

Recommendations

CHAPTER 2: PURPOSE AND CHARACTERISTICS OF EASEMENTS

PRIVATE EASEMENTS IN GROSS

1. No change should be made to the current rule that easements cannot exist in gross except under special legislation.

NEGATIVE EASEMENTS

2. The categories of negative easement should not be extended to create an easement of access to solar energy, as restrictive covenants provide a more suitable mechanism for this purpose. Further consideration should be given to the development of a public planning framework for regulating solar access for energy generation.

CHAPTER 3: EXPRESS CREATION OF EASEMENTS

EXPRESS SUBDIVISIONAL EASEMENTS

3. Section 98(a) of the *Transfer of Land Act 1958* (Vic) and sections 12(2) and 24(2)(d) of the *Subdivision Act 1988* (Vic) should be consolidated into a single provision that prospectively creates express subdivisional easements.

STANDARD WORDING

4. Standard wording for types of private easements, together with an assigned word label for each type, should be prescribed in regulations. The standard wording should apply to easements created by a registered or unregistered instrument or by a registered plan of subdivision that creates an easement by reference to one or more of the assigned word labels. It would not apply to regulatory easements.
5. The regulations prescribing standard wording for private easements should include updated wording for an easement of carriageway, replacing schedule 12 of the *Transfer of Land Act 1958* (Vic).

CREATION OF PRIVATE EASEMENTS BY ORDER OF VCAT

6. The *Property Law Act 1958* (Vic) should empower VCAT to make an order granting an easement over land if the easement is:
 - a. reasonably necessary for the effective use or development of other land that will have the benefit of the easement, and
 - b. consistent with the reasonable use and enjoyment of the lot or lots over which the easement is sought.
7. VCAT should be empowered to make an order for the grant of an easement over land only if satisfied that:
 - a. the use of the land having the benefit of the easement will not be inconsistent with the public interest
 - b. the owner of the land to be burdened by the easement can be adequately compensated for any loss or other disadvantage that will arise from imposition of the easement, and
 - c. all reasonable attempts have been made by the applicant to obtain the easement or an easement having the same effect but have been unsuccessful.

8. VCAT should not be empowered to make an order granting an easement over Crown land or land in which any right, title or interest is held by a council, VicTrack, the Melbourne Water Corporation, an Authority within the meaning of the *Water Act 1989* (Vic), or a licensee under Division 1 Part 2 of the *Water Industry Act 1994* (Vic).
9. VCAT should be empowered to order that notice of an application for an order granting an easement be given to the council and to any referral authority.
10. When VCAT orders that an easement be granted, it should be required to:
 - a. direct the Registrar to amend the register to give effect to the order, and
 - b. make an order for compensation unless it finds that no compensation should be paid due to the special circumstances of the case.
11. Where the burdened land is registered land, an easement created by VCAT order should take effect only when the Registrar makes a recording of the easement under section 103(1AA) of the *Transfer of Land Act 1958* (Vic).
12. Schedule 1 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) should be amended to enable VCAT to apply the following principles, in place of section 109(1), to the award of costs in a proceeding under the *Property Law Act 1958* (Vic) for an order that an easement be granted:
 - a. Where the application is unsuccessful, the applicant should normally pay the costs of the respondent over whose land the easement is sought.
 - b. Where the application is successful, the applicant should normally pay the costs of the respondent incurred prior to the point in time at which, in the opinion of VCAT, the respondent has had a full opportunity to assess the merits of the application. The respondent should normally bear his or her own costs incurred after that point, but not the costs of the successful applicant.
13. An easement created by order of VCAT should be able to be removed or varied by order of a court or VCAT under section 84 of the *Property Law Act 1958* (Vic).
14. Section 36 of the *Subdivision Act 1988* (Vic) should no longer apply to the acquisition of a private easement.

CHAPTER 4: IMPLIED AND PRESCRIPTIVE EASEMENTS

IMPLIED EASEMENTS

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.
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

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.

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18. A prescriptive easement that is subsisting and in use on the specified date should be expressly preserved.
19. Upon the abolition of prescriptive easements, immature claims to a prescriptive easement should not be preserved.

STATUTORY RECIPROCAL RIGHTS

20. 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.
21. 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.
22. 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.

COMMON LAW EXTINGUISHMENT BY UNITY OF ESTATES

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

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.

CHAPTER 5: REGULATORY EASEMENTS

CREATION OF REGULATORY EASEMENTS

25. Section 36 of the *Subdivision Act 1988* (Vic) should be amended to empower VCAT to order that an easement acquired on the basis of a written statement by the council or a referral authority under section 36(1) is an easement in gross for the benefit of the council or referral authority specified in the order.

AVAILABILITY OF INFORMATION ABOUT REGULATORY EASEMENTS

26. Statutes that authorise the creation of a regulatory easement should require the holder of the easement to take all steps necessary to have the easement registered or recorded by the Registrar.

AVAILABILITY OF INFORMATION ABOUT ASSETS WHEN NO EASEMENT HAS BEEN ACQUIRED

27. All service providers operating under Victorian legislation should issue property statements on request containing details of any assets they have installed on a privately owned lot, including any that are not contained within a registered regulatory easement.
28. The Department of Sustainability and Environment should lead the development of a scheme for providing simpler access to information about the assets installed by service providers on a lot, including those installed without creating a regulatory easement.
29. Section 32 of the *Sale of Land Act 1962* (Vic) should be amended to require the vendor's statement to include a warning to the effect that not all assets installed and owned by service providers may be contained within easements and that any proposed renovation to buildings or redevelopment of the property may be affected by the location of these assets.

CHAPTER 6: PURPOSE AND NATURE OF COVENANTS

RESTRICTIVE COVENANTS DISTINGUISHED FROM STATUTORY AGREEMENTS AND RESTRICTIONS

30. Statutes that provide for statutory agreements should specify how they may be enforced, varied and removed and not express the agreements as being enforceable 'as if they were restrictive covenants'.

STATUTORY RESTRICTIONS UNDER THE SUBDIVISION ACT

31. A restriction created by section 24(2)(d) of the *Subdivision Act 1988* (Vic) should be defined as a restriction that is required by a responsible authority or a referral authority in the exercise of its statutory powers.
32. Section 6(1) of the *Subdivision Act 1988* (Vic) should be amended to provide that, if a plan creates a restriction, the restriction must be one that is required by a responsible authority or referral authority in the exercise of its statutory powers.
33. Sections 88(1AA)–(1C) of the *Transfer of Land Act 1958* (Vic) should be amended to delete references to a 'restrictive covenant' created by a plan, and to substitute the word 'restriction'.

THE STATUS OF RESTRICTIVE COVENANTS ON REGISTERED LAND

34. Restrictive covenants should not be registered interests. They should continue to be recorded under section 88(1) of the *Transfer of Land Act 1958* (Vic) and recording should not affect their validity.

POSITIVE COVENANTS

35. The burden of a positive covenant should not run with the covenantor's land except under specific legislation.

LIMITING THE DURATION OF RESTRICTIVE COVENANTS

36. A restrictive covenant that is recorded by the Registrar after a specified date must be for a defined period of time not exceeding 20 years.

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CHAPTER 7: EASEMENTS AND COVENANTS UNDER PLANNING LAW

REMOVAL OF AN EASEMENT UNDER SECTION 36 OF THE SUBDIVISION ACT

37. Section 36 of the *Subdivision Act 1988* (Vic) should be amended so that it no longer provides for the removal of private easements.

REGULATION AS AN ALTERNATIVE TO REMOVAL

38. We propose the following set of reforms to planning legislation and recommend further public consultation regarding their implementation:
- a. It should no longer be possible to remove a restrictive covenant by registration of a plan under section 23 of the *Subdivision Act 1988* (Vic). Consequential amendments should be made to the *Planning and Environment Act 1987* (Vic) and the *Subdivision Act 1988* (Vic) to omit provisions that enable restrictive covenants to be removed or varied by or under a planning scheme.
 - b. In determining an application for a planning permit, a responsible authority should not be expressly required to have regard to any restrictive covenant.
 - c. The *Planning and Environment Act 1987* (Vic) should provide that:
 - i) The Victorian Planning Provisions may specify forms of use or development of land that cannot be prevented or restricted by a restrictive covenant.
 - ii) A planning scheme may, in respect of a zone or a planning scheme area, specify forms of permitted use or development of land that cannot be prevented or restricted by a restrictive covenant.
 - iii) A restrictive covenant is unenforceable to the extent it is inconsistent with such a specification.
39. The *Property Law Act 1958* (Vic) should be amended to clarify that a restrictive covenant that is inconsistent with any law is unenforceable to the extent that it is inconsistent.

CHAPTER 8: REMOVAL OF EASEMENTS AND COVENANTS BY ORDER

REMOVAL AND VARIATION OF EASEMENTS AND RESTRICTIVE COVENANTS BY ORDER OF A COURT OR VCAT

40. Section 84 of the *Property Law Act 1958* (Vic) should be expressed not to apply to a restriction in a plan created by operation of the *Subdivision Act 1988* (Vic).
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.
42. Section 84(3) of the *Property Law Act 1958* (Vic) should be amended to provide that the court may direct that notice of the application be given to any local authority.

FORUM AND COSTS

43. The Supreme Court, the County Court, the Magistrates' Court and VCAT should have concurrent jurisdiction to hear and determine applications under sections 84(1) and (2) of the *Property Law Act 1958* (Vic).

44. Schedule 1 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) should provide that, for the purpose of hearing an application under section 84 of the *Property Law Act 1958* (Vic), VCAT must be constituted by or include a member who in the opinion of the President has knowledge of or experience in property law matters.
45. In an application under section 84 of the *Property Law Act 1958* (Vic), the court or VCAT should apply the following principles to the award of costs:
 - a. Where the application is unsuccessful, the applicant should normally pay the costs of any respondent entitled to the benefit of the easement or restriction.
 - b. Where the application is successful, the applicant should normally pay the costs of the respondent incurred prior to the point in time at which, in the opinion of the court or of VCAT, the respondent has had a full opportunity to assess the merits of the application. The respondent should normally bear his or her own costs incurred after that point, but not the costs of the successful applicant.

RELEVANT CONSIDERATIONS

46. The conditions in section 84(1)(a)–(c) of the *Property Law Act 1958* (Vic) should be removed. Instead, the court or VCAT should be required to consider the following matters in deciding whether to grant an application for the discharge or modification of an easement or restrictive covenant:
 - a. the relevant planning scheme
 - b. the purpose of the easement or restrictive covenant
 - c. any changes in circumstances since the easement or restrictive covenant was created (including any change in the character of the dominant or benefited land or the servient or burdened land or the neighbourhood)
 - d. any increased burden of the easement on the servient land resulting from changes to the dominant land or its mode of use
 - e. the extent to which the removal or variation of the easement or a restrictive covenant would cause material detriment to a person who has the benefit of the easement or restrictive covenant
 - f. the extent to which a person who has the benefit of an easement or a restrictive covenant can be adequately compensated for its loss
 - g. acquiescence by the owner of the dominant land in a breach of the restrictive covenant
 - h. delay by the dominant owner in commencing legal proceedings to restrain a breach of the restrictive covenant
 - i. abandonment of the easement by acts or omissions
 - j. non-use of the easement (other than an easement in gross) for 15 years
 - k. any other factor the court or VCAT considers to be material.

RELEASE FROM CONTRACTUAL OBLIGATIONS

47. The *Property Law Act 1958 (Vic)* should expressly empower the court or VCAT to order that, from the date on which an order under section 84 takes effect:
 - a. If the order is for discharge of the restrictive covenant, the covenantor is released from any contractual obligation or liability under the restrictive covenant without prejudice to his or her liability for any prior breach of the restrictive covenant.
 - b. If the order is for modification of a restrictive covenant, the covenantor is released from any contractual obligation or liability under the restrictive covenant to the extent of the modification without prejudice to his or her liability for any prior breach of the restrictive covenant.