘adversely occupied’ for at least 30 years can be removed at the discretion of the Registrar under section 73A of the Transfer of Land Act. Unlike for section 73 of the Act, there does not appear to be any case law related to the operation of section 73A.

9.28 Possibly, common law principles of adverse possession would apply to section 73A in much the same way that principles of abandonment apply to section 73, though the language of the section is not clear on this point.

9.29 If so, the operation of section 73A could present an issue similar to section 73: that grounds for removal on the basis of 30 years adverse occupation are lost upon registration of a transfer of the dominant land if the easement has not previously been deleted.

REFORM OPTIONS

REMOVAL FOR ABANDONMENT OR NON-USE

9.30 Most Australian jurisdictions have provisions corresponding to section 73 of the Transfer of Land Act which enable the Registrar to remove abandoned easements from title.³⁵ Some other jurisdictions have enacted provisions that provide a clearer indication that non-use for the statutory time limit is grounds for removal of the easement.

9.31 For example, section 229A(2) of the *Transfer of Land Act 1893* (WA) empowers the Commissioner (Registrar) to direct the removal of an easement if satisfied that it has not been used or enjoyed for 20 years. The section does not mention abandonment.

17 *Wolfe v Freijah's Holdings Pty Ltd* [1988] VR 1017, 1025.

18 *Wolfe v Freijah's Holdings Pty Ltd* [1988] VR 1017, 1025–6.

19 [2003] SASC 120 [57].

20 *Riley v Penttila* [1974] VR 547; see Chapter 5.

21 [1988] VR 1017.

22 *Wolfe v Freijah's Holdings Pty Ltd* [1988] VR 1017, 1025; see also *Riley v Penttila* [1974] VR 547.

23 *Wolfe v Freijah's Holdings Pty Ltd* [1988] VR 1017, 1025.

24 Bradbrook and Neave (2000), above n 15, 489, citing *Tapling v Jones* (1865) 11 HLC 290 and *Scott v Pape* (1886) 31 Ch D 554.

25 See eg, Law Reform Commission of Victoria, *Easements and Covenants*, No 41 (1992) 50.

26 [2007] VSC 67.

27 *Bookville Pty Ltd v Ross Brendan O'Loughlen* [2007] VSC 67 [25], [54].

28 *Bookville Pty Ltd v Ross Brendan O'Loughlen* [2007] VSC 67 [54]. The explanation relies on the principle that registration is an original source of title.

29 *Bookville Pty Ltd v Ross Brendan O'Loughlen* [2007] VSC 67 [54], relying on *Riley v Penttila* [1974] VR 547 and *Wolfe v Freijah's Holdings Pty Ltd* [1988] VR 1017.

30 *Conveyancing Act 1919* (NSW) s 89(1)(b).

31 *Proprietors Strata Plan No 9968 v Proprietors Strata Plan No 11173* [1979] 2 NSWLR 605; Peter Butt, *Land Law* (6th ed) (2009) [16.131]; but see *Ashoil Holdings Pty Ltd v Fassoulas* [2005] NSWCA 80 [5].

32 [2005] NSWCA 80.

33 Bradbrook and Neave (2000), above n 15, 497.

34 Law Reform Commission of Victoria (1992), above n 25, 51.

35 Griggs (2007), above n 8, 164.



9.32 Section 108 of the *Land Titles Act 1980* (Tas) retains abandonment as the ground for removal by the Recorder (Registrar) but allows it to be proved by non-use. Section 108(3) states that:

Where it is proved to the satisfaction of the Recorder that any easement or profit a 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 a prendre has been abandoned.

9.33 The advantage of the Tasmanian legislation is that it allows all the common law modes of proving abandonment, while avoiding the need to prove intention to abandon where 20 years non-use is shown.

9.34 Section 89(1A) of the *Conveyancing Act 1919* (NSW) provides that an easement may be treated as abandoned if the court is satisfied that the easement has not been used for at least 20 years before the application. This formulation is preferable to the evidentiary provision in the Tasmanian Act because it authorises a finding of abandonment based on specified facts.

9.35 The current period of non-use in section 73(3) of the *Transfer of Land Act* is 30 years. This is substantially longer than the 20 years required for acquisition of an easement by prescription under the doctrine of lost modern grant,³⁶ and the 15 year limitation period for actions for recovery of land.³⁷ In Ireland, recent legislation sets a period of equivalent duration for all these purposes.³⁸ To achieve consistency, the period of non-use in section 73(3) could be reduced to 20 years, if the doctrine of lost modern grant is retained, or 15 years if it is not.

Should sections 73(3) and 73A of the Transfer of Land Act be modified to provide that non-use of an easement for a specific period is a ground for removal, distinct from common law abandonment?

Should abandonment or non-use of an easement by a previous registered owner of the dominant land be grounds for removal?

ABANDONMENT AS A STATUTORY CRITERION IN PROCEEDINGS FOR REMOVAL

9.36 Under section 84 of the *Property Law Act 1958* (Property Law Act), a court may order the removal or variation of a covenant but not an easement. The equivalent provision in most other Australian jurisdictions applies to easements as well as covenants.³⁹ In Chapter 16, we propose that section 84 of the Property Law Act be amended to give the court power to remove or vary easements.

9.37 In other Australian jurisdictions, provisions for judicial removal or variation of easements already contain mechanisms for their removal on the basis of abandonment.⁴⁰ For example, section 89 of the *Conveyancing Act 1919* (NSW) reads in relevant part:

(1) ... the Court may...by order modify or wholly or partially extinguish the easement, profit a prendre, restriction or obligation upon being satisfied

(b) that the persons of the age of eighteen years or upwards and of full capacity... have agreed...or by their acts or omissions may reasonably be considered to have abandoned the easement...

9.38 We propose that if section 84 is extended to the removal or variation of easements as well as covenants, it should include power to remove an easement that had been abandoned, in the same terms as the Registrar's power of removal under section 73.

OTHER COMMON LAW MECHANISMS

EXPRESS RELEASE

- 9.39 At common law, the person entitled to the benefit of an easement or covenant can agree to release or vary it.⁴¹ The means by which a release is made effective in relation to Torrens system land is different for easements and covenants.
- 9.40 Covenants can be deleted by the Registrar on the basis of release or variation by all the relevant parties.⁴² Even if it has not been deleted, a covenant that has been released is unenforceable because its enforceability is determined by equitable rules.⁴³ Consent is also a ground for an application to a court to remove or vary a covenant under section 84(1)(b) of the Property Law Act.
- 9.41 Easements that have been extinguished in whole or in part may be removed by the Registrar under section 73(2) of the Transfer of Land Act. The section would therefore appear to authorise the removal of easements that have been released.⁴⁴
- 9.42 The extent to which release by a prior owner may operate to extinguish an easement over Torrens system land is unclear. In *Pieper v Edwards*,⁴⁵ for example, the NSW Court of Appeal held that an unregistered release of an easement by a previous owner could still operate to extinguish the easement. This was because the history of the easement was a relevant factor to consider in the exercise of judicial discretion under section 89 of the *Conveyancing Act 1919* (NSW).

UNITY OF ESTATES

- 9.43 Easements can be extinguished at common law if the same owner acquires both possession and title to the dominant and servient estates.⁴⁶ Similarly, restrictive covenants are extinguished if the same owner acquires both the benefited and the burdened land.⁴⁷ Once an easement or covenant is extinguished by unity of estates, it will not automatically revive if the owner subsequently sells either the dominant or servient land.⁴⁸ At common law, an exception to this rule existed for schemes of development where extinguishment by unity would destroy the effectiveness of the scheme.⁴⁹
- 9.44 In most Australian states, the unity of estates rule has been abolished by statute.⁵⁰ For example, under section 47(7) of the *Real Property Act 1900* (NSW), easements and restrictive covenants will not be extinguished solely because the same person has become the proprietor of the burdened and benefited lots.
- 9.45 Even if easements or covenants have been extinguished by unity of estates, they could be revived by a subsequent transfer of the previous dominant land by the owner of both lots.⁵¹ For example, in *Margil Pty Ltd v Stegul Pty Ltd*⁵² Needham J said that an easement that had been extinguished by unity of estates might be revived by subsequent transfer of the previous dominant land if the transfer referred to the easement.
- 9.46 In *Post Investments Pty Ltd v Wilson*,⁵³ Powell J held that merger of the burdened and benefited land would not extinguish a covenant that had been recorded on the title. The decision has been criticised by Peter Butt on the grounds that the reasoning conflated the terms 'registered' and 'recorded' and did not take account of section 88(3)(b) of the *Conveyancing Act 1919* (NSW).⁵⁴ The provision states that a recorded covenant has no greater operation than it does under the instruments that created it.

36 See eg, Adrian Bradbrook et al, *Australian Real Property Law* (4th ed) (2007), 765–6.

37 *Limitation of Actions Act 1958* (Vic) s 8.

38 See eg, *Land and Conveyancing Law Reform Act 2009* (Ir), Explanatory Memorandum s 33.

39 *Conveyancing Act 1919* (NSW) s 89; *Transfer of Land Act 1893* (WA) s 129C; *Property Law Act 1974* (Qld) s 181; *Conveyancing and Law of Property Act 1884* (Tas) s 84C.

40 Griggs (2007), above n 8, 165.

41 Bradbrook and Neave (2000), above n 15, 482, 484.

42 *Transfer of Land Act 1958* (Vic) s 88.

43 Bradbrook and Neave (2000), above n 15, 483.

44 *Ibid.*, 484.

45 [1982] 1 NSWLR 336.

46 Butt (2009), above n 31, 507. It is doubtful that unity of estates will extinguish an easement that is necessary for the enjoyment of the dominant land: See eg, Gaunt and Morgan (2008), above n 14, 501, citing *Margil Pty Ltd v Stegul Pty Ltd* [1984] 2 NSWLR 1.

47 *Re Tiltwood* [1978] 1 Ch 269, 280; *Kerridge v Foley* [1964-5] NSWLR 1958, 1961.

48 Butt (2009), above n 31, 507.

49 Law Reform Commission of Victoria (1992), above n 25, 53.

50 See eg, *Conveyancing Act 1919* (NSW) s 88B(3)(c)(iii); *Real Property Act 1900* (NSW) s 47(7); *Conveyancing and Law of Property Act 1884* (Tas) s 9A; *Land Titles Act 1980* (Tas) s 109; *Land Title Act 1994* (Qld) s 88; *Real Property Act 1886* (SA) s 90C(2).

51 See eg, *Cuvel v Davis* (1883) VLR 390.

52 [1984] 2 NSWLR 1.

53 (1990) 26 NSWLR 598.

54 Peter Butt, 'Torrens Title Restrictive Covenants not Extinguished by 'Merger' of Dominant and Servient Lands' (1993) 67 *Australian Law Journal* 293, 296–7, but see *Re Standard and the Conveyancing Act 1919* (1970) 92 W.N. 953 in relation to easements.



9.47 The uncertainty with regard to the application of extinguishment by unity of estates under the Torrens system could also arise in Victoria, where the unity of estates rule has not been statutorily abolished. As noted in Chapter 5, Victorian law fails to distinguish clearly between easements which have been recorded under section 72 with conclusive effect, and easements which are not so recorded.

Should section 73 of the Transfer of Land Act expressly provide for extinguishment by unity of estates as a ground for removal of an easement from the register?

Should the provisions for the removal of recorded easements in section 73 of the Transfer of Land Act be brought into line with provisions in section 88 for the removal of covenants that have been expressly released?

Chapter 10

The Role of Covenants

CONTENTS

Development of the law of covenants	88
Covenants under common law	88
Enforcement of restrictive covenants in equity	89
Types of covenants	90
Perspectives on covenants and public planning	90
Covenants as complementary to public planning	91
Covenants as tools for public-private collaboration	91
Covenants as impediments to public planning	91
Covenants as a zone of local and individual autonomy	92
Covenants as unrepealable private legislation	92
Summary	94

The Role of Covenants



- 10.1 This Chapter provides an introduction and overview of the law of freehold covenants. We explain what freehold covenants are and how they developed. Because covenants are made by private parties and affect the use of land, they have an uneasy relationship with public planning processes which regulate land use and development. We ask what the role of covenants should be in relation to public planning, and outline different perspectives on this question.
- 10.2 Restrictive covenants are agreements which impose specified restrictions on the use of certain land (the burdened land) for the benefit of other land (the benefited land). The terms 'benefited land' and 'burdened land' have similar meanings to the terms 'dominant land' and 'servient land' in the law of easements.¹ Victorian law allows restrictive covenants to be enforced against successive owners of the burdened land.
- 10.3 Positive covenants require the owner of the burdened land to perform an action or to spend money. Victorian law does not allow positive covenants to run with the burdened land. Some of the issues discussed in this Chapter are relevant to the question of whether positive as well as restrictive covenants should be allowed to run with land.²

DEVELOPMENT OF THE LAW OF COVENANTS

COVENANTS UNDER COMMON LAW

- 10.4 Covenants are promises created expressly by an agreement between a person who gives the promise (the covenantor), and a person to whom the promise is given (the covenantee). At common law, a covenant, which originally meant a promise in a deed,³ is generally enforceable only between the parties to the deed, under the law of contract.
- 10.5 Leases are an exception to the rule. If a tenant transfers the lease to someone else, that person can enforce the landlord's covenants under the lease and is bound by the tenant's covenants.⁴ In the same way, a purchaser of the landlord's title is bound by the landlord's covenants and can enforce the tenant's covenants.⁵ If both the tenant and the landlord assign their respective interests, the lease covenants may be enforced by and against persons who were not parties to the original lease. In this sense, leasehold covenants are said to 'run with the land'.
- 10.6 The common law does not allow covenants to run with freehold estates in the same way as leaseholds. The benefit of a covenant can be transferred to a purchaser of the benefited land,⁶ but the burden of the covenant remains with the covenantor who granted it. This means that the covenant cannot be enforced against the owner of the burdened land once the covenantor has parted with the land. A freehold covenant is a personal obligation of the covenantor which does not run with the burdened land.
- 10.7 The common law treats leasehold and freehold covenants differently because leases are for a limited time. Since freehold estates can be of unlimited duration,⁷ burdens running with them would also be unlimited as to time. The likely reason for the restriction on freehold covenants is that to hold all subsequent owners to a promise made by a past owner might impair the economic value of land.⁸

ENFORCEMENT OF RESTRICTIVE COVENANTS IN EQUITY

- 10.8 In the period of rapid urbanisation in the second quarter of the 19th century, there was a perceived need to allow the burden of freehold covenants to run with land. Developers of planned residential, commercial and industrial estates wished to be able to make covenants about land use that would bind not just the first purchasers, but also their successors.
- 10.9 In 1832, the English Real Property Commissioners recommended that the law should be changed to allow freehold covenants to run with land,⁹ but no legislative reform followed. In 1840, Scottish courts began to enforce freehold covenants against the covenantor's successors.¹⁰
- 10.10 In 1848, the English Court of Chancery laid the foundation for the modern law of restrictive covenants. In *Tulk v Moxhay*,¹¹ the central garden in London's Leicester Square had been sold to a purchaser called Elm, subject to a covenant against building on it. When Elm's land was conveyed to Moxhay, the covenant against building was omitted from the deed, although Moxhay was aware of it. The developer, who still owned lots in the estate, sought an injunction to prevent Moxhay from building on the square. In granting the injunction, the Court said that it would be inequitable if Moxhay could buy the land for a price discounted because of the restriction imposed by the covenant, then resell it at a higher price free of the covenant.¹²
- 10.11 By holding that a covenant was enforceable against the covenantor's successors who took with notice of it, the court effectively created a new type of property right.¹³ The Court of Chancery¹⁴ administered a distinct body of judge-made law known as equity. The other English courts, which administer the common law, continued to regard covenants as purely contractual arrangements. Therefore, the restrictive covenant is an 'equitable' property right in the sense that it depends on enforcement by a court which can grant 'equitable relief'.
- 10.12 In Victoria, all courts of civil jurisdiction administer both law and equity, and if there is any conflict or variance between them, the rules of equity prevail.¹⁵ Restrictive covenants are still enforced by equitable orders. The usual remedy is an injunction to restrain a breach, but a court may grant equitable damages instead of or in addition to an injunction.¹⁶
- 10.13 To say that restrictive covenants are equitable property rights means that they are subject to different rules of enforcement than common law property rights,¹⁷ and are enforced by different types of orders. Restrictive covenants remain equitable property rights under the *Transfer of Land Act 1958* (Transfer of Land Act), which regulates Victoria's Torrens system of registered title.¹⁸
- 10.14 Over the half century following *Tulk v Moxhay*, the scope of the new property right became settled. It was decided that equity would enforce only covenants that were intended to run with the covenantor's land,¹⁹ were given for the benefit of land held by the covenantee,²⁰ and were 'restrictive' in the sense that they prohibited specified uses of the burdened land.²¹ These rules apply in Victoria²² subject to statutory exceptions.
- 10.15 The United States, which was also experiencing rapid urbanisation in the same period, developed a similar type of property right called an equitable servitude, which could be positive or restrictive.²³
- 10.16 Freehold covenants are also used throughout Britain,²⁴ Ireland and Commonwealth countries. Some European countries achieve similar functions through the use of negative 'servitudes' which are similar to easements.²⁵

- 1 Recent reforms in Ireland now use the term 'servient land' and 'dominant land' for covenants as well as easements: *Land and Conveyancing Law Reform Act 2009* (Ir) s 48.
- 2 See discussion in Chapter 12.
- 3 Adrian Bradbrook and Marcia Neave, *Easements and Restrictive Covenants in Australia* (2nd ed) (2000) [12.2].
- 4 Only covenants which 'touch and concern' the land are enforceable after assignment: *Spencer's Case* (1583) 77 ER 72, 74.
- 5 *Property Law Act 1958* (Vic) ss 142, 143. Only covenants that 'have reference to the subject matter' of the lease run with the assignment of the leasehold reversion. This is similar to the 'touch and concern' test in *Spencer's Case*.
- 6 Bradbrook and Neave (2000), above n 3, [13.15–13.24], [18.23].
- 7 The most common freehold estate, the fee simple absolute, is of unlimited duration. Life estates and remainders are freehold estates which are limited in time.
- 8 Brendan Edgeworth, 'The Numerus Clausus Principle in Contemporary Australian Property Law' (2006) 32 *Monash University Law Review* 387, 394–5; Susan French, 'Design Proposals for the New Restatement of the Law of Property Servitudes' (1988) 21 *UC Davis L Rev* 1213, 1222.
- 9 *Real Property Commissioners Third Report*, Parl Papers 1832 (484) XXIII, 321 as cited by Edgeworth (2006), above n 8, 398.
- 10 *Tailors of Aberdeen v Coutts* (1840) 1 Rob 296. Scottish 'real burdens' can be restrictive or positive.
- 11 (1848) 2 Ph 774; 41 ER 1143.
- 12 (1848) 2 Ph 774; 41 ER 1143, 1144 (Cottenham LC); Edgeworth (2006), above n 8, 396–7.
- 13 Edgeworth (2006), above n 8, 396.
- 14 The Court of Chancery is now known as the Chancery Division of the High Court of England and Wales.
- 15 *Supreme Court Act 1986* (Vic) s 29.
- 16 Bradbrook and Neave (2000), above n 3, [18.30], [18.64]; *Supreme Court Act 1986* (Vic) s 38.
- 17 Equitable property rights are not enforceable against a bona fide purchaser for value of the legal estate without notice, while legal rights yield only to prior inconsistent legal rights.
- 18 See discussion in Chapter 11.
- 19 *Austerberry v Corporation of Oldham* (1885) 29 Ch D 750. There is a statutory presumption that a covenant relating to the land of the covenantor is made on behalf of the covenantor and his or her successors: *Property Law Act 1958* (Vic) s 79.
- 20 *London County Council v Allen* [1914] 3 KB 642.
- 21 *Haywood v Brunswick Permanent Benefit Building Society* (1881) 2 QB 403; Edgeworth (2006), above n 8, 397; Bradbrook and Neave (2000), above n 3, [12.6].
- 22 See for example, *Pirie v Registrar-General* (1962) 109 CLR 619; *Forestview v Perpetual Trustees* (WA) (1998) 193 CLR 154; *Clem Smith Nominees Pty Ltd v Farrelly & Farrelly* (1978) 20 SASR 227; *Quadramain Pty Ltd v Sevastapol Investments Pty Ltd* (1976) 8 ALR 555.
- 23 Jesse Dukeminier and James Krier, *Property* (5th ed) (2002) 867.
- 24 In Scotland they are known as 'real burdens': Scottish Law Commission, *Report on Real Burdens*, No 181 (2000).
- 25 See examples in Scottish Law Commission, *Real Burdens Discussion Paper*, No 106 (1998) [2.28].



TYPES OF COVENANTS

- 10.17 It is useful to distinguish between three types of covenants which are found in common law jurisdictions and serve different functions.
- 10.18 The first type are building covenants imposed by developers to ensure that the owners of lots complete building works in accordance with the developer's master plan and within a specified time. For example, a covenant may require the lot owner to complete the front landscaping within six months of the certificate of occupancy being issued. Since building covenants mainly impose positive obligations, they can be enforced only in contract. It is difficult for the developer to enforce the covenants if the purchaser sells the lot to someone else before completing the works.²⁶ This problem has led to calls for a change in the law to allow positive covenants to run with land.
- 10.19 The second type are covenants which are intended to preserve neighbourhood character and amenity against inconsistent use or development in the subdivision. For example, covenants may provide that the covenantor will not subdivide the land, build more than one dwelling on it, or erect a building which exceeds a specified height. Covenants of this type are intended to maintain the value of the benefited lots,²⁷ by assuring purchasers that the attractiveness of the neighbourhood will be maintained.²⁸ Such covenants are enforceable in Victoria as restrictive covenants if they are recorded.
- 10.20 The third type are covenants which effectively impose rules of communal living on lot owners relating to the use of the land. Examples are covenants which prohibit the parking of a commercial vehicle, boat or trailer in open view on a lot, or require lot owners not to allow weeds or rubbish to accumulate. Covenants of this type are sometimes created in Victoria, but they are unenforceable if they purport to impose positive obligations. There is an alternative mechanism for making both positive and negative rules of communal living, by rules made under the *Owners Corporations Act 2006* (Owners Corporations Act). This mechanism is discussed in Chapter 12.

PERSPECTIVES ON COVENANTS AND PUBLIC PLANNING

- 10.21 The enforcement of restrictive covenants as property rights met a need in the mid 19th century when public planning processes were undeveloped.²⁹ Victoria now has an advanced public planning system, in which state wide planning policies are developed through a process of public consultation, analysis of data and expert advice. Many different interests and policy concerns are taken into account, to produce policies which provide a net public benefit. The types of uses and developments that can be conducted on any lot are controlled by planning schemes which apply within municipal boundaries and implement state planning policies.³⁰
- 10.22 The developments in public law raise the question: what is the role of covenants in an era of public planning? The question is controversial, and we have identified five different perspectives in academic, planning and legal discussion of the issue.

COVENANTS AS COMPLEMENTARY TO PUBLIC PLANNING

- 10.23 One perspective is that private planning by covenants complements public planning. It is said that covenants add value to public planning because they can be customised to meet particular needs,³¹ enable landowners to agree on allocations of land uses that maximise the utilisation of land,³² and protect amenity and aesthetic values in ways that may not be achievable through the planning process.³³
- 10.24 Bradbrook and Neave observe that planning authorities may not want to regulate matters such as uniformity of architecture because of high enforcement costs.³⁴ They suggest that neighbouring landowners face lower enforcement costs in securing some kinds of amenity values through restrictive covenants. For example, neighbours are better able to detect breaches, and may be able to use informal methods of persuading an offending owner to comply.³⁵

COVENANTS AS TOOLS FOR PUBLIC–PRIVATE COLLABORATION

- 10.25 Another perspective is that covenants are not just a private planning tool, but have become integrated into the public planning process. For example, councils use agreements to achieve planning objectives, and many covenants imposed by developers on purchasers of lots serve council requirements.
- 10.26 Most covenants are created by developers when an estate is subdivided for sale as individual lots. A council may impose various conditions on the planning permit for the subdivision, including that the developer enter into a planning agreement with the council under section 173 of the *Planning and Environment Act 1987*.³⁶ This is a statutory agreement which runs with the land once it is registered.³⁷ Unlike a freehold covenant, a planning agreement can impose positive obligations, and the council can enforce it even though the council holds no land benefited by it.³⁸
- 10.27 Requirements in planning agreements commonly regulate the staged development of the subdivision and the establishment of the built environment. For example, the agreement may require that buildings constructed on the lots comply with design guidelines approved by the council. The guidelines commonly deal with matters such as building heights, materials, and colours. Although the developer's obligations in the planning agreement bind its successors,³⁹ only the council can enforce the agreement. The developer may impose similar requirements on purchasers of the lots by means of covenants, giving the developer and the owners of benefited lots the right to enforce the covenants.⁴⁰

COVENANTS AS IMPEDIMENTS TO PUBLIC PLANNING

- 10.28 A common view among planners is that covenants create problems because they conflict with planning law and policies. They rarely conflict in a legal sense, because the requirements imposed by covenants are cumulative with those imposed by planning law. For example, if a covenant limits the use of a lot to a single dwelling, and the planning scheme provides that a planning permit is required for the construction of two dwellings, the owner of the burdened land must obtain both a planning permit and the consent of the benefited owners. If consent is refused, the development is permitted under planning law but would breach the covenant.⁴¹
- 10.29 Cases can arise where the combined effect of planning restrictions and a restrictive covenant is that no use is lawful. For example, in *Re Robinson*, land was subject to a restrictive covenant under which no building other than a private dwelling house could be erected on it. Subsequently the planning scheme was changed, to permit the construction of shops but not residential buildings.⁴²

- 26 Christensen and Duncan discuss different ways in which developers have sought to make these requirements enforceable against subsequent purchasers: Sharon Christensen and W Duncan, 'Is it Time for a National Review of the Torrens System? The Eccentric Position of Private Restrictive Covenants' (2005) 12 *Australian Property Law Journal* 104, 113-5.
- 27 Bradbrook and Neave (2000), above n 3, [12.8].
- 28 French (1988), above n 8, 1215.
- 29 Edgeworth (2006), above n 8, 399.
- 30 *Planning and Environment Act 1987* (Vic) s 6. 'Use' and 'development' are defined in s 3(1).
- 31 American Law Institute, *Restatement (Third) of Property: Servitudes* (2000) ch 6, introductory note.
- 32 Dukeminier and Krier (2002), above n 23, 890.
- 33 Bradbrook and Neave (2000), above n 3, [12.34]; Michael Weir, 'Private and Public Planning: Implications for Legal Processes' (1994) 11 *Environmental and Planning Law Journal* 137, 141.
- 34 Bradbrook and Neave (2000), above n 3, [12.34].
- 35 Ibid. See also Barrie Needham, *Planning Law and Economics: An Investigation of the Rules we make for Using Land* (2006), arguing that covenants can be more effective than public law in regulating the detail of neighbourhood quality.
- 36 *Planning and Environment Act 1987* (Vic) s 173. The provisions enable 'responsible authorities' (usually councils) to enter into agreements with land owners (including developers) which may impose positive or negative obligations regulating the use or development of land.
- 37 *Planning and Environment Act 1987* (Vic) s 182.
- 38 *Planning and Environment Act 1987* (Vic) s 182(b).
- 39 *Planning and Environment Act 1987* (Vic) s 182(b).
- 40 *Planning and Environment Act 1987* (Vic) s 182(b).
- 41 For purposes of the present example of a general point, we leave aside the effect of s 61(4) of the *Planning and Environment Act 1987* (Vic), which is discussed in Chapter 15.
- 42 *Re Robinson* [1972] VR 278. The case is discussed in Chapter 16. For another example, see *Perth Construction v Mount Lawley* (1955) 57 WALR 41; Weir (1994), above n , 145-8.



10.30 Even if there is no legal conflict, covenants may conflict with planning law in the sense that they affect the implementation of planning policies. Planning schemes are based on the State Planning Policy Framework, which establishes broad policies for land use and development in Victoria.⁴³ Planning policies are statements of intent which seek to channel different land uses to designated areas.⁴⁴ The achievement of planned objectives may be impeded if restrictive covenants prohibit the land uses planned for an area. The impediment is greatest when a widespread area is blanketed by the same type of restrictive covenant.

10.31 Planned outcomes can be frustrated by private agreements which do not take account of the broader public interest and effects, or which were made in the past when planning needs were different. The widespread use of covenants which prohibit the construction of more than one dwelling on a lot, or which restrict buildings to a single storey, is of particular concern to planners, as David Crowder explains:⁴⁵

State and local planning policy clearly encourages the consolidation of existing urban areas, and the various residential areas beyond the designated activity centres are expected to carry their share of the load. However, if restrictive covenants prevent the achievement of urban consolidation in many areas, policy objectives will be compromised and pressures will be exerted on other areas – such as those beyond the Urban Growth Boundary.

COVENANTS AS A ZONE OF LOCAL AND INDIVIDUAL AUTONOMY

10.32 Some commentators defend the right of landowners to make covenants even if they impede the achievement of public planning objectives. They argue that local communities need a means to protect their neighbourhood character, amenity and lifestyle against irreversible planning changes which they find unsuitable.⁴⁶

10.33 Miles Lewis argues that urban consolidation policies that promote higher density development in designated areas redistribute benefits.⁴⁷ They allow developers to appropriate the benefits of the neighbourhood amenity created by existing landowners, while devaluing the landowners' rights and benefits.⁴⁸

10.34 On this view, neighbours should be able to reach an agreement on behalf of themselves and their successors that none of them will exercise their rights under planning law to engage in specified land uses, such as constructing multi-storey dwellings. By ensuring that neighbourhood quality is maintained, covenants protect the long term expectations upon which investment and settlement decision are based.⁴⁹

COVENANTS AS UNREPEALABLE PRIVATE LEGISLATION

10.35 In the United States and other countries, there is growing concern about the extent of private land use regulation by means of covenants.⁵⁰ Developers' covenants are often very detailed and comprehensive. Purchasers cannot negotiate the terms of the covenants, which are 'bundled' with the land.⁵¹ Although covenants have the form of agreements, they operate like local laws to the extent that they bind all future lot owners.⁵²

10.36 Covenants are not subject to the review and quality assurance processes that apply to local laws made by councils.⁵³ There is no legislative regulation of the kinds of rules that can be imposed on lot owners by covenants.⁵⁴ Unlike local laws made by councils⁵⁵ there is no provision in law for 'sunsetting' or lapsing of covenants after a specified period of time.

- 10.37 Many covenants bind the land for an indefinite period. As static requirements imposed on evolving communities, they have the potential to exclude new uses and to lock in the values, lifestyle choices and aesthetic preferences of the original lot owners.⁵⁶
- Covenants are designed to produce an instant – but also final – place identity; in doing so they close down processes of becoming.*⁵⁷
- 10.38 Purchasers of lots may be attracted by the assurance that the neighbourhood quality will be maintained, but non-lapsing covenants have the potential to become out of date, and to become more irksome as circumstances change.⁵⁸ For example, covenants which prohibit planting drought-tolerant garden plants such as coastal natives may become more onerous in a period of water restrictions.⁵⁹
- 10.39 While legislation that imposes restrictions on land use can be repealed or revoked, covenants can be very difficult to vary or remove unless special provision is made in the covenant. It is common for many lot owners in large estate subdivisions to be subject to, and have the benefit of, a common set of covenants. Although the covenants are created as multilateral obligations, they can be enforced bilaterally. This means that each individual lot owner can enforce them against each other lot owner.⁶⁰ Even if most of the benefited owners agree to release a covenant or to permit a use that would otherwise be a breach, it takes only one ‘holdout’ to block the removal or to refuse consent for the breach.⁶¹
- 10.40 The transaction costs of removing or varying covenants can be high. They cannot be released by the developer once benefited lots have been sold, nor by the lot owners collectively acting under the Owners Corporations Act.⁶² An application to the court for removal is costly and the grounds for removal are very restrictive.⁶³ There is provision for removal of covenants by planning permit, but the grounds are so restrictive that an application is unlikely to succeed if any benefited owner objects.⁶⁴

- 43 Des Eccles and Tannetje Bryant, *Statutory Planning in Victoria* (3rd ed) (2006) 22.
- 44 Ibid 1.
- 45 David Crowder, ‘Covenants – Time to Simplify their Removal/Variation’ *Planning News* Vol 35 No 10, November 2009.
- 46 See eg, Miles Lewis, *Suburban Backlash: The Battle for the World’s Most Livable City* (1999) vii–viii, 1; Clayton P Gillette, ‘Courts, Covenants and Communities’ (1994) 61 *Uni of Chicago Law Rev* 1375, 1375–82.
- 47 Lewis (1999), above n 46, 2–20, 143–5, 160–3.
- 48 Ibid 163, where Lewis calls this ‘amenity mining’.
- 49 Needham (2006), above n 35, 106.
- 50 See eg, the collection of articles in Georg Glasze, Chris Webster and Klaus Frantz (eds), *Private Cities: Global and Local Perspectives* (2006); Evan Mckenzie, *Privatopia: Homeowner Associations and the Rise of Residential Private Government* (1994).
- 51 Greg Alexander, ‘Freedom, Coercion and the Law of Servitudes’ (1988) 73 *Cornell Law Review* 883, 894–5.
- 52 U Reichman, ‘Towards a Unified Concept of Servitudes’ (1982) 55 *S Cal L Rev* 1177, 1233.
- 53 See the requirements the making of local laws in the *Local Government Act 1989* (Vic) Part 5.
- 54 Compare with the restricted list of subjects on which owners corporations can make rules which bind lot owners under the *Owners Corporations Act 2006* (Vic) s 138, schedule 1. Covenants are subject to the requirements of the general statute law, such as the *Fair Trading Act 1999* (Vic) and the *Equal Opportunity Act 1995* (Vic).
- 55 *Local Government Act 1989* (Vic) s 122. Sunset provisions also apply to statutory rules: *Subordinate Legislation Act 1994* (Vic) s 5.
- 56 More particularly, the developer’s covenants are likely to serve the assumed values of the target buyer market.
- 57 K Dovey, I Woodcock & S Wood, ‘Slippery Characters’ in K Dovey, *Becoming Places* (2010) 57–78; French (1988), above n 8, 1215.
- 58 French (1988), above n 8, 1218.
- 59 Dovey, Woodcock and Wood (2010), above n 57, 68 refers to covenants in these terms in a 1990s subdivision in Beacon Cove, a coastal suburb of Melbourne. Roses and coastal natives are relatively drought-tolerant plants.
- 60 The covenants may provide that the developer is responsible for enforcing the covenants until all lots have been sold.
- 61 There are competing views on whether the law should allow holdouts. See R Epstein, ‘Notice and Freedom of Contract in the Law of Servitudes’ (1982) 55 *S Cal L Rev* 1353 and reply by Stewart E Sterk, ‘Freedom from Freedom of Contract: The Enduring Value of Servitude Restrictions’ (1985) 70 *Iowa Law Rev* 615.
- 62 The developer may specify proposed rules which are created and deemed to be rules of the owners corporation on registration of the plan of subdivision: *Subdivision Act 1988* (Vic) s 27E. The lot owners acting through the owners corporation can revoke or amend the rules by a special resolution: s 27E(2), and *Owners Corporations Act 2006* (Vic) s 138.
- 63 See Chapter 16.
- 64 See Chapter 15, which also discusses removal by planning scheme amendment.
- 65 French (1988), above n 8, 1227.



SUMMARY

- 10.41 The role of covenants and their relationship to planning law has changed significantly since restrictive covenants were introduced in the mid 19th century. Planning law now regulates land use comprehensively, but the use of covenants has actually increased. This is mainly due to their use by developers in the private planning of subdivisions.
- 10.42 The focus of covenants has widened from isolated arrangements among landowners to multilateral covenants designed by developers to control land use in large commercial and residential developments.⁶⁵
- 10.43 The growing use of covenants raises questions about the extent to which land use regulation should be under public control and governed by legislative arrangements and standards, or under private control and regulated by covenants and common law and equity. In answering the following question, it is useful to bear in mind the distinction between building covenants, covenants for the preservation of neighbourhood amenity and character, and covenants that create rules of communal living. Perhaps different approaches should be taken, depending on the type and function of the covenant.

Is there a role for covenants in relation to planning law and, if so, what is it?

Chapter 11

Covenants and the Register

CONTENTS

The legal effect of recording a restrictive covenant.....	96
Recording of the benefit of the covenant.....	97
Covenants in other jurisdictions.....	98
Removal of covenants from the register.....	99





11.1 This Chapter explains how restrictive covenants run with Torrens system land in Victoria and discusses issues in relation to the legal effect of recording covenants on the register. It raises the question whether covenants should be registered or merely recorded. The difference between registration and recording is explained in Chapter 5.

THE LEGAL EFFECT OF RECORDING A RESTRICTIVE COVENANT

- 11.2 At equity, restrictive covenants are binding on purchasers who acquire burdened land with notice of the covenants. Initially, there was no provision in the *Transfer of Land Act 1958* (Transfer of Land Act) for restrictive covenants to be recorded or registered on folios.
- 11.3 From around 1880, the Registrar adopted the practice of recording covenants on the folio for the burdened land.¹ The practice was retrospectively authorised by legislation in 1964.² The recording of the covenant gives notice of the covenant to purchasers of the burdened land, which makes it enforceable against them in equity.³ Purchasers cannot rely on the indefeasibility provisions in the Transfer of Land Act to avoid the covenant because section 42(1) says that the registered owner holds the land 'subject to such encumbrances as are recorded on the relevant folio of the Register'.⁴
- 11.4 Section 88(3) of the Transfer of Land Act provides that the recording of a restrictive covenant in the register 'shall not give it any greater operation than it has under the instrument or Act creating it'. This means that the recording of a covenant does not validate it. Restrictive covenants are not made indefeasible or conclusive by recording.⁵ The effect of the recording is to make them enforceable against successive registered owners, 'for what they are worth', as Whalan put it.⁶ Their validity and effect depends on the general law.⁷
- 11.5 Since covenants are recorded rather than registered, they are not subject to the same degree of legal examination as instruments lodged for registration. Recording under section 88(1) means that the covenants are effectively untested claims, not indefeasible interests conferred by registration. While the Registrar may send requisitions (queries) to the lodging party in relation to covenants which are clearly positive in effect or otherwise invalid at general law,⁸ the Act gives the Registrar no clear power to refuse to record an invalid covenant.
- 11.6 Although covenants are only recorded, it is often assumed that they are registered and consequently validated by registration. The misconception is partly due to the fact that they are sometimes referred to in legislation as 'registered' covenants. The term 'registered restrictive covenant' is used throughout the *Planning and Environment Act 1987*,⁹ and section 3(1) of the *Subdivision Act 1988* defines 'restriction' as 'a restrictive covenant or restriction which can be registered or recorded in the register under the Transfer of Land Act'.
- 11.7 While it is not semantically incorrect to use the terms 'registration' and 'recording' for any form of register entry,¹⁰ the use of term 'registered restrictive covenant' in legislation tends to create a false impression that recorded covenants are indefeasible interests.

RECORDING OF THE BENEFIT OF THE COVENANT

- 11.8 Until recently, the Registrar was empowered to notify covenants only on the folio of the burdened land. Recording on the folio for the burdened land but not the benefited land can lead to difficulties in identifying the benefited owners when an owner of the burdened land seeks to negotiate the variation or release of covenants.¹¹
- 11.9 Problems in identifying benefited owners are more likely to arise where the benefited land has been subdivided. Unless the covenant provides otherwise, the benefit of the covenant attaches to every subdivided part 'which is capable of benefiting from it'.¹²
- 11.10 Difficulties have arisen in determining whether land has the benefit of a building scheme¹³ covenant. A building scheme is an early form of private subdivision regulated by an equitable rule under which each lot owner is entitled to enforce a covenant given to the developer by the purchaser of any other lot, regardless of the order in which the lots were sold by the developer.¹⁴ The rule applies where all lots in the scheme were subject to the same covenants, and were intended by the developer to have the benefit of the same covenants on a reciprocal basis. Building scheme covenants affecting Torrens system land are not enforceable in Victoria unless the Registrar records on the folio of the burdened land the nature of the restrictions and the identity of the benefited land.¹⁵ In some cases, finding proof of the existence of a building scheme requires research beyond the register; for example, examining historic evidence as to statements about covenants made by the developer in marketing the lots.
- 11.11 The view of the Registrar's office is that it would be unduly costly for the Registrar to record covenants on the folios of all benefited land. In the case of a large subdivision, this would require recordings to be made on the folios of dozens or even hundreds of benefited lots. It has been suggested to us that recording of the benefit is unnecessary, as burdened owners can identify the benefited land from the plan of subdivision, or from the recording on the folio of the burdened land, or from documents referred to on the folio.
- 11.12 An amendment to section 88(1) of the Transfer of Land Act made in 2009 now empowers the Registrar to notify covenants on the parcel or parcels affected by the covenant, if all the registered owners and mortgagees of the affected land consent.¹⁶ This appears to empower the Register to record a covenant on the folio of benefited land as well as the burdened land.

What difficulties arise in identifying the lots which have the benefit of restrictive covenants?

- 1 Stanley Robinson, *Transfer of Land in Victoria* (1979) 50–1, citing *Re Arcade Hotels Pty Ltd* [1962] VR 274, 280.
- 2 *Transfer of Land Act 1954* (Vic) s 88(1), inserted by the *Transfer of Land (Restrictive Covenants) Act* (Vic) 1964. Robinson notes that there is a provision in s 10 of the *Real Property Act 1918* which indirectly recognised the practice: *Ibid* 350–1.
- 3 *Fitt v Luxury Developments Pty Ltd* [2000] VSC 258 [176]–[186] (Gillard J); *Pirie v Registrar-General* (1962) 109 CLR 610, 627–8.
- 4 *Fitt v Luxury Developments Pty Ltd* [2000] VSC 258 [185].
- 5 *Fitt v Luxury Developments Pty Ltd* [2000] VSC 258 [178]–[182], [315], [325], [326] (Gillard J).
- 6 Douglas Whalan, *The Torrens System in Australia* (1982) 111.
- 7 The 'general law' is the law of property other than the Torrens system rules contained in the *Transfer of Land Act 1958* (Vic). It includes other statutes and the common law and equitable rules of property law developed by the courts.
- 8 For example, a covenant that the covenantor cannot sell the land unless a dwelling has been built on it would be an invalid restriction on the owner's power of sale.
- 9 *Planning and Environment Act 1987* (Vic) ss 3(1), 19(1)(ca), (2A), 47(1)(d), (e), 52(1), (1AA), 57, 61(4), 62(1), 91(3A), 96A(1), (4), 96C(1), (2A), 96I(1A).
- 10 Alejandro M Garro, *The Louisiana Public Records Doctrine and the Civil Law Tradition* (Paul M Herbert Law Centre Publications Institute, Baton Rouge, La, 1989) 76, fn 6.
- 11 This point was made by the English Law Commission as follows: 'A vast number of covenants may fall into limbo as it is impossible to discover who (if anyone) is entitled to enforce them. It is, of course, impossible to negotiate a release from such covenants as it is not known with whom such negotiation should be initiated.' Law Commission [England and Wales], *Easements, Covenants and Profits a Prendre: A Consultation Paper*, CP No 186 (2008) 133.
- 12 *Property Law Act 1958* (Vic) s 79A.
- 13 This is also known as a scheme of development.
- 14 This was a rule developed by equity in *Elliston v Reacher* [1908] 2 Ch 374, and applied in *Re Dennerstein* [1963] VR 688: See Adrian Bradbrook et al, *Australian Real Property Law* (4th ed) (2007) 807, fn 96. The United States developed a similar rule for enforcement of 'reciprocal implied covenants'.
- 15 *Fitt v Luxury Developments Pty Ltd* [2000] VSC 258 [320]–[331]; *Re Dennerstein* [1963] VR 688, 696. In *Fitt*, Gillard J did not follow *Re Dennerstein* on the question of whether the existence of a building scheme must be recorded.
- 16 *Transfer of Land Act 1958* (Vic) s 88(1) as inserted by *Land Legislation Amendment Act 2009* (Vic) s 44(1).



COVENANTS IN OTHER JURISDICTIONS

- 11.13 There is little consistency in the way that covenants are treated under the Torrens statutes in the Australian states and territories.¹⁷ NSW, Tasmania and Western Australia make similar provision to Victoria for recording restrictive covenants on the folio or certificate of title for the burdened land, with the result that they are enforceable against purchasers of that land.¹⁸ There is no provision for recording of covenants in Queensland, South Australia and the ACT.¹⁹ It has been suggested that the caveat provisions in those jurisdictions are wide enough to enable a person claiming the benefit of a restrictive covenant to protect it by a caveat.²⁰
- 11.14 No jurisdiction in Australia or overseas has extended title registration to restrictive covenants which operate at equity. New Zealand has a statutory scheme for positive and restrictive covenants but they are notified on the title register without validating the covenant.²¹
- 11.15 A few jurisdictions have created statutory interests in substitution for restrictive covenants. In the Northern Territory, a covenant (which may be positive or restrictive) is created on registration and forms part of the indefeasible title to the lot.²² The enforcement of covenants is now regulated by statute, not by equity.²³
- 11.16 Ireland has abolished the rules of common law and equity relating to freehold covenants and substituted a statutory scheme of positive and restrictive covenants.²⁴ Although Ireland has a registered title system, the enforcement of covenants does not depend on whether they are registered.
- 11.17 Registered title statutes in common law countries generally restrict registration to estates and interests that were legal interests (rather than equitable interests) at general law.²⁵ There may be a functional explanation, based on cost-benefit analysis. Registration requires close legal examination of instruments by the Registrar to ensure that the covenants and instruments are valid under the general law. The legal estates and charges are relatively standard in their terms, and are generally the most valuable interests. Covenants are much more variable in content and therefore more costly to examine, while their value is less.
- 11.18 The current recording provision in section 88 of the Transfer of Land Act leaves the legal effect of the covenants to be determined under the general law. One difficulty with this approach is that if unlawful, lapsed, or otherwise unenforceable covenants are recorded, the recording may mislead purchasers and owners of the burdened land. At a minimum, there should be a warning to purchasers that recorded covenants are only binding on them if they are legally valid. Such a warning might be required in vendor statements under section 32 of the *Sale of Land Act 1962*, if the vendor is required to disclose a covenant.²⁶

Should covenants be (a) recorded or (b) registered?

REMOVAL OF COVENANTS FROM THE REGISTER

11.19 Prior to 2009, the Registrar could remove a covenant from the register where the covenant was released, varied or modified by agreement of all interested parties, or where a court ordered the Registrar to amend or delete the recording.²⁷ In 2009, section 88(1) of the Transfer of Land Act was amended to empower the Registrar to record any instrument purporting to vary or release a privately created restrictive covenant.²⁸ The Registrar can delete or amend a recording of a covenant which has been released or varied by agreement of all the owners and mortgagees of the affected land, by an order of the court, or by a planning scheme, permit or plan.²⁹ Restrictive covenants which are created, released or varied by planning scheme, permit or plan can only be removed by a similar instrument or a court order.³⁰

11.20 A key point to note about the provisions is that the Registrar is not empowered to delete or amend the recording of covenants on his or her own motion. A covenant that may be obsolete or that has become void due to a subsequent change in the law will remain on the register until removed by one of the means specified above. This essentially passive role for the Registrar is consistent with the idea that the entry of covenants under section 88 records claims, not guaranteed interests.

Are the provisions for removal of recorded covenants adequate?

- 17 Sharon Christensen and W Duncan, 'Is it Time for a National Review of the Torrens System? The Eccentric Position of Private Restrictive Covenants' (2005) 12 *Australian Property Law Journal* 104, 105, 106, 120. Each state and territory has its own 'Torrens statute' which regulates the Torrens system in that jurisdiction and corresponds to the *Transfer of Land Act 1958* (Vic), although the specific provisions differ.
- 18 *Conveyancing Act 1919* (NSW) ss 89A, 89B, 89C; *Transfer of Land Act 1893* (WA) ss 129A, 129B; *Land Titles Act 1980* (Tas) ss 102, 104.
- 19 Bradbrook (2007), above n 14, 797; Adrian Bradbrook and Marcia Neave, *Easements and Restrictive Covenants in Australia* (2nd ed) (2000) [17.4]. Christensen and Duncan note that in South Australia, covenants are often included in registered conveyances to provide notice and make them enforceable in equity: Christensen and Duncan (2005), above n 17, 116-8.
- 20 Bradbrook (2007), above n 14, 798. Christensen and Duncan say that this method is not much used due to objections by mortgagees: Christensen and Duncan (2005), above n 17, 120.
- 21 *Law of Property Act 2007* (NZ) s 307 (3)–(5).
- 22 *Land Title Act 2000* (NT) ss 106, 116, 117, 30, 39, 40; and *Law of Property Act 2000* (NT) s 169.
- 23 *Law of Property Act 2000* (NT) Part 9, Divs 4 and 5.
- 24 *Land and Conveyancing Law Reform Act 2009* (Ir), Chapter 4.
- 25 With the exception of second and subsequent mortgages, which can exist as registered charges but at general law were equitable.
- 26 *Sale of Land Act 1962* (Vic) s 2(2) (b) requires the vendor to disclose the existence of a covenant.
- 27 *Transfer of Land Act 1958* (Vic) s 88(1).
- 28 Amended by the *Land Legislation Amendment Act 2009* s 44(1).
- 29 *Transfer of Land Act 1958* (Vic) s 88(1AC) inserted by the *Land Legislation Amendment Act 2009* s 44(1).
- 30 *Transfer of Land Act 1958* (Vic) s 88(1AA), (1AB).

Chapter 12

Positive Covenants

CONTENTS

Should positive covenants run with land?.....	102
Positive covenants in Victoria.....	103
Policy considerations	105
Should positive obligations run only under legislation?	106
Positive covenants in England and the United States	107
Reform proposals.....	108
Options.....	109

12

Chapter 12

Positive Covenants



- 12.1 Positive freehold covenants are agreements between parties to perform an obligation or to expend money in respect of land. A positive covenant requires deliberate action by a defined person or group of people. Restrictive covenants, by comparison, require someone to refrain from doing something or allowing something to be done in relation to land.
- 12.2 The burden of the obligation under a positive covenant does not run with freehold land. This means it is not enforceable against successors of the owner of the burdened land who granted the covenant. This is the rule in *Austerberry v Corporation of Oldham*¹ (the *Austerberry* rule) which has been 'preserved virtually intact'² by the English courts.³ A positive covenant is enforceable only in contract, against the original covenantor.
- 12.3 In Australia, positive covenants run with land only in the Northern Territory, where in 2000 a statutory scheme for positive and restrictive covenants replaced the common law and equitable rules.⁴ Victoria, New South Wales and Western Australia each make limited provision for positive covenants to run with land.⁵
- 12.4 In this Chapter, we discuss the question of whether any positive freehold covenants should run with land in Victoria.

SHOULD POSITIVE COVENANTS RUN WITH LAND?

- 12.4 It is not entirely clear why the English courts ruled out the running of positive covenants with freehold land. It seems that the courts were primarily concerned with what has been called 'the problem of the future'.⁶
- 12.4 The courts saw a need to limit the running of any covenant which 'undesirably limits the freedom of future generations to manage resources wisely and autonomously'.⁷ There was also concern that proliferating positive obligations could impair the marketability or value of land and create inefficiencies in land use.⁸ These objections applied to restrictive as well as positive covenants, but were more prominent in relation to positive covenants.
- 12.5 To English courts, positive covenants looked suspiciously like the obligations to provide services and pay dues that were imposed on land under feudalism.⁹ As a leading American academic put it, the likely explanation for the rule against positive covenants was 'the courts' antipathy to involuntary servitude'.¹⁰
- 12.6 The reform of the law relating to freehold covenants has been the subject of recent discussions and legislative initiatives in other jurisdictions. The Northern Territory, New Zealand, Ireland, Northern Ireland, and Trinidad and Tobago have all introduced or proposed legislation in this area, and positive covenants have been the subject of extensive law reform discussion in England, Scotland and Ontario. We discuss these reforms in detail in Chapter 13.
- 12.7 A major focus of reform in these jurisdictions has been on overturning the *Austerberry* rule. A major impetus for the reform is to enable the use of positive covenants in the private planning of both residential and commercial developments. The following discussion focuses on the experiences in Victoria, England and the United States, and considers the issues that arise in determining whether the burden of positive covenants should run with land in this jurisdiction.

POSITIVE COVENANTS IN VICTORIA

12.8 In Victoria, the burden of positive covenants cannot run with land unless specifically provided for by statute. Various statutory provisions have been introduced to allow positive obligations to run with land in various ways.

STATUTORY PROVISIONS FOR IMPOSING POSITIVE OBLIGATIONS ON LANDOWNERS

12.9 One of the statutory methods which has developed is the provision for planning agreements made under section 173 of the *Planning and Environment Act 1987* (Planning and Environment Act). The provisions enable 'responsible authorities' (usually councils) to enter into agreements with land owners (including developers) which may impose positive or negative obligations regulating the use or development of land. Once recorded by the Registrar on the folio for the affected land, the obligations are enforceable by the responsible authority against successors in title.¹¹ Planning agreements are commonly made at the stage of subdivision or development, but can also be initiated by landowners seeking to make neighbourhood agreements to which the council is a party.¹² The agreements can be used to ensure that the establishment of the built environment in the subdivision conforms with the plan and design guidelines agreed between the developer and the council.

12.10 Victoria also has provisions which enable landowners to contribute to funding the provision of special services or local amenities for their common benefit, in conjunction with the council. For example, a council may arrange for the extension of reticulated water supply, utilities and roads to particular localities, and recover contributions from the benefiting landowners and their successors by levying a differential rate.¹³ Councils can also establish a special rate scheme to fund the provision of local benefits.¹⁴

12.11 Positive covenants are permitted under statute as a means of achieving environmental aims. For example, the Trust for Nature (Victoria) is empowered to enter into positive or restrictive covenants with landowners for the purpose of conservation or preservation.¹⁵

12.12 The most significant legislative mechanism which allows for ongoing positive obligations to be imposed on landowners is the owners' corporations legislation, discussed below.

- 1 *Austerberry v Corporation of Oldham* (1885) 29 Ch D 750. This paper considers freehold covenants only. If there is privity of estate between the parties (i.e. in a landlord and tenant situation) then the burden of positive covenants will run with the land.
- 2 J Snape, 'The Benefit and Burden of Covenants: Now Where Are We?' (1995) 3 *Nottingham Law Journal* 68, 68.
- 3 The rule was affirmed by the House of Lords in *Rhone and Another v Stephens (Executrix)* [1994] 2 All ER 65.
- 4 *Law of Property Act 2000* (NT) Division 4.
- 5 See discussion below regarding the Victorian context. Section 88BA of the *Conveyancing Act 1919* (NSW) allows a positive covenant to be imposed for the maintenance and repair of land that is the site of an easement. The positive covenant runs with land as the legislation treats it in the same way as a restrictive covenant (s 88F). The legislation also permits public authorities to impose positive obligations concerning development, the provision of services or maintenance and repair; *Conveyancing Act 1919* (NSW) ss 87A, 88D, 88E, 88F; *Land Administration Act 1997* (WA) ss 15, 74. See generally discussion in Adrian Bradbrook and Marcia Neave, *Easements and Restrictive Covenants in Australia* (2nd ed) (2000) [14.25] and 'Legislation to permit positive covenants' *Law Soc J* December 1986, 28.
- 6 Molly Shaffer Van Houweling, 'The New Servitudes' (2008) 96 *Geo L J* 885, 900.
- 7 *Ibid.*
- 8 *Ibid.*; see also Bernard Rudden, 'Economic Theory v Property Law: The Numerus Clausus Problem' in John Eekelaar and John Bell (eds) *Oxford Essays in Jurisprudence: Third Series* (1987) 252-3; Brendan Edgeworth, 'The Numerus Clausus Principle in Contemporary Australian Property Law' (2006) 32 *Monash University Law Review* 387, 394.
- 9 Shaffer Van Houweling (2008), above n 6, 900.
- 10 Carol Rose, 'Servitudes' 2009 *Arizona Legal Studies*, Discussion Paper No. 09-13, 23.
- 11 *Planning and Environment Act 1987* (Vic) ss 173, 182. One of the current difficulties with s 173 agreements is their removal, which requires agreement between the council and all persons bound by any covenant in the agreement (s 177). A draft Bill was released in December 2009 setting out proposed amendments to the Act which address this issue: *Modernising Victoria's Planning Act, Planning and Environment Amendment (General) Bill 2009 Commentary on the draft Bill* December 2009 55. The Victorian Urban Development Authority (VicUrban) can also enter into agreements with landowners concerning the use and development of land. These agreements run with land and are treated like s 173 agreements under the *Planning and Environment Act 1987* (Vic): *Victorian Urban Development Authority Act 2003* (Vic) s 49.
- 12 Des Eccles and Tannetje Bryant, *Statutory Planning in Victoria* (3rd ed) (2006) 55.
- 13 *Local Government Act 1989* (Vic) ss 161, 161A, 162.
- 14 *Local Government Act 1989* (Vic) s 163. The special charge can be levied if the council considers that the performance of the function/exercise of power is or will be of special benefit to the persons required to pay the charge. An example would be a street fair organised by the council whereby it can recoup expenses of setting up stalls, security etc by way of special charge to the retailers on that street; the special benefit being the guaranteed footfall and increased business for the retailers.
- 15 *Victorian Conservation Trust Act 1972* (Vic) s 3A. In several American states, conservation covenants entered into between private landowners and charitable or not for profit organisations are commonly used to achieve the same purpose: Jesse Dukeminier and James Krier, *Property* (5th ed) (2002) 858, 892.

12

Chapter 12

Positive Covenants



OWNERS' CORPORATIONS LEGISLATION

- 12.13 The *Subdivision Act 1958* and Regulations together with the *Owners Corporations Act 2006* (Owners Corporations Act) and the *Owners Corporations Regulations 2007* currently form the 'statutory and regulatory framework for communal living'¹⁶ in Victoria. Where a plan of subdivision makes provision for common property, it must also provide for the creation of an owners' corporation.¹⁷ An owners' corporation may also be established where there is no common property.¹⁸ It operates as the governing body for the affected lots and is made up of all the lot owners.¹⁹
- 12.14 Owners' corporations have powers to create and enforce positive obligations upon the owners of individual lots in the subdivision, such as the levying of fees and the making, amending and revoking of rules.²⁰ All owners, tenants and occupiers of lots must comply with the rules.²¹ Owners' corporations legislation also imposes a positive obligation on lot owners to maintain any part of their lot which affects its outward appearance or the use and enjoyment of common property.²²
- 12.15 The rule-making powers conferred on owners' corporations are subject to statutory controls relating to the content of the rules and the process for making them. The rules must relate to the subjects prescribed by the Act²³ and must be for the purpose of the control, management, administration, use or enjoyment of the common property or of a lot.²⁴ They must not unfairly discriminate against a lot owner or be inconsistent with any law.²⁵ The right of lot owners to decorate their building interiors to their own taste is protected.²⁶ The rules can only be made, amended or revoked by a special resolution, which requires support by a 75 per cent majority of members, or a 50 per cent majority for an interim resolution.²⁷
- 12.16 Through their membership of the owners' corporation and their voting rights, the Owners Corporations Act gives lot owners control over the local rules that regulate their communal living. The strengths of the system include delegated rule-making within limits set by Parliament, with democratic processes for the amendment and revocation of the rules. It is an administrative law model for local rule-making, which is more adaptable and better regulated than the use of private covenants to achieve similar purposes.²⁸

CONVEYANCING WORKAROUNDS

- 12.17 In situations outside the statutory exceptions, conveyancers use various drafting devices to get around the *Austerberry* rule that the burden of the obligation under a positive covenant does not run with land. One method is the use of a chain of indemnity covenants where, on the sale of a lot, the developer requires a purchaser to enter into a covenant indemnifying the developer against any breach of covenant by the purchaser. The covenant also stipulates that the purchaser will impose a similar covenant on each transfer made.²⁹ The chain of covenants usually breaks after a few transfers when a vendor omits to obtain the covenant from the next purchaser.
- 12.18 A more roundabout approach is to draft covenants which are restrictive in form but positive in effect. An example of this type of drafting is:
- The Transferee covenants not at any time to leave the lot in a state of disrepair, including the presence of excessive weeds or rubbish.*
- 12.19 This covenant is positive in effect because it requires the purchaser of the lot to take deliberate action to control weeds and remove rubbish.

- 12.20 While developers find these drafting devices useful, they can lead to covenants being recorded in the register which are invalid as restrictive covenants. The Registrar sometimes queries covenants which are positive in substance, but lacks clear power to refuse to record them. As explained in Chapter 11, covenants are not validated by registration but are recorded for what they worth under the equitable rules.
- 12.21 The recording of invalid covenants creates a risk that purchasers and owners will be misled about the enforceability of the covenant. Invalid covenants which are recorded may also block the grant of planning permits. Under section 61(4) of the Planning and Environment Act a council may not grant a planning permit which 'would authorise anything which would result in the breach of a registered restrictive covenant'.³⁰ This problem is discussed in Chapter 15.
- 12.22 Victoria has an enforcement problem with the *Austerberry* rule. If it is retained, additional enforcement mechanisms are needed to empower the Registrar to refuse to record invalid covenants, or to empower a court or tribunal to remove them expeditiously when an objection is taken.
- 12.23 From another perspective, the use of 'workarounds' by conveyancers to avoid the rule demonstrates a need to allow the burden of positive covenants to run with land. This point is discussed further below.

POLICY CONSIDERATIONS

- 12.24 In 1992, the former Law Reform Commission of Victoria proposed that the burden of positive covenants should run with freehold land. The Commission said that positive covenants would be useful where neighbours wished to establish 'a permanent facility for their mutual benefit'³¹ such as 'a sea wall or a windbreak of cypress trees across their front boundaries'.³² As noted above, several jurisdictions have recently legislated to allow positive freehold covenants, or have been advised to do so by law reform bodies.
- 12.25 On one view, the law should facilitate agreements and allow private parties to impose positive covenants on land that they believe will suit their needs. As Richard Epstein put it:³³
- We may not understand why property owners want certain obligations to run with their land but as it is their land, not ours, some very strong reason should be advanced before our intentions are allowed to control.*
- 12.26 The opposing view is that a 'freedom of contract' model takes insufficient account of the needs of future landowners and the public interest in the marketability of land. Allowing positive covenants to run gives freedom of choice only to the original covenanting parties, but denies subsequent purchasers of the burdened land the chance to buy the land free of the covenant. Once the land is subject to the covenant, no vendor can release or vary it. The purchaser's choice is to take the land subject to the covenant or not to take it at all.³⁴
- 12.27 It is not certain that even the original covenantor has a choice about whether to accept the covenant. It is now common in Victoria for large estates, even entire new suburbs, to be developed under an overarching master plan, in which all lots are subject to the same set of covenants drafted by the developer. Since all lots must be subject to and have the benefit of identical covenants, essentially no covenant is negotiable.³⁵
- 12.28 Purchasers' choices are becoming more constrained by housing affordability, transport costs and the location of work and services. A purchaser who needs to buy in a particular area may have little choice but to buy subject to the covenants.

- 16 Neil McPhee, 'Big Changes For the World of Communal Living' (2008) *Law Institute Journal* 1/2, 38.
- 17 *Subdivision Act 1988* (Vic) s 27A.
- 18 *Subdivision Act 1988* (Vic) s 27.
- 19 On registration of the plan of subdivision, the owners' corporation is incorporated, the owners of the lots become the members and the common property is vested in the lot owners as tenants in common in shares corresponding to their lot entitlements: *Subdivision Act 1988* (Vic) s 30.
- 20 *Owners Corporations Act 2006* (Vic) ss 23, 138 and Schedule 1.
- 21 *Owners Corporations Act 2006* (Vic) ss 128, 137, 141.
- 22 *Owners Corporations Act 2006* (Vic) s 129.
- 23 *Owners Corporations Act 2006* (Vic) s 138 and Schedule 1. Rules can be made in respect of matters which include: health, safety and security; management and administration; behaviour of persons; and dispute resolution.
- 24 *Owners Corporations Act 2006* (Vic) s 138(3).
- 25 *Owners Corporations Act 2006* (Vic) s 140. The rules cannot unfairly discriminate against a lot owner or occupier, nor can they be inconsistent with any law (s 140).
- 26 *Owners Corporations Act 2006* (Vic) s 132.
- 27 *Owners Corporations Act 2006* (Vic) ss 138, 96, 97. As lot owners hold 'lot entitlements' in proportion to their lot area, if a ballot or poll is taken a special resolution requires 75% of the total lot entitlements of all lots. The owners corporation can amend or revoke the rules made by the developer at the time the plan of subdivision was lodged: *Subdivision Act 1988* (Vic) s 27E and Part 8 of the *Owners Corporations Act 2006* (Vic).
- 28 The legislation regulates the establishment, functions, powers and dispute resolution processes of owners' corporations, which must act honestly and in good faith and exercise due care and diligence in the exercise of these powers (s 5).
- 29 Sharon Christensen and W Duncan, 'Is it Time for a National Review of the Torrens System? The Eccentric Position of Private Restrictive Covenants' (2005) 12 *Australian Property Law Journal* 104, 114.
- 30 *Planning and Environment Act 1987* (Vic) s 61(4).
- 31 Law Reform Commission of Victoria, *Easements and Covenants*, No 41 (1992) [85].
- 32 *Ibid.* See paras 12.9–12.10 above for other ways of accommodating this need.
- 33 R Epstein, 'Notice and Freedom of Contract in the Law of Servitudes' (1982) 55 *S Cal L Rev* 1353, 1359.
- 34 See discussion at p 21 of E McKenzie, 'The Dynamics of Privatopia: Private residential governance in the USA', in Georg Glasze, Chris Webster and Klaus Frantz (Eds), *Private Cities: Global and local perspectives* (2006).
- 35 *Ibid.*

12

Chapter 12

Positive Covenants



- 12.29 There is evidence that purchasers do not fully consider the implications of covenants when they are making a decision to buy land. The American Law Institute observes:³⁶
- Buyers of residential property, particularly first-time buyers in common-interest communities, tend to focus on price, location, schools, and physical characteristics of the property, rather than on the details of the documents that impose servitudes on the property.*
- 12.30 The Scottish Law Commission conducted its own research into the level of awareness by purchasers and owners about 'real burdens' (covenants) over their land. The Commission's conclusions were as follows:³⁷
- Most purchasers do not weigh carefully the package of real burdens before deciding whether or not to buy. Typically they buy with little in the way of detailed knowledge. Slightly over half of those surveyed bought without any knowledge of the burdens at all. ...Except in a question between the original parties, burdens are not contractual in nature. They have not been freely entered into. A purchaser who does not want the burdens must give up the house, a solution so drastic that it is rarely chosen. But more usually there is no knowledge and hence no choice.*
- 12.31 Some covenants used by developers purport to give the developer the right unilaterally to vary or exclude any of the requirements in the covenants.
- 12.32 Covenants imposed by developers are not consensual documents, nor is their content regulated by law, except to the extent that they must be negative or restrictive in effect in order to run with the land. This raises the question of whether the law should allow positive obligations to be imposed on landowners under covenants, or only under legislation.

SHOULD POSITIVE OBLIGATIONS RUN ONLY UNDER LEGISLATION?

- 12.33 The consequence of the *Austerberry* rule in Victoria is that positive obligations do not run with land except under legislation, or agreements which are made to run with land under legislation. The benefit of this model is that the imposition of positive burdens on land remains under the control of the legislature.
- 12.34 If positive obligations become oppressive, or certain types become outdated or contrary to public policy, the legislature can extinguish or alter them. Owners' corporation rules, which impose positive obligations on lot owners, are regulated by legislation and can be amended or revoked by lot owners exercising their voting rights as members of the owners' corporation. If positive covenants are allowed to run with land, there may be a tendency for them to displace owners' corporation rules as a means of imposing positive obligations on lot owners. The use of positive covenants would avoid the statutory controls on rule-making by owners' corporations and put the obligations beyond the power of the owners' corporation to discharge or modify.³⁸
- 12.35 In the United States and a number of other countries, there is growing concern about the use of private law covenants as a primary instrument of local governance and management.³⁹ It is difficult for governments to reverse or control the governance of communities through covenants, since any legislative intervention in a sphere ruled by private property rights raises questions of compensation.

CONTROL OF ONEROUS COVENANTS

- 12.36 The common law has always been reluctant to allow positive obligations to run with land under private property arrangements without a regulatory framework. Any relaxation of the *Austerberry* rule should include safeguards to ensure that land does not become overburdened with onerous obligations.
- 12.37 The Law Commission for England and Wales proposes that the problem of onerous obligations passing to successors in title can be controlled through the application of the traditional 'touch and concern' test.⁴⁰ This common law test requires that the performance of the promise relates to the ownership or occupation of the burdened land, and benefits the land of the covenantee.⁴¹ Its function is to screen out covenants which are essentially personal, rather than relating to the land. Elizabeth Cooke explains the importance of the rule in relation to positive covenants:⁴²
- The Law Commission's view is that a 'touch and concern' requirement is a robust control mechanism that prevents land being overburdened, even if it is vulnerable to the uncertainties of judicial interpretation at times. It acts as a filter, in limiting the range of enforceable covenants; it can therefore meet and counter assertions that the enforceability of positive obligations would open the door to a wide range of unsuitable burdens.*
- 12.38 The 'touch and concern' test would preclude the running of positive covenants which do not have sufficient connection with the land, such as a covenant requiring lot holders to take a course in environmental waste management.⁴³ It would not prevent the running of onerous positive obligations with a sufficient connection to the land, such as a covenant that requires lot owners to paint their houses every two years.⁴⁴
- 12.39 Before we consider what reform would be suitable in this jurisdiction, an overview of the use of positive covenants in England and the United States is useful to inform our discussion.

POSITIVE COVENANTS IN ENGLAND AND THE UNITED STATES

- 12.40 Each Australian state and territory has developed extensive legislation to regulate subdivisions of land into lots with common property.⁴⁵ This legislation establishes and confers powers on management structures such as 'owners' corporations' to own and manage the common property and to impose positive ongoing obligations on individual 'lot owners'.
- 12.41 In other jurisdictions such as England and the United States, this model has not developed in the same way, and in those jurisdictions a stronger case exists for the use of both positive and restrictive covenants in the private planning of communities.
- 12.42 In England there is a history of using long leasehold titles instead of granting freehold title for flats.⁴⁶ This method allows the developer to impose positive covenants, as the *Austerberry* rule prohibits only covenants on freehold title. Recent attempts to introduce a system of commonhold (similar to our subdivisions with common property) have failed to take off.⁴⁷ This has prompted the English Law Commission to reconsider the introduction of a new scheme under which positive covenants can run with land.

- 36 American Law Institute, *Restatement (Third) of Property: Servitudes* (2000) ch 6, introductory note.
- 37 Scottish Law Commission, *Report on Real Burdens*, No 181 (2000) [5.6].
- 38 'They are not negotiable or subject to democratic processes': K Dovey, I Woodcock and S Wood, 'Slippery Characters' in K Dovey, *Becoming Places* (2010) 57–78, 77.
- 39 Shaffer Van Houweling (2008), above n 6; Glasze, Webster and Frantz (2006), above n 34.
- 40 Elizabeth Cooke, 'To Restate or Not to Restate? Old Wine, New Wineskins, Old Covenants, New Ideas' 6 *Conveyancer and Property Lawyer* 448, 458.
- 41 The rule goes back to *Spencer's Case* (1583) 77 ER 72, 74.
- 42 Cooke (2009), above n 40, 458. The retention of the 'touch and concern' test has been controversial in the United States: see Epstein (1982), above n 33; R Epstein, 'Notice and Freedom of Contract in the Law of Servitudes' (1982) 55 *S Cal L Rev* 1353, 1359.
- 43 Cathy Sherry, 'The Complexities of Multi-Owned Property: Australian Strata and Community Title and United States Condominiums and Homeowner Associations' in Bennett Moses (ed) *Property and Security: Selected Essays Chapter 13* (2010) 272.
- 44 This example is drawn from similar ones from Cathy Sherry, 'The Legal Fundamentals of High Rise Buildings and Master Planned Estates: Ownership, Governance and Living in Multi-Owned Housing with a case study on Children's Play' (2008) 16 *Australian Property Law Journal* 1, 14. In addition, as acknowledged by the English Law Commission, the touch and concern test is a judicial test and as such 'vulnerable to the uncertainties of judicial interpretation'; Cooke (2009), above n 40, 458.
- 45 *Subdivision Act 1988* (Vic); *Owners Corporations Act 2006* (Vic); *Strata Schemes (Freehold Development) Act 1973* (NSW); *Strata Schemes Management Act 1996* (NSW); *Community Land Development Act 1989* (NSW); *Community Land Management Act 1989* (NSW); *Body Corporate and Community Management Act 1997* (Qld); *Strata Titles Act 1988* (SA); *Strata Titles Act 1966* (WA); *Strata Titles Act 1998* (Tas); *Unit Titles Act* (NT). There is unfortunately a lack of harmonisation between jurisdictions: K Everton-Moore et al, 'The Law of Strata Title in Australia: A Jurisdictional Stocktake' (2006) 13 *APLJ* 1.
- 46 This is the result of 'the dominance of the long residential lease in all urban development...from the sixteenth century onwards': Sherry (2008), above n 44, 4.
- 47 According to figures provided by the UK Land Registry 'as at 20 February 2008 only 14 commonholds had been registered': Law Commission [England and Wales], *Easements, Covenants and Profits a Prendre: A Consultation Paper*, CP No 186 (2008) 199.

12

Chapter 12

Positive Covenants



- 12.43 The Law Commission for England and Wales has found that English conveyancers resort to various devices to work around the *Austerberry* rule.⁴⁸ The commissioner in charge of the review, Elizabeth Cooke, regards the devices as ‘clumsy solutions to inescapable practical problems – in particular, the need to enforce a shared responsibility for shared facilities’.⁴⁹
- 12.44 Cooke also comments, in relation to the use of these ‘workarounds’,⁵⁰ that ‘the persistence of the use of methods other than commonhold demonstrates that the desire for positive obligations that run with land persists in situations for which commonhold is not designed’.⁵¹ Positive covenants are therefore required in England, not only in situations where commonhold title is not appropriate, but also to perform the functions which commonhold was designed to perform.
- 12.45 In the United States, the *Austerberry* rule was never adopted, and the burden of positive covenants runs with freehold land.⁵² Master planning in the United States, in respect of both large ‘common interest developments’⁵³ and commercial developments, relies largely on the law of private covenants to provide the legal framework for regulating privately planned estates.
- 12.46 The philosophy underlying the American approach is that ‘people are free to create servitudes so long as their arrangements do not infringe constitutional, statutory, or public policy norms’.⁵⁴ The running of positive covenants suits this model of private regulation of subdivided estates, whereas Australia ‘arguably has a stronger tradition of government regulation’.⁵⁵

REFORM PROPOSALS

- 12.47 We think that any proposal to allow positive freehold covenants to run with land should be approached with caution. The use of owners’ corporation rules to provide the rules for communal living should be encouraged in preference to the use of covenants for this purpose. Any move to overturn the *Austerberry* rule should be informed by evaluation of overseas experience with the use of private positive covenants in the management of planned communities.⁵⁶
- 12.48 A more modest reform would be to allow only certain defined types of positive covenants to run with land. NSW permits the use of positive covenants to require the maintenance and repair of land that is the site of an easement.⁵⁷ For example, a standard form easement, the creation of which is discussed in Chapter 3, could contain a similar positive obligation.
- 12.49 We are aware that there is support among the legal profession for allowing positive covenants to run without restriction as to type or subject matter. The use of conveyancing workarounds, the difficulties of enforcing the current rule, and the misleading effects of recording invalid covenants all provide further arguments for abolishing the *Austerberry* rule.
- 12.50 As discussed in Chapter 10, there is a problem with the enforcement of building covenants which impose positive obligations against successors in title to the original purchasers of the lots. Since building covenants are intended to operate only for a relatively short time, one reform option is to permit positive building covenants to be enforced against successors in title to the original covenantors for a limited period of time. The period could be limited to six years, which is the period allowed in Victoria for actions to enforce contracts.⁵⁸ Lapsing provisions are discussed further in Chapter 14.

12.51 If the *Austerberry* rule is abolished in whole or in part, there is a need to provide an adequate regulatory framework, including accessible mechanisms for removal or variation of positive covenants. A new statutory scheme regulating freehold covenants, the aspects of which are discussed in Chapter 13, could provide such a mechanism.

12.52 If positive covenants are permitted to run with land, it will be necessary to create new rules for them. The current equitable rules are designed specifically for restrictive covenants. In particular, rules are needed to establish the class of people against whom positive covenants are enforceable. The class must be limited, to ensure that positive obligations are not unfairly imposed on persons with only a minor or short term interest in the burdened land.

REMOVAL

12.53 Both positive and restrictive covenants can become out of date, but the problem is greater in relation to positive covenants. Outdated restrictions imposed by covenants are often disregarded with the acquiescence of the benefited owners. Burdened owners incur greater risk in ignoring a covenant which requires positive action and under which debts may accrue. Mechanisms for removal and lapsing of positive as well as restrictive covenants are discussed in Chapters 14 and 16.

OPTIONS

12.54 In light of the issues discussed above, aside from preserving the status quo, the following reform options are identified:

1. Allow positive covenants to run only in limited circumstances specified by legislation, such as obligations to maintain the site of an easement.
2. Allow positive covenants to run by including them in a new statutory scheme, as set out in Chapter 13, which would reformulate freehold covenants as statutory legal interests.
3. Allow positive covenants to run on the same basis as restrictive covenants, that is, in equity. This is a minor incremental reform which would validate positive covenants as equitable covenants,⁵⁹ and avoid the need for 'workarounds'.
4. Allow positive covenants to run in accordance with options 2 or 3 only if they relate to building works to be completed as part of the developer's master plan for the lot, and subject to a lapsing provision based on the six year limitation period for enforcement of contracts.

Should positive obligations be imposed upon landowners by covenants, or only under Acts of Parliament and owners' corporation rules?

If positive covenants are permitted to run with land, which of the four options outlined in this Chapter is preferable?

48 These are legal mechanisms constructed to allow positive covenants to run with land, and include: chains of indemnity covenants, right of re-entry annexed to an estate rentcharge, and enlargement of long leases: *Ibid* [7.46]–[7.58].

49 Cooke (2009), above n 40, 458.

50 *Ibid* 455.

51 *Ibid* 456.

52 See American Law Institute, *Restatement (Third) of Property: Servitudes* (2000) regarding the general law of servitudes in the United States. See discussion of history of the law of servitudes in America in Susan French, 'Design Proposals for the New Restatement of the Law of Property Servitudes' (1988) 21 *UC Davis L Rev* 1213, 1214–17.

53 McKenzie (2006), above n 34, 11.

54 French (1988), above n 52, 1231.

55 Sherry (2010), above n 43, 265.

56 See discussion in Chapter 14.

57 *Conveyancing Act 1919* (NSW) s 88BA. The covenant must be registered and clearly identify both the benefited and burdened land. The positive covenant runs with land as the legislation treats it in the same way as a restrictive covenant (s 88F).

58 *Limitation of Actions Act 1958* (Vic), s 5(1). The six year limitation period starts to run from when the cause of action accrues on breach of the contract.

59 This approach was taken by New Zealand; *Property Law Act 2007* (NZ) ss 301–318.

Chapter 13

Freehold Covenants – A New Statutory Scheme

CONTENTS

Issues with the current system	112
A new statutory scheme?	113
Examples in other jurisdictions	114
Overview of design issues in a statutory scheme	116



Freehold Covenants – A New Statutory Scheme

- 13.1 The rules governing the running of the benefit and burden of freehold covenants are notoriously complex. Different rules apply depending on whether the covenant is positive or restrictive, and whether the context is law or equity.
- 13.2 In this Chapter we identify the inherent defects in the law and suggest that radical reform is necessary. We look to examples of statutory reform in other jurisdictions and we highlight the design issues to be considered in the implementation of any statutory scheme in Victoria.

ISSUES WITH THE CURRENT SYSTEM

- 13.3 The rules relating to freehold covenants and their flaws are identified by the Law Commission for England and Wales in a recent Consultation Paper.¹ These issues apply equally² in Victoria:
1. *The burden of positive covenants does not run so as to bind successors in title of the covenantor. Such devices as are available to circumvent this rule are complex and insufficiently comprehensive.*
 2. *The burden of a restrictive covenant can run in equity under the doctrine of Tulk v Moxhay,³ but only if certain complex and technical conditions are met.*
 3. *The benefit of a restrictive covenant can run at law and in equity, but according to rules which are different, and which are possibly even more complicated than the rules for the running of the burden.*
 4. *There is no requirement that the instrument creating the covenant should describe the benefited land with sufficient clarity to enable its identification without extrinsic evidence.*
 5. *There is no requirement to enter the benefit of a covenant on the register of title to the dominant land.⁴*
 6. *The contractual liability, which exists between the original parties to a covenant, persists despite changes in ownership of the land. It is therefore possible for a covenant to be enforced against the original covenantor even though he or she has disposed of the land.⁵*
- 13.4 The modification and discharge of freehold covenants by court order in Victoria also presents difficulties, which we discuss in Chapter 16.
- 13.5 The issues raised by the Law Commission for England and Wales have been reported in a number of other common law jurisdictions. Many commentators have criticised the law of freehold covenants in the most derogatory terms, and have demanded reform.⁶ The leading Australian commentary describes the current law relating to restrictive covenants as ‘a morass of technicalities, inconsistencies and uncertainties’ which ‘in its complexity...resembles the medieval rules regulating the creation of future interests’.⁷

- 13.6 One of the key difficulties with freehold covenants is the continuing contractual operation of covenants.⁸ As we explained in Chapter 10, covenants were originally purely contractual rights. When equity started to enforce them against purchasers who took with notice of them this gave them the effect of property rights.⁹ The law still treats them as contractual rights which under certain conditions operate as property rights.
- 13.7 One result of the contractual nature of covenants is that the person making the promise (the covenantor) is liable in contract for breaches of covenant which occur after he or she has parted with the land.¹⁰ This does not occur with easements. Easements are ‘appurtenant rights’, meaning that they are attached to land and are enforceable against anyone who at any time is the owner or occupier of the servient land.¹¹ The original owner of the servient land who granted the easement is not liable for interference with the easement by his or her successors.
- 13.8 One aim of reform in this area is to enable freehold covenants to operate as appurtenant rights in a similar way to easements.¹² Former owners of interests in the burdened land should not be liable for breaches of covenant which occurred after they parted with their interest.

A NEW STATUTORY SCHEME?

- 13.9 The problems with the law relating to freehold covenants outlined above have been considered in other common law jurisdictions. The common theme in recent law reform discussions and legislative initiatives is the introduction of a new statutory scheme, the fundamental characteristics of which can be broadly stated as follows:
- the replacement of the common law and equitable rules governing enforceability of freehold covenants with statutory rules;
 - the treatment of freehold covenants as property rights appurtenant to land rather than as contractual rights;¹³
 - the abolition of the rule in *Austerberry v Corporation of Oldham*,¹⁴ which prevents the burden of positive covenants running with freehold interests in land;¹⁵ and
 - the application of the statutory scheme to both positive and restrictive freehold covenants, with the favoured approach being to replace entirely the rules relating to the running of freehold covenants.
- 13.10 The following discussion provides an overview of various statutory schemes proposed and legislation enacted in other jurisdictions. It gives an indication of the challenges that the adoption of a statutory scheme would present in Victoria, and the design issues that would arise in specifying the rules.

- 1 Law Commission [England and Wales], *Easements, Covenants and Profits a Prendre: A Consultation Paper*, CP No 186 (2008) 5.
- 2 With perhaps the exception of point 1 regarding positive covenants – see Chapter 12 for a detailed discussion of this issue.
- 3 *Tulk v Moxhay* (1848) 2 Ph 774.
- 4 See discussion in Chapter 11. In Victoria, restrictive covenants are recorded and not registered on title. Previously the Registrar only had the power to record restrictive covenants on burdened land; however, after legislative amendments made in 2009, the Registrar can now record covenants on the lots affected by the covenant if all the registered owners and mortgagees of the affected land consent: *Transfer of Land Act 1958* (Vic) s 88(1) as amended by the *Land Legislation Amendment Act 2009* (Vic) s 44(1).
- 5 See *Re Markin; Re Roberts* [1966] VR 494, 496 and comments in Adrian Bradbrook, ‘Are They Really Buying What They See? Advising a Purchaser of Land Regarding Easements and Freehold Covenants’ (1984) *Law Institute Journal* 653, 659.
- 6 For examples, see Susan French, ‘Towards a Modern Law of Servitudes: Reweaving the Ancient Strands’ (1982) 55 *Southern California Law Review* 1261 fn1.
- 7 Adrian Bradbrook and Marcia Neave, *Easements and Restrictive Covenants in Australia* (2nd ed) (2000) [12.11].
- 8 See point 6 in para 13.3 above.
- 9 *Tulk v Moxhay* (1848) 2 Ph 774.
- 10 See for example, *Re Markin; Re Roberts* [1966] VR 494, 496 where, although Gillard J decided the court could consider an application under section 84 of the *Property Law Act 1958* by the original covenantor to modify or discharge the relevant covenants, he stated that ‘I cannot relieve the applicants from the contractual obligations entered into them arising at common law. This could only be done by the covenantee entering into a novation with the covenantors for good and valuable consideration, or giving each of them a release under seal’.
- 11 The terms ‘dominant’ and ‘servient’ land are used when referring to land benefited and burdened by an easement.
- 12 Law Commission [England and Wales] (2008), above n 1, 141.
- 13 *Ibid*; See also the view of the Irish Law Reform Commission that ‘freehold covenants will, in future, acquire the status of legal rights, enforceable against successive owners of the “servient” land, just like easements’: Law Reform Commission [Ireland], *Report on Land Law and Conveyancing Law: (7) Positive Covenants over Freehold Land and other proposals*, 70 (2003) 16.
- 14 *Austerberry v Corporation of Oldham* (1885) 29 Ch D 750.
- 15 See discussion in Chapter 12.

Freehold Covenants – A New Statutory Scheme



EXAMPLES IN OTHER JURISDICTIONS

- 13.11 The only Australian example of a statutory scheme is in the Northern Territory.¹⁶ The most comprehensive law reform analysis and proposals for statutory schemes are in England,¹⁷ Ireland¹⁸ and Ontario.¹⁹ The jurisdictions which have introduced statutory schemes for freehold covenants are Ireland,²⁰ New Zealand,²¹ Scotland,²² Northern Territory and Northern Ireland.²³
- 13.12 The approaches favoured in the reform proposals and legislation fall broadly into two types: Ireland and New Zealand replace the existing rules, while the approach proposed or adopted in the Northern Territory, England and Scotland takes the further step of replacing the category of freehold covenants with a new statutory property right. The latter is a sizeable undertaking. Each scheme is briefly outlined below.

IRELAND

- 13.13 The Irish Law Reform Commission identified defects in the current system similar to those listed above. In its 2003 report,²⁴ the Commission proposed a statutory scheme providing for the enforceability of freehold covenants, whether positive or restrictive, against successors in title. The substantive aspects of the Commission's recommendations were implemented in the *Land and Conveyancing Law Reform Act 2009 (Ir)*, which abolishes the rules of common law and equity to the extent they relate to the enforceability of freehold covenants.²⁵
- 13.14 The Irish scheme reconceptualises covenants as appurtenant rights. The benefit and burden of the relevant covenant run with the land, not in contract. A covenant is only enforceable by and against owners of the 'dominant' and 'servient' land while they are owners.

NEW ZEALAND

- 13.15 The *Property Law Act 2007 (NZ)* rewrites previous legislative amendments introduced in 1986 pursuant to a law reform report on covenants.²⁶ The legislation provides that both positive and restrictive covenants can run with land, but does not completely replace the old common law and equitable rules. The Act expressly retains the application of equitable principles to the enforceability of covenants running with land.²⁷
- 13.16 This model extends the running of the burden of restrictive covenants in equity to positive covenants.²⁸ It is an incremental reform which preserves the rules of equity, in contrast to the creation of a set of new statutory legal rights as proposed, for example, in England.

ENGLAND

- 13.17 The scheme proposed by the Law Commission for England and Wales in its current review of easements, profits and covenants is the introduction of a new statutory interest in land, called a 'Land Obligation', to take the place of both positive and restrictive freehold covenants.²⁹ The idea of a new land obligations scheme was originally proposed by the UK Law Commission in 1967, when it was 'expressly recognised that in nature and attributes, the new land obligations would be "more akin to easements than covenants"'.³⁰ The Law Commission for England and Wales uses the name with capitals to distinguish it from the quite different 'land obligation' scheme proposed in the 1967 Report.³¹
- 13.18 The land obligation idea was developed in further reform proposals by the UK Law Commission in 1984.³² Proposals to introduce the land obligation scheme were deferred pending the introduction of commonhold,³³ a form of title akin to Australian strata titles. The current proposal is that a Land Obligation will be appurtenant to an estate in the benefited land and the enforcer of the Land Obligation must have the benefit of the obligation at the time of enforcement.³⁴

SCOTLAND

- 13.19 The recommendations of the Scottish Law Commission for reform of the law of 'real burdens' (covenants) were implemented by the *Title Conditions Act (Scotland) Act 2003*.³⁵ The Act provides for a registrable obligation to be registered against both burdened and benefited land.
- 13.20 The Scottish Law Commission considers that only the owner of the burdened property (and not other interest holders such as lessees) should be bound by an 'affirmative burden' (positive covenant).³⁶

NORTHERN TERRITORY

- 13.21 The Northern Territory introduced a statutory scheme in its *Law of Property Act 2000*.³⁷ This appears to be based on elements of the reforms proposed by the UK Law Commission in its 1984 report, which have not been implemented in England.³⁸
- 13.22 The scheme creates a 'covenant in gross' which may be created 'without dominant land in favour of the Territory, a local government body, a statutory corporation or a prescribed person'.³⁹ Covenants in gross are a 'statutory creation'⁴⁰ and do not exist at common law.
- 13.23 The legislation introduces a scheme for the registration of covenants as legal interests on the title to the benefited and burdened lots. It 'discards the uncertainties and technicalities of the equitable rules and replaces them with a clear process for registration'.⁴¹
- 13.24 The adequacy of the provisions does not appear to have been tested, as there is a lack of case law and little commentary on its operation. There have been no legislative amendments of substance to the scheme since it was first enacted.

- 16 *Law of Property Act 2000* (NT), Division 4. There has been some law reform discussion on restrictive covenants in Western Australia which focuses on the use of restrictive covenants in regulating development and their interplay with town planning schemes: Law Reform Commission of Western Australia, *Final Report on Restrictive Covenants*, No 91 (1997). To date the Commission's recommendations have not been implemented: Western Australia Law Reform Commission *Annual Report 2008/2009* 68.
- 17 Law Commission [England and Wales] (2008), above n 1.
- 18 Law Reform Commission [Ireland] (2003), above n 13.
- 19 Ontario Law Reform Commission, *Report on Covenants Affecting Freehold Land*, (1989).
- 20 *Land and Conveyancing Law Reform Act 2009* (Ir) ss 48–50.
- 21 *Property Law Act 2007* (NZ) ss 301–318.
- 22 *Title Conditions Act (Scotland) Act 2003*, based on Scottish Law Commission, *Report on Real Burdens*, No 181 (2000).
- 23 *Property (NI) Order 1997* Art 34. Trinidad and Tobago have also proposed legislation under s 118 of the *Land and Conveyancing Act 1981* (Trinidad and Tobago). This legislation has yet to be enacted: <http://rgd.legalaffairs.gov.tt/Laws2/Chs_56-60/56.01/56.01_notes.htm>.
- 24 Law Reform Commission [Ireland] (2003), above n 13.
- 25 *Land and Conveyancing Law Reform Act 2009* (Ir) s 49(1).
- 26 The Property Law and Equity Reform Committee produced a report called *Positive Covenants Affecting Land* (1985), some of the recommendations of which were enacted in the *Property Law Amendment Act 1986* (NZ) – New Zealand Law Commission, *A New Property Law Act*, Report 29 (1994), 26, 27, 388.
- 27 *Property Law Act 2007* (NZ) s 303(2).
- 28 New Zealand Law Commission (1994), above n 26, [696].
- 29 Law Commission [England and Wales] (2008), above n 1, 144.
- 30 *Ibid* 125, citing UK Law Commission, *Transfer of Land – Report on Restrictive Covenants*, 11 (1967).
- 31 The 'land obligations' proposed in 1967 included easements and profits, whereas the 1984 and current 'Land Obligations' include freehold covenants only: *Ibid* 141–2, fn 120.
- 32 UK Law Commission, *Transfer of Land – The Law of Positive and Restrictive Covenants*, 127 (1984).
- 33 Law Commission [England and Wales] (2008), above n 1, 125.
- 34 *Ibid* 177.
- 35 Scottish Law Commission (2000), above n 22.
- 36 *Ibid* [4.32].
- 37 *Law of Property Act 2000* (NT) Division 4.
- 38 UK Law Commission (1984), above n 32.
- 39 *Law of Property Act 2000* (NT) s 168.
- 40 Northern Territory Law Reform Committee, *Report on the Law of Property*, No 18 (1998), 44.
- 41 Sharon Christensen and W Duncan, 'Is it Time for a National Review of the Torrens System? The Eccentric Position of Private Restrictive Covenants' (2005) 12 *Australian Property Law Journal* 104, 123.

13

Chapter 13

Freehold Covenants – A New Statutory Scheme



OVERVIEW OF DESIGN ISSUES IN A STATUTORY SCHEME

13.25 The aim of a statutory scheme would be to clarify the ambiguities and to solve the difficulties identified in paragraph 13.3 above, by:

- eliminating the differences in treatment of freehold covenants in law and equity;
- converting covenants to appurtenant rights which run with the land;
- allowing positive covenants to run with land (if this is thought to be desirable); and
- providing a comprehensive, integrated and simplified scheme encompassing all freehold covenants.

13.26 Through our research into examples in other jurisdictions, we can identify the following factors as key design issues in any proposed statutory scheme.

ABOLITION OF COMMON LAW AND EQUITABLE RULES

13.27 We suggest that the abolition of the equitable rules is preferable to the New Zealand approach, in which the legislation restates the equitable rules relating to the running of restrictive covenants.⁴² The result is that the scheme retains the problems inherent in the current law relating to the running of the burden at equity. This approach is also not helpful in achieving the assimilation of the laws of easements and covenants.

13.28 The legislation should make a 'clear statement'⁴³ abolishing the common law and equitable rules relating to the enforceability of freehold covenants. Examples can be found in the Irish⁴⁴ and Northern Irish⁴⁵ legislation, which expressly state that the common law and equitable rules are replaced by the statute.

COVENANTS AS PROPRIETARY RIGHTS

13.29 As discussed at the start of this Chapter, we propose that freehold covenants be established as appurtenant rights, so that 'the parties' personal liabilities will be merged into the property right, which will only bind them in their capacity as benefited and burdened owners of the affected land'.⁴⁶ This addresses the current problem that covenants remain enforceable against the covenantor as former owner of the burdened land.

POSITIVE AND/OR RESTRICTIVE COVENANTS

13.30 In Chapter 12, we discussed whether the *Austerberry* rule should be overturned to enable the burden of positive covenants to run with freehold land. If this change is not adopted, the statutory scheme would apply to restrictive covenants only. If positive covenants are allowed to run with land, consideration must be given as to who would be bound by such obligations. This question is considered further below.

COVENANTS IN GROSS

- 13.31 Covenants in gross are covenants which run with the burdened land, even though the party imposing the covenants holds no land capable of benefiting from them. They are currently not permitted under Victorian law, except under special statutory powers.⁴⁷
- 13.32 One option would be to introduce a general provision allowing the creation of covenants in gross in favour of public bodies for the purposes of environmental and conservation preservation. This approach was taken in the Northern Territory scheme.⁴⁸ A general provision of this kind may be unnecessary. The approach in Victoria has been for statutes dealing with environmental and conservation matters to include provisions for the making and recording of agreements in gross between authorities and landowners.⁴⁹
- 13.33 To allow covenants in gross, other than as specific statutory exceptions, is inconsistent with the proposal that covenants should exist only as rights appurtenant to land.

ENFORCEABILITY

- 13.34 In a new statutory scheme, it must be clear who can enforce and who is bound by a freehold covenant.
- 13.35 By reconceptualising covenants as property rights, the question of who can enforce is initially straightforward. The current owner of the benefited land can enforce the covenant against the current owner of the burdened land. It is necessary to consider the scope of the definition of 'owner' and whether this term includes parties such as a short term lessee or an adverse possessor.
- 13.36 Likewise, the various categories of persons bound by freehold covenants also need to be considered. This becomes particularly important when considering compliance with a positive covenant. If positive covenants are included in the statutory scheme, the class of persons against whom they can be enforced should be narrower than in the case of restrictive covenants.
- 13.37 The reason is that each type of covenant imposes a different kind of obligation. Positive covenants require deliberate action and may require expenditure of money by the parties who are subject to them, whereas restrictive covenants limit the use that may be made of the burdened land.⁵⁰
- 13.38 It is necessary to consider whether mortgagees, occupiers, licensees and adverse possessors of the burdened land should be bound by the obligations imposed under a positive covenant. For example, it might be reasonable to expect a short term lessee to refrain from breaching a restrictive covenant, but not to hold them liable for discharging positive obligations to maintain a structure or contribute to improvements.⁵¹

42 *Property Law Act 2007* (NZ) s 303(2).

43 Law Reform Commission [Ireland] (2003), above n 13, 15.

44 *Land and Conveyancing Law Reform Act 2009* (Ir) s 49(1).

45 *Property (NI) Order 1997* Art 34(1).

46 Elizabeth Cooke, 'To Restate or Not to Restate? Old Wine, New Wineskins, Old Covenants, New Ideas' 6 *Conveyancer and Property Lawyer* 448, 462.

47 See for example, the provisions for forest property agreements under the *Forestry Rights Act 1996* (Vic) ss 5–9.

48 See discussion at para [13.22] in this Chapter.

49 See for example: Cultural Heritage Agreements under the *Aboriginal Heritage Act 2006* (Vic) ss 68–77, s 173 agreements under the *Planning and Environment Act 1987* (Vic); Land Management Notices under the *Catchment and Land Protection Act 1994* (Vic) ss 37–40; Land Management Co-operative agreements under the *Conservation, Forests and Lands Act 1987* (Vic) ss 69–72; *Victorian Conservation Trust Act 1972* (Vic) s 3A.

50 Law Commission [England and Wales] (2008), above n 1. This point was expressed by the English Law Commission in its 1984 report, which stated that the class 'must comprise a sufficient range of substantial "targets" to make the obligations real and valuable from the point of dominant owners; but it must not include anyone whom it would be unfair to burden with their performance': Law Commission [England and Wales] (2008), above n 1, 178 citing UK Law Commission (1984), above n 32, [11.8].

51 See generally, John Mee and Alan Murphy, 'Reform of the Law of Covenants' (2007) 12 *Conveyancing and Property Law Journal* 100, 107.

Freehold Covenants – A New Statutory Scheme

REMEDIES

- 13.39 The covenantee or a successor in title to the covenantee can enforce a restrictive covenant against the covenantor or a successor to the covenantor by obtaining an injunction. The court can grant equitable damages instead of, or as well as, an injunction.⁵² According to a leading Australian commentary, ‘the courts are showing an increasing readiness to substitute an award of equitable damages for the grant of an injunction’.⁵³
- 13.40 We propose that, under the statutory scheme, covenants should continue to be enforceable by the same remedies of injunction and equitable damages. The covenantee would no longer be able to enforce the covenant by action for breach of contract after the covenantor has ceased to own and occupy the burdened land.
- 13.41 If positive covenants are not included in the scheme, they would remain enforceable only against the covenantor as contractual rights and obligations.

STRUCTURE AND TERMINOLOGY

- 13.42 In terms of the structure of a new statutory scheme, the Irish model is attractive in its clarity and comprehensiveness.⁵⁴ The new statutory scheme is set out in the *Land and Conveyancing Law Reform Act 2009* (Ir).⁵⁵ The legislation uses easement terminology of ‘dominant land’ (instead of ‘benefited land’), and ‘servient land’ (instead of ‘burdened land’). Clear definitions of ‘freehold covenant’, ‘dominant land’ and ‘servient land’ allow for brevity and clarity of the scope of application.⁵⁶
- 13.43 Consideration should be given to whether the term ‘covenant’ should continue to be used, or whether a new name is appropriate for a new statutory interest. The term ‘covenant’ emphasises its contractual origins, which is not consistent with redefining the interest as a property right appurtenant to an estate in land.⁵⁷
- 13.44 In the United States, restrictive covenants are called ‘equitable servitudes’. We think that the term ‘servitudes’ is best avoided, since it has different meanings. In civil law systems, servitudes are a class of interest that includes easements but not covenants. It is also not a term which is familiar to the layperson in this jurisdiction. Scotland has substituted the term ‘title conditions’, which has no history of other uses and sends a clearer message to owners and purchasers about the effect of covenants.⁵⁸ Alternatively, covenants could be renamed ‘land obligations’ or ‘restrictions’ if the scheme is confined to negative obligations.

REMOVAL AND MODIFICATION

- 13.45 The removal and modification of freehold covenants will be a substantive element of a new statutory scheme. The issues relating to removal and modification and proposals for reform are discussed in detail in Chapters 14 and 16.

PROSPECTIVE APPLICATION AND TRANSITIONAL PROVISIONS

- 13.46 A statutory scheme replacing the common law and equitable rules relating to the enforceability of freehold covenants should apply only to interests created after commencement of the amending legislation.⁵⁹ To give retrospective effect to the scheme could upset existing expectations. Therefore, existing freehold covenants would continue to be treated in accordance with current common law and equitable rules.
- 13.47 The running of two sets of rules in parallel is not ideal. This point is acknowledged by the Law Commission for England and Wales, which observes that 'a system of law which left the millions of restrictive covenants subject to current law could not purport to offer a complete solution to the defects in the current law'.⁶⁰ The need to allow existing property rights to run their course under the old rules is often a problem in the reform of property law, but is not a sufficient reason for failing to reform unsatisfactory laws.
- 13.48 The Law Commission for England and Wales identifies several options for phasing out existing covenants to make way for the proposed new 'Land Obligation', including the following:⁶¹
- the automatic extinguishment of existing covenants a specified number of years after creation unless renewed as Land Obligations;
 - the automatic transformation of covenants into Land Obligations on a specified trigger;
 - the extinguishment of covenants on application after a specified number of years; and
 - existing restrictive covenants to co-exist with any new regime.
- 13.49 The Law Commission for England and Wales identifies the following benefits in allowing existing restrictive covenants to co-exist with the new regime:⁶²

This option avoids the difficulties that arise in relation to the other proposals discussed above. No party to a covenant would be obliged to act in any way or to incur costs. There would be no complexity in determining which covenants were eligible for termination. There would be no issue of retrospectively altering rights and obligations. There would be no problem of inadvertence leading to rights being lost.

Should all freehold covenants exist under a statutory scheme as legal proprietary interests attaching to land?

If a statutory scheme is introduced:

- (a) who should be bound by a freehold covenant?**
- (b) what remedies should be available for breach of covenant?**
- (c) should an owner of burdened land who breaches a covenant before selling the land remain liable to the benefited owner after transferring title?**
- (d) what transitional arrangements are required for existing covenants?**
- (e) should we rename freehold covenants? If so, what name is preferable?**

- 52 Bradbrook and Neave (2000), above n 7, [18.31]; *Supreme Court Act 1986* (Vic) s 38. This section originated in 'Lord Cairns Act' – *Chancery Amendment Act 1858* (Eng).
- 53 Ibid [18.33].
- 54 Note the comment of Professor John Mee, asking 'is it really possible to recast the law in such simple terms?': Mee and Murphy (2007), above n 51, 102.
- 55 *Land and Conveyancing Law Reform Act 2009* (Ir), Part 8, Chapter 4.
- 56 *Land and Conveyancing Law Reform Act 2009* (Ir) s 48.
- 57 This was also the view taken in 1967 by the English Law Commission who chose the term 'land obligation' 'so that the contractual (*in personam*) connotations of the word "covenant" were avoided': Law Commission [England and Wales] (2008), above n 1, 125 fn 10, citing UK Law Commission (1967), above n 30, [31].
- 58 Scottish Law Commission (2000), above n 22, [1.36].
- 59 See for example, *Land and Conveyancing Law Reform Act 2009* (Ir) s 48, stating that the legislation has prospective effect and applies to freehold covenants entered into after the commencement of the legislation.
- 60 Law Commission [England and Wales] (2008), above n 1, 212-3.
- 61 Ibid Part 13.
- 62 Ibid 225.

Chapter 14

Changed Conditions and Lapsing of Covenants

CONTENTS

Background	122
Changed conditions	122
Large scale subdivision covenants	122
Reform options	123
Lapsing provisions in covenants	123
Time as a consideration in judicial removal.....	125
Summary of options	125

Changed Conditions and Lapsing of Covenants

BACKGROUND

14.1 Restrictive covenants exist indefinitely unless they are specifically time limited when they are created. This means that ordinarily a covenant will continue to bind successive owners of the burdened land for as long as it remains on title, and will remain on title until it is removed or extinguished.

14.2 Most covenants do not contain lapsing provisions and will continue to bind successive owners of the burdened land, even when they no longer serve a useful purpose. As noted by the Scottish Law Commission:¹

Most if not all burdens become obsolete in the end. If burdens are allowed to proliferate without limitation, property will increasingly be encumbered by ageing and inappropriate restrictions.

14.3 In this Chapter we discuss the problems associated with the persistence of ageing covenants. We suggest addressing these by introducing provisions for the automatic lapsing or 'sunseting' of covenants created in the future.

CHANGED CONDITIONS

14.4 Covenants may become outdated because their purpose ceases to be relevant. They may also need to be amended or removed due to changing circumstances which increase their effect on the burdened land. For example, covenants related to building materials could require the use of materials that are no longer available or are impractical to use due to shortages, changed building standards or practices or safety issues.²

14.5 Some covenants may conflict with uses of land that are subsequently deemed useful or desirable by government policy. For example, covenants that limit the types of permitted roofing materials might be framed in a way that prevents the use of solar panels, which today are encouraged as a source of electricity.³

14.6 Covenants that were in common use at a certain point in the past can be overly broad and prevent other uses that were not contemplated when the covenant was first created. A typical example of a covenant intended to prevent quarrying and brick making in a residential area might read:⁴

The owner of the land will not at any time hereafter carry on or permit to be carried on quarrying or brick making operations upon the said land or dig, carry away or remove or permit to be dug, carried away or removed any marl, stone, earth, clay, gravel or sand from the said land.

14.7 If interpreted literally, such a covenant would prohibit not just quarrying or brick making, but any activity which required the digging and carrying away of earth from the servient land. There currently appears to be a split in the authorities dealing with the extent to which a literal interpretation of a 'quarrying' covenant can impinge on land uses such as excavation for a garage, pool, lily pond or a rotary clothesline.⁵

LARGE SCALE SUBDIVISION COVENANTS

14.8 Restrictive covenants created by developers on large plans of subdivision typically establish comprehensive schemes of restrictions regulating the construction of buildings on the land, including restrictions on building heights, colours and setbacks. Some covenants restrict the development of lots to buildings that have been approved by the developer.⁶

14.9 Building covenants are intended to direct the establishment of the built environment, rather than to have any permanent ongoing effect. They may be expressed to lapse after a certain period of time.⁷

- 14.10 Covenants that do not include a lapsing provision may continue to bind owners of land, even when they have become obsolete or where conditions have changed since they were imposed. These issues are increased exponentially in the case of covenants in large subdivisions, due to their complexity and the large number of benefited and burdened lots.
- 14.11 Where the number of benefited owners is very large, the chances of obtaining the formal consent of all diminish.⁸ As explained in Chapter 10, removal or variation of covenants by negotiation is difficult and it takes only one benefited owner to prevent it. Removal or variation by judicial order may be very costly where a large number of benefited owners in a subdivision must be notified or joined as parties. With the increasing popularity of large commercial and residential subdivisions, it is necessary to consider whether an alternative mechanism for removal and variation of covenants is needed.

REFORM OPTIONS

LAPSING PROVISIONS IN COVENANTS

- 14.12 One possible reform that would alleviate the problems with outdated and large-scale covenants would be to mandate that all covenants automatically lapse after a certain amount of time. This solution has been adopted in North America, particularly in the United States, which has much longer experience in dealing with the use of covenants to regulate land use on large-scale subdivisions.
- 14.13 Where lapsing provisions have been adopted, they typically provide that all covenants will cease to bind the servient land after a certain amount of time from the date of creation. Most allow for an extension of time by lodgement of notice by the dominant owner, acting unilaterally.
- 14.14 The provisions for extensions of time allow either for a periodic resetting of the period or for a one-off extension. In both cases, they function as a sort of 'dead man's handle' allowing for automatic removal of covenants that dominant owners no longer regard as important enough to renew.
- 14.15 Some examples of lapsing covenant provisions are set out below:
- In the Northern Territory, covenants expire after 20 years. This period can be extended for 20 years by lodging an instrument with the Land Titles Office during the initial 20 year period.⁹
 - In Iowa, covenants automatically terminate after 21 years, but can be extended for a further 21 years.¹⁰
 - In Minnesota, there is a provision limiting covenants to 30 years with a possible further extension of 7 years.¹¹
- 14.16 Two law reform bodies have recommended that lapsing provisions be adopted. The Ontario Law Reform Commission has proposed that all land obligations lapse after 40 years, with provision to renew them from time to time.¹² The California Law Revision Commission has proposed that a period of 60 years, renewable once for a further 60 years, be adopted for all servitudes (that is, easements, covenants and profits a prendre).¹³

- 1 Scottish Law Commission, *Report on Real Burdens*, No 181 (2000) 126.
- 2 See eg, *Rosscorp Pty Ltd v Manningham CC* [2001] VCAT 1609 [36]–[40], discussing a covenant requiring walls be made of brick, stone, concrete, glass, timber, aluminium or asbestos cement.
- 3 See eg, *Carina v Boroondara CC* [2008] VCAT 1362 [8]–[13], discussing whether a covenant that a roof could only be covered with 'tiles or slate' prevented installation of solar panels.
- 4 See eg, *D'Amelio & Ors v Monash CC* [2004] VCAT 2644 [5].
- 5 See eg, *Shaw v Glen Eira* [2006] VCAT 68 [22]–[23] noting the conflict in authorities but arriving at a decision that these uses are not prevented.
- 6 See eg, *Nguyen v Brimbank CC* [2004] VCAT 1858 [22].
- 7 See eg, *Stockland Developments Pty Ltd v Greater Dandenong CC* [2007] VCAT 969 [31].
- 8 This type of situation is sometimes referred to as an 'anti-commons' problem. An anti-commons exists where many different parties have the power to veto a use of land. The cost of negotiating with all of these parties to use the land may far outweigh its benefit. See eg, Carol Rose, 'Servitudes' 2009 *Arizona Legal Studies*, Discussion Paper No. 09-13.
- 9 *Law of Property Act 2000* (NT) s 174.
- 10 Iowa Revised Code § 614.24.
- 11 Minnesota Statutes Annotated § 500.20.
- 12 Law Reform Commission of Western Australia, *Final Report on Restrictive Covenants No 91* (1997) [4.20] citing Ontario Law Reform Commission, *Report on Covenants Affecting Freehold Land*, (1989).
- 13 California Law Revision Commission, *Marketable Title: Enforceability of Land Use Restrictions*, 26 Cal. L. Revision Commission Reports 289 (1996).

Changed Conditions and Lapsing of Covenants



14.17 The idea of limiting the duration of covenants was mooted by the Law Reform Commission of Western Australia, but was ultimately rejected on the grounds that:¹⁴

- restrictive covenants are proprietary rights and should not be extinguished by time limitations and, additionally, any time limitations would be arbitrary;
- owners of benefited land may not know about a still useful and valuable covenant or of the need to re-register;
- automatic removal would involve extra work for the Land Titles Office; and
- renewal provisions would be difficult to implement on estate schemes with large numbers of benefited lots.

14.18 It is not clear that these criticisms outweigh the benefits of lapsing provisions. There is nothing unusual about property rights being subject to expiry by operation of law. Freehold and leasehold titles can be extinguished by at least 15 years adverse possession,¹⁵ easements can be acquired by 20 years of use,¹⁶ and in Tasmania they can also be extinguished by 20 years non-use, which is deemed to be abandonment.¹⁷ Because property rights will otherwise exist forever, time limitations are sometimes necessary to ensure that the use of land by subsequent owners is not unduly restricted.

14.19 The selection of the time interval can be guided by the purpose. Building covenants could be subject to a shorter expiry period than covenants that are intended to maintain the long term value of the benefited land. In Chapter 12, we suggested that if positive building covenants are permitted to run, they might be subject to a lapsing provision based on the six year period allowed in Victoria for lawsuits to enforce contracts. The lapsing period is linked to the purpose of the proposed reform, which is to overcome the problem that positive covenants are not enforceable against a lot owner who buys from a covenantor.

14.20 The Law Reform Commission of Western Australia objected to lapsing provisions on the additional ground that a benefited owner may not know of the covenant or the need to extend it. In Victoria, vendors are required to provide to purchasers a written statement which includes a description of any covenant affecting the land and any existing failure to comply with it.¹⁸ Covenants which add value to the benefited land are also likely to feature in the vendor's marketing campaign.

14.21 If benefited owners are unaware of a covenant, the lapsing provision would clear restrictions from the land that are unlikely to be enforced. It would also mean that, where owners are unaware of a covenant and allow a conflicting use for a long period of time, they cannot then enforce the covenant once they become aware of its existence.

14.22 Other objections to lapsing provisions raised by the Law Reform Commission of Western Australia relate to the costs of administering the system. If a system allowing extension of covenants is adopted, the Registrar should be empowered to record the extensions and to delete from the folio the records of covenants that have lapsed. A computerised register significantly reduces the cost of automatically deleting lapsed covenants and other expired data from the folios and certificates of title of the burdened lots. Covenants are not recorded on the benefited lots.¹⁹ Even if lapsed covenants remain on the folio of the burdened lots for a time, this should not mislead purchasers if the expiry date is shown.

14.23 The automatic lapsing of covenants is the cheapest and surest method of clearing covenants that the benefited owner is no longer interested in preserving. It is cheaper because it requires no proceedings, other than the recording of an extension notice. It provides certainty that the land is no longer subject to a covenant which has lapsed and cannot be extended or has not been extended.

TIME AS A CONSIDERATION IN JUDICIAL REMOVAL

14.24 As an alternative to a lapsing provision, it would be possible to incorporate a time limit into the test for judicial removal of covenants under section 84 of the *Property Law Act 1958* (Property Law Act). The lapse of a specified time since creation of the covenant could be a statutory consideration in an application under that section. As we discuss in Chapter 16, some jurisdictions have already adopted this approach.

14.25 In addition to these broad methods of dealing with the problem of covenants that have become obsolete due to changed conditions, there are other, more specific, mechanisms for the removal or modification of individual covenants. These mechanisms are also useful when dealing with obsolete or outdated covenants. We discuss them in Chapters 15 and 16.

SUMMARY OF OPTIONS

14.26 We summarise the options as follows:

1. A statutory sunset provision under which all new covenants or certain types of new covenants will lapse automatically after a certain period of time.
2. A sunset provision as in option one, but with provision for the benefited owner or owners to extend the covenant by notifying the Registrar within a specified time before the expiry date.
3. No lapsing provision, but the judicial power of removal in section 84 of the Property Law Act should include as a relevant consideration the period that has elapsed since the covenant was created, or whether a specified period of time has elapsed.

Should legislation provide for newly created covenants to lapse after a certain period of time? If so, should there be provision for the dominant owner(s) to extend the period?

Alternatively, should the amount of time since creation of a covenant be a discretionary consideration under section 84 of the Property Law Act?

14 Law Reform Commission of Western Australia (1997), above n 12, [5.11]–[5.12].

15 *Limitation of Actions Act 1958* (Vic) Pt 1 div 3.

16 See generally, Chapter 7.

17 *Land Titles Act 1980* (Tas) s 108; see also para 9.32 in Chapter 9.

18 *Sale of Land Act 1962* (Vic) s 32(2)(b).

19 The Registrar is now empowered, although not required, by s 88(1) of the *Transfer of Land Act 1958* (Vic) to record the covenant on the folio for any lots affected by a covenant. Prior to the commencement of the amendment to s 88(1) inserted by the *Land Legislation Amendment Act 2009* (Vic) s 44(1), the Registrar was empowered to record only the burden of the covenant on the folio to the burdened land.

Chapter 15

Removal and Variation of Easements and Covenants under Planning Legislation

CONTENTS

Overview	128
Planning scheme amendment.....	128
Planning permit	129
Easements	129
Restrictive covenants.....	130
Criticisms	131
Section 61(4) of the Planning and Environment Act 1987	133
Background	133
Criticisms	133

Removal and Variation of Easements and Covenants under Planning Legislation

OVERVIEW

- 15.1 In Chapter 9 we discussed methods of removal and variation that are available only for easements. In this Chapter we discuss methods under planning law that are available for both easements and covenants. In Chapter 16 we discuss section 84 of the *Property Law Act 1958* (Property Law Act), which provides for judicial removal and variation of covenants only, and propose that the section should be extended to easements as well.
- 15.2 In some cases, problems with easements or covenants can be overcome by modifying or varying their terms without removing them. The variation of an easement can involve the realignment,¹ narrowing² or partial deletion³ of an existing easement. For example, in *Jordan v Stonnington City Council* an existing easement was varied by deleting part of an easement of carriageway that had been built over.⁴
- 15.3 The variation of a restrictive covenant may involve amending the terms of the covenant to relax the restrictions it imposes. For example, in *Dukovski v Banyule CC*,⁵ a restrictive covenant was varied to allow the burdened owners to build a house facing in a particular direction, which was prohibited by the original covenant.
- 15.4 Under planning statutes, there are two main mechanisms for the removal or variation of easements and restrictive covenants. These are:
- by planning scheme amendment under section 6(2)(g) of the *Planning and Environment Act 1987* (Planning and Environment Act);
 - by planning permit and registered plan under section 60 of the Planning and Environment Act.
- 15.5 A third method is removal or variation under the significant projects power contained in section 9A of the Planning and Environment Act. It is of very limited application and we do not discuss it in this paper.

PLANNING SCHEME AMENDMENT

- 15.6 Restrictive covenants and easements can be varied or removed by the making or amendment of a planning scheme under section 6(2)(g) of the Planning and Environment Act. There are some restrictions on the scope of the power to regulate easements and covenants by a planning scheme.⁶
- 15.7 A planning scheme amendment can be requested by anybody, but must be prepared by a planning authority (usually a council) with the authorisation of the Minister for Planning.⁷ The planning authority must give notice to owners and occupiers of land that may be affected,⁸ and consider all submissions. If the planning authority does not accommodate a submission requesting a change, it must refer it to a planning panel.⁹ The panel must consider all submissions referred to it and give a hearing to the persons who made the submissions.¹⁰ The panel must report its findings to the planning authority and may make recommendations.¹¹ The planning authority must consider the panel's report in deciding whether to adopt or change the amendment.¹² The amendment comes into operation when the notice of approval is published.¹³
- 15.8 If a planning scheme or amendment authorises or regulates the removal or variation of an easement or restriction, the owner of the servient or burdened land must prepare a plan, have it certified by the council, and lodge it for registration by the Registrar.¹⁴ The consent of the dominant or benefited owner is not required.¹⁵ When the plan is registered, the easement or covenant is removed or varied as specified in the plan.¹⁶

- 15.9 The legislation specifies no criteria for a planning authority to apply in deciding whether to adopt an amendment that authorises the removal or variation of easements or covenants,¹⁷ other than broad planning policies.¹⁸ In some cases planning panels have identified special considerations relevant to the removal or variation of covenants.¹⁹ For example, in one report a planning panel took into account the following considerations:²⁰
- whether the proposed amendments would further the objectives of planning in Victoria;
 - the interests of affected parties, including the persons who have the benefit of the easement or restrictive covenant;
 - whether the removal or variation of an easement or restrictive covenant would enable a use or development that complies with the planning scheme; and
 - whether the amendment will provide a net community benefit and promote sustainable development.

15.10 Although a planning scheme amendment can authorise the removal or variation of easements and covenants on specific lots, amendments usually affect a larger area and require consideration of many interests and policy considerations. Amendment of planning schemes is a time-consuming process, which requires the support of a planning authority and ministerial approval. It is not a method which is generally suitable for removing covenants on individual lots at the request of the owner.

Should the provisions in the Planning and Environment Act that allow for the removal or variation of a restrictive covenant or easement by planning scheme amendment be retained in their current form?

PLANNING PERMIT

15.11 The second main mechanism for removal or variation of easements or restrictive covenants under planning law is by the issue of a planning permit by a 'responsible authority' under section 60 of the Planning and Environment Act.²¹ If a planning permit is granted, the owner of the burdened land must lodge a certified plan with the Office of Titles for registration.²² On registration of the plan, the easement is removed or varied as specified in the plan.²³

15.12 This mechanism for removal or variation of easements and restrictive covenants is unique to Victorian law. In its application to covenants, it was intended to function as a simple and cost effective alternative to an application for a court order for removal or variation under section 84 of the Property Law Act.²⁴

EASEMENTS

15.13 Section 60 of the Planning and Environment Act sets out a list of matters that a responsible authority (usually the council) must consider in granting a permit. The list includes specific tests for applications to remove or vary restrictive covenants, but none for applications relating to easements. Nonetheless, decisions of VCAT and its predecessor, the Administrative Appeals Tribunal of Victoria, have established some guiding criteria for the grant of permits to remove or vary easements.

1 See eg, discussion in *Brighton Beach Apartments PL v Bayside CC* [2002] VCAT 236.

2 See eg, discussion in *Pitt & Others v Surf Coast SC and Another* [2000] VCAT 1664.

3 *Jordan v Stonnington City Council* [2004] VCAT 2008.

4 *Jordan v Stonnington City Council* [2004] VCAT 2008 [94]–[95].

5 [2003] VCAT 190.

6 *Planning and Environment Act 1987* (Vic) s 6A for these restrictions generally.

7 *Planning and Environment Act 1987* (Vic) s 8A.

8 *Planning and Environment Act 1987* (Vic) s 19(1). The Minister can grant exemption from the notice requirements: s 20.

9 *Planning and Environment Act 1987* (Vic) s 19(1).

10 *Planning and Environment Act 1987* (Vic) s 24.

11 *Planning and Environment Act 1987* (Vic) s 25.

12 *Planning and Environment Act 1987* (Vic) ss 27–29.

13 *Planning and Environment Act 1987* (Vic) ss 36, 37. The amendment requires the approval of the Minister, unless the Minister has authorised the council to approve it: ss 35, 35A, 35B and 11.

14 *Subdivision Act 1988* (Vic) s 23(1).

15 *Subdivision Act 1988* (Vic) s 23(2).

16 *Subdivision Act 1988* (Vic) s 24(2)(d).

17 See eg, *M A Zeltoff Pty Ltd v Stonnington City Council* [1999] 3 VR 88.

18 *Planning and Environment Act 1987* (Vic) ss 6(1), 12(2); See generally, *Planning and Environment (Planning Schemes) Act 1996* (Vic).

19 Tannetje Bryant, 'Removal or Variation of Restrictive Covenants in Victoria' (1996) 1 *Local Government Law Journal* 164, 174; Geoffrey Code, 'The Planning and Environment (Restrictive Covenants) Act 2000 (Vic) - Another Setback for Public Planning?' (2001) 18 *Environmental and Planning Law Journal* 211, 216-18; Casey Planning Scheme Amendment C67, Panel Report, June 2005, 19-20.

20 See eg, *Mornington Peninsula Planning Scheme Amendment C46*, Panel Report April 2004, 23-25. But see contra *Stonnington Planning Scheme Amendment C23* Panel Report October 2004, 30-31 in which the panel said that the removal or variation of restrictive covenants did not raise any special considerations different from those that apply to amendments to planning schemes generally.

21 See eg, *Subdivision Act 1988* (Vic) ss 23(1), 24(2)(d); *Planning and Environment Act 1987* (Vic) s 60.

22 *Subdivision Act 1988* (Vic) s 23(1).

23 *Subdivision Act 1988* (Vic) s 24(1), 2(d).

24 See para 15.22 below.

Removal and Variation of Easements and Covenants under Planning Legislation



15.14 The leading decision with respect to easements is *KJ Barge & Associates v City of Prahran Body Corporate – Strata Plan No 1235*, in which it was held that the following questions should be asked:²⁵

- (i) *Does the current use of or the current state or condition of the dominant and servient lands (tenements) indicate a need or requirement for the continued existence of the easement; and*
- (ii) *would the owners of the dominant land suffer any material detriment in their use and enjoyment of that land if the easement were removed or varied?*

15.15 This ‘need and detriment’ test,²⁶ although not binding,²⁷ has often been applied in VCAT decisions.²⁸

RESTRICTIVE COVENANTS

15.16 The original legislation appeared to give responsible authorities the broad power to issue permits to remove easements or covenants, without specifying any particular criteria other than broad planning policy considerations.²⁹ This original legislation was found to be deficient.³⁰ Subsequently, the *Subdivision (Miscellaneous Amendments) Act 1991* removed the deficiency by inserting section 60(2) into the Planning and Environment Act.³¹ This sub-section imposed a test to be satisfied before a responsible authority could issue a permit to remove or vary a restrictive covenant.

15.17 Section 60(2) of the Planning and Environment Act provides that a permit cannot be issued to remove or vary a restrictive covenant unless the benefited owner will be unlikely to suffer:

- (a) *financial loss; or*
- (b) *loss of amenity; or*
- (c) *loss arising from change to the character of the neighbourhood; or*
- (d) *any other material detriment.*

15.18 Section 60 was further amended in 1993, with the intention of confining the removal of covenants under the permit mechanism to ‘deadwood’ covenants where there were no objections to their removal.³² This was achieved by inserting section 60(5), which applied a new test to applications concerning covenants created before 25 June 1991. The old test contained in section 60(2) continues to apply to covenants created after 25 June 1991.

15.19 In relevant part, section 60(5) provides that a permit cannot be granted unless:

- (a) *the owner of any land benefited... will be unlikely to suffer detriment of any kind (including any perceived detriment)...*
- (b) *if the owner has objected... the objection is vexatious or not made in good faith.*

CRITICISMS

15.20 There have been several key criticisms of the tests in sections 60(2) and 60(5) of the Planning and Environment Act. These criticisms are that:

- In practice, it is extremely difficult to remove or vary all but the most obviously obsolete covenants, if there are any objections.
- The interpretation of the tests has developed in a complex and legalistic fashion.
- Under section 60(5), unrelated third parties who are not owners or occupiers of the benefited land are able to object to the removal.
- The notice requirements for a permit application are too onerous.
- There is no provision for granting compensation to the benefited owner for the removal of variation of covenants by permit.

15.21 These criticisms are separately examined below.

DIFFICULTY IN SATISFYING TESTS

15.22 As noted above, one of the initial aims of the permit mechanism was to provide an alternative to an application under section 84 of the Property Law Act. This was, in part, because the courts gave a narrow interpretation to the grounds for removal or variation of covenants in section 84(1).³³ Additionally, it was intended to adjust the balance between the competing values of public policy and private rights.³⁴

15.23 With the addition of section 60(2) of the Planning and Environment Act, planning authorities were presented with a relatively high bar to the exercise of this power.³⁵ Section 60(2) provides an absolute test that must be satisfied, rather than a set of statutory criteria to be balanced. With the later addition of section 60(5), the bar has been raised to the point where it is extremely difficult to remove or vary a pre-1991 covenant where any benefited owner objects.³⁶

DIFFICULTIES IN INTERPRETATION OF THE TESTS

15.24 The insertion of subsections 60(2) and 60(5) into section 60 of the Planning and Environment Act has injected legal complexity into the mechanism for removal of covenants by planning permit.

15.25 In *Pletes v City of Knox*,³⁷ the Administrative Appeals Tribunal of Victoria³⁸ identified several key interpretive points under the test in section 60(2), deciding that:

- each of the listed losses (financial, amenity and character of neighbourhood) must be material;
- the loss or detriment must result from breach of the covenant, not from the proposed development; and
- only the effect on the benefited lots (as opposed to the burdened lots) can be considered.

15.26 Section 60(5) has caused even greater difficulties in interpretation. The term 'perceived detriment' contained in section 60(5)(a) has been particularly problematic, with early decisions failing to arrive at a consistent interpretation of the phrase.³⁹ A special panel of the Tribunal,⁴⁰ was constituted to resolve some of these issues in interpretation in the case of *Scuderi v Hume City Council (Scuderi)*.⁴¹ A subsequent decision in *McFarlane v Greater Dandenong City Council* expanded on *Scuderi* to identify five discrete issues in the interpretation of section 60(5).⁴²

- 25 *KJ Barge & Associates v City of Prahran Body Corporate – Strata Plan No 1235* [1992] 10 AATR 345.
- 26 *Jordan v Stonnington City Council* [2004] VCAT 2008 [42].
- 27 See eg, *Potts v Glen Eira CC* [2003] VCAT 1129 [11]; *Castles v Bayside CC* [2004] VCAT 864 [23].
- 28 See eg, *Echuca Workers & Services Club Ltd v Campaspe SC* [2009] VCAT 1633; *Jordan v Stonnington City Council* [2004] VCAT 2008 [41]; *Preston Corporate Centre Pty Ltd v Darebin CC* [2010] VCAT 617 [50]–[64].
- 29 Joyce Toohar, 'Restrictive covenants and public planning legislation - should the landowner feel 'touched and concerned?'' (1991) 9 *Environmental and Planning Law Journal* 63, 75.
- 30 See generally *Ibid* 73–82.
- 31 *Subdivision (Miscellaneous Amendments) Act 1991* (Vic) s 61(2).
- 32 Victoria, Legislative Assembly, *Hansard, Second Reading Speech, Planning and Environment (Amendment) Bill*, 11 November 1993, 1700.
- 33 See discussion in Chapter 16.
- 34 Joyce Toohar, 'A setback for public planning?' (1991) 65 *Law Institute Journal* 721, 723.
- 35 *Ibid* 722–3.
- 36 See eg, Bryant (1996), above n 19, 167–8, citing *Swinton Pty Ltd v City of Melbourne*, Unreported, AAT 1993/37829. But see Mark Bender, 'Triple Treat: Legal Options for the Removal or Modification of Restrictive Covenants on Land in Victoria' (2006) 13 *Australian Property Law Journal* 179, 195.
- 37 *Pletes v City of Knox*, Unreported, AAT, Fagan J, Webb and Ball, 16 March 1993.
- 38 The Administrative Appeals Tribunal was the predecessor to the VCAT planning list.
- 39 See eg, the discussion in *Scuderi v Hume CC* [1998] VCAT 469 [45]; also cited as *Carabott v Hume City & Scuderi* (1998) 22 AATR 261, 276.
- 40 The panel comprised four members including then Vice President, Judge Wood.
- 41 (1998) 22 AATR 261; see Bender (2006), above n 36, 190–1.
- 42 See Bender (2006), above n 36, 190–1, referring to *McFarlane v Greater Dandenong CC* [2002] VCAT 469.

Removal and Variation of Easements and Covenants under Planning Legislation



BENEFITS TO UNRELATED AND UNAFFECTED PARTIES

- 15.27 Section 60(5) requires the responsible authority (and on appeal, VCAT) to consider the position of benefited owners who have not objected to the grant of a permit for removal.⁴³ This means that objectors who are strangers to the covenant can require the planning authority to consider the detrimental impact of the development on benefited owners, even where no benefited owners have objected. Planning authorities and VCAT must consider objections and submissions by these unrelated parties.⁴⁴
- 15.28 The ability of strangers to take advantage of the covenants in the planning process is a consequence of the blurring of the distinction between property law and planning law in the permit removal mechanism. Planning law encourages participation by interested parties in decision making, and therefore enables planning authorities to consider objections without having to apply restrictive standing tests. Property law enables persons to enforce their private property rights against anyone who infringes them. Section 60 of the Planning and Environment Act creates an anomalous situation in which objectors to a planning process can effectively enforce somebody else's property right. This point is discussed further below.

ONEROUS NOTICE REQUIREMENTS

- 15.29 Under the Planning and Environment Act, notice must be given to all owners and occupiers of land benefited by a covenant where variation or removal is sought, or where a breach of the covenant would result.⁴⁵ Additionally, further notice must be furnished by placing a sign on the land subject to the application and by publishing notice in a local newspaper.⁴⁶
- 15.30 These notice requirements are extensive, particularly where the benefited land is subject to multiple tenancies.⁴⁷ They could be unduly burdensome for owners seeking minor variations of covenants or the removal of outdated covenants. In Parliamentary debates, a Member of the Legislative Assembly gave an example where removal of an indisputably obsolete covenant required that notice be given to 300 benefited owners, at a cost of \$5 per beneficiary.⁴⁸

NO COMPENSATION PROVISIONS

- 15.31 A final criticism of the permit mechanism for removing or varying restrictive covenants is that the legislation does not provide for the payment of compensation by the applicant to the owner of the benefited land.⁴⁹ This is inconsistent with section 84(1) of the Property Law Act, which empowers the court to make an order for compensation where it orders the removal or variation of a covenant. Although compensation provisions are uncommon in planning law,⁵⁰ the lack of such a provision for removal of covenants by planning permit means that the removal of similar proprietary rights is treated inconsistently under different legislation.
- 15.32 As noted above, removal or variation of covenants by planning permit is peculiar to Victoria. Other jurisdictions have not been attracted to this model. It blurs the distinctions between the public law of planning and the private law of property in relation to parties, enforcement rights, notice requirements, criteria for making decisions and compensation. Due to the amendments which inserted sections 60(2) and 60(5) into the Planning and Environment Act, the scope of the permit mechanism is now severely restricted.

15.33 Some of the purposes that the permit mechanism was intended to serve have been addressed in other jurisdictions by reforming the provisions for judicial removal, which we discuss in Chapter 16.

Should the provisions in the Subdivision Act and the Planning and Environment Act that allow for the removal of easements and covenants by planning permit be retained?

If the provisions for removal by planning permit are retained:

(a) should the restrictions in section 60 of the Planning and Environment Act be modified?

(b) should provision for compensation be added?

(c) should the notice requirements be modified?

SECTION 61(4) OF THE PLANNING AND ENVIRONMENT ACT 1987

BACKGROUND

15.34 Additional difficulties in the planning system arise from restrictions imposed by section 61(4) of the Planning and Environment Act on the issue of planning permits. Under section 61(4), a responsible authority cannot issue a planning permit for a use that would conflict with an existing covenant. This means, for example, that a permit to erect a three metre high fence cannot be issued if there is a covenant restricting fences on the property to two metres in height.

15.35 Section 61(4) was inserted in 2000 for two primary reasons:⁵¹

- To ensure that an application for removal or variation of a covenant is made at the same time as the application for a planning permit for a use that is inconsistent with the covenant. It was expected that this would avoid the need for objectors to respond to two separate permit applications.
- To ensure that developments would not proceed in breach of a covenant in the mistaken belief that a planning permit authorised the breach.

15.36 It is debatable whether the legislation achieves these goals, and whether other mechanisms might be better suited to achieve them.⁵²

CRITICISMS

15.37 Since its adoption, a number of difficulties have arisen in applying section 61(4). Many of the following issues were raised in submissions by councils to a 2009 departmental review of the Planning and Environment Act:

- Responsible authorities (mainly councils) are regularly required to interpret obscure or ambiguous covenants.
- There is no adequate mechanism for the Registrar to delete invalid covenants from the register.
- Councils have in effect been made responsible for enforcing property rights arising under private law.
- Unrelated third parties are able to take advantage of private covenants as objectors to permit applications.
- Responsible authorities have to assess all covenants and deny all conflicting permits, regardless of the merits and circumstances.
- The section is unlikely to achieve its stated goals.
- The terminology used by planning legislation reflects confusion about the legal status of recorded restrictive covenants.

15.38 These concerns are examined individually below.

43 See eg, *Ingberg RC v Bayside CC* [2000] VCAT 2407 [61], citing *Grisby & Sansom v City of Greater Geelong* (1997) 21 AATR 11.

44 See eg, *Ingberg RC v Bayside CC* [2000] VCAT 2407 [73]; *McFarlane v Greater Dandenong CC & Ors* [2002] VCAT 469 [20].

45 *Planning and Environment Act 1987* (Vic) ss 52(1)(ca), 52(1)(cb).

46 *Planning and Environment Act 1987* (Vic) s 52(1AA).

47 Code (2001), above n 19, 222.

48 Victoria, Legislative Assembly, *Hansard, House Debates*, 30 October 2001, 1317.

49 Tooher (1991), above n 29, 87.

50 *Ibid.* But see *Subdivision Act 1988* (Vic) s 36(2)(b)(ii).

51 Inserted by *Planning and Environment (Restrictive Covenants) Act 2000* (Vic) s 9. See Victoria, Assembly, *Hansard, Second Reading Speech*, 3 October 2000, 336–7.

52 See Chapter 1, para 1.9.

Removal and Variation of Easements and Covenants under Planning Legislation



INTERPRETING COVENANTS

- 15.39 Under section 61(4), responsible authorities are required to assess all restrictive covenants that burden any lot that is the subject of a permit application. This requirement imposes a substantial burden on the authorities. In some cases they find it necessary to seek legal advice, which adds to their costs and delays in finalising permit applications.
- 15.40 The burden is exacerbated by the nature of restrictive covenants as an essentially unregulated form of private agreement. Because of their variable content and expression, many covenants are difficult to interpret. This is particularly true of older covenants that use antiquated and complex legal terminology or outdated concepts.
- 15.41 The cost and difficulty in interpreting restrictive covenants creates inefficiencies and delays in the issue of planning permits. Even covenants of an essentially similar type do not use standard terms, which means that each covenant must be individually interpreted.⁵³
- 15.42 Many covenants intended to prevent particular uses are expressed in broader terms than necessary. For example, a typical covenant intended to prevent quarrying and brick making reads:⁵⁴
- The owner of the land will not at any time hereafter carry on or permit to be carried on quarrying or brick making operations upon the said land or dig, carry away or remove or permit to be dug, carried away or removed any marl, stone, earth, clay, gravel or sand from the said land.*
- 15.43 Such a provision could have the effect of preventing not just quarrying or brick making, but any activity which required the digging and carrying away of earth from the servient land.⁵⁵ Although it appears that most VCAT decisions on ‘quarrying’ covenants have adopted an ‘ordinary English’, ‘non-technical’ approach to the interpretation of these covenants rather than a ‘narrow, literal approach’, at least one decision has held that ‘quarrying’ covenants should be literally interpreted to prevent the installation of a pool.⁵⁶
- 15.44 Responsible authorities may be less inclined to allow a permit where it is unclear whether it will conflict with a covenant or not.⁵⁷ There may be a tendency for councils to reject permit applications based on conservative interpretations of the covenants in order to avoid risk.

LACK OF JURISDICTION TO REMOVE INVALID COVENANTS

- 15.45 Although section 61(4) of the Planning and Environment Act requires responsible authorities to interpret covenants to determine if a planning permit would conflict with them, neither responsible authorities nor VCAT can remove or ignore invalid covenants.⁵⁸
- 15.46 The tests under sections 60(2) and 60(5) are largely directed to determining any detrimental effect of removal on the dominant owner. There are no separate grounds for removal of a covenant which is invalid. Some power to consider invalidity may exist where the covenant fails sufficiently to identify the dominant land.⁵⁹ This power may be limited to the need to identify the dominant owner for the purpose of assessing any detriment to that person from removing the covenant. To remove a recorded but invalid restrictive covenant, the burdened owner would need to apply to the Supreme or County Court for a declaration of invalidity under section 84(2) of the Property Law Act.⁶⁰

ENFORCEMENT MECHANISM

- 15.47 The operation of section 61(4) means that a breach of a covenant is likely to also be a breach of planning law. This is because a use or development in breach of a covenant often occurs where a permit is required but is not available because of section 61(4), or where the applicant failed to disclose the existence of the covenant when applying for the permit.
- 15.48 These breaches, either through lack of a permit or non-disclosure, leave owners open to sanctions from the responsible authority. This is so even where a permit might have been granted but for the restriction in section 61(4). Responsible authorities may be in the position of having to take action against uses or developments that they would otherwise encourage.

UNRELATED THIRD PARTIES

- 15.49 Unrelated third parties can and do invoke the existence of covenants to block developments that they oppose. Section 61(4) creates an avenue for third parties to object to planning permits based on inconsistency with restrictive covenants, even when no benefited owner objects to the planning permit. It enables third parties to appropriate one of the benefits of private property rights, being the right to decide whether to enforce them.
- 15.50 There is no policy interest in ensuring that covenants are always enforced. Covenants are not laws which must be obeyed at all times. They are private rights which their owners may choose to assert or not to assert. Non-enforcement serves a beneficial function in preventing land from becoming overburdened by covenants that are outdated or no longer useful to their owners.
- 15.51 The indirect enforcement of covenants under section 61(4) allows third parties to stir up controversies over private rights where none exist between the parties to the rights. It prolongs the life of covenants that might otherwise be on the path to extinguishment under equitable principles.⁶¹

LACK OF DISCRETION

- 15.52 Section 61(4) creates a blanket prohibition on the issuing of permits for uses or developments that would breach a restrictive covenant. This means that even where a covenant is clearly obsolete, a permit cannot be issued until the covenant is removed. For example, in one case a covenant requiring the written consent of a long-dead person needed to be removed before a permit could be issued.⁶²
- 15.53 A further effect of the sub-section is that a permit cannot be issued where the development sought is relatively minor, or where the breach would be inconsequential. For example, a situation arose where a permit could not be issued for the construction of a 'tree house' unless the tree house would have a sloped, tiled roof as required by the covenant.⁶³
- 15.54 Applications for the removal of a covenant can be expensive and time-consuming, regardless of the merits of the case. The effect of section 61(4) may be to require applications that are costly to the landowner and a waste of the resources of the responsible authorities.

- 53 See eg, *Brissac Investments PL v Stonnington CC* [2004] VCAT 342 [4].
- 54 See eg, *D'Amelio & Ors v Monash CC* [2004] VCAT 2644 [5].
- 55 Martin Boulton, 'Covenant leaves would-be pool owner high and dry' *The Age*, 24 November 2003.
- 56 *Shaw v Glen Eira CC* [2006] VCAT 68 [20]–[23], citing inter alia *Isles v Glen Eira CC* [2003] VCAT 2039; see also *Nolan & Ors v Moreland CC* [2009] VCAT 1681 [26]–[29].
- 57 Code (2001), above n 19, 229.
- 58 See eg, *Hill v Campaspe SC* [2002] VCAT 1541 [11]–[17].
- 59 *Arifoglou v Stonnington CC* [2003] VCAT 1461 [4]; compare with *Herzog Group of Companies v Glen Eira CC* [2010] VCAT 44.
- 60 *Arifoglou v Stonnington CC* [2003] VCAT 1461 [4.5].
- 61 A court of equity may refuse to enforce a covenant if the benefited owner has waited too long to restrain breaches, or has led the burdened owner to assume that the covenant will not be enforced. Where this occurs, the covenant is 'effectively discharged': Adrian Bradbrook et al, *Australian Real Property Law* (4th ed) (2007) 811; B J Edgeworth et al, *Sackville and Neave Australian Property Law* (8th ed) (2008) [9.75]. These equitable doctrines (known as laches and acquiescence) are discussed further in Chapter 16.
- 62 Victoria, Legislative Assembly, *Hansard, House Debates*, 30 October 2001, 1317.
- 63 See the Banyule City Council submission to the Department of Planning and Community Development Review of the Planning and Environment Act; submission 107.

Removal and Variation of Easements and Covenants under Planning Legislation



ACHIEVING STATED GOALS

AVOIDING MULTIPLE PROCEEDINGS

- 15.55 The goal of avoiding separate proceedings for applications for planning permits and applications to remove or vary restrictive covenants has not been achieved. Parties can appeal the decision of a responsible authority to VCAT. Even after exhausting all administrative appeal mechanisms, parties can still apply to the Supreme Court or the County Court under section 84 of the Property Law Act.
- 15.56 For example, an initial section 60(5) application could be made and refused, an appeal then lodged with VCAT and also denied. Any dispute as to the validity of the covenant would require the VCAT proceedings to be adjourned while a declaration was sought in a court. Even if removal is denied by VCAT, the burdened owner can apply to a court under section 84, and then apply to the responsible authority for the grant of the planning permit.

BREACH BASED ON PERMIT

- 15.57 The second stated goal of section 61(4) was to prevent a permit-holder from mistakenly assuming that a planning permit authorises a breach of a covenant.
- 15.58 It is important not to confuse the different nature of public and private law. Permits for use or development issued by responsible authorities only permit a use or development under planning law. They do not purport to release or affect private rights. Parties are still able to bring private actions against burdened landowners who breach private covenants even where a planning permit has been issued.
- 15.59 Other mechanisms could be used to achieve the second goal. For example, planning permits could carry prominent warnings that they do not relieve the permit holders of their private obligations. Another mechanism would be to include an appropriate warning in the written statements that vendors are required to give to purchasers under section 32 of the *Sale of Land Act 1962* before they sign the contract of sale. Vendors are already required to warn purchasers about the need to ensure that any proposed use of the land is permitted under planning law.⁶⁴ The statutory warning could be amended to refer also to the need to remove a covenant or obtain the consent of the benefited owners for any use or development which might breach a covenant.

MISLEADING TERMINOLOGY

- 15.60 Section 61(4) provides that a permit cannot be granted if it would authorise anything that would result in a breach of a 'registered restrictive covenant', unless a permit is granted for its removal or variation. The term 'registered restrictive covenant' is misleading and includes covenants that may be invalid at common law. Section 3 of the Planning and Environment Act defines 'registered restrictive covenant' as a 'restriction within the meaning of the Subdivision Act 1988'. Section 3 of the *Subdivision Act 1988* defines 'restriction' to mean:
- a restrictive covenant or a restriction which can be registered, or recorded in the Register under the Transfer of Land Act 1958.*
- 15.61 The *Transfer of Land Act 1958* provides for the recording but not the registration of restrictive covenants.⁶⁵ This is an important distinction because registration ordinarily confers indefeasible title upon the owner of the interest.

- 15.62 A recorded restrictive covenant, despite being a 'registered restrictive covenant' for the purposes of the Planning and Environment Act, may not be enforceable. This could be because it does not comply with the common law requirements for covenants (for example, if it imposes positive obligations). It might be invalidly created due to irregularities in the document or the way it was executed (for example, if a signature was forged). A covenant might have been validly created but have since been extinguished (for example, by a deed of release executed by the benefited owner).
- 15.63 Section 61(4) therefore appears to give binding force in planning law to a recorded covenant that may be invalid or that has been extinguished at common law. This is possibly an unintended consequence of the drafting of the section and a blurring of the terms 'recorded' and 'registered' in the various definitional sections in the Act.
- 15.64 The result of section 61(4) is that a landowner seeking a planning permit may be put to the trouble and expense of applying to a court for an order declaring that the covenant is invalid, even though property law does not require it. This indiscriminate requirement adds significantly to the regulatory costs of applicants for planning permits.
- 15.65 Section 61(4) is aimed at addressing difficulties that had arisen in the procedures for removal or variation of covenants by planning permit under section 60 of the Planning and Environment Act. If, as we propose in Chapter 16, removal of covenants is done by application to a court rather than by planning permit, sections 60 and 61(4) could both be repealed.

Should section 61(4) of the Planning and Environment Act be retained? If so, should planning authorities be given discretion to issue permits which may conflict with a covenant?

64 *Sale of Land Act 1962* (Vic) s 32(2)(ca).

65 *Transfer of Land Act 1958* (Vic) s 88(1).

Chapter 16

Removal and Variation of Easements and Covenants by Judicial Order

CONTENTS

Section 84 of the Property Law Act.....	140
The threshold tests	140
Interpretation of the threshold tests	141
Relevance of planning considerations	142
Additional issues arising under Section 84	142
Possible criteria for a structured discretion.....	144
Background	144
Criteria from the existing threshold tests	145
Criteria derived from the common law and equity	145
Criteria from equivalent statutory tests in other jurisdictions.....	148
Combined list of potential Section 84 criteria.....	155

16

Chapter 16

Removal and Variation of Easements and Covenants by Judicial Order



- 16.1 In Chapter 15 we completed our discussion of methods of removing or varying easements and covenants under planning legislation. In this Chapter we discuss a provision for removal and variation of easements and covenants by judicial order on the application of a servient or burdened owner.
- 16.2 We suggest that a revised version of section 84 of the *Property Law Act 1958* (Property Law Act) should be the principal mechanism for removing or varying both easements and covenants. This is a private law procedure in which the affected lot owners, but not the planning authority, are the parties and the decision is made by a court or tribunal under property law.
- 16.3 We propose extending the scope of the court's power under section 84 to enable it to remove and vary easements as well as restrictive covenants. We also propose that the criteria which the court is required to consider in dealing with an application under section 84 should be clarified, more fully specified, and broadened to enable a wider range of circumstances to be taken into account, including planning considerations.

SECTION 84 OF THE PROPERTY LAW ACT

THE THRESHOLD TESTS

- 16.4 Under section 84 of the Property Law Act the Supreme Court or County Court can 'discharge or modify' (remove or vary) a 'restriction' (restrictive covenant) on the application of any person interested in land affected by it. The court may also order the applicant to pay compensation to any person suffering loss as a consequence.
- 16.5 The court's power depends upon being satisfied that one or more of the conditions set out in section 84(1) exists. In considering the conditions, the court is effectively applying the following four tests:
 - *The consent test*—'that the persons of full age and capacity...entitled to the benefit of the restriction...have agreed...to the same being discharged or modified'.¹
 - *The obsolescence test*—'that by reason of changes in the character of the property or neighbourhood or other circumstances of the case which the Court deems material the restriction ought to be deemed obsolete'.²
 - *The impediment to reasonable user test*—'that the continued existence of the restriction thereof would impede the reasonable user of land without securing practical benefits to other persons or (as the case may be) would unless modified so impede such user'.³
 - *The substantial injury test*—'that the proposed discharge or modification will not substantially injure the persons entitled to the benefit of the restriction'.⁴
- 16.6 Even where one or more of these tests is satisfied, the court retains a discretion to grant or deny an application. The tests can be thought of as a threshold or a 'gateway' to the 'field' of discretion. The question then arises as to what circumstances the court should consider in exercising its discretion in the field, and whether they should be incorporated into section 84 as statutory criteria.

INTERPRETATION OF THE THRESHOLD TESTS

- 16.7 Since its adoption in Victoria in 1918, an established approach to the interpretation of section 84 has arisen. The approach has typically sought to protect property rights by giving a narrow interpretation to the threshold tests in section 84(1). The effect has been to restrict significantly the scope of the court's power to remove or vary covenants.
- 16.8 The narrow interpretation of section 84 was influenced by decisions of English courts about a similar provision in English legislation.⁵ It was based on the view that a judicial power to take away private property rights should be used sparingly.⁶
- 16.9 In *Stanhill Pty Ltd v Jackson and Others*⁷ (*Stanhill*), Justice Morris proposed a broader interpretation of section 84. His Honour proposed a more liberal application of the obsolescence, impediment to reasonable user and substantial injury tests. In later cases, judges have taken different views about the interpretation of section 84 in *Stanhill*.
- 16.10 The different approaches to the interpretation of each of the three tests are summarised below. As the consent test in section 84(1)(b) has caused no problems of interpretation, we do not discuss it further.

THE OBSOLESCENCE TEST

- 16.11 The established approach to this test has been to consider a covenant obsolete only if 'its original purpose can no longer be served'.⁸ This means that the test for obsolescence is very hard to meet where the covenant 'continues to have any value for the persons entitled to the benefit of it'.⁹
- 16.12 In *Stanhill*, Morris J held that the word 'obsolete' should be given its ordinary English meaning, so that the test is whether the covenant was 'outmoded' or 'out of date'.¹⁰ Subsequent authorities appear to have split on the interpretation of the test, with some judges seeming to follow the *Stanhill* approach and others expressly declining to follow it.¹¹

THE IMPEDIMENT TO REASONABLE USER TEST

- 16.13 Prior to *Stanhill*, the established interpretation of this test had two limbs. First, to 'impede a reasonable user', the covenant must impede all reasonable uses of the burdened land rather than a particular reasonable use of the land.¹² Secondly, if the covenant secures any practical benefit at all, it will not be removed even if it impedes all reasonable uses.¹³
- 16.14 This interpretation is illustrated by the decision in *Re Robinson*,¹⁴ where the court declined to remove or vary a residential housing covenant over land that was zoned to allow only commercial developments. The effect of the covenant, in conjunction with the zoning, was that the land could not be developed for any purpose. The court held that despite rendering the land essentially unusable, the covenant still provided a practical benefit to benefited landowners because it preserved the amenity of the area.
- 16.15 In *Stanhill*, Morris J held that the first limb of the test would be met if the covenant impeded a particular reasonable use rather than all uses. For example, if the land is reasonably suitable for use as a shop, office or restaurant, and the covenant prohibited any of those uses, the covenant would 'impede the reasonable user of the land'.¹⁵ As to the second limb of the test, Morris J said that the 'practical benefits' secured by the covenant must be more than trifling or merely theoretical.¹⁶
- 16.16 The impediment to reasonable user test has not been decisive in subsequent cases but, where it has been considered, Morris J's approach in *Stanhill* has not been adopted.¹⁷

1 *Property Law Act 1958* (Vic) s 84(1)(b).

2 *Property Law Act 1958* (Vic) s 84(1)(a).

3 *Property Law Act 1958* (Vic) s 84(1)(a).

4 *Property Law Act 1958* (Vic) s 84(1)(c).

5 The narrow interpretation of s 84(1) is based on the interpretation of a similar provision in the *Law of Property Act 1925* (Eng) s 84 in *In re Henderson's Conveyance* [1940] Ch 835.

6 *In re Henderson's Conveyance* [1940] Ch 835 846 (Farnwell J).

7 *Stanhill Pty Ltd v Jackson and Others* (2005) 12 VR 224.

8 *In re Truman, Hanbury, Buxton & Co Ltd's Application* [1956] 1 QB 261; *Re Miscamble's Application* [1966] VR 596, 601.

9 *Re Robinson* [1972] VR 278, 282 (Adam J).

10 *Stanhill Pty Ltd v Jackson and Others* (2005) 12 VR 224, 237–8.

11 For cases appearing to follow *Stanhill* see *Re Milbex Pty Ltd* (2007) V ConvR 54-726; *Dissanayake & Anor v Hillman & Ors* (2008) V ConvR 54-745; *Fraser v Di Paolo* (2008) V ConvR 54-751. For cases declining to follow *Stanhill* see *Bevilaqua v Merakovsky* [2005] ANZ ConvR 504; *Vrakas v Registrar of Titles* [2008] VSC 281.

12 *Re Miscamble's Application* [1966] VR 596, 602; *Stannard v Issa* [1987] 1 AC 175.

13 See eg, *Re Robinson* [1972] VR 278.

14 [1972] VR 278.

15 *Stanhill Pty Ltd v Jackson and Others* (2005) 12 VR 224, 238.

16 *Stanhill Pty Ltd v Jackson and Others* (2005) 12 VR 224, 238.

17 For cases declining to adopt the approach see *Bevilaqua v Merakovsky* [2005] ANZ ConvR 54-703; *Vrakas v Registrar of Titles* [2008] VSC 281.

16

Chapter 16

Removal and Variation of Easements and Covenants by Judicial Order



THE NO SUBSTANTIAL INJURY TEST

- 16.17 Prior to *Stanhill*, the established approach to the no substantial injury test was to interpret 'substantial' as meaning 'to have any substance at all'. For example, it has been held that the test cannot be met by 'merely proving that there will be no appreciable injury or depreciation of value of the property'.¹⁸ The test appears to be broad enough to be met by a 'thin end of the wedge' argument.¹⁹ This is an argument that to grant the application might establish a precedent allowing other applications to be granted which would cause the substantial injury.
- 16.18 In *Stanhill*, Morris J held that 'substantial' should be taken to mean 'of ample or considerable amount, quantity or size', and that the test can be met by establishing that the removal or variation would not cause harm of 'real significance or importance'.²⁰
- 16.19 Several subsequent decisions have split over this interpretation, with judges either adopting the approach of Morris J or continuing to apply the established approach.²¹

RELEVANCE OF PLANNING CONSIDERATIONS

- 16.20 Morris J in *Stanhill* also re-evaluated the type of considerations that the court can take into account in an application under section 84. In particular, Morris J said that the impediment to reasonable user test would inevitably require consideration of planning issues.²²
- 16.21 Prior to *Stanhill*, the established approach was that planning policy and local planning requirements could not be considered by a court when applying the threshold tests.²³ The authorities are divided about whether planning considerations can be taken into account in the 'field' of discretion once the threshold test has been satisfied. In *Greenwood v Burrows*,²⁴ Eames J stated that he did not believe that planning policy should be considered by the court when deciding whether to exercise its discretion. Other judges have appeared to accept the relevance of planning policy and/or local planning requirements.²⁵

ADDITIONAL ISSUES ARISING UNDER SECTION 84

NO RELEASE FROM CONTRACTUAL OBLIGATIONS

- 16.22 It has been held that removing or varying a covenant under section 84 will not release an original covenantor from that person's contractual obligations under the covenant.²⁶ Even if the court discharges the covenant from the burdened land, the benefited owner to whom the covenant was granted (the covenantee) could sue the covenantor in contract. This problem is discussed in Chapter 13.

NOT COVERING EASEMENTS

- 16.23 Section 84 applies only to the removal and modification of covenants. It does not apply to easements.
- 16.24 Section 84 of Victoria's Property Law Act is based on section 84 of the English *Law of Property Act 1925*. Many other jurisdictions whose equivalent provisions were also based on section 84 of the English Act have amended them to provide for judicial removal and variation of easements.²⁷
- 16.25 Easements and restrictive covenants serve similar functions and there is no compelling reason why they should not be subject to similar provisions for judicial removal and variation. It appears that they are treated alike under the NSW provision corresponding to section 84, where case law relating to the removal of covenants is applied to the removal of easements to the extent that it is appropriate.²⁸

APPROPRIATE FORUM

- 16.26 Another issue that arises with regard to section 84 is the appropriate forum for hearing applications. Currently section 84 of the Property Law Act provides that 'the Court' shall have the power to modify or discharge easements or restrictive covenants. Under section 3 of the Property Law Act, 'Court' is defined to mean:
- (a) *in relation to property or an estate or an interest in property the value of which does not exceed the jurisdictional limit of the County Court, the Supreme Court or the County Court;*
- (b) *in any other case, the Supreme Court.*
- 16.27 The County Court previously had a jurisdictional limit that was limited to a value of \$200,000 in civil matters other than personal injury. The limit was abolished by the *Courts Legislation (Jurisdiction) Act 2006*.²⁹ The County Court currently has jurisdiction over section 84 applications without limitation as to the value of the property.
- 16.28 Both the Supreme Court and the County Court are expensive forums for resolving disputes over property rights that may be of modest value. The Magistrates' Court could provide a less costly and more convenient forum for the hearing of applications for removal or variation of easements or restrictive covenants than the Supreme and County Courts.
- 16.29 Although it currently does not have jurisdiction to hear applications under section 84, the Magistrates' Court does have jurisdiction in some property matters where the amount claimed or the value of the relief sought is within the jurisdictional limit of \$100,000.³⁰ For the purpose of determining whether a matter is within the jurisdictional limit, the Court may accept a certificate issued by a valuer as evidence of the value, in the absence of evidence to the contrary.³¹ The Court's jurisdiction is unlimited as to amount where the parties have given written consent.³²
- 16.30 Because the value of easements and covenants is intertwined with the use and enjoyment of the dominant land as a whole, it can be difficult to value them. This could lead to disputes over valuations and whether particular applications are within the jurisdiction of the Magistrates' Court. Therefore, if the Magistrates' Court were given jurisdiction to hear applications under section 84, the value limit on its jurisdiction may need to be relaxed.
- 16.31 VCAT could provide a less expensive and less formal venue for applications to remove or vary easements or covenants under a modified section 84. Indeed, VCAT was formed for the purpose of providing 'fast, cheap, efficient and fair access to justice'.³³
- 16.32 VCAT already has jurisdiction to hear various types of property disputes, including applications under Part IV of the Property Law Act relating to the sale or division of co-owned land and goods and applications for leave to acquire or remove an easement under section 36 of the Subdivision Act. For the purposes of its jurisdiction under the Property Law Act, VCAT must be constituted by, or include a member 'who, in the opinion of the President, has knowledge of or experience in property law matters'.³⁴
- 16.33 Although VCAT can award costs against an unsuccessful party, the general rule is that parties must bear their own costs.³⁵ This is different to the norm in the courts, where the losing party is generally ordered to pay the successful party's costs.³⁶

- 18 *Re Cook* [1964] VR 808.
- 19 Mark Bender, 'Triple Treat: Legal Options for the Removal or Modification of Restrictive Covenants on Land in Victoria' (2006) 13 *Australian Property Law Journal* 179, 186 citing, among others, *Re Stani* (Unreported, Vic SC, Full court, 7 December 1976).
- 20 *Stanhill Pty Ltd v Jackson and Others* (2005) 12 VR 224, 238–9.
- 21 For cases following *Stanhill* on this point see *Re Milbex Pty Ltd* (2007) ANZ ConvR 504; *Dissanayake & Anor v Hillman & Ors* (2008) V ConvR 54-745; *Fraser v Di Paolo* (2008) V ConvR 54-751. For cases declining to follow *Stanhill* see *Bevilaqua v Merakovsky* [2005] ANZ ConvR 504; *Vrakas v Registrar of Titles* [2008] VSC 281.
- 22 See eg, *Stanhill Pty Ltd v Jackson and Others* (2005) 12 VR 224, 226; but see *Vrakas v Registrar of Titles* [2008] VSC 281 rejecting this approach.
- 23 *Greenwood v Burrows* (1992) V Conv R 54-444.
- 24 (1992) V Conv R 54-444.
- 25 See eg, *Kort Pty Ltd v Shaw* [1983] WAR 113.
- 26 *Re Markin, Re Roberts* [1966] VR 494.
- 27 See eg, *Transfer of Land Act 1893* (WA) s 129C(1).
- 28 See eg, *Lolakis & Anor v Konitsas* [2002] NSWSC 889 [49]–[53].
- 29 The limit was abolished by the *Courts Legislation (Jurisdiction) Act 2006* (Vic) s 3. For the previous limit see the *Court Act 1958* (Vic) Version No. 115 s 3(1).
- 30 *Magistrates Court Act 1989* (Vic) ss 3(1), 100(1)(a), (b).
- 31 *Magistrates Court Act 1989* (Vic) s 100(3).
- 32 *Magistrates Court Act 1989* (Vic) ss 3(1), 100(1)(c).
- 33 Kevin Bell, *One VCAT, President's review of VCAT* 30 November 2009 1.
- 34 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) Sch 1 cl 66A.
- 35 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 109.
- 36 See eg, N J Williams QC, *Civil Procedure Victoria*, vol 1 [63.02.80]–[63.02.90].

16

Chapter 16

Removal and Variation of Easements and Covenants by Judicial Order



16.34 The options for vesting jurisdiction under section 84 would appear to be:

- the Supreme Court and County Court, as at present;
- the Supreme Court, County Court and Magistrates' Court;
- VCAT, exclusively; or
- VCAT and the Supreme and County Courts having concurrent jurisdictions as alternative forums.

Should section 84 of the Property Law Act be modified to include the removal and variation of easements?

Which forums (courts and/or VCAT) should be given jurisdiction to hear applications under section 84 of the Property Law Act?

POSSIBLE CRITERIA FOR A STRUCTURED DISCRETION

BACKGROUND

- 16.35 The *Stanhill* decision has unsettled the interpretation of section 84. Underlying the *Stanhill* decision, and the resulting split in authority, is a tension between the established narrow approach to section 84 and a broader approach which allows for public planning considerations and lowers the bar for burdened owners seeking removal or variation of covenants.
- 16.36 The established interpretation of the threshold tests in section 84(1) has created a high bar for applicants to overcome and generally excludes public planning considerations from being taken into account. The *Stanhill* decision, and some of the decisions that have followed it, have sought to broaden the scope of the court's power to remove or vary covenants.
- 16.37 The wording of section 84(1), particularly para (a), is unclear. As our discussion of the authorities has shown, many of the key terms used are ambiguous, and the relationship between elements of the tests is unclear. If the section is retained in its present form, the terms and tests should be clarified in the legislation.
- 16.38 Another reform option would be to reformulate section 84 as a structured discretion instead of a set of threshold tests. A structured discretion is one in which the relevant considerations are set out in the legislation and must be considered. This approach has been adopted in a number of other jurisdictions, with the most recent example being section 50 of the *Land and Conveyancing Law Reform Act 2009* (Ir). We discuss this provision later in this Chapter.
- 16.39 Criteria for the structured discretion could be derived from various sources including the existing threshold tests, similar judicial removal provisions in other jurisdictions, and common law and equitable doctrines. The statutory criteria would not be exhaustive or exclusive of other considerations, such as the principles of equity which guide the administration of equitable remedies. For example, courts will not grant an injunction where it would be futile,³⁷ or allow a claim where the plaintiff seeks to 'derive advantage from his own wrong'.³⁸
- 16.40 If other reform options from this consultation paper are implemented, additional criteria may also be necessary. For example, recognition of positive covenants could require consideration of any increased burden on the burdened land due to changed circumstances. If the judicial power of removal under section 84 is extended to easements, additional criteria relating to abandonment and non-use of easements will be needed.

CRITERIA FROM THE EXISTING THRESHOLD TESTS

16.41 The underlying components of the four existing threshold tests could be used as criteria for judicial consideration under a reformulated section 84. For example, the obsolescence test involves consideration of both the obsolescence of the covenant and changes to the neighbourhood or property. While the wording of any statutory criteria would need to be defined, the criteria from the current section 84 could be broadly characterised as:

- obsolescence of the covenant due to change in the character of the property or the neighbourhood;
- obsolescence of the covenant due to other circumstances of the case;
- impeding a reasonable use;
- consent; and
- lack of substantial injury to the benefited owner or owners from the removal or variation.

CRITERIA DERIVED FROM THE COMMON LAW AND EQUITY

16.42 In addition to the statutory mechanisms for removal or modification of covenants and easements, several doctrines enable removal or variation at common law and in equity. These doctrines could be incorporated into section 84 as statutory criteria under a structured discretion.

COMMON LAW DOCTRINES

INCREASED BURDEN

16.43 Changed use of an easement which imposes an increased burden on the servient land can extinguish the easement where the increase is deemed to be excessive.³⁹ This increased burden could arise from a change in the use being made of the dominant land.⁴⁰

16.44 An easement will not ordinarily be extinguished if the excessive use can be quantified, such as the use of cars to travel over a footway, because other remedies such as injunction or trespass would be more appropriate in such cases.⁴¹

16.45 In the leading case of *Jelbert v Davis*⁴² it was held that an easement was extinguished by the increased use of a right of way by patrons of a caravan park that had been agricultural land when the easement was granted. In a Western Australian case considering the extent of the doctrine, Hasluck J stated:⁴³

although some change in the degree of user is permissible, provided it does not go beyond anything contemplated by the parties at the time the easement was created, it will not be permissible if the result is to increase substantially the burden upon the servient tenement.

16.46 In *Boglari and Another v Steiner School and Kindergarten*,⁴⁴ the Victorian Supreme Court of Appeal held that it is a question of fact whether an increase in use is excessive. The Court upheld a magistrate's finding that the burden of an easement that had originally provided rear access to a residential dwelling was not impermissibly increased when it was used to provide access to a car park for a school.

16.47 Increased burden could be used as a criterion for a court exercising a structured discretion under section 84, rather than as a discrete rule of extinguishment for easements at common law.

37 Gino Dal Pont and Tina Cockburn, *Equity and Trusts in Principle* (2005) 390.

38 *Meyers v Casey* (1913) 17 CLR 90, 124.

39 See eg, Jonathan Gaunt and Justice Morgan, *Gale on Easements* (18th ed) (2008) 515–16, 542–4; Adrian Bradbrook and Marcia Neave, *Easements and Restrictive Covenants in Australia* (2nd ed) (2000) 497–9.

40 B J Edgeworth et al, *Sackville and Neave Australian Property Law* (8th ed) (2008) 1041.

41 See generally, Gaunt and Morgan (2008), above n 39, 542.

42 [1968] 1 WLR 589.

43 *The Owners of Corinne Court 290 Stirling Street Perth Strata Plan 12821 v Shean Pty Ltd & Anor* [2000] WASC 181 [89].

44 (2007) 20 VR 1.

16

Chapter 16

Removal and Variation of Easements and Covenants by Judicial Order

EQUITABLE DOCTRINES

- 16.48 Several doctrines have emerged in equity that may prevent the dominant owner from using equitable remedies to enforce an easement or a restrictive covenant. These equitable defences work differently for covenants and easements.
- 16.49 Because covenants are recognised only at equity, an equitable defence will generally act as an absolute bar on actions for enforcement or damages.⁴⁵ Easements, on the other hand, can exist as legal interests or as equitable ones, depending on the way they were created. The equitable defences only bar equitable remedies, such as injunctions and equitable damages, while leaving the possibility of legal damages for breach.

DELAY

- 16.50 It is possible that delay in commencing proceedings will result in a requested equitable remedy being refused.⁴⁶ In determining whether the delay is sufficient to justify refusal of an equitable remedy, two factors will be looked at: the length of the delay, and the nature of acts done during the delay.⁴⁷ Generally, there is no minimum length of delay for the doctrine to apply, but delay alone will not be sufficient.⁴⁸
- 16.51 In *Jessica Estates Pty Ltd v Lennard*,⁴⁹ the court found that delay of two and a half months in applying for a mandatory injunction to enforce a restrictive covenant was not substantial enough to warrant refusal of an equitable remedy. This was despite the construction of a semi-detached duplex on the land in question in the meantime.

ACQUIESCENCE

- 16.52 Acquiescence in the breach of a restrictive covenant or easement may result in equitable remedies being refused.⁵⁰ Acquiescence can be shown either by actions which indicate an acceptance of the breach, or by inaction in the face of a breach which would lead someone to infer acceptance.⁵¹
- 16.53 In *Gafford v Graham*,⁵² a defendant converted a bungalow to a two storey house and extended a barn in breach of a covenant. The plaintiff waited for three years before instigating action. In considering whether acquiescence had occurred, Nourse LJ stated:⁵³
- As a general rule, someone who, with the knowledge that he has clearly enforceable rights and the ability to enforce them, stands by whilst a permanent and substantial structure is erected, ought not to be granted an injunction to have it pulled down.*
- 16.54 The ruling in *Gafford* was distinguished in *Mortimer v Bailey*,⁵⁴ another case in which construction had already occurred in breach of a covenant. The court dismissed the defence of acquiescence to the plaintiff's action for a mandatory injunction. While the plaintiff had delayed in instituting proceedings against the defendants, the plaintiffs had from a far earlier date consistently warned the defendant that proceedings would be instituted.

ESTOPPEL

- 16.55 A promise or representation that a dominant owner will not enforce an easement, or that a benefited owner will not enforce a covenant, could also give rise to an estoppel in favour of the defendant.⁵⁵ For example, a burdened owner might have constructed a building in breach of the terms of a covenant on the basis of representations by the benefited owner that the covenant would not be enforced. In this case, the representations of the benefited owner could give rise to an estoppel preventing that owner from seeking enforcement of the covenant.
- 16.56 Estoppel by representation, including where the representation is mere inactivity, is sometimes also called 'acquiescence' even though it has common law rather than equitable origins.⁵⁶

CHANGE IN CHARACTER OF NEIGHBOURHOOD

- 16.57 Changes in a neighbourhood that render a covenant unable to serve its original purpose might be so substantial that a court will refuse to equitably enforce the covenant on this basis.⁵⁷ There is conflicting English authority as to whether the changes to the neighbourhood must be the result of the actions of the dominant landowner.⁵⁸
- 16.58 This is similar to the 'changed circumstances' doctrine in common law in the United States. The doctrine allows for modification or termination of a servitude (easement or covenant) where changes have rendered either its purposes impractical or the servient land unsuitable for the uses which it permits.⁵⁹
- 16.59 The Restatement (Third) of Property: Servitudes § 7.10 states that:
- (1) *When a change has taken place...that makes it impossible as a practical matter to accomplish the purpose for which the servitude was created...a court may modify...[or] if modification is not practicable...a court may terminate the servitude.*
- (2) *if the purposes of a servitude can be accomplished, but because of changed conditions the servient estate is no longer suitable for uses permitted by the servitude, a court may modify the servitude.*
- 16.60 In addition to appearing in the Restatement (Third), the doctrine of changed circumstances has also been codified in legislation in many American states.⁶⁰
- 16.61 A similar concept also appears to exist under the Canadian common law. For example, section 61 of the *Conveyancing and Law of Property Act 1990* (Ont) provides almost unfettered discretion to modify or discharge easements:
- Where there is annexed to land a condition or covenant...any such condition or covenant may be modified or discharged by order of the Superior Court of Justice.*
- 16.62 Despite the breadth of section 61, the court in *Re Moody*⁶¹ held that the provision could only be used where 'the character of the neighbourhood is so changed that an order can be made without doing violence to the rights of other land owners'.
- 16.63 While the Canadian doctrine of change to the character of the neighbourhood may appear quite similar to the test under section 84(1)(a) of the Property Law Act, which refers to obsolescence due to changes in the character of the property or neighbourhood, the Canadian doctrine does not depend on the obsolescence of the covenant. It can be seen as an example of equity withholding an injunction 'on the ground of hardship to the defendant coupled with failure to confer an appreciable benefit upon the plaintiff'.⁶²

POTENTIAL CRITERIA

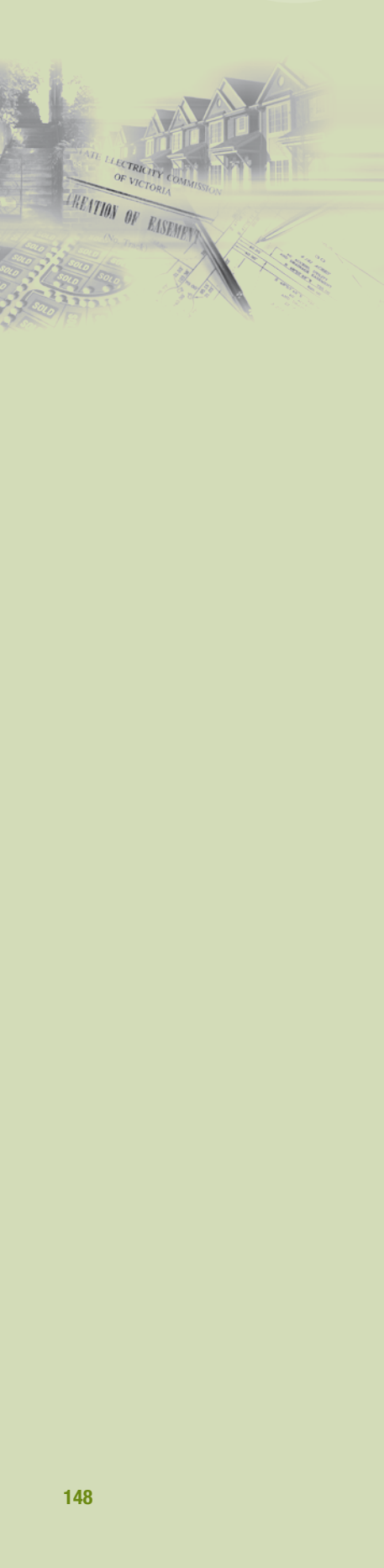
- 16.64 It would be possible to incorporate some of the equitable doctrines as statutory criteria for judicial consideration. For example, delay in bringing an action or acquiescence in the breach could be separate factors for consideration under section 84. Alternatively, they could both be incorporated as part of the test for a particular criterion under the section. For example, delay or acquiescence for a particular period of time could create a presumption of abandonment.
- 16.65 By extending section 84 to easements and incorporating equitable principles into the criteria, it would be possible to provide more consistency in the law of easements and covenants.

- 45 Except in cases where there is privity of contract or estate. See generally, Bradbrook and Neave (2000), above n 39, 443–7.
- 46 Ibid 472–8. The equitable defence of laches applies to enforcement of covenants.
- 47 *Beamer Pty Ltd v Star Lodge Supported Residential Services Pty Ltd* [2005] VSC 236 [470], citing *Lindsay Petroleum Co v Hurd* (1874) LR 5 PC 221.
- 48 G E Dal Pont et al, *Equity and Trusts: Commentary and Materials* (4th ed) (2007) 888.
- 49 (2007) 13 BPR 25, 297 (reversed by *Lennard v Jessica Estates* (2008) 71 NSWLR 306 on other grounds).
- 50 Dal Pont et al (2007), above n 48, 889. Although it is often confused with laches, acquiescence is a separate doctrine in equity.
- 51 See eg, *Mehmet v Benson* (1965) 113 CLR 295.
- 52 (1999) 77 P&CR 73.
- 53 *Gafford v Graham* (1999) 77 P&CR 73, 84.
- 54 [2004] EWCA Civ 1514.
- 55 Bradbrook and Neave (2000), above n 39, 476.
- 56 See eg, Patrick Milne, 'A Thoroughly Conscionable Decision' *L.Q.R.* 1998 114 (Oct) 555, 556.
- 57 Bradbrook and Neave (2000), above n 39, 478–81.
- 58 Ibid 479–80.
- 59 See generally, American Law Institute, *Restatement (Third) of Property: Servitudes* (2000) § 7.10.
- 60 See eg, NY CLS RPAPL § 1951.
- 61 *Re Moody* [1941] OWN 167.
- 62 Bradbrook and Neave (2000), above n 39, 481.

16

Chapter 16

Removal and Variation of Easements and Covenants by Judicial Order



CRITERIA FROM EQUIVALENT STATUTORY TESTS IN OTHER JURISDICTIONS

- 16.66 Many of the reforms that other jurisdictions have undertaken with regard to their versions of section 84 have not been adopted in Victoria, largely because Victoria relies mainly on planning law mechanisms for the removal and variation of easements and covenants.
- 16.67 The models that exist in other jurisdictions can be divided into the following broad categories:
- old English model, comprising jurisdictions that, like Victoria, have provisions that are still largely based on section 84 of the *Law of Property Act 1925* (Eng);
 - reformed English model, comprising jurisdictions that have incorporated the 1969 amendments to section 84 of the *Law of Property Act 1925* (Eng);
 - proposed Western Australian model, comprising the proposed model developed in 1997 by the Law Reform Commission of Western Australia;
 - structured discretion models, which use a single threshold ground for removal and a discretionary field with a non-exclusive list of relevant considerations;
 - other models, primarily focusing on those models adopted or proposed in the United States and Canada.

OLD ENGLISH MODEL

- 16.68 The equivalent sections to section 84 that exist in Tasmania, Western Australia, New Zealand and the Northern Territory are very similar to the Victorian model. There are, however, some minor differences.
- 16.69 Section 84C of the *Conveyancing and Law of Property Act 1884* (Tas) is a similarly framed set of threshold tests to the Victorian model, though the test for impediment is framed in terms of impeding a 'user of land in accordance with an interim order or planning scheme'. This means that planning considerations are explicitly included in, and indeed central to, the Tasmanian provision.
- 16.70 Section 317 of the *Property Law Act 2007* (NZ) is a similarly framed set of threshold tests, though it allows for variation or removal of easements as well as covenants. The section includes a test not found in section 84, namely the 'nature or extent of the use' being made of the benefited and burdened land. Additionally, the impediment test is framed in terms of impeding the reasonable use of the land 'in a different way or to a different extent' from what 'could reasonably have been foreseen' by the original parties.

- 16.71 Section 89 of the *Conveyancing Act 1919* (NSW), is similar to the Victorian model in that it is framed as a threshold test with similar criteria to section 84. There are two key differences. The first is that easements as well as covenants can be removed or varied under the provision. The second is that abandonment by 'acts or omissions' is listed as a ground for removal or variation. The addition is necessary because NSW has extended its judicial removal provision to easements.
- 16.72 The language of the abandonment ground in section 89 of the NSW legislation may depart from strict application of the common law doctrine of abandonment in that it incorporates language, such as 'may reasonably be considered', that might inject objective elements into the test. In addition, section 89(1A) states that an easement may be treated as abandoned if it has not been used for at least 20 years.
- 16.73 Section 129C of the *Transfer of Land Act 1893* (WA) is similar to the Victorian model and is framed as a threshold test. Like the NSW provision, it extends to easements and incorporates abandonment by 'acts or omissions'.

REFORMED ENGLISH MODEL

- 16.74 In 1969, section 84 of the *Law of Property Act 1925* (Eng) was modified to include new criteria for a structured discretion attached to one of the threshold tests.⁶³ Similar changes have also been adopted in a number of Australian jurisdictions, but not in Victoria.
- 16.75 One of the primary changes was to the test related to impeding a reasonable user. The 1969 amendments extended the power of removal or variation where 'the restriction, in impeding that user' is 'contrary to the public interest'. Additionally, in making this determination the court is directed to consider a non-exhaustive set of criteria, including local planning decisions and the 'period at which and context in which the restriction was created'.
- 16.76 This is both a substantial broadening of the threshold test for impediment and an opening up of the considerations that the court must rely on in making a determination. While the framework is still that of a 'threshold test', the English model in some ways appears to be an intermediate step between strict application of the threshold test models and the structured discretion models discussed below.
- 16.77 Section 181 of the *Property Law Act 1974* (Qld) is very similar to the English model, in that it still relies on threshold tests and includes a reference to the public interest as part of the impediment test. Unlike the English model, but like the NSW and Western Australia models, the Queensland provision extends to easements and incorporates abandonment as a ground for removal.
- 16.78 Section 177 of the *Law of Property Act 2000* (NT) is also very similar to the English model. However, like the Queensland provision it also applies to easements and incorporates abandonment as a ground for removal.

16

Chapter 16

Removal and Variation of Easements and Covenants by Judicial Order



PROPOSED WESTERN AUSTRALIAN MODEL

16.79 In a 1997 report, the Law Reform Commission of Western Australia recommended changes to section 129C.⁶⁴ If adopted by legislation, they would create very broad threshold tests with a non-exclusive set of criteria for judicial consideration.

16.80 In relevant part, the Commission recommended that the following threshold tests be created:

- That the use proposed would not be out of character with or prejudicial to the amenity of the benefited land.
- That the restriction would impede a reasonable use or development of the land that is in accordance with planning regulations.
- That because of planning regulations, enforcement of the restriction would render the land unable to be used for any purpose.
- That the restriction would prevent the subdivision or amalgamation of a lot under planning law.

16.81 The Commission also recommended that the court be required to take into account a number of planning regulations, documents and decisions when applying the first two tests. In addition, it would be required to consider 'the time at which and the context in which the restriction was created or imposed'.⁶⁵

STRUCTURED DISCRETION MODELS

NORTHERN IRELAND

16.82 The Northern Irish model is different to the Victorian model in that it creates one ground for removal and then outlines a non-exclusive set of mandatory criteria for consideration. Article 5 of the *Property (Northern Ireland) Order 1978* provides that:⁶⁶

(1) The Lands Tribunal... may make any order modifying, or wholly or partially extinguishing, the impediment on being satisfied that the impediment unreasonably impedes the enjoyment of the land.

16.83 Article 5(5) of the order outlines several non-exclusive mandatory criteria for the Lands Tribunal to take into account when applying the broad test. These considerations are:

- the period, circumstances and purposes of the creation of the covenant;
- any change in the character of the land or neighbourhood;
- any public interest in the land, particularly as related to planning;
- any trend shown by planning decisions;
- whether the impediment secures any practical benefit to any person and the nature and extent of any such benefit;
- for positive covenants, whether the obligation has become unduly onerous in comparison to the benefit to be derived from the works;
- either express or implied agreement by the benefited owner.

16.84 The Northern Irish model, therefore, is quite different to the threshold tests typically derived from the English model. When comparing the Northern Irish model to the English model, the Lands Tribunal for Northern Ireland has noted that the Northern Irish model has greater flexibility and scope. In particular, it observed that:⁶⁷

In [the Northern Irish model] the only requirement is that an applicant must 'persuade the Tribunal that the restriction 'unreasonably impedes the enjoyment', taking into account seven specified matters together with any other material circumstances.

16.85 The Tribunal then went on to state that those matters largely reflect the substance of the grounds contained in the reformed English model but that the 'Tribunal is given discretion to determine the weight, if any, to be attached to each of these matters in any particular case'.⁶⁸ This discretion, it was noted, is wider than the residual discretion in the reformed English model.

IRELAND

16.86 Section 50 of the *Land and Conveyancing Law Reform Act 2009* (Ir) sets out a mechanism similar to the Northern Irish model, in that it contains one underlying ground for removal and a non-exclusive list of mandatory criteria for consideration.

16.87 The underlying ground for removal is contained in section 50(1) of the Act and allows removal of a covenant if 'continued compliance with it would constitute an unreasonable interference with the use and enjoyment of the servient land'. Section 50(2) then provides a non-exclusive list of mandatory considerations in making a determination under section 50(1). These considerations are essentially the same as those contained in the Northern Irish model except that they also include, 'any representations made by any person interested in the performance of the covenant'.

SCOTLAND

16.88 While Scottish land law differs from the land law of other common law countries, it does recognise property rights that are substantially similar to covenants and easements, calling them 'real burdens' and 'servitudes' respectively.⁶⁹ Prior to 2003, Scotland had a threshold model mechanism for the removal of real burdens similar to others derived from the old English model.⁷⁰ The previous Scottish mechanism held that discharge could be granted upon satisfaction that:⁷¹

(a) *by reason of changes in the character of the land affected by the obligation or of the neighbourhood thereof or other circumstances... the obligation is or has become unreasonable or inappropriate; or*

(b) *the obligation is unduly burdensome compared with any benefit resulting or which would result from its performance; or*

(c) *the existence of the obligation impedes some reasonable use of the land.*

16.89 A 2000 report from the Scottish Law Commission noted that these threshold tests were artificially self-contained and that they also inevitably overlapped.⁷² The Commission recommended that the section be reformulated with a 'single ground for granting an application, such as reasonableness; but in assessing reasonableness the Tribunal would be required to have regard to a number of specific factors'.⁷³ In doing so, it noted that this was the approach already adopted in Northern Ireland.⁷⁴

16.90 The Commission report proposed the following criteria for judicial consideration:⁷⁵

- change of circumstances;
- extent of private benefit;
- extent of public benefit;
- extent to which the condition impedes enjoyment of the burdened property;
- for positive covenants, the cost and practicability of compliance;
- age of the covenant; and
- planning and other consents.

64 Law Reform Commission of Western Australia, *Final Report on Restrictive Covenants*, No 91 (1997) 70–2.

65 *Ibid.*

66 *Property (Northern Ireland) Order 1978* (No. 459 (N.I. 4)).

67 *Danesford Developments Ltd v Morrow* 2002 WL 819913, Lands Tribunal (Northern Ireland) 10 January 2002 [8], citing *Andrews v Davis* [1994] R/17/1993 12.

68 *Danesford Developments Ltd v Morrow* 2002 WL 819913, Lands Tribunal (Northern Ireland) 10 January 2002 [8].

69 See eg, *Black's Law Dictionary* (8th ed. 2004): burden.

70 See Scottish Law Commission, *Report on Real Burdens*, No 181 (2000) 114.

71 *Conveyancing and Feudal Reform (Scotland) Act 1970* (Scot) s 1(3)

72 Scottish Law Commission (2000), above n 70, 115.

73 *Ibid* 115–16.

74 *Ibid* 116.

75 *Ibid* 116–22.

16

Chapter 16

Removal and Variation of Easements and Covenants by Judicial Order



- 16.91 The recommendations of the Commission were subsequently enacted in the *Title Conditions (Scotland) Act 2003*. In particular, the recommendations related to moving to a broad discretion test were enacted as sections 98 and 100 of the Act.
- 16.92 Section 98 provides that an application for variation or discharge of a title condition shall be granted if it is reasonable, unless it is not in the best interests of the owners of all the units in the community or unfairly prejudicial to one or more of these owners. In deciding an application, the Lands Tribunal must have regard to a list of criteria set out in section 100. In addition to those already listed above, the court is to consider ‘whether the owner of the burdened property is willing to pay compensation’.
- 16.93 When considering the differences between the old and new provisions for the variation or removal of easements and covenants the Lands Tribunal of Scotland held that:⁷⁶
- s[ection] 100 does not require consideration, under each head, of whether the application succeeds or fails under it. Rather, as we see it at this stage, the task is to look at evidence about the various factors and then weigh them up as a whole judging, not, as it were, the result under each factor but rather the relative strength and weakness, in the overall issue of reasonableness in the circumstances of the case, of the various items of evidence in relation to the factors set out in the section.*
- 16.94 The Scottish model is therefore very similar to the Irish and Northern Irish models in the criteria to be considered in applying the single ground. The Scottish model provides a clear example of a modern transition from a threshold model based on the old English model to a broad discretion model.

OTHER MODELS

ONTARIO

- 16.95 Unlike in the models listed above, the language of the judicial removal mechanism in Ontario appears to provide almost unlimited discretion to the court to remove conditions or covenants from land.⁷⁷ Nevertheless, decisions made under the Act have imposed substantial limitations on the exercise of the power.
- 16.96 For example, in *Re Moody*, the court held that the statute could only be used where ‘the character of the neighbourhood is so changed that an order can be made without doing violence to the rights of other landholders’.⁷⁸ Similarly, in *Re Toronto*, the court held that ‘the rule still should be that the order should not be made unless the benefit to the applicant greatly exceeds any possible detriment to the respondents’.⁷⁹
- 16.97 In a 1989 report, the Ontario Law Reform Commission recommended the modification of section 61 of the *Conveyancing and Law of Property Act 1980* to add the following specific grounds for the exercise of the power:⁸⁰
- obsolescence due to changes in the character of the servient land or neighbourhood;
 - that the change will not injure the persons who have the benefit of the obligation;
 - express or implied agreement to the changes;
 - that the proposed change would remove a factor prejudicial to the carrying out of the general purposes of a development scheme, and
 - is for the benefit of the whole or part of the land subject to the scheme, and
 - the prejudice to those bound by the scheme doesn’t outweigh the benefits;

- that the land obligation, other than one requiring the payment of money, impedes a reasonable user, secures no practical value to anyone benefited and the person who has the benefit can be adequately compensated;
- for positive obligations – that as a result of a change in circumstances, the scheme or the provision, the covenant has ceased to be reasonably practicable or has become unreasonably expensive compared to the benefit it confers;
- with respect to development schemes or any provision in a development scheme – that as a result of a change in circumstances, the scheme or provision, has become obsolete, has ceased to be reasonably practicable or has become unreasonably expensive compared to the benefit it confers;
- with respect to land obligations in gross – that the person who owns the benefit secures no real or substantial benefit from it.

16.98 The proposed changes to the Ontario model mirror many of the tests that exist under statutes derived from the old English model, though there are several unique tests dealing with obligations in gross, positive obligations and development schemes.

ALBERTA

16.99 Under section 48(4) of the *Land Titles Act 2000* (Alb) covenants can be removed or varied by order of the court. In relevant part section 48(4) provides:

Any such condition or covenant may be modified or discharged by order of the court, on proof...that the condition or covenant conflicts with the provisions of a land use bylaw or statutory plan under Part 17 of the Municipal Government Act, and the modification or discharge is in the public interest.

16.100 While the language of the section may seem broad, it has been held that a conflict would only exist if complying with the covenant meant violating the bylaw or statutory plan.⁸¹

MASSACHUSETTS

16.101 Under section 30, Chapter 184 of *Massachusetts General Laws*, no restriction shall be enforceable unless it confers an actual and substantial benefit to the persons claiming rights of enforcement. There is a presumption that most restrictions are not of actual and substantial benefit unless:⁸²

(1) such restriction at the time it was imposed is not more burdensome as to the requirements for lot size, density, building height, set back, or other yard dimensions than such requirements...applicable to the land of the persons for whose benefit rights of enforcement are claimed; or

(2) such restriction is part of a common scheme applicable to four or more parcels contiguous...

(3) ...such restriction is in favor of contiguous land of the grantor.

76 *George Wimpey East Scotland Ltd v Fleming* 2006 SLT (Lands Tr) 2.

77 *Conveyancing and Law of Property Act* 1990 (Ont) s 61.

78 *Re Moody* [1941] OWN 167.

79 *Re Toronto* [1945] OWN 723 [9], citing *Re Crocker* (1931) 40 OWN 294.

80 Ontario Law Reform Commission, *Report on Covenants Affecting Freehold Land* (1989), 139 - 145.

81 *Crump v Kemahan* 1995 CarswellAlta 348 [27].

82 *Massachusetts Annotated Laws*, c 184, s 30.

16

Chapter 16

Removal and Variation of Easements and Covenants by Judicial Order



16.102 The Massachusetts model creates a broad ground based on benefit to the owner, then sets out various presumptive ways of meeting it. In addition to this test, the Massachusetts statute outlines several grounds for which money damages will be the only remedy. These are:

(1) changes in the character of the properties affected or their neighborhood, in available construction materials or techniques, in access, services or facilities, in applicable public controls of land use or construction, or any other conditions or circumstances, reduce materially the need for the restriction or the likelihood of the restriction accomplishing its original purpose or render it obsolete or inequitable to enforce...

(2) conduct of persons from time to time entitled to enforce the restriction had rendered it inequitable to enforce...

(3) in case of a common scheme the land of the person claiming rights of enforcement is for any reason no longer subject to the restriction...

(4) continuation of the restriction on the parcel against which enforcement is claimed or on parcels remaining in a common scheme with it or subject to like restrictions would impede reasonable use of the land for purposes for which it would be suitable and would tend to impair the growth of the neighbourhood or municipality in a manner inconsistent with the public interest...

(5) enforcement, except by award of money damages, is for any reason inequitable or not in the public interest.

NEW YORK

16.103 New York Consolidated Laws, Real Property Actions and Proceedings, section 1951 provides a mechanism for the removal of covenants and easements. Section 1951 provides that:

No restriction on the use of land created at any time ... shall be enforced...[if] it appears that the restriction is of no actual and substantial benefit to the persons seeking its enforcement...either because the purpose of the restriction has already been accomplished or, by reason of changed conditions or other cause, its purpose is not capable of accomplishment.

16.104 This provision appears to be a codification of the general principles of the doctrine of 'changed circumstances' adopted by the Restatement (Third) of Property as discussed above at paragraph 16.59.

COMBINED LIST OF POTENTIAL SECTION 84 CRITERIA

16.105 While there are several ways to approach the drafting of any reformed section 84, there is a trend in recent overseas legislation to move away from rigid tests of the kind currently found in the section, and to provide a set of criteria for the court to consider and weigh in exercising its discretion. There are many criteria that might be considered for inclusion in such a provision. Based on our survey of legislation and law reform proposals from various jurisdictions, equitable principles and commentaries, we suggest that the discretionary criteria might be drawn from the following list:

- obsolescence of the easement or covenant due to changes to the neighbourhood, or to the dominant/benefited land, the servient/burdened land or both, or any other circumstances;
- whether the original purpose of an easement or covenant can still be practicably achieved;
- planning policies applicable to the lots, including planning schemes and patterns of decisions made by planning authorities relating to lots in the area;
- whether the easement or covenant impedes a reasonable use or development of the servient or burdened land that is permitted under planning law;
- whether the easement or covenant impedes the reasonable use of the land in a different way or to a different extent from what could reasonably have been foreseen by the original parties;
- whether enforcement of the restriction would render the land unable to be used for any purpose permitted under planning law;
- whether the easement or covenant secures any practical benefit to the dominant or benefited owner, and the nature and extent of any such benefit;
- whether due to changed circumstances a positive obligation under a covenant has become unduly onerous in relation to the benefit to be derived from it;
- whether the removal or variation of the easement or covenant would cause material detriment to a benefited or dominant owner;
- whether the person who has the benefit of an easement or covenant can be adequately compensated for its loss;
- whether a scheme of development on which a covenant is based is obsolete;
- acquiescence by the applicant in a breach of the covenant;
- delay by the applicant in commencing legal proceedings to restrain a breach;
- increased burden of an easement on the servient land resulting from changes to the dominant land or its mode of use;
- abandonment of an easement by acts or omissions;
- non-use of an easement for 20 years.

Should the considerations in section 84(1) of the Property Law Act be reformulated to specify discretionary criteria rather than a threshold test? If so, which criteria should be adopted?

Questions



Questions

CHAPTER 2: FUNCTIONS OF EASEMENTS

1. Should the current restrictions on easements in gross be relaxed?

CHAPTER 3: EXPRESS CREATION OF EASEMENTS

2. Should standard wording for particular types of easements be provided by statute? If so, which types?
3. Should the provisions for the private compulsory acquisition of easements be replaced by a provision for court imposed easements?
4. If court imposed easements are introduced:
 - (a) what criteria should courts use in determining whether to order an easement?
 - (b) which forums (courts and/or VCAT) should have jurisdiction to order an easement?

CHAPTER 4: EASEMENTS FOR UTILITIES AND SERVICES

5. Are the current arrangements sufficient to inform purchasers about the existence and location of utility and service easements and concealed structures?
6. Should public authorities be required to notify the Registrar of all agreements with landowners for the creation of utility and service easements?

CHAPTER 5: RECORDING AND REGISTRATION OF EASEMENTS

7. Are the provisions in the Transfer of Land Act for removal of recorded easements adequate?
8. Should expressly created easements be (a) registered or (b) recorded?

CHAPTER 6: IMPLIED EASEMENTS

9. Which, if any, statutory reciprocal rights should be adopted in Victoria?

CHAPTER 7: PRESCRIPTIVE EASEMENTS

10. Should the acquisition of easements under common law prescription be abolished? If so, what provisions for acquiring easements should replace prescription?

CHAPTER 8: AN INTEGRATED SCHEME FOR CREATION OF EASEMENTS

11. Does the scheme proposed in Chapter 8 meet the needs for easements currently served by the rules of implication and prescription?
12. Should the exception to indefeasibility in section 42(2)(d) of the Transfer of Land Act be confined to:
 - (a) easements omitted or misdescribed by the Registrar;
 - (b) statutory implied subdivisional easements;
 - (c) court imposed easements;
 - (d) easements or rights in the nature of easements created under statute; and
 - (d) claims to easements enforceable against the registered proprietor by personal action?

CHAPTER 9: REMOVAL OF EASEMENTS

13. Should the mechanism for removal of easements under section 36 of the Subdivision Act be retained in its present form?
14. Should sections 73(3) and 73A of the Transfer of Land Act be modified to provide that non-use of an easement for a specific period is a ground for removal, distinct from common law abandonment?
15. Should abandonment or non-use of an easement by a previous registered owner of the dominant land be grounds for removal?
16. Should section 73 of the Transfer of Land Act expressly provide for extinguishment by unity of estates as a ground for removal of an easement from the register?
17. Should the provisions for the removal of recorded easements in section 73 of the Transfer of Land Act be brought into line with provisions in section 88 for the removal of covenants that have been expressly released?

CHAPTER 10: THE ROLE OF COVENANTS

18. Is there a role for covenants in relation to planning law and, if so, what is it?

CHAPTER 11: COVENANTS AND THE REGISTER

19. What difficulties arise in identifying the lots which have the benefit of restrictive covenants?
20. Should covenants be (a) recorded or (b) registered?
21. Are the provisions for removal of recorded covenants adequate?

CHAPTER 12: POSITIVE COVENANTS

22. Should positive obligations be imposed upon landowners by covenants, or only under Acts of Parliament and owners' corporation rules?
23. If positive covenants are permitted to run with land, which of the four options outlined in Chapter 12 is preferable?

CHAPTER 13: FREEHOLD COVENANTS – A NEW STATUTORY SCHEME

24. Should all freehold covenants exist under a statutory scheme as legal proprietary interests attaching to land?
25. If a statutory scheme is introduced:
 - (a) who should be bound by a freehold covenant?
 - (b) what remedies should be available for breach of covenant?
 - (c) should an owner of burdened land who breaches a covenant before selling the land remain liable to the benefited owner after transferring title?
 - (d) what transitional arrangements are required for existing covenants?
 - (e) should we rename freehold covenants? If so, what name is preferable?

Questions

CHAPTER 14: CHANGED CONDITIONS AND LAPSING OF COVENANTS

26. Should legislation provide for newly created covenants to lapse after a certain period of time? If so, should there be provision for the dominant owner(s) to extend the period?
27. Alternatively, should the amount of time since creation of a covenant be a discretionary consideration under section 84 of the Property Law Act?

CHAPTER 15: REMOVAL AND VARIATION OF EASEMENTS AND COVENANTS UNDER PLANNING LEGISLATION

28. Should the provisions in the Planning and Environment Act that allow for the removal or variation of a restrictive covenant or easement by planning scheme amendment be retained in their current form?
29. Should the provisions in the Subdivision Act and the Planning and Environment Act that allow for the removal of easements and covenants by planning permit be retained?
30. If the provisions for removal by planning permit are retained:
 - (a) should the restrictions in section 60 of the Planning and Environment Act be modified?
 - (b) should provision for compensation be added?
 - (c) should the notice requirements be modified?
31. Should section 61(4) of the Planning and Environment Act be retained? If so, should planning authorities be given discretion to issue permits which may conflict with a covenant?

CHAPTER 16: REMOVAL AND VARIATION OF EASEMENTS AND COVENANTS BY JUDICIAL ORDER

32. Should section 84 of the Property Law Act be modified to include the removal and variation of easements?
33. Which forums (courts and/or VCAT) should be given jurisdiction to hear applications under section 84 of the Property Law Act?
34. Should the considerations in section 84(1) of the Property Law Act be reformulated to specify discretionary criteria rather than a threshold test? If so, which criteria should be adopted?

Glossary



Glossary

Accommodate	An easement must 'accommodate' dominant land; this means the easement must be for the benefit of dominant land.
Appurtenant	A term used to describe a right that becomes attached to an estate in land by express or implied grant or by prescription, such as an easement. ¹
Austerberry rule	The rule established in <i>Austerberry v Corporation of Oldham</i> ² that positive obligations do not run with the land unless authorised by legislation.
Benefited land	A lot or lots which benefit from a covenant. Same as dominant land in the case of an easement.
Building scheme	An early form of private subdivision regulated by an equitable rule under which each lot owner is entitled to enforce a covenant given to the developer by the purchaser of any other lot, regardless of the order in which the lots were sold by the developer. Also called a scheme of development.
Burdened land	A lot or lots which are subject to a covenant that requires the lot owner to refrain from doing something on or to the land. Same as servient land in the case of an easement.
Common law	Law derived from judicial decisions as opposed to legislation. More specifically, the traditional body of law developed by English courts other than the Court of Chancery.
Consolidation	The bringing together of separate lots into a single lot with one title.
Covenantee	The party to a covenant to whom the promise is made and who has the benefit of the promise.
Covenantor	The party to a covenant who gives the promise and who has the burden of fulfilling the promise.
Covenant	A binding promise created expressly by an agreement between a person who gives the promise (the covenantor), and a person to whom the promise is given (the covenantee).
Developer	A landowner who subdivides land and is the common vendor of the lots in the subdivision.
Dominant land	A lot or lots which benefit from an easement.
Dominant owner	The owner of dominant land.
Easement	A property right to the use of land by someone other than an owner. The right cannot be exclusive possession and must be for the benefit of other land.
Equity	The separate body of judge-made law, developed in the English Court of Chancery, which 'supplements, corrects, and controls the rules of common law'. ³ Equity is similar to the common law in that it is law made by judges rather than by the legislature. The rules and forms of orders developed under this body of law are 'equitable rules' and 'equitable relief'.
Equitable relief	Discretionary orders and remedies such as injunctions or equitable damages which are granted by a court of equity to right a wrong.
Estoppel	Estoppel protects a person from suffering detriment (loss or damage) because they have relied on a promise or representation made by another person, who later departs from that promise or representation. Equitable estoppel allows a court to grant relief to avoid the detriment.
Folio	The record in the register relating to a lot registered under the <i>Transfer of Land Act 1958</i> , showing the registered owner and other interests held in the land. Folios are of three kinds: ordinary, provisional or identified.
Freehold	A freehold estate includes what is commonly thought of as ownership of land (a fee simple estate – the most usual type), as well as life estates and estates in remainder.

General law	The law of property other than the Torrens system rules contained in the <i>Transfer of Land Act 1958</i> . The general law includes other statutes and the common law and equitable rules of property law developed by the courts.
Grantee	The person who receives the grant of an interest in land. A broad term which includes purchasers, lessees, and persons who receive land by gift or by will.
Grantor	The person who grants an interest in land to another, and which includes a vendor, lessor or donor.
Identified folio	The record created by the Registrar of Titles under the <i>Transfer of Land Act 1958</i> identifying a parcel of old system land governed by the general law rather than the Torrens system of land title.
Implied easement	An easement that is not expressly created by a grant or reservation in an instrument, but is implied by common law so that the land can continue to be used in a particular way. ⁴
Indefeasibility	As applied to an interest registered under the <i>Transfer of Land Act 1958</i> , it means that the interest is validated by registration and the holder of the interest is protected against any other claims or interests, subject to specified exceptions.
Lot	A parcel of land which has its own unique identifier. A lot for which a folio has been created under the <i>Transfer of Land Act 1958</i> is identified by a volume and folio number.
Occupier	A person physically using or taking up a place on land. ⁵ A person can be an occupier without necessarily being an owner or a tenant.
Old system land	Land which is not registered in an ordinary folio under the <i>Transfer of Land Act 1958</i> , though it may be recorded under that Act in an identified or provisional folio. Property rights in old system land are regulated solely by the general law.
Ordinary folio	The most common type of folio, in which registration of an interest in land confers title to the interest.
Owner	The holder of any interest in land, usually the freehold.
Plan of subdivision	A document required in the subdivisional planning process showing the proposed location of lots and easements. The plan must be certified by a council and registered by the Registrar before individual folios are created for the lots to enable them to be sold. ⁶
Planning scheme	Planning schemes are prepared by local councils or the Minister and set out objectives, policies and controls for the use, development and protection of land in an area. ⁷
Positive covenant	An agreement between parties to perform an obligation or to expend money in respect of burdened land. It requires something to be done, rather than preventing something, as in a restrictive covenant.
Prescriptive easement	An easement acquired by possessing or using the land for at least 20 years without secrecy, permission or force. The owner may also need to have known about it and not prevented it.
Priority	An interest has priority over another if it takes precedence in enforcement. For example, a first mortgagee's priority over a second mortgagee means that it has first claim to enforce its debt against the mortgaged land.
Provisional folio	A transitional folio for old system land in which interests in the land are enforceable in accordance with general law rules. After 15 years, a provisional folio is upgraded to an ordinary folio.
Purchaser	A person who acquires an interest that has been granted by the vendor, including as a purchaser of the freehold, a lessee, a mortgagee or a donee.

Glossary

Referral authority	A person or body specified in a planning scheme as being required to give approval to a permit or plan. Usually a provider of services such as utilities or communications.
Register	The records kept by the Registrar of Titles in accordance with the <i>Transfer of Land Act 1958</i> . The register includes the folios for particular lots. The entry of information into the register has the legal effects set out in the <i>Transfer of Land Act 1958</i> .
Registrar	The Registrar of Titles, who carries out duties and functions as set out in the <i>Transfer of Land Act 1958</i> . The primary function of the Registrar is the administration of the register to ensure that records of interests in property are accurate and up to date.
Release	Extinguishment of an easement or covenant by instrument executed by the dominant or benefited owner.
Rent-seeking	A term describing behaviour that seeks to exploit an economic advantage, such as a monopoly situation rather than earn income through productive activity and market transactions.
Restrictive covenant	An agreement between parties which prohibits specified uses of the burdened land.
Run with the land	The term used to describe the benefit and burden of a property right passing to successors in title to land, so that it continues to apply to the new owner or occupier.
Scheme of development	See building scheme.
Servient land	A lot or lots which are burdened by an easement.
Servient owner	The owner of servient land.
Subdivision	Subdivision means the division of land into two or more parts which can be disposed of separately. ⁸
Successors in title	Subsequent owners of land who derive title from or through a specified person, eg heirs, all subsequent purchasers.
Torrens system	A system of registered title to land which provides authoritative information about property rights for each lot. In Victoria, the Torrens system is regulated by the <i>Transfer of Land Act 1958</i> and administered by the Registrar. Applies to all private land in Victoria, except for less than 3 per cent of lots which are not yet registered and remain under the old system.
Torrens system land	Land registered in ordinary folios under the <i>Transfer of Land Act 1958</i> and held subject to the rules in the Act.
Touch and concern	A common law requirement that the performance of the promise in a covenant relates to the ownership or occupation of the burdened land, and benefits the land of the covenantee. This rule derives from the 16 th century English rule laid down in <i>Spencer's Case</i> . ⁹
Unity of estates	Where both the dominant and servient lots are owned and occupied by the same person. Also called 'unity of seisin'.
VCAT	Victorian Civil and Administrative Tribunal.

1 *Butterworths Encyclopaedic Australian Legal Dictionary* [online version], (LexisNexis Australia 9 September 2004).

2 (1885) 2 Ch D 750.

3 *Butterworths Encyclopaedic Australian Legal Dictionary* [online version], (LexisNexis Australia 9 September 2004).

4 Nygh & Butt (Eds) *Butterworths Australian Property Law Dictionary* (1997) 122.

5 *Butterworths Encyclopaedic Australian Legal Dictionary* [online version], (LexisNexis Australia 9 September 2004).

6 See *Subdivision Act 1988* (Vic) s 6; *Sale of Land Act 1966* (Vic) s 9AA.

7 See *Planning and Environment Act 1987* (Vic) Part 2.

8 *Subdivision Act 1988* (Vic) s 3.

9 (1583) 77 ER 72.

