Chapter 4
Implied and Prescriptive Easements

CONTENTS

Implied easements 44
  Common law implied easements 44
  Easements implied by statute 47
Prescriptive easements 50
  Criticisms of prescription 51
  Conclusions on reform of prescription 54
Statutory reciprocal rights 57
Easements and the Torrens system 58
  Should easements be recorded or registered? 58
  Common law extinguishment by unity of estates 59
  Narrowing the enforceability of unrecorded easements 60
Today, most easements needed for access to land and the provision of services are created by plan of subdivision or by an instrument of transfer on sale. In the past, the process of subdividing land was not regulated by planning law, and the creation of easements was unsystematic.

When part of a larger lot was sold, vendors and purchasers did not always turn their minds to whether an easement was needed for the benefit of the sold land or the land retained by the vendor. Consequently, the common law developed certain rules or ‘doctrines’ that operated to create easements by implication, based on the actual or presumed intention of the parties.

Apart from easements implied under common law doctrines, certain easements can be implied by operation of statute when the land is subdivided, even though their nature and location is not specified on the plan of subdivision. We call them ‘implied subdivisional easements’.

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’ (20 years continuous use).

Victoria retains all the 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 is a complex jumble of overlapping rules. In this chapter, we consider which of these rules are still needed and what changes should be made to streamline them and improve their operation.

We think that, as far as possible, easements should be shown on the folio for the servient land in the title register so that purchasers can easily discover them. We discuss which easements should have to be registered or recorded, and which should be enforceable against subsequent owners of the servient land even if unregistered and unre corded.

IMPLIED EASEMENTS
COMMON LAW IMPLIED EASEMENTS

In Chapter 3 we explain that private easements can be expressly created at common law either by grant or by reservation. The distinction between grant and reservation also matters when discussing implied easements. Some types of implied easements can only be created by implied grant.

An easement created 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 also be able to use the driveway to access the sold land.

Conversely, 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, the parties may intend to reserve a right of carriageway over the land sold, to provide the vendor’s retained land with 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.

The types of easements that can be created at common law by implication include:
- easements of necessity
- intended easements
- easements implied under the rule in Wheeldon v Burrows.2
Easements of necessity

4.11 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.3

4.12 The doctrine relies on the actual or presumed intention of the parties rather than on public policy.4 If the parties did not intend to create the easement, it will not be created despite its necessity. For example, in North Sydney Printing Pty Ltd v Sabemo Investment Corporation Pty Ltd,5 a lot was subdivided and part sold without an easement, leaving the remaining portion landlocked. The court held that an easement of necessity was not created as there was in fact no intention to retain access to the remaining portion.

Intended easements

4.13 Intended easements are easements that are implied in order to give effect to the common intention of the vendor and the purchaser as to the proposed use of the land.6 The easements can be either impliedly granted to a purchaser or impliedly reserved by a vendor. For example, the grant of a right of way to service a building might be implied where the vendor knew of the purchaser’s plan to construct the building on unimproved land.7

The rule in Wheeldon v Burrows

4.14 Under the rule in Wheeldon v Burrows,8 the grant of an easement may be implied where the vendor enjoyed a ‘quasi-easement’ over the retained land before the sale. A quasi-easement is a use that would be capable of being an easement if the servient and dominant lands were owned or occupied by different persons.9

4.15 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 was sold. Prior to the sale, the vendor’s right to use the driveway is called a ‘quasi-easement’.10

4.16 The conditions under which a quasi-easement will become an implied easement on the sale of the land are:

- 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
- at the time of the sale, the vendor used the quasi-easement for the benefit of the land sold.10

4.17 If all the conditions are satisfied, the quasi-easement becomes an implied easement over land retained by the vendor for the benefit of the sold land.

4.18 The rule in Wheeldon v Burrows was more useful in the days before subdivisions were regulated by planning law. If a vendor subdivides land into separate lots for sale, the Subdivision Act 1988 (Vic) (Subdivision Act) provides for easements to be created by plan.11

4.19 The rule may still be needed for cases where a vendor owns adjoining lots with separate titles and no subdivision is required before the sale of one lot. For example, a farmer may buy up adjoining lots without consolidating them into a single lot,12 use them as one large farm for a time, and then sell one of the lots.
Reform of implied easements

4.20 In our consultation paper, we outlined three options with regard to common law implied easements:

- retain the current law
- codify the common law rules of implication in a statute, or
- replace the common law rules of implication with a scheme that empowers a court or the Victorian Civil and Administrative Tribunal (VCAT) to order the grant of an easement that is reasonably necessary for the use of land.

4.21 Lynden Griggs supported the codification option, noting that common law rules are complex. In his view, a statutory system could overcome deficiencies in the common law. It could ensure that the result is not necessarily ‘winner takes all’ by imposing conditions on the use of an easement granted or implied by statute and the payment of compensation. The Law Institute of Victoria supported abolishing some rules for implied easements and adopting court-ordered easements.

4.22 Some submissions expressed a preference for retaining all of the common law rules for implied easements. Michael Macnamara argued that an inspection of the land should put a prospective purchaser on notice, and that the doctrines of implication ‘come to the aid of the status quo on land where … easements under subdivisional legislation have not been brought into existence’. Land Victoria and the Real Estate Institute of Victoria also indicated that they would prefer the common law rules of implication to remain.

4.23 We consider that just one type of common law implied easement should be abolished: the easement of necessity.

4.24 There is some overlap between the easement of necessity and intended easements. Recent authorities indicate that the common law easement of necessity is based on the intention of the parties. The Ontario Law Reform Commission says that easements of necessity may merely be examples of intended easements. Abolishing the easement of necessity would help to streamline the categories of implied easements by reducing overlap.

4.25 There would be no need to retain the common law easement of necessity if, as we recommend in Chapter 3, VCAT can order the grant of an easement that is both:

- reasonably necessary for the effective use and development of the dominant land
- consistent with the reasonable use and enjoyment of the servient land.

4.26 The standard of necessity that we recommend VCAT apply is the same as that which applies to the creation of implied subdivisional easements under section 12(2) of the Subdivision Act (discussed below). It derives from the rule in *Wheeldon v Burrows* and is not as strict as the standard that must be met for the creation of a common law easement of necessity. Therefore, any rights that would have been recognised under the common law easement of necessity would meet the requirements for creation of an easement by VCAT order.

4.27 Although it should no longer be possible to acquire an easement under the common law doctrine of necessity, subsisting easements of necessity should be expressly preserved.
4.28 The remaining common law doctrines, intended easements and easements implied under the rule in *Wheeldon v Burrows*, serve the useful function of giving effect to the actual or presumed intention of the parties to a transaction. As we received no submissions that the rules caused actual hardship to purchasers of land burdened by the easements, we think they should be retained.

**RECOMMENDATION**

15. From the commencement of the provision for easements created by VCAT order (Recommendation 6), it should no longer be possible to acquire an easement under the common law doctrine of necessity. It should still be possible to acquire an implied easement under other common law rules.

**EASEMENTS IMPLIED BY STATUTE**

Section 62 of the Property Law Act

4.29 At common law, it was customary to include in conveyances of land certain ‘general words’ to ensure that interests and rights enjoyed by the vendor passed to the purchaser, including all of the easements that benefited the land prior to the sale. In order to shorten the length of conveyances, legislation was enacted to deem the general words to be included in all conveyances. ‘Conveyance’ is widely defined, and includes an instrument of transfer.

4.30 Section 62 of the *Property Law Act 1958* (Vic) (Property Law Act) deems conveyances of land to include ‘all … privileges, easements, rights and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof’.

4.31 This provision applies to transfers of land under the operation of the *Transfer of Land Act 1958* (Vic) (Transfer of Land Act) as well as to transfers of land under the previous deeds-based system of title.

4.32 The effect of section 62 of the Property Law Act is that any easements or covenants or other interests attached to the land pass with it, regardless of whether they are specified in the instrument of transfer. In addition, section 62 may also operate to convert revocable licences into easements.

4.33 Section 62 may operate in a way the parties did not intend, particularly where a licence is converted into an easement. A number of other jurisdictions have identical provisions, all derived from section 62 of the *Property Law Act 1958*.

Implied subdivisional easements

4.34 Section 24(2)(d) of the Subdivision Act and section 98(a) of the Transfer of Land Act operate to create certain easements as specified in a registered plan. We discuss these express subdivisional easements in Chapter 3.

4.35 Section 24(2)(e) of the Subdivision Act operates to create another type of easement by registered plan even though its nature and location are not specified in the plan. We call easements of this type ‘implied subdivisional easements’.
4.36 Section 24(2)(e) of the Subdivision Act provides that, on registration of the plan, ‘any easements or rights implied by section 12(2) are created’.

4.37 Section 12(2) of the Subdivision Act provides that there are implied into certain plans of subdivision,\(^{30}\) for the benefit of each lot and any common property, ‘all 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
- maintenance of overhanging eaves.

4.38 It is possible to expressly note in the plan that only some, or none, of these easements will be implied over the subdivision.\(^{31}\)

4.39 The easements are implied into the plan of subdivision if they are both:

- necessary for the reasonable use and enjoyment of the lot or the common property
- consistent with the reasonable use and enjoyment of the other lots and the common property.

4.40 The phrase ‘necessary for the reasonable use and enjoyment’ is derived from *Wheeldon v Burrows*. The standard it imposes is less strict than the standard of necessity required for a common law implied easement of necessity.\(^{32}\) The word ‘necessary’ in this context has been interpreted to mean essential, rather than substantially preferable.\(^{33}\) Whether an easement is essential depends on whether there is a feasible or reasonably available alternative.\(^{34}\) The standard of necessity required for the easement has therefore been held to be more than as a matter of ‘mere convenience’,\(^{35}\) but not ‘absolutely essential’.\(^{36}\)

**Conflict with the Torrens system**

4.41 In our consultation paper, we noted that there are different schools of thought about whether implied easements are consistent with the principles of the Torrens system.\(^{37}\) In one view, implied easements undermine the Torrens system because prospective purchasers may be unaware of them. They are not recorded on the register, yet are enforceable against subsequent registered owners.\(^{38}\) The alternative view is that implied easements have always been enforceable against subsequent registered owners without being recorded on title; they were taken into account when the Torrens system was designed.\(^{39}\)

4.42 As we discuss below, similar arguments are made about prescriptive easements, which are acquired by long possession or use of land. However, our conclusions about the two different categories of easement are quite different.

4.43 Unlike prescriptive easements, implied easements continue to make a valuable contribution to efficient land use. As Land Victoria pointed out ‘[t]he implication of statutory easements is an essential and common part of modern surveying and land registration practice’.\(^{40}\)
It was suggested that implied subdivisional easements are needed because it is not always possible to determine the precise location of installations such as electrical cables and air conditioning units when a plan of subdivision is being prepared. Although it would be desirable to have all easements appear on the register where purchasers can readily discover them, it is not practicable to require all easements to be expressly created and recorded. Land Victoria observed:

*It is not always possible to know with sufficient accuracy where a building boundary will be located until after it is built. In many cases the location of an implied easement cannot be known at the outset. Later insertion of location would be expensive and very complex for multi-storey buildings.*

We believe that implied subdivisional easements are more likely to prevent and settle disputes among lot owners than to create them. We received no submissions indicating that purchasers were disadvantaged by them. However, as we discuss in the next section, there is a risk that purchasers could be disadvantaged if the necessity for an implied subdivisional easement can arise from circumstances that did not exist when the plan was registered.

**Possible future application**

In *Gordon v Body Corporate Strata Plan 3023,* Justice Osborn held that the easements implied by section 12(2) of the Subdivision Act did not depend on the circumstances existing at the time of the subdivision. He held that the phrases ‘necessary for the reasonable use and enjoyment of the lot or the common property’ and ‘consistent with the reasonable use and enjoyment of the other lots and the common property’ in section 12(2) should be interpreted as having a prospective operation.

Justice Osborn examined the legislative history of section 12 of the Subdivision Act. The predecessor provision, section 12 of the *Strata Titles Act 1967* (Vic), operated to create implied subdivisional easements that ‘may from time to time be necessary for the reasonable use or enjoyment’ of the common property and each unit on the registered plan. Section 12(2) of the Subdivision Act, as originally enacted, provided that certain classes of easements were created based on circumstances existing at the time the plan was registered. Those temporal references were subsequently removed by amendment. Justice Osborn concluded that the terms and history of the legislation show that, if the implication of easements was meant to be confined to circumstances existing at the time of the subdivision, the Act would contain express words of limitation.

In a subsequent decision, the Court of Appeal appears to have approved Justice Osborn’s interpretation.

The potential for implied subdivisional easements to bind unsuspecting purchasers of the servient land increases substantially if the necessity for them can be implied from circumstances that exist from time to time. Purchasers cannot be expected to anticipate easements that may only become necessary as a result of future development of the dominant land that was not contemplated in the plan.

In *Gordon v Body Corporate Strata Plan 3023,* Justice Osborn held that an easement could be implied under section 12(2) of the Subdivision Act for a building extension undertaken 32 years after the subdivision.
Chapter 4

Implied and Prescriptive Easements

4.51 We recognise that lots are commonly sold in an undeveloped state with an expectation or requirement that the purchaser will build on the lot. But the process of implication should not have unlimited prospective operation. The purpose of section 12(2) of the Subdivision Act is to imply provisions required for an effective subdivision. It should not be an unlimited grant of implied easements for extensions and works undertaken long after the built environment in the subdivision is established.

4.52 We believe that the implication of an easement under section 12(2) of the Subdivision Act should arise from circumstances that existed or were planned by the developer at the time of subdivision.

4.53 If a regulatory easement subsequently becomes necessary, the owners corporation or lot owner should apply under section 36 of the Subdivision Act to acquire it for the benefit of the relevant service provider. If a private easement is required and the lot owner cannot obtain it by agreement, the owner of the dominant land would be able to apply to VCAT, under our proposed new provisions, for an order granting an easement. In both cases, VCAT would be empowered to make an order for compensation.

RECOMMENDATION

16. Section 12(2) of the Subdivision Act 1988 (Vic) should be amended, without prejudice to any existing rights, to require the circumstances that create the necessity for an easement or right to be in existence or in the developer’s plan at the time of subdivision.

PREScriptive easements

4.54 Prescriptive easements are a separate category of easement that can be created by operation of common law without an express grant. Prescription is an ancient legal principle under which certain types of property rights can be acquired by long possession or use of land. It underlies many rules of property law in English law and European legal systems.49

4.55 In Victoria, the ‘long user’ (use) of a right over neighbouring land can give rise to an easement for the use, under a rule of prescription known as the doctrine of lost modern grant.50 By a legal fiction, it is presumed that an easement for the use was granted but the documentary evidence of the grant has been lost.51 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’.52

4.56 For an easement to arise by prescription, the use must have been capable of being the subject of an easement at common law.53 The use must have been exercised ‘as of right’ and for a continuous period of 20 years or more (the prescription period).54

4.57 It has been said that use ‘as of right’ means use ‘as if of right’.55 For the use to be ‘as of right’ it must be without force, without secrecy and without permission.56 If the use is authorised by a licence, permit or lease, it will not give rise to a prescriptive easement. Whether use of land has been ‘as of right’ will be a question of fact to be determined by the court.57

4.58 In addition, the servient owner must have acquiesced in the use throughout the 20-year prescription period.58 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.59
4.59 Western Australia allows easements to be acquired by prescription on the same basis as Victoria. South Australia allows prescriptive easements to run with land only where the same registered owner owned the land for the whole of the prescription period and the easement has been registered. Tasmania has replaced common law prescription with a statutory scheme. Prescriptive easements cannot be acquired over registered land in New South Wales. Queensland does not allow rights of way to arise by prescription. Otherwise, the position in Queensland, and in the ACT and the Northern Territory, is unclear.

**CRITICISMS OF PRESCRIPTION**

4.60 As noted in our consultation paper, prescription has been controversial in Australia and many other jurisdictions. Critics of prescription have said that it:

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

Conflict with the Torrens system

4.61 Like implied easements, prescriptive easements are enforceable against subsequent owners of the servient land even though they do not appear on the register. They are difficult for purchasers to discover, particularly as the use giving rise to the easement might be intermittent and unobservable on inspection of the land.

4.62 Even if a purchaser is aware of the easement, it may be difficult to ascertain its scope since there is no document that sets out the terms. The scope depends upon the use of the servient land during the prescription period. There may be evidentiary difficulties in establishing the extent and nature of the use during that time.

4.63 There is a policy principle that, in a system of registered title, interests should not run with land unless they are registered or recorded on title. The former Law Reform Commission of Victoria recommended that prescriptive easements be abolished, partly because of the conflict with this principle. Other commentators have also criticised prescription on this point. In his submission, Mr Griggs stated that ‘[p]rescriptive easements have no role to play in a system of Torrens title and their historical legacy has caused nothing but confusion and division’.
4.64 The contrary view is that easements of all kinds have long had a special position under the Torrens system in Victoria and therefore prescriptive easements form part of the overall scheme.74

Fairness and human rights
4.65 Prescription has been criticised for allowing claimants to acquire a permanent proprietary right for nothing or by ‘mere accident’.75 The Irish Law Reform Commission said that prescription arguably lacks ‘any moral justification’ for its operation.76

4.66 Where the acquisition of the right is not by ‘mere accident’, prescription has been criticised as rewarding the dominant owners for what would otherwise be wrongful behaviour.77 Professor Brendan Edgeworth calls it ‘legalised theft’.78

4.67 It could be argued that the acquisition of an easement by prescription is contrary to human rights because it occurs without consent, due process or compensation.79 However, we do not think that prescription is contrary to the Charter of Human Rights and Responsibilities Act 2006 (Vic) (the Charter). Section 20 of the Charter states that ‘a person must not be deprived of his or her property other than in accordance with law’. Prescriptive acquisition has long been permitted by Victorian law and may be considered to be ‘in accordance with the law’.

4.68 Professor Edgeworth submitted that, even if the Charter does not authorise the courts to overturn a long-established principle like prescription, human rights as expressed in decisions of bodies such as the European Court of Human Rights ‘offer sound policy reasons for the reform of the domestic law in Australia’.80

Indiscriminate mechanism
4.69 One of the strongest justifications for prescription is that it protects expectations and reliance based on long use,81 but it is poorly designed for this purpose. Professor Edgeworth characterises it as an indiscriminate mechanism.82

4.70 In some respects, the operation of prescription is too broad. 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.83 Even if reliance exists, it does not follow that it should create an easement.84 To confer a permanent property right in the land ‘confers too many benefits on the long user’.85 It is a disproportionate response.

4.71 In other ways, prescription is too limited. The requirement of acquiescence by the servient owner limits its value in protecting reliance based on long use. 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
4.72 Acquiescence by the servient owner is the basis of prescription,86 but tolerance of a neighbour’s incursions might be explained by other factors. 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.87 The Law Commission of England and Wales noted that prescription may actually operate to penalise altruism and ‘good neighbourly’ attitudes.88

4.73 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 acquisition of a prescriptive easement of support of a building.89 In such cases, it is likely that ‘often the acquiescence will be a fiction not a fact’.90
Unnecessary in light of modern planning

4.74 The development of prescription was driven by the lack of planning regulation, and particularly the unregulated private subdivision of land.91 The introduction of legislation that provides for the creation of express and implied subdivisional easements upon registration of a plan of subdivision has diminished the need to rely on prescription. As noted by Moses and Sherry, ‘[h]ighly regulated modern systems of planning greatly reduce the likelihood that land will be developed without necessary easements being created’.92

Easements over land held by councils and other statutory authorities

4.75 Submissions from several councils and VicTrack expressed the view that the law should not permit persons to acquire prescriptive easements over their land.93

4.76 VicTrack is a statutory body that owns most of Victoria’s railway land. It submitted: ‘It seems incongruous that VicTrack is immune from adverse possession claims, but could be subject to claims for lesser interests in land, such as unregistered easements and rights of way by long user. This is particularly so, given the quantity, nature and geographical spread of VicTrack’s landholdings ... The reasons for protecting VicTrack from adverse possession claims apply equally to these other claims.’94

4.77 The City of Greater Geelong said that claims to prescriptive easements over council land commonly relate to land that was purchased for parking at the rear of retail and commercial areas but is used for unauthorised access to adjoining private properties.95 Claims also arise where owners of private adjoining land install gates in park fences, boat ramps over sensitive coastal reserves and double-locks on gates to parkland to gain vehicular access to the rear of their properties.

4.78 The City of Greater Geelong offered the following justifications for statutory protection against prescriptive easements on council land:

- Loss of interest in community land is against the public interest.
- If private owners are seeking permanent easements over public land, where appropriate, that right should be purchased at fair value.
- Council’s landholdings are extensive and detailed management of prescriptive easements through access licences is onerous.96
- Administering a licence system for access to Council land is often viewed by licensees as overly restrictive and aimed at revenue raiseing.
- Councils have limited means to prevent unauthorised access once established. Local laws allow only for fines, and enforcement of the Fences Act 1968 and trespass requires the obtaining of court orders.
- Resisting registration of prescriptive easements requires time consuming research and gathering of historic information. Witness statutory declarations introduce a level of subjectivity into the process.97

4.79 These submissions demonstrate that prescriptive acquisition imposes significant abatement costs on councils, statutory authorities and corporations such as VicTrack. Accounts of landowners brazenly installing locks, gates and boat ramps on council property for their own use are disturbing. It seems that prescription may provide an incentive for landowners to make unauthorised use of adjoining land from which it is difficult or costly to exclude them.
Alternatives to prescription

4.80 In our consultation paper, we noted that prescription provides benefits as well as creating problems. It may have a function in quieting disputes where a servient landowner might otherwise seek to disrupt a longstanding use of the land. It may also save costs by allowing easements of a minor nature to be created by long use where the cost of recording or registering them is out of proportion to the perceived need.

4.81 If the rule of prescription is abolished, there is a need to ensure that the functions it currently serves are met in other ways. In our consultation paper, we suggested that this could be achieved by a combination of:

- existing express and implied subdivisional easements created under the Subdivision Act
- the introduction of court-ordered easements, subject to payment of compensation
- new statutory reciprocal rights in the nature of easements, to avoid the need to rely on prescription to obtain an easement of party wall or an easement of support for buildings (discussed later in this chapter).

4.82 Three submissions indicated that prescription should not be abolished in favour of court-ordered easements. Mr Macnamara said that:

> [T]he rule of prescription … generally come[s] to the aid of the maintenance of the status quo on land where for a variety of reasons express easements or statutory easements under subdivisional legislation have not been brought into existence.

4.83 Eight submissions indicated clear support for replacing prescription with court-ordered easements. Professor Edgeworth submitted that a mechanism for court-ordered easements similar to section 88K of the Conveyancing Act 1919 (NSW) would be ‘a useful alternative regime for dealing with compensable … interests by prescription’. He said that the provision for compensation overcomes the human rights objections to compulsory acquisition.

4.84 As we discuss in Chapter 3, we favour the introduction of easements created by order of VCAT rather than by a court, though section 88K of the Conveyancing Act 1919 (NSW) provides a useful model.

CONCLUSIONS ON REFORM OF PRESCRIPTION

4.85 Prescription should be abolished, not just for land owned by councils and statutory authorities, but for all land. Prescription was needed in the past when easements were a matter of private agreement between landowners and subdivision of land was unregulated. Modern planning has greatly diminished the need for it, and the needs that remain can be served by other mechanisms.

4.86 Prescription is also at odds with international human rights norms. It allows property rights to be acquired over somebody’s land without consent, without notice and without compensation. To accord with human rights, such a law would have to be a measure that is ‘carefully considered, balanced and proportionate’.

4.87 The legal principle of prescription, and specifically the doctrine of lost modern grant, is not ‘carefully considered’. It was received in Victoria along with the common law of England, and has never been adopted into Victorian legislation. Parliament has not had occasion to consider whether the doctrine should be retained. It is not ‘balanced’, as there is no balancing of the competing interests of claimants and the landowners over whose land an easement is claimed. It is not ‘proportionate’, since the creation of an easement may in some cases be more than what is required to satisfy the claimant’s reliance on the use.
4.88 There is a further public interest in preventing the acquisition of prescriptive easements over land that is required for public purposes. The need to prevent unauthorised uses from ripening into easements imposes significant costs on councils and corporations, which are ultimately borne by ratepayers and taxpayers.

Long use and easements created by VCAT order

4.89 One of the functions of prescription is to give effect to expectations arising from long use of other land. We recommend in Chapter 3 that VCAT should be able to order the creation of easements in certain circumstances.\(^\text{107}\) In accordance with our recommendation, easements created by order of VCAT would be able to satisfy expectations arising from long use where the easement is reasonably necessary for the use of the land that has the benefit of the easement.

4.90 There is clear authority in Queensland and New South Wales that long use is a relevant factor in determining whether to grant an easement under the court-ordered easement provisions in those states.\(^\text{108}\) In *Marshall v Council City of Wollongong*, Justice Bryson said, in applying the court-ordered easement provision in section 88K of the *Conveyancing Act 1919* (NSW):

> 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.\(^\text{109}\)

4.91 Easements created by order of VCAT offer many advantages over common law prescriptive acquisition of easements:

- Their use would remove an incentive to trespass, since longstanding use would no longer be the sole consideration in obtaining an easement.\(^\text{110}\)
- Easements that were granted would only be as broad as the necessity dictated, rather than being potentially overbroad, as they are under the doctrine of prescription.
- VCAT-ordered easements would be more certain in scope since they are defined by the terms of the order and not by the nature of the use during the prescription period.
- A provision for obtaining easements by order of VCAT satisfies human rights concerns by providing due process and compensation for servient owners.
- The local council and referral authorities can be notified of the application for an easement.

**RECOMMENDATION**

17. From a date on which the provision for easements created by order of VCAT commences (the specified date), the rule of law permitting a person to acquire an easement by long user under the fiction of lost modern grant (prescriptive easements) should be abolished.

Transitional provisions

4.92 A key issue in making the transition to a system that no longer recognises certain unrecorded rights as enforceable against subsequent registered owners is what should be done with those rights that already exist and are enforceable but are not currently recorded.
Chapter 4

Implied and Prescriptive Easements

4.93 We considered whether subsisting prescriptive easements should be preserved only if they are recorded or registered within a specified time. They can be recorded by the Registrar under section 72(2B) of the Transfer of Land Act on the evidence of a legal practitioner’s certificate, or under section 103(1) where a court directs the Registrar to give effect to a judgment or order.

4.94 We came to the view that this option would be impractical. We expect that very few owners of prescriptive easements would seek to record them, even if an alternative procedure for proving and recording the claims were provided. Holders of prescriptive easements tend to take them for granted and would not think to protect them until they perceive a risk of losing them. There is no sure and easy way of identifying the holders of the easements to alert them to the need to register or record easements within a time period specified by statute.

4.95 A requirement to record easements within a specified time would impose significant compliance costs in assembling evidence to support the claim. The need to prove the claims would also stir up disputes between users and servient owners. The costs of recording the easements would be out of proportion to the benefits of a more complete register.

4.96 For these reasons, we have concluded that prescriptive easements that are subsisting and still in use should be preserved without a requirement to record them.

**RECOMMENDATION**

18. A prescriptive easement that is subsisting and in use on the specified date should be expressly preserved.

Immature claims

4.97 A person who has been using somebody else’s land for less than 20 years in a way that would, at the end of that period, give rise to a prescriptive easement, may be said to have an ‘immature claim’ to a prescriptive easement.

4.98 New Zealand did not preserve immature claims when it abolished the doctrine of lost modern grant. Section 296(1) of the Property Law Act 2007 (NZ) provides:

> After 31 December 2007, no period of time runs, or continues to run, in favour of a person who, but for this subsection, would, at the expiry of that period, acquire, by continuous use or enjoyment throughout that period, (a) a prescriptive right to an easement.

4.99 We agree with the law reform commissions of Ontario, British Columbia and Manitoba that immature claims should not be preserved to enable them to mature into prescriptive easements. The use of land for less than 20 years does not give rise to an existing right. It is a wrongful act that the landowner is entitled to terminate at any time within the prescription period. If immature claims are necessary for the use of other land, the claimant would have the option of applying to VCAT for an order to create an easement.

**RECOMMENDATION**

19. Upon the abolition of prescriptive easements, immature claims to a prescriptive easement should not be preserved.
Profits à prendre

4.100 Prescription also applies to another category of property rights called a profit à prendre (profit). A profit can be defined as a ‘right to enter another person’s land and take away part of the soil or the natural produce of the soil’.114

4.101 Common examples of the subject matter of a profit are timber, crops, wild birds or animals (such as rabbits), sand, gravel, and fruits. A profit is similar to an easement in that it is an interest in land that does not give a right to possess the land. Unlike a private easement, it can be held in gross.115 At common law, profits can be created by express grant or by prescription.116

4.102 If prescription is abolished, it would be necessary to consider whether the abolition should extend to profits as well as easements. As profits were not included in our terms of reference, we have not examined this issue.

STATUTORY RECIPROCAL RIGHTS

4.103 Some legislation in Victoria and other jurisdictions creates statutory rights that serve the function of easements. These statutory rights supplement implied subdivisional easements in ensuring the efficient and effective use of land, though they do not depend on the registration of a plan of subdivision.

4.104 They typically exist as reciprocal rights between landowners. For example, under current Victorian legislation, landowners have certain reciprocal rights in relation to fences under the Fences Act 1968 (Vic) (Fences Act).

4.105 We suggested in the consultation paper that several other categories of statutory reciprocal rights could be created in order to reduce the need for easements or to remedy issues with the common law rules. We proposed that reciprocal rights be created in party walls, the support of buildings and temporary rights of access to adjoining land. Legislation creating such reciprocal rights has been adopted in other states and territories.117

4.106 Of the submissions that commented on this issue, all but one agreed that statutory reciprocal rights similar to those which exist in other jurisdictions should be created in Victoria.118 Wellington Shire Council argued that section 12(2) of the Subdivision Act is adequate for this purpose.119

4.107 Although there is a natural right to the support of land in its unimproved state, which does not depend on the creation of an easement, an easement for the support of buildings from adjoining land must be created in a manner recognised by law such as by grant, implication or prescription.120 Under section 12(2)(c) of the Subdivision Act, all easements and rights necessary to provide ‘support, shelter or protection’ are implied into a plan of subdivision. This probably covers support of buildings121 and party walls, but only where the land and structures are contained in a plan of subdivision. For this reason, we remain of the view that legislation to clarify and extend the rights implied under section 12(2) of the Subdivision Act is necessary.

4.108 The Law Institute of Victoria agreed that the adoption of statutory rights for party walls and support of buildings is desirable, but pointed out that the Fences Act and the Building Act 1993 (Vic) (Building Act) already allow access to neighbouring land for certain purposes, though the adequacy of their scope and application may require review.122
Chapter 4

Implied and Prescriptive Easements

4.109 Certainly, the Fences Act does provide statutory rights of access in certain circumstances. 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. 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.\textsuperscript{123}

4.110 The Building Act contains limited provisions dealing with a right of entry to carry out works. Under section 95 of that Act, an adjoining landowner can enter neighbouring land to ‘carry out protection work required by the building regulations’, subject to some restrictions.\textsuperscript{124} 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.

4.111 We recommend that legislation be introduced to allow access to adjoining land in other reasonable circumstances. It could supplement rather than replace existing legislation.

\begin{center}
RECOMMENDATIONS
\begin{enumerate}
\item The Property Law Act 1958 (Vic) should provide a reciprocal right of support by a party wall where on adjoining lots there are erected buildings supported by a party wall. The owner of each lot should have the right to the continued existence of the portion of the wall that is necessary for the support of a building on the owner’s land and is part of the adjoining lot.
\item The natural right to the support of land in its unimproved state from neighbouring land should be extended to provide a right of support for buildings and structures on the land.
\item On the application of an owner or occupier of land, VCAT should be empowered to make an order authorising the applicant to enter neighbouring land for the purpose of carrying out necessary or desirable works to the applicant’s land or to a structure on the land, on such terms as VCAT thinks fit.
\end{enumerate}
\end{center}

EASEMENTS AND THE TORRENS SYSTEM

4.112 In our consultation paper, we asked whether easements expressly created by instrument should be registered or recorded, and whether unregistered easements should continue to be enforceable.\textsuperscript{125}

4.113 The responses and our conclusions regarding private easements are discussed in the following sections. We discuss the recording and registration of regulatory easements in Chapter 5.

SHOULD EASEMENTS BE RECORDED OR REGISTERED?

Registered easements

4.114 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 registered proprietor’s title includes the benefit of any easement attached to the land.
4.115 Section 42(1) of the Transfer of Land Act confers upon the registered proprietor 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.

4.116 Registered easements can also be created by ‘a transfer of that interest under section 45 of the Transfer of Land Act’.126

4.117 Registered interests are statutory interests conferred by operation of the Transfer of Land Act on registration of the transfer.127 A registered interest cannot be annulled for removal of the record of an easement from the register. Only one submission posse of and title to the dominant and servient estates.136 This is called easements can be extinguished at common law if the same owner acquires both

4.118 An easement can also be recorded on the folio of the servient or dominant land. Under section 72 of the Transfer of Land Act, the Registrar may record 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.139 In Riley v Penttila,131 Justice Gillard held that the recording of an easement on the folio to the dominant land under section 72 is conclusive evidence of the dominant owner’s right to the easement.

4.119 In response to the question in our consultation paper about whether expressly created easements should be registered or recorded, six submissions supported registration132 and one supported recording.133 Of the submissions that supported the registration of expressly created easements, only three put forward arguments as to why registration should be preferred over recording. The submissions made the following arguments:

- Registration would provide certainty with regard to the easements.
- Registration allows access to compensation if losses occur because an easement that should not be registered is registered.134

4.120 Land Victoria suggested that it could be left to the parties to elect whether to record or register easements.135 In making this suggestion, Land Victoria indicated that it would be less onerous and less costly to record rather than register an easement, as registration demands more rigorous examination by the Registrar.

4.121 We consider that the current law, which gives transacting parties a choice of recording or registration, is satisfactory.

COMMON LAW EXTINCTION BY UNITY OF ESTATES

4.122 Easements can be extinguished at common law if the same owner acquires both possession of and title to the dominant and servient estates.136 This is called extinguishment by unity of estates.137

4.123 In our consultation paper, we noted that the operation of the Torrens system might serve to revive easements that have been extinguished at common law by unity of estates.138 Registration creates a statutory title to land, which can be different to the title of the previous registered owner. For example, a transfer might refer to an easement and thus revive it,139 or a recorded easement might not be extinguished until it is removed from the register, despite being inoperative at common law.140

4.124 We asked whether, as a solution, unity of estates should be an express ground for removal of the record of an easement from the register. Only one submission supported the proposition.141
Chapter 4

Implied and Prescriptive Easements

4.125 Three submissions argued that extinguishment by unity of estates should instead be abolished in Victoria. Goulburn-Murray Water submitted that:

> When easements are extinguished at common law the extinguishment is rarely noted on the relevant Titles … this can, and does, cause confusion and uncertainty when the … lands are sold on to third parties.

4.126 Abolition of the doctrine in Victoria would promote harmonisation. In most Australian states, extinguishment by unity of estates has been abolished.

**RECOMMENDATION**

23. The common law rule that easements are extinguished by unity of estates should be prospectively abolished. An easement should not be extinguished merely because the owner of the lot benefited by the easement acquires an interest, or a greater interest, in the lot burdened by the easement.

**NARROWING THE ENFORCEABILITY OF UNRECORDED EASEMENTS**

4.127 Easements can be enforced even if they have been neither recorded nor registered. Section 42(2)(d) of the Transfer of Land Act provides that the title of a registered proprietor is subject to all easements, ‘howsoever acquired’. This means that once an easement is created, it is enforceable against all successive owners of the servient land whether it is recorded or not.

4.128 The effect of this provision is that there is little incentive for dominant owners to register or record the easements, since to do so does not affect the enforceability of the easement. As a result, the information in the register about expressly created easements is incomplete.

4.129 In our consultation paper, we asked whether the scope of the provision should be narrowed.

**Omitted or misdescribed easements**

4.130 In several other Australian jurisdictions, unrecorded easements bind the servient owner if the easements are ‘omitted or misdescribed’ from or in the register.

4.131 Section 185(3) of the Land Titles Act 1994 (Qld) provides a definition of an ‘omitted’ easement: ‘Omitted’ means:

(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.

4.132 In Victoria, omitted and misdescribed easements are enforceable against subsequent servient owners, who are entitled to compensation under section 110(1)(c) of the Transfer of Land Act for the error.

4.133 Where an easement is omitted or misdescribed, difficult issues arise. In particular, there are two parties with competing claims: the owner of dominant land who wishes to preserve the easement, and the owner of the servient land who may have been unaware of the easement and wants it to be extinguished. Where one party succeeds in having the easement preserved or extinguished, the other party will have a valid claim for compensation.
The Law Institute of Victoria submitted that omitted and misdescribed easements should not be enforceable against subsequent registered owners of the servient land and that the Registrar should be liable to compensate for any losses incurred through registry errors.150

However, we consider that the easement should be preserved, as rights of use that dominant owners rely upon would otherwise be lost. In most cases, the purchaser is likely to be aware of the easement prior to sale, as section 32(2)(b) of the Sale of Land Act 1962 (Vic) requires the vendor to disclose in a written statement particulars of any easement affecting the land. Some easements may also be apparent from inspection of the land.

To preserve omitted and misdescribed easements would be consistent with the law in other states.

Land Victoria submitted that, if an easement is created expressly by instrument but is not registered or recorded, a purchaser of the servient land should be bound by it only if the purchaser has notice of it.151

The submission is at odds with the Torrens system principle that registered owners take free of unregistered interests even if they have notice of them.152

If expressly created easements are enforceable against purchasers of the servient land without registration or recording, there is little incentive for dominant owners to register or record them. We therefore think that the easements should not be enforceable against subsequent owners unless they appear on the folio of the servient land.153

At common law, easements can be implied into a transaction as a means of protecting the expectations of one of the parties. Because the dominant landowner may be unaware that an easement was created by the transaction, he or she cannot be expected to register or record it.

Earlier in this chapter, we recommended retaining the classes of implied easements that can be created at common law, with the exception of the common law easement of necessity. To be effective, implied easements must continue to be enforceable against subsequent registered owners of the servient land.

Any amendment to section 42(2)(d) of the Transfer of Land Act would also need to preserve the enforceability of easements implied into plans of subdivision under section 12(2) of the Subdivision Act.

Some easements were created when the land was first granted by the Crown, and the grant reserved an easement to the Crown.154 The reservations in any Crown grant are preserved by section 42(2)(a) of the Transfer of Land Act and will be unaffected by proposed amendments to section 42(2)(d).

In this chapter, we have recommended abolishing prescription and reducing the categories of implied easements. These recommendations apply only to the future acquisition of these rights.
4.145 Any rights that exist at the date specified in the new legislation should remain enforceable against present and future owners of the servient land without being recorded or registered. This means that the register will remain an incomplete record of easements for a long time to come. Eventually, however, the majority of easements will appear on the register.

RECOMMENDATION

24. Section 42(2)(d) of the Transfer of Land Act 1958 (Vic) should be amended to provide that the registered title is subject to any easements howsoever acquired before a specified date, and the following easements that are created or arise after a specified date:
   a. easements created or implied by statute or by common law
   b. easements at any time omitted from, or misdescribed in, the register.