# EASEMENTS AND RESTRICTIVE COVENANTS IN VICTORIA

**PRESENTATION TO LAW INSTITUTE OF VICTORIA'S ACCREDITED PROPERTY LAW SPECIALISTS**
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## SPEAKER

1. Matthew Townsend has been a barrister for more than 20 years and practises exclusively in planning and environment and property law. He has taught in the Trial Practice and Advocacy program at Monash University and lectures in planning and environmental law at the Leo Cussen Institute. Matthew regularly supervises students for legal research and work experience.

2. In 2000 Matthew was awarded the Public Interest Law Clearing House Pro Bono Award by the Governor of Victoria for his work in environmental litigation. He was Dux of International Environmental Law at Leiden University in Holland in 1992 and was the inaugural winner of the JF Kearney, QC prize in environmental law in 1991.

3. Matthew maintains Restrictive Covenants in Victoria, a website providing case-notes and resources about the modification and removal of restrictive covenants in Victoria. He regularly provides legal opinions on covenants to accompany planning applications.

## EXECUTIVE SUMMARY

4. An easement comes in a number of forms but may generally be described as the right to use another person's land without occupying it. It may be a private right between specified landowners, or an easement in gross, granted to a public authority by operation of statute. Easements may be implied if not expressly created; and easements may be prescribed by using land for at least 20 years without secrecy, permission or force.

5. A restrictive covenant is a contract that runs with the land, constraining its use or development. Both forms of encumbrances should be discoverable on the face of the Register, but there are exceptions to this rule that require careful scrutiny.

6. There are many ways to modify a restrictive covenants, including by:

    a) planning permit, with advertising;

    b) order of the Supreme Court under section 84 of the *Property Law Act 1958*;

c) planning permit, without advertising, via section 47(2) of the *Planning and Environment Act 1987;*

d) planning scheme amendment;

e) consent of beneficiaries; or

f) at the direction of the Registrar.

7. Presently, there is no judicial means of removing or modifying easements in Victoria and statutory processes have been criticised for their clumsiness.

8. Practitioners should be wary about advising clients to purchase land that cannot be used or developed without the modification or removal of easements or covenants, by reason of the unpredictability and potential cost of the process.

## INTRODUCTION

9. This seminar provides a short overview and update in relation to easements and restrictive covenants in Victoria and the means by which they are most commonly modified or removed.

## WHAT ARE EASEMENTS AND RESTRICTIVE COVENANTS?

### Easements

10. An easement is a right to use another person's land without occupying it. There are different varieties:

a) A **private easement** is a property right to make a limited use of land by someone other than an owner. It cannot give exclusive possession, and must be for the benefit of other land (the dominant land).

The key elements of a private easement are:

1) there must be a dominant and servient tenement;

2) the easement must accommodate the dominant tenement;

3) the owners of the dominant and servient tenements must be different from each other; and

4) the right or claim must be capable of being the subject matter of a grant.

In Victoria, private easements can be expressly created by grant or reservation:

1) 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.

2) 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.

b) An **easement in gross** is an easement for the benefit of the holder of the easement (usually a service provider) which is not attached to dominant land. It is not recognised at common law and is a creature of statute. An example might be a drainage easement along the rear of a number residential properties in favour of a water authority.

c) An **implied easement** is an easement that is not expressly created by grant or reservation in an instrument or by statute but is implied by common law or statute so that the land can continue to be used in a particular way; and finally

d) A **prescriptive easement** is an easement acquired by using land for at least 20 years without secrecy, permission or force.

The owner of the land may need to have known about the use and not prevented it.

But as we shall see, there are questions about the future of prescriptive easements in Victoria.

**Restrictive covenants**

11. A restrictive covenant is:

a) a contract that runs with the land;

b) that is negative in nature.

12. In its most common form it is a contract between neighbouring land owners by which the covenantee, determined to maintain the value of a parcel of land or to preserve its enjoyment, acquires a right to restrain the other party, namely the covenantor, from using and/or developing the land in a certain way.

13. The most common restrictive covenants we see are those:

a) controlling the number of dwellings that can be constructed on a lot;

b) controlling the type of building materials that can be used in a building's construction; and

c) controlling the height of buildings, often to preserve views.

**Identifying the burden**

14. Typically, if land is burdened by an easement or restrictive covenant, it will be noted under the heading "Encumbrances, Caveats and Notices" on a register search or on a plan of subdivision.

15. However, under section 42(2)(d) of the *Transfer of Land Act 1958*, all easements, 'howsoever acquired', exist over land even if they do not appear on the register:

> **Estate of registered proprietor paramount**
>
> (1) Notwithstanding the existence in any other person of any estate or interest (whether derived by grant from Her Majesty or otherwise) which but for this Act might be held to be paramount or to have priority, the registered proprietor of land shall, except in case of fraud, hold such land subject to such encumbrances as are recorded on the relevant folio of the Register but absolutely free from all other encumbrances whatsoever, except—
>
> (a) the estate or interest of a proprietor claiming the same land under a prior folio of the Register;
>
> (b) as regards any portion of the land that by wrong description of parcels or boundaries is included in the folio of the Register or instrument evidencing the title of such proprietor not being a purchaser for valuable consideration or deriving from or through such a purchaser.
>
> (2) Notwithstanding anything in the foregoing the land which is included in any folio of the Register or registered instrument shall be subject to—…
>
> (d) any easements howsoever acquired subsisting over or upon or affecting the land;

16. This is significant, because while covenants can fall away if they not clear on the face of the title, easements may survive the sale process even if they are not revealed on an inspection of the Register.

**How do I know if land has the benefit of an easement or restrictive covenant?**

17. Determining whether land has the benefit of an easement or restrictive covenant is also not necessarily straightforward.

18. With restrictive covenants, the location of land with the benefit of a covenant will typically need to be discerned from a careful reading of the covenant.

19. Significantly, however, some covenants purport to convey the benefit of a covenant to all land in a subdivision. The recent case of *Xu v Natarelli* [2018] VSC 759 affirmed the principle in *Re Mack and the Conveyancing Act* [1975] NSWLR 623, that contractual principles of privity exclude the registered proprietors of the lots transferred out of the parent title before the restrictive covenant was made. That is:

> Equity does not extend the benefit of the covenant to them although it does extend the benefit to proprietors (and their successors in title) of the lots transferred out of the parent title, that is subdivided and sold, after the restrictive covenant was made.

20. The exception to this is where a building scheme or scheme of development exists. However, despite the frequency with which the existence of building schemes are raised by objectors (and the Titles Office), very few have actually been confirmed to have been established in Victoria.

21. Similarly, assessing who takes the benefit of an easement requires careful analysis. The benefit of private easements cannot flow to the public at large. The exception is an easement in gross, which will confer a licence upon the person for whom the right was created. Easements in gross are commonly created in favour of statutory bodies, such as the local government or water authorities.

22. That said, the case of *Anderson & Anor v City of Stonnington & Anor* [2016] VSC 374 provides a detailed explanation of how easements can become roads, and if and when that occurs, the operation of the *Road Management Act 2004*, may mean the easement is permanently displaced. Clause 14 of Schedule 5 to the *Road Management Act 2004* states:

> A private right of way or easement cannot—
>
> (a) develop or co-exist with a public right of way over the same land

## MODIFYING OR REMOVING RESTRICTIVE COVENANTS

### Planning permits can be useful to modify or remove deadwood covenants

23. There are several ways in which restrictive covenants can be varied or modified, but the two most common means are via a planning permit application to the local council or by application to the Supreme Court.

24. There is an initial appeal in applying for a permit to modify a covenant via the planning system, because it is perceived to be cheaper and easier, but this appeal diminishes when one understands that:

    a) all beneficiaries need to be notified; and

    b) for covenants created before 25 June 1991, only one genuine objection from a beneficiary is effectively sufficient to bring the process to an end.

25. For example, I had a client that had spent in the order of $10,000 advertising an application to modify a covenant via the Planning and Environment Act 1987 process, and it attracted one or two superficial (but genuinely held) objections, meaning the application was then hopeless.

26. We then took it to the Supreme Court and while the application had to be re-advertised with signs on the land and letters to nearby beneficiaries, there were no objectors, and the Court granted the relief sought. Interestingly, the Court found that on a proper reading of the Covenant there were no beneficiaries at all.

### Section 84 of the *Property Law Act 1958* is useful for more contentious applications

27. The relatively high success-rate of the section 84 process means that applications that are seen as controversial, such as increasing the number of dwellings on a lot, routinely go straight to the Supreme Court.

28. The challenge is to pitch your application at something a judge will be comfortable with, for the Courts have traditionally acted with caution when it comes to modifying restrictive covenants. The conference with the client to determine the scope of the application is often the hardest part of the process.

29. The Supreme Court is proving to be often efficient with one application we lodged late last year, having been resolved at a final hearing in early March this year—a process from start to finish of about three months.

**Section 47(2) of the *Planning and Environment Act 1987* is useful where a breach already exists**

30. Notwithstanding the difficulties in the permit application process, there is a provision that allows the circumvention of the onerous advertising provisions in the *Planning and Environment Act 1987* where the breach has been in existence for two years or more. Section 47(2) of the PEA provides:

> (2) Sections 52 and 55 do not apply to an application for a permit to remove a restriction (within the meaning of the Subdivision Act 1988) over land if the land has been used or developed for more than 2 years before the date of the application in a manner which would have been lawful under this Act but for the existence of the restriction.

31. Section 52 of the Act deals with advertising of applications for permits to potentially affected third parties and section 55 deals with referral to bodies such as DELWP, Telstra, VicRoads and so on.

32. In *Hill v Campaspe SC* [2004] VCAT 1399, the Tribunal explained:

> 26 My conclusion is that if part of a covenant is breached, and the breach continues for 2 years without any action on the part of those having the benefit of the covenant, it is reasonable that no notice should be given of an application to vary by removal part of the covenant of which there is a breach. But this exemption from notice pursuant to section 47(2) of the Act should not extend to the removal of any aspect of a covenant of which there is no breach.

33. Although the proper interpretation of this provision is not free from doubt, this decision suggests that if a use or development has been in breach of a covenant for more than two years, a permit can be granted to remove or modify the covenant to regularise the use or development.

34. If you can successfully rely on this provision, the relevant responsible authority under the Act should issue the permit to remove or amend the covenant without notifying other beneficiaries.

35. We are regularly modifying covenants in this way now, by way of permit application supported by evidence as to the existence and duration of the breach with a legal opinion in support.

36. The best example of this might be a building materials covenant we recently modified in Hawthorn. We were able to have a brick and stone building materials covenant removed by pointing out to Council that a mid-70s add-on was constructed of timber—in

contravention of the covenant. This enabled a planning permit to be issued varying the covenant to remove the building materials covenant—without notice to beneficiaries. A later application for an ambitious extension at the rear could then be constructed of glass and steel.

37. Had the two permit applications been made together, the applicant may well have attracted unwanted opposition to the covenant modification process.

38. For practitioners, the question therefore needs to be asked of clients early in the process—has the covenant you wish to modify or remove, been the subject of a breach for two years or more? If so, this might be worth dealing with, as a separate question, before the main development application is made at a later date.

**Planning schemes can be amended to modify or remove covenants**

39. For completeness, the least-used means of removing or amending a covenant is also that arguably capable of delivering the most ambitious proposals, namely amending the planning scheme to remove or amend a covenant.

40. In this process, the assessment is made according to ordinary planning principles.

41. In the Mornington Peninsula C46 Panel Report, Member Ball explained:

> First, the Panel should be satisfied that the Amendment would <u>further the objectives of planning</u> in Victoria. …
>
> Second, the Panel should consider the <u>interests of affected parties</u>, including the beneficiaries of the covenant. …
>
> Third, the Panel should consider whether the removal or variation of the covenant would enable a use or development that <u>complies with the planning scheme</u>.
>
> Finally, the Panel should balance conflicting policy objectives in favour of <u>net community benefit</u> and sustainable development. If the Panel concludes that there will be a net community benefit and sustainable development it should recommend the variation or removal of the covenant.

42. An example of this process being successfully employed was the approval of a Place of Assembly (museum) at 217 And 219 Cotham Road, Kew as part of Amendment C143 to the Boroondara Planning Scheme.

43. The proposal involved the conversion of two dwellings into a contemporary museum with a liquor licence and few on-site parking spaces, contrary to a restrictive covenant that prevented the use of the land for anything other than dwellings. Arguably, there would have been no prospect that such an ambitious project would have been approved under s84 of the Property Law Act 1958, but the project received Council backing at the beginning and end of the process and a favourable planning panel report.

44. The City of Stonnington also used the planning scheme amendment process to modify single dwelling covenants on Dandenong Road opposite the Caulfield campus Monash University for medium density development. However, Council was so jaded by the whole process in the end, that officers remarked that they would not go through the same

process again but refer applicants to section 84 of the Property Law Act 1958 and the Supreme Court process.

### Covenants can be modified or removed by consent

45. A restrictive covenant can also be removed or modified by consent. Section 88(1C) of the *Transfer of Land Act 1958* provides:

> (1C) A recording on a folio of a restrictive covenant that was created in any way other than by a plan under the Subdivision Act 1988 may be amended or deleted by the Registrar under this section if the restrictive covenant is varied or released by—
>
> (a) the agreement of all of the registered proprietors of the land affected by the covenant; or
>
> (b) an order of a court or VCAT.

46. If the proposed modification or removal is not controversial and/or the number of beneficiaries is not large, this may be the most efficient means of proceeding.

### Covenants can be modified or removed at the direction of the Registrar

47. Finally, a covenant may be removed at the direction of the Registrar of Titles pursuant to s106(1)(c) of the *Transfer of Land Act 1958*. This provides:

> (1) The Registrar—
>
> (c) if it is proved to his satisfaction that any encumbrance recorded in the Register has been fully satisfied extinguished or otherwise determined and no longer affects the land, may make a recording to that effect in the Register;

48. This provision can be used, for instance, for covenants that do not define the land to which the benefit is affixed, or where the benefit of the covenant might be said to have not passed to subsequent successors or transferees.

49. However, our experience has been that the Registrar tends to be conservative in the use of this power and will typically refer applicants to the Supreme Court.

## MODIFYING OR REMOVING EASEMENTS

### Victoria has no scheme for the judicial removal or variation of easements

50. In contrast, Victoria has no scheme for the judicial removal or variation of easements. Other jurisdictions have extended the scope of their provisions for judicial removal to include easements. The VLRC Report in easements and restrictive covenants recommended that:

> 41 Section 84 of the *Property Law Act 1958* (Vic) should be amended to include the power to remove or vary by order easements created other than by operation of statute.

51. Insofar as claims for abandonment are concerned, these are notoriously difficult to prosecute.

52. In *Brookville Pty Ltd v O'Loghlen* , a previous owner of the dominant tenement had erected a double-brick garage which blocked access to the easement. This garage had been in place since at least 1963, far exceeding the 30-years of non-use required to establish abandonment. Section 73 of the *Transfer of Land Act 1958* provides for the deletion from the Register of an easement which has been found to have been abandoned. The relevant provisions of s.73 are as follows:

> (1) A registered proprietor may make application in an appropriate approved form to the Registrar for the deletion from the Register of any easement in whole or in part where it has been abandoned or extinguished. …
>
> (2) Where it is proved to the satisfaction of the Registrar that any such easement has not been used or enjoyed for a period of not less than 30 years, such proof shall constitute sufficient evidence that such easement has been abandoned.

53. Kaye J rejected the application, finding that to establish this, the plaintiff must prove that the owner of the dominant tenement intended to relinquish their rights to the easement forever:

> 17. The relevant intention of the owner of the dominant tenement is generally derived from all the facts and circumstances of the case by a process of inference. In order to establish abandonment, it must be proven that the owner of the dominant tenement, or his predecessors in title, intended forever to forego the rights provided by the easement, and not to assert them again. In *Tehidy Minerals Limited v Norman* [1971] 2 QB 582 at 553, the Court of Appeal (consisting of Salmon, Sachs and Buckley LJJ) stated:
>
> > "Abandonment of an easement or of a profit á prendre can only, we think, be treated as having taken place where the person entitled to it has demonstrated a fixed intention never at any time thereafter to assert the right himself or to attempt to transmit it to anyone else."
>
> 24. … At all times that owner, and indeed his or her successors in title, had the power either to remove the obstruction, or, more realistically, to modify it by inserting a door or other opening in it. That proposition is by no means fanciful. The schematic drawings annexed to the defendant's application for the planning permit demonstrate that it is, and thus always was, feasible for a door to be inserted in the north wall of the garage. Thus at all times the owner of the dominant tenement had in his or her own hands the capacity to insert an opening in the north wall of the garage, and thereby to regain access to the laneway.

54. Insofar as statutory mechanisms to modify or remove easements are concerned, section 23 of the *Subdivision Act 1988* and the *Planning and Environment Act 1987*, together, allow for easements to be removed or varied, without the consent of or compensation being paid to beneficiaries. Section 23 provides:

> **23 What if a planning scheme directs the creation, removal or variation of rights?**
>
> (1) If a planning scheme or permit regulates or authorises the creation, removal or variation of an easement or restriction, the owner of the land burdened or to be burdened by the easement or restriction must, in accordance with the planning

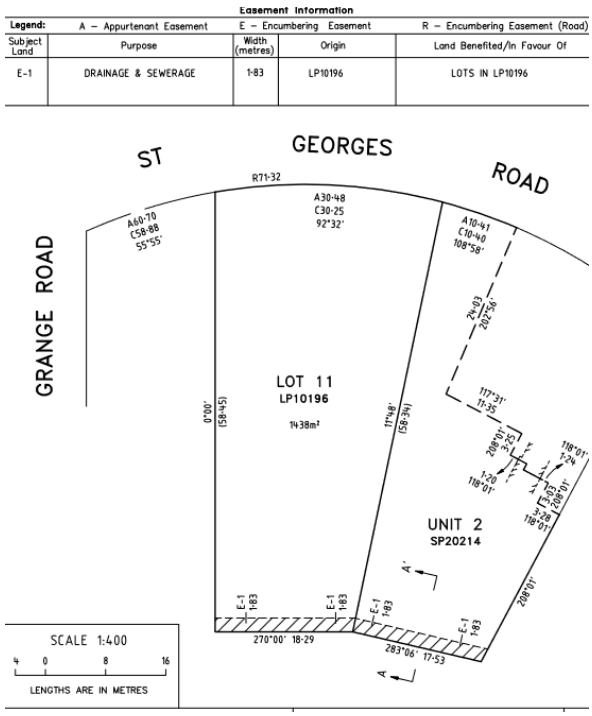
> scheme or permit and with the Planning and Environment Act 1987, lodge a certified plan at the Office of Titles for registration.

55. For this to occur, a planning permit must first be granted under clause 52.02 of the relevant planning scheme, the purpose of which is:

> To enable the removal and variation of an easement or restrictions to enable a use or development that complies with the planning scheme after the interests of affected people are considered.

56. Clause 52.02 provides that before deciding on an application, in addition to the decision guidelines in clause 65, the responsible authority must consider the interests of affected people.

57. An example of this in operation can be found in *Warner Crest Pty Ltd v Stonnington CC* [2019] VCAT 36 in which an applicant wished to remove a drainage easement from the southern end of two properties in St Georges Road, Toorak:




58. The applicant submitted that the easement should be removed as there were no services within the easement, and the properties which could potentially use the easement were already served by alternative locations.

59. The relevant sewerage authority did not object to the removal of the easement.

60. However, the City of Stonnington opposed the removal of the easement on the basis that it may be required at some time in the future.

61. In *Warner Crest*, the easement was not expressed as benefiting any party therefore the Tribunal carried out a substantive analysis to understand which properties would benefit from the easement.

62. Having done so, the Tribunal concluded that "the affected people would not suffer any material detriment from the removal of the easement."

63. The Tribunal then turned to the questions of need and acceptable planning outcomes and found that:

> … there is no need, nor is there a planning reason, to retain the easement. It removes a restriction from land that is no longer necessary and will enable those properties to be more fully utilised.

64. The Application was therefore successful.

65. In contrast, in *Element 96 Pty Ltd v Moorabool SC* [2018] VCAT 1399, the Tribunal refused to allow the removal of the easement on the basis that it was not satisfied that it could properly identify the beneficiaries to the easement. The Tribunal said:

> Unfortunately, resolving the question of who may benefit from the easement is quite a complicated legal question. Difficulties associated with identifying regulatory easements, and of ascertaining the entity responsible for rural drainage have been recognised and discussed elsewhere.

66. The Application was therefore refused, after the Applicant failed to prove its case.

## CREATION OF EASEMENTS

### Easements created in the process of subdivision

67. There are overlapping provisions for the creation of express subdivisional easements contained in two different statutes:

a) section 12(1) of the *Subdivision Act 1988*; and

b) section 98(a) of the *Transfer of Land Act 1958*.

68. Section 12(1) of the *Subdivision Act 1988* requires all proposed and existing easements to be specified in subdivision plans:

> **12 Plan must show easements and other rights**
>
> (1) A plan of subdivision or consolidation must specify—
>
> (a) existing registered easements that burden the land …, the purpose of the easements and either the land benefited by the easements or, if they were authorised by or under an Act other than this Act or the Transfer of Land Act 1958, the public authority, Council, Minister or other person in whose favour they are created; and

69. These easements are then created upon registration of the plan. Easements created under this section are in addition to those created under section 98(a) of the *Transfer of Land Act 1958*.

70. This provision, which predates section 12(1) of the *Subdivision Act 1988*, deems certain classes of easements to be attached to the dominant owner's lot where they are necessary

for the reasonable enjoyment of the land and where they are shown on an approved or registered plan of subdivision:

> **98 Easements arising from plan of subdivision**
>
> The proprietor of an allotment of land shown on an approved plan of subdivision or a lot shown on a registered plan shall be entitled to the benefit of the following easements which shall be and shall be deemed at all times to have been appurtenant to the allotment or the lot, namely—
>
> (a) 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; and

71. In its report into easement and restrictive covenants, the Victorian Law Reform Commission suggested that the two provisions should be consolidated because it is confusing to have two provisions with overlapping operation but different wording. However, this recommendation, along with many others was not acted on.

**Section 36 of the *Subdivision Act 1988***

72. Section 36 of the Subdivision Act 1988 also provides for an owner of land to acquire an easement compulsorily over other land in the subdivision or consolidation, or in the vicinity, if granted leave to do so by the Victorian Civil and Administrative Tribunal (VCAT):

> **36 Power of owner to acquire or remove easements**
>
> (1) If—
>
> (a) when considering a proposed amendment to a planning scheme or an application for a permit or to amend a permit; or
>
> (b) in implementing an amendment to a planning scheme; or
>
> (c) in a condition in a permit—
>
> the Council or a referral authority states in writing that it considers that the economical and efficient subdivision or consolidation (whether existing or proposed) or servicing of, or access to, land covered by the amendment, proposed amendment, application or permit requires the owner of land to—
>
> (d) remove a right of way over the owner's land; or
>
> (e) acquire or remove an easement over—
>
> (i) other land in the subdivision or consolidation; or
>
> (ii) other land in the vicinity—
>
> and that the removal or acquisition will not result in an unreasonable loss of amenity in the area affected by the removal or acquisition, the owner may apply to the Victorian Civil and Administrative Tribunal for leave to remove the right of way or acquire or remove the easement compulsorily.

(1AA) In conferring powers on a Council or referral authority under subsection (1) it is the intention of Parliament that, in considering a matter for the purposes of that subsection, the Council or referral authority should make an assessment of the engineering and amenity aspects of the matter, is not bound to notify anyone affected or to hear objections, but objections to that assessment may be raised before the Tribunal.

(1A) The Tribunal may give leave subject to any conditions it thinks fit.

(2) If leave is given—

(a) in accordance with any conditions to which the leave is subject, the owner may compulsorily acquire the easement and—

(ii) the Land Acquisition and Compensation Act 1986 applies to the acquirement of the easement, and for that purpose this section is the special Act and the owner is the Authority; or

(b) in accordance with any conditions to which leave is subject, the owner may submit for certification and lodge for registration a plan to remove the easement and—

(i) unless the Tribunal otherwise directs, the consent of any person having an interest in land benefited by the easement is not required for its removal, and section 22(1)(c)(d) and (da) does not apply to the removal of the easement; and

(ii) Parts 3, 4, 6, 7, 10 and 11 of the Land Acquisition and Compensation Act 1986 apply to claims for compensation on the removal of the easement by persons having an interest in land benefited by the easement as if the owner who removed the easement had acquired by compulsory process an interest in land benefited by the easement, and for that purpose this section is the special Act and that owner is the Authority.

73. The best step by step analysis of this provision remains the 2007 case of *JT Snipe Investments Pty Ltd v Hume CC* (Red Dot) [2007] VCAT 1831, however, a case decided in March this year *Gale v Frankston CC* [2019] VCAT 62 suggested a slight change in emphasis:

25 With one important proviso, all parties accepted (and we agree) that the leading decision of *JP Snipe Investments Pty Ltd v Hume CC* (Red Dot) [2007] VCAT 1831 commendably sets out broad-brush a comprehensive framework for how the Section 36 assessment process should operate. Hence the hearing before us generally unfolded consistent with the principles set out in *Snipe*.

26 The proviso is as follows. By the end of the hearing process, there was an important dispute between the parties as to whether, in the circumstances here, the Section 36(1) test for the potential granting of leave should be applied 'narrowly' or 'broadly' (see detailed discussion below).

…

32 The debate set out above is complicated by the less-than-ideal drafting of Section 36. It is stated at [13] of Snipe (and I agree) that "The section 36 framework is complex and the wording of the provision is cumbersome". It follows that rather

than myself searching for a simple answer to this point of law, it more seems a case of 'making the best of a difficult legal issue to resolve'.

33 For the following reasons, the Tribunal rejects the submission by the permit applicant that the Tribunal must take a 'narrow' approach to the application of Section 36(1), and that it must not consider "economical and efficient" considerations.

34 Rather, I am satisfied that the Tribunal has an unfettered and very broad discretion as to what matters it should take into account, in making its Section 36 findings.

74. The VLRC report also recommended that section 36 be abolished insofar as it relates to the acquisition of private easements—its reasons for doing so, highlights the cumbersome nature of the process:

> The procedure for an acquisition under section 36 of the Subdivision Act is complex and may result in multiple discontinuous hearings. The applicant must first obtain a permit or a written statement from the council or a referral authority. A decision by a council or referral authority to either make a written statement or to decline to make it is reviewable by VCAT, and is heard by the Planning and Environment List. An application for leave to acquire the easement is heard by VCAT's Real Property List. If leave is granted, the compensation is assessed by VCAT's Valuation List.

**Implied easements**

75. Another way easements can arise without being expressly created is under a common law rule called prescription. A prescriptive easement can be acquired by what is called 'long user' or 20 years of continuous use.

76. Victoria retains many common law rules of implication and prescription that predate the subdivisional planning system, as well as the new statutory provisions for implied subdivisional easements. The result was described in the VLRC report as a complex jumble of overlapping rules.

77. Earlier this year, in *Laming v Jennings* [2018] VSCA 335, the Court of Appeal made some interesting comments about the apparent inconsistency of prescriptive easements with the Torrens system:

> 179 This ground raises the uneasy interaction between easements by prescription and the Torrens system of land registration. Although the position is different in some other States, easements by prescription have been upheld in Victoria since at least the decision of the Supreme Court in *Nelson v Hughes*. The applicant did not contend that *Nelson v Hughes* was wrongly decided.
>
> 180 On the basis of that authority, an easement by prescription may be established where there is long user for 20 years and the necessary degree of acquiescence on the part of the servient owner. The issue raised by ground 4 is whether s 42 of the TLA has the effect that the claim can only be raised against a single registered owner so that a change of registered owner re-starts the relevant 20 year period.

78. The Court expressed the concern that the doctrine of lost modern grant may operate more unfairly in the case of a person who becomes the registered proprietor of the servient tenement during the period of 20 years of uninterrupted use compared to a person who has remained the registered proprietor for the entire period. This is because the former

person has less opportunity to observe the user and take steps to stop it, particularly if he or she becomes the registered proprietor in the last weeks of that period.

79. It concluded by noting that the historical rationale of legal fictions such as the doctrine of lost modern grant has significantly diminished with the advent of modern systems for the registration of title, comprehensive planning laws and more mature land law jurisprudence:

> 197 In *Pyrenees Shire Council v Day*, Gummow J said 'the spirit of the times [is] unfavourable to the preservation of legal fictions and hostile to the creation of new legal fictions'. He repeated this statement in *Scott v Davis*. The statement was quoted with approval by Mason P in Williams. His Honour stated:
>
> > [I]t is to pile fiction upon fiction to extend the doctrine of lost modern grant into the Torrens system, because (assuming no relevant exception to s 42 or its equivalents) that system contemplates title at law as arising only upon registration. To transpose the fiction of lost modern grant into a Torrens context one has to presume considerably more than the loss of an executed (and delivered) deed. At the very least, one would have to presume the execution and delivery of a registrable instrument. But logic suggests that one has to go further and presume delivery accompanied by certificate of title, since that is the normal way in which the person entitled to have an interest registered goes about perfecting such title so far as lies in the grantor's power. Indeed, the title is only perfected through the act of a third party (the Registrar-General), and there is no basis for inferring that officer's acquiescence in the user giving rise to the common law doctrine.

80. This matter is now the subject of a special leave application before the High Court.

## CONCLUSION

81. By way of conclusion, I note that I'm routinely asked by prospective purchasers of land whether people should buy land on the assumption that an easement or restrictive covenant can be modified or removed in order for it to be developed.

82. While covenants, in particular, can cost as little as a few thousand dollars to modify if things go well, parties have also been known to spend close to half a million dollars to modify covenants without success.

83. Equally, while we have on occasion been able to modify covenants through the Supreme Court in a matter of weeks, we are also waiting on one decision that has been reserved for over a year.

84. So while some applications receive little or no sustained opposition, others ignite well-orchestrated and well-resourced community campaigns.

85. The bottom line, is that the land is of no use to your client unless the encumbrance is modified or removed, the first question to ask is whether there isn't a similar parcel of land elsewhere that is not so encumbered.

END