‘Consonant to Reason and Common Sense’? All About (Implied Subdivision) Easements in Victoria

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I. Overview

1. The term ‘easements’ denotes an important class of property rights, as widespread as they are poorly understood by property owners and practitioners alike.

2. Some easements benefit the Crown, allowing public authorities to use private land in delivering essential services (the ubiquitous drainage easement is a widely known example). Others, however, are attached to and benefit a neighbouring lot. The easement belonged to the lot (described as ‘appurtenant’ to it), not the owner, and follows the property as it changes hands.[1] They are likewise indefeasible.[2]

3. Easements are of great relevance in cities like Melbourne, where population growth and the need for more housing has long been a contentious issue. The last decade has seen a shift from outward expansion of the city (derided as ‘urban sprawl’) to increased density, largely in the inner-city and former industrial areas (which in a similar vein is labelled as ‘overdevelopment’). In summation, where once there was but one lot, many more are created.

[1] *Property Law Act* 1958 s 62
[2] *Transfer of Land Act* 1958 s 42(2)(d)

4. This means more homes coming onto the market are encumbered. While some of these encumbrances are express – such as when an owner sells some of their land (and reserves rights over the portion sold), or one lot expressly grants right to the owner of another (which can be for consideration) – a great many are **implied by law**.

5. This paper concerns the most common, readily identified specifies of easement (at least in my experience): implied subdivision easements.

6. While, by and large, the common law looks at past use – for instance, if farmhands at Whiteacre are deposited at a bus stop on Odgers Way, fronting Blackacre farm, and trudge across to neighbouring Whiteacre – the implied easements are far more flexible, even prospective. This is likely as, unless a subdivision is of a very large block, the resulting sub-lots will be unviable unless some use can be made of the neighbouring lots.

7. The source of the subdivision easements is section 12(2) of the *Subdivision Act* 1988, which list a series of easements that *may* be implied in subdivisions. Depending on what is being subdivided, it is possible to opt-on from them.

8. These "subdivision easements" are broad, and elastic. Because they are implied, the affected area of the burdened land (the ‘servient tenement’) is not identified on the plan of subdivision. Indeed, it can permit (subject to necessity) new uses to be made of land, even where that use was not made before subdivision.

9. To clearly distinguish them from easements implied at common law, I will refer to these subdivision easements as ‘**statutory easements**.’

10. Statutory easements are an alternative to setting aside common property, and setting up an owners' corporation. And while the entire subdivision is encumbered, specific aspects are affected more than most.

II. The Scheme

11. The *Subdivision Act* statutory easements are mandatory in:

    (a) the subdivision of a building;

    (b) subdivisions that create common property; but

    In all other subdivisions, are applicable on an 'opt-in' basis. The following is an example from a Plan of Subdivision:

In proclaimed Survey Area no.

Easement Information

Legend: A - Appurtenant Easement E - Encumbering Easement R - Encumbering Easement (Road)

SECTION 12(2) SUBDIVISION ACT 1988 APPLIES TO ALL THE LAND IN THIS PLAN

Easement Reference	Purpose	Width (Metres)	Origin	Land Benefited/In Favour Of
E-1	DRAINAGE & SEWERAGE	1.83	LP 8376	LOTS ON LP 8376
E-1	SEWERAGE	1.83	THIS PLAN	CITY WEST WATER LIMITED
[illegible]	ANY EASEMENTS	1.83	SEE [illegible]	UNSPECIFIED

12. The applicable aspects of section 12 ('**Plan must show easements and other rights**') provide as follows:

    (2) Subject to subsection (3), there are implied

    (a) over—

    (i) all the land on a plan of subdivision of a building; and

    (ii) that part of a subdivision which subdivides a building; and

    (iii) any land affected by an owners corporation; and

    (iv) any land on a plan if the plan specifies that this subsection applies to the land; and

    (b) for the benefit of each lot and any common property–

    all easements and rights necessary to provide–

    (c) support, shelter or protection; or

    (d) 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); or

    (e) rights of way; or

    (f) full, free and uninterrupted access to and use of light for windows, doors or other openings; or

(g) maintenance of overhanging eaves–

*if the easement or right is **necessary for the reasonable use and enjoyment** of the lot or the common property and **is consistent with the reasonable use and enjoyment of the other lots** and the common property.*

(3) A plan may provide that some only, or none, of the easements and rights mentioned in subsection (2) are implied over all or any of the land on the plan.

13. The section 12(2) easements are taken to be created when the Plan of Subdivision is registered: section 24(2)(e) ('**What is the effect of registration?**')

14. While the form of the wording has changed – it was once section 12 of the former *Strata Titles Act* 1967 (which the *Subdivision Act* repealed) – the constant has always been that an easement must be 'necessary for the reasonable use and enjoyment' of the dominant tenement.

15. A distinction can be drawn with section 98 of the *Transfer of Land Act* 1958 ('**Easements arising from plan of subdivision**'), which also creates a type of 'implied' easement in subdivisions–

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

*(b) **in the case of the subdivision of a building**, all such additional easements of way drainage support and protection and for the supply of water gas electricity sewerage and telephone and other services to the allotment or the lot on or over the other allotments or other lots in the subdivision as may be*

necessary for the reasonable enjoyment of the allotment or the lot as part of that building or any building at any time situated on the land in the subdivision—

in all respects as if all such easements had been expressly granted.

16. There are two significant differences between the provisions:
    (a) the *Transfer of Land Act* requires that the subject land be 'set apart for those purposes' on the Plan of Subdivision (unless subdividing a building), but the *Subdivision Act* does not; and
    (b) the *Transfer of Land Act* only requires the easement to be 'necessary' for the reasonable use and enjoyment of the dominant lot. The *Subdivision Act*, however, also requires it to be 'consistent' with the reasonable use and enjoyment of the lot to be burdened.

17. Victorian Courts have given a consistent interpretation to the phrase 'necessary for the reasonable use and enjoyment' in both provisions, and the two are considered together often.[3] The inclusion of the phrase is why, despite their display on the Plan of Subdivision,[4] *Transfer of Land Act* easements are still 'implied.'

III. History of Section 12(2)

18. To recall, an implied easement has the following traits at common law –[5]
    (a) there is a dominant and servient tenement;
    (b) it must accommodate the dominant tenement, that is, be connected with its enjoyment and for its benefit;
    (c) the dominant and servient owners must be different persons;
    (d) The right claimed must be capable of forming the subject of a grant.

19. Most law students in their second or third year spend perhaps 10 to 20 minutes on the old English matter, *Wheeldon v Burrows* (1879) 12 Ch D 31. Although the facts

[3] *Gordon v Body Corporate Strata Plan 3023 (*2004) 15 VR 557, 564 (Osborn J)
[4] *Boglari v Steiner School and Kindergarten* (2007) 20 VR 1, 10 (Neave JA)
[5] *Re Ellenborough Park* [1956] Ch 131, 140 (Danckwerts J); see also *Riley v Penttila* [1974] VR 547

are hardly ever referred to, the dicta of Thesiger LJ continues to be of utility. His Lordship at 49 consolidated the authorities on easements as follows:

> We have had a considerable number of cases cited to us, and out of them I think that **two propositions** may be stated as what I may call the general rules… The first of these rules is, that on the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed, there will pass to the grantee all those [**1**] continuous and apparent easements (by which, of course, I mean *quasi* easements), or, in other words, all those easements which are [**2**] necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant [**3**] used by the owners of the entirety for the benefit of the part granted. The second proposition is that, if the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant. Those are the general rules governing cases of this kind, but the second of those rules is subject to certain exceptions. One of those exceptions is the well-known exception which attaches to cases of what are called ways of necessity; and I do not dispute for a moment that there may be, and probably are, certain other exceptions, to which I shall refer before I close my observations upon this case.
>
> Both of the general rules which I have mentioned are founded upon a maxim which is as well established by authority as it is **consonant to reason and common sense**, viz, that a grantor shall not derogate from his grant.

20. While easements might still arise in this manner, the factual circumstances must be quite specific, and are about as common as matters involving adverse possession.

21. Before the *Strata Titles Act* 1967 (preceding the *Subdivision Act*), statutory easements existed in Victoria for some time, notably section 212(2) of the *Transfer of Land Act* 1928, now section 98 of the present Act referred to above. While that law requires a notation on the Plan of Subdivision (that is, indication of existence), the extent of use was implied.

22. Unlike the easements in *Wheeldon v Burrows*, these subdivision easements did not depend on the circumstances existing at the time of subdivision, Lowe J observing in *Bowman v Taylor* that–[6]

> The whole doctrine [in *Wheeldon v Burrows*] rests on the assumption that it is the intention of the parties that after the severance the use of the severed part, so far as the quasi-easement is concerned, shall continue as when in the ownership of the grantor… **That presumption cannot, in my opinion, arise when the very purpose of the subdivision is, as in this case, to change the nature of the use in future of the subdivisional blocks from what had been their use prior to the subdivision**.

23. Section 12(2) of the *Subdivision Act* evolved from the former section 12 of the *Strata Titles Act* 1967, which provided:

> *(1) The common property and each unit on a registered plan shall by virtue of this section have as appurtenant thereto all such rights of support, shelter and protection, and for the passage or provision of water, sewerage, drainage, gas, electricity, garbage, air and all other services of whatsoever nature (including telephone, radio and television services) over the parcel and every part thereof as may from time to time be necessary for the reasonable use or enjoyment of such common property or unit.*
>
> *(2) The common property and each unit on a registered plan shall by virtue of this section have as appurtenant thereto—*
>
> *(a) a right to the full free and uninterrupted access and use of light to or for any windows doors or other apertures existing at the date of registration of the plan and enjoyed at that date; and*
>
> *(b) arise to maintain overhanging eaves existing at the date of registration of the plan—*
>
> *over the parcel and every part thereof.*
>
> *(3) The rights created by this section shall be easements, and shall carry with them all ancillary rights necessary to make them effective: Provided that any*

[6] [1934] VLR 34, 40

person exercising such rights shall make good all damage done in the exercise thereof.

24. While modified, the approach then is quite similar to what exists now.

25. But what happens if section 12(2) is amended? Would that only impact upon subdivisions that post-date the amendments?

26. Although section 24 refers to the 'creation' of the statutory easement at registration – as if creating an easement by express grant – a better reading is that, upon registration, the land is, from that time, bound by section 12(2), in *whatever form section 12(2) takes*.

27. In interpreting any law, the default position is that any rights and liabilities it created are unaffected by subsequent amendments to that law, unless a contrary intention appears.[7] While it might seem that section 24 has a temporal aspect – the easements created are based on what section 12(2) provided at registration – an overall reading of the *Subdivision Act* shows a contrary intention.

28. That contrary intention appears in clause 2(1) of schedule 2, which affects pre-1988 subdivisions. That provides, among other things, that–

    (e) the easements or rights implied over a strata or cluster plan under section 12 of the Strata Titles Act 1967 or section 20 of the Cluster Titles Act 1974 are extinguished;

    (f) there are implied over the land in a strata or cluster plan the easements referred to in section 12(2) of this Act…

29. Notice that, unlike section 24, clause 2(1)(f) does not 'create'; it only refers back to section 12(2). It is not tied to its text as enacted. This means that, if Parliament did

[7] See *Interpretation of Legislation Act* 1958 (Vic) s 14(2)(e)

broaden the easements which apply to subdivisions, subdivisions that existed before 1988 would be affected.

30. Likewise, if Parliament displaced the default position for pre-1988 subdivisions (that the old Acts continue to apply), and quite expressly, did it also intend for those old subdivisions to be forever bound by the text of the original 1988 legislation?

31. Put another way, if it were intended that easements in older subdivisions should not change with the law, Parliament could have expressed what the easements should have been. Reference to section 12(2) showed a contrary intention.

32. In my view, that also goes for post-1988 subdivisions, because if it did not, that would lead to an inconsistent approach to subdivisions created before and after 1988 (older subdivisions encumbered by newer easements, with newer subdivisions subject only to older easements)

IV. <u>Operation of subdivision easements – case law on section 12(2)</u>

33. Aside from the manner by which it arises, a statutory easement is no different from an ordinary implied easement. They arise if–
    (a) they are 'necessary for the reasonable use and enjoyment' of the dominant tenement; and
    (b) are 'consistent with the reasonable use and enjoyment' of the servient tenement.

34. Section 12(2) has been discussed in Victorian Superior Courts on three occasions–
    - *Body Corporate No 413424R v Sheppard* (2008) 20 VR 362;
    - *Gordon v Body Corporate Strata Plan 3023* (2004) 15 VR 557; and
    - *Burford v Wichlinski* (unreported, Beach J, 30 April 1996)

    What these examples illustrate is the balancing act that is performed. The examples are slightly more contentious there, but can also arise in more pedestrian fashions (such as the use of a driveway on a battle-axe subdivision).

35. Dodds-Streeton JA (Buchanan JA and Osborn AJA concurring) considered when an easement is 'necessary' in ***Sheppard***:[8]

> [T]he word "necessary" bears its ordinary meaning of "essential". It is not, however, to be construed in isolation, but in the context of the composite phrase, in which it is qualified by the broad concept of reasonable use and enjoyment of the benefited property. Further, it is the easement, rather than the function it secures, which must be "necessary". The reasonable use and enjoyment of the property not only clearly exceeds mere use, but also admits consideration of the effect on the reasonable use and enjoyment of property if the function to be achieved by the easement is unavailable and of the costs or detriments of securing the function by means other than the easement.
>
> [The trial judge], in my view, correctly concluded that "necessary" meant that the easement was essential to achieving the specified function, <u>in the sense that no alternative means of achieving the relevant function was feasible or reasonably available</u>. In determining whether an alternative to the easement was reasonably available, all relevant circumstances, including physical factors, legal restrictions, safety considerations and cost should be considered.
>
> While the mere possibility of an alternative to the easement would not preclude the satisfaction of the first condition, his Honour did not hold the contrary, but rather, correctly concluded that if the alternative were reasonable, although involving some inconvenience or additional cost, an implied easement would not be necessary in the relevant sense.

36. *Sheppard* saw an action by a body corporate against an apartment owner, whose apartment took up one-and-a half floors. The owner ceased allowing maintenance workers through their apartment to access an external staircase. This was one of two ways in the workers could access the building services (including lifts and central air-conditioning). The alternative was to climb 16 flights of stairs.

[8] *Sheppard* (2008) 20 VR 362, 374 (Dodds-Streeton JA)

37. While at first, workers only had to go through the laundry, the owners reconfigured the apartment, and the path changed. It now involved proceeding through the dining room, kitchen, and then the laundry.

38. The body corporate unsuccessfully argued that a statutory easement arose. The Court found that while it was costlier, there were other means of access to the building services, and also, the easement contended for was inconsistent with the reasonable use and enjoyment of the apartment. The Court also indicated that 'necessary' does not mean 'substantially preferable.'[9]

39. The plaintiffs in ***Gordon*** owned a unit in a strata development (comprising five apartments), and obtained a declaration that section 12 established easements and rights of support, enabling their use of the common property.

40. The issue was that, while the surface of land outside the apartment was on their title (a hatched area on the Plan of Subdivision), the subsurface was not, and was common property. The works proposed would involve, among other things, foundations founded at least 500mm into the subsurface.

41. Osborn J observed that the language of section 12(2) is prospective, and is not to be judged by the circumstances existing at the time of the subdivision. His Honour's view was influenced in particular by the plain language of the section.[10] His Honour also rejected the contention that the strip footing (necessitating the easement) was unnecessary because an alternative was available (transfer slab system), as that had a prohibitive cost.

42. It was also noted the footings would not interfere with any existing use of the common property.

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[9] Ibid.
[10] *Gordon* (2004) 15 VR 557, 564-5 (Osborn J)

43. In ***Burford*** (which was heard on an urgent basis), Beach J restrained the defendant from laying a sewerage and drainage pipe along the front of the plaintiff's lot. The defendant preferred to connect the pipe to the existing branch line on the plaintiff's lot (from which his lot was subdivided), rather than run a new, deeper pipe to the main road, creating an entirely new branch.

44. While the cheaper course, and despite section 12(2), his Honour did not consider the easement 'necessary' (in the sense of essential), because the alternative course (a pipe along the driveway to the defendant's lot) would inconvenience or cause detriment to the plaintiff. The proposal would also interfere with landscaping of the plaintiff's land.

45. A related matter (discussed below), under the parallel wording in section 98 of the *Transfer of Land Act* 1958, is *Boglari v Steiner School and Kindergarten* (2007) 20 VR 1 where Neave JA observed the necessity test

> does not require the person asserting an implied easement to show that access to the land is impossible without use of the right of way, but only to show that the easement of way is "necessary for the reasonable enjoyment of the lot."[11]

46. The key issue, in recognising an easement, is whether it is '**necessary**,' in that no alternative means of achieving its function is feasible or reasonably available.

V. Nature and Scope of an Easement, Changing Uses, and 'Excessive User'

47. Statutory easements are far from stiff and unchanging. They can adapt to different uses of the land, although there are limits.

48. ***Boglari*** concerned an implied right of way over a driveway on the servient tenement. It was first created to permit access to a dwelling at the rear of the dominant tenement. The dominant tenement later was occupied by a school. The

[11] *Boglari* (2007) 20 VR 1, 7 (Neave JA)

school built a carpark, only accessible by the right of way, which was then used by the parents of 30 children, and also for delivery vehicles.

49. The servient owners blocked access by constructing a fence on the boundary, and installing a gate at the driveway entrance, which was sometimes locked. The school brought an action in nuisance.

50. Neave JA (Chernov JA and Habersberger AJA concurring) observed that a change in use of the dominant tenement does not end an easement. The question is whether the change substantially increases the burden on the servient tenement (which is not permitted). Her Honour observed that is a question of fact.

51. The Court found the use was not excessive, and the erection of the gate and the fence interfered with the use of the easement.[12]

52. ***Todrick v Western National Omnibus*** **[1934] Ch 561**, to which Neave JA refers in *Bolgari*, is a good illustration of an excessive use. Todrick acquired a home, which included a private lane (seven feet in width) leading to a garage. The lane was encumbered by an express easement, including a reservation to extend it onto neighbouring land. Todrick's lot was located halfway up a hill.

53. The neighbouring land later came into ownership of a bus company, which also acquired additional land at the top and bottom of the hill. At the top was its depot and ticketing station, and at the bottom, it constructed bus garages. Between them was a gradient too steep for the buses. The solution was Todrick's lane.

54. Not only was the lane extended, a concrete ramp was built on it to allow the buses to travel over a boundary wall. Buses then travelled down the hill through the narrow laneway, causing much disturbance to Todrick.

[12] *Boglari* (2007) 20 VR 1, 10 (Neave JA)

55. The Court of Appeal upheld the decision of Farwell J at first instance, that both the building of the ramp, and driving of buses through the lane, were an excessive use of the easement, Lord Handworth MR holding:[13]

> [T]here has been a distinct limitation imposed upon the plaintiff of his rights in respect of the garage and land which he owns. The defendants have for their own purposes put up upon the land… this ramp in order to use the gradient which leads up to the garage upon their own ground… they have put up this structure without bearing in mind the rights of the plaintiff over the land. It is an exercise of the right of way which is not merely a development… but an intrusion on the rights and property of the plaintiff…
>
> Having regard to the fact that the omnibuses when they pass through the gateway would only have a margin of one and a half inches on either side, it is quite plain that the right of way was never intended for such vehicles, and [the defendant] was quite right in not pressing… a claim to a right to use the right of way in such a manner as to introduce these heavy motor vehicles…

56. ***Shean Pty Ltd v Owners of Corinne Court 290 Stirling Street, Perth Strata Plan 12821*** **[2001] WASCA 311** involved a right of way over a carriageway. The carriageway was the principle means of accessing an apartment building. It also connected to a laneway on the dominant tenement and, through it, a carpark on a neighbouring lot (also belonging to the dominant owner). The carpark post-dated the subdivision. When the carpark was constructed, iron gates at either end of the lane were removed, freeing up access to the carriageway.

57. The servient owners sought an order extinguishing the easement, arguing it was obsolete or abandoned; their issue was not so much vehicle use, but pedestrian use (the apartments were located near Perth Oval). That was unsuccessful.

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[13] *Todrick v Western National Omnibus* [1934] Ch 561, 575-6 (Lord Holdworth MR)

58. While the trial judge declared access to the carpark was not a proper use, as it was on a different lot, the Court of Appeal disagreed, finding that the carpark served the dominant tenement.

59. Steytler J (Wallwork and Burchet AUJ concurring) found the use was not excessive, as vehicle traffic had fallen away. The Court also found that use of the carriageway to access the carpark could have been envisioned at subdivision (relevant for an express easement), as the building on the dominant tenement had a suspended concrete slab. This would permit an additional level to be added, which would only be possible if more parking space came about.

60. Of note in *Shean* is the carriageway was not the sole means of accessing the carpark (it had an entrance from another street). It did not have to be the sole means for the easement argued to arise.

61. ***Kyren Pty Ltd v Cinema Place Pty Ltd*** **[2004] SASC 268** also involved a right of way whose use changed. A private road was subject to a 'free and unrestricted right of way' in favour of the dominant tenements (five separate allotments). It had largely been used by pedestrians. Works began to construct a large building on all five lots, with construction workers using the lane to access the rear. And it was envisioned that, on completion, shop occupiers would use the road for delivery vehicles. The servient owner blocked access, arguing the use and future use were excessive.

62. *Kyren* is interesting for its factual discussion, such as the hours trucks would use the lane (the servient tenement hosted a weekend 'street market,' with which the use did not conflict). In addition, the paving had been constructed for pedestrian use, but the evidence indicated occasional heavy vehicle use, plus frequent light vehicle use, would not cause much damage. Doyle CJ saw no reason to view the new uses as excessive.

63. ***Currumbin Investments Pty Ltd v Body Corp Mitchell Park Parkwood CTS*** **[2012] 2 Qd R 511** considered what constitutes 'drainage.' The easement was for 'drainage

and stormwater,' and applied to the handle of a battle-axe block. The respondent (who owned the servient tenement) contended 'drainage and stormwater' did not include sewerage.

64. McMurdo P there held that–[14]

> [T]he word "drainage" in the phrase "drainage and stormwater" in the grant… includes drainage of sewage. That is the ordinary meaning of the term "drainage". The ordinary meaning of "stormwater" is the sudden, excessive runoff of water following a storm. The grant… refers to "drainage and stormwater" not "stormwater drainage". The use of the latter phrase would have supported the respondent's contention that "drainage" does not include the drainage of sewage. The use of the phrase "drainage and stormwater", however, favours a construction giving "drainage" in that phrase its ordinary meaning of a channel for all liquids, including sewage

65. The meaning of 'drainage' (and the phrase 'passage or provision of water' in section 12(2)) is important, because it also covers air-conditioning unit pipes.

VI. Interference/Nuisance (Substantial and Unreasonable)

66. An interference with an easement, as with any other property right, is actionable as a private nuisance. A private nuisance has three elements–
    (a) the defendant has interfered with a property right of the plaintiff;
    (b) the interference was both 'substantial and unreasonable'; and
    (c) the plaintiff has title to sue (this extends to tenants).

67. There is much case law concerning nuisance and easements. The following are but a few of those, illustrating what is a 'substantial and unreasonable interference.'

68. The action in *Jelbert v Davis* [1968] 1 All ER 1182, in contrast to the examples in the previous section, involved a competition between two dominant tenements. The

[14] *Currumbin Investments* [2012] 2 Qd R 511, 513 (McMurdo P); see also at 528-9 (Fryberg J)

servient tenement comprised a private driveway, over which both the plaintiff and defendant both had rights of way. Neither property was connected to the public highway, and the driveway was the only means of access.

69. The plaintiff obtained permission to use his land, in certain months, as a caravan park (it was formerly agricultural land). The defendants lived in a lodge near the end of the drive, and farmed land further up.

70. While the Court found that the right of way, as granted, could be wide enough to accommodate a caravan park use, it would not be if that interfered with other users of the easement. In this instance, the presence of 200 caravans was excessive, and a substantial interference with the rights of the defendants.

71. *Panfili v Lawless* (2010) 14 BPR 27, 283 also involved interference with a right of way, which ran on either side of the property boundaries. Large-bodied trucks used the right to deliver plants and garden materials to the plaintiff (a landscape gardening consultant) once every two months.

72. The use, however, was quite limited. While the trucks used a drive on the plaintiff's land primarily, they would cross onto a short stretch of the defendant's land, so as to manoeuvre through some double gates. The defendant raised its side, planting garden beds, trees, and installing retaining walls. This prevented truck access.

73. Having interpreted the easement, the Supreme Court of NSW (White J) found it was not excessive for the large bodied trucks to use the right of way. But the Court did not consider it necessary to restore the entirety of the boundary, as only certain trees had to be removed to permit the manoeuvre described–

> The authorities establish that… the owner of the servient tenement can erect such a fence, provided that the dominant owner is provided reasonable access to the right of way. This access might change from time to time. The reason, that, *prima facie*, a dominant owner is not entitled to access at all points along the boundary is because the dominant owner's right is only to such use of the

> right of way as is reasonable, and only a substantial interference with the easement is actionable.[15]

74. *Pettey v Parsons* [1914] 2 Ch 653 establishes that gates and fencing of a right of way can be consistent with an easement, unless it amounts to a 'substantial obstruction' of it.[16] Lord Cozens-Hardy MR explained that–[17]

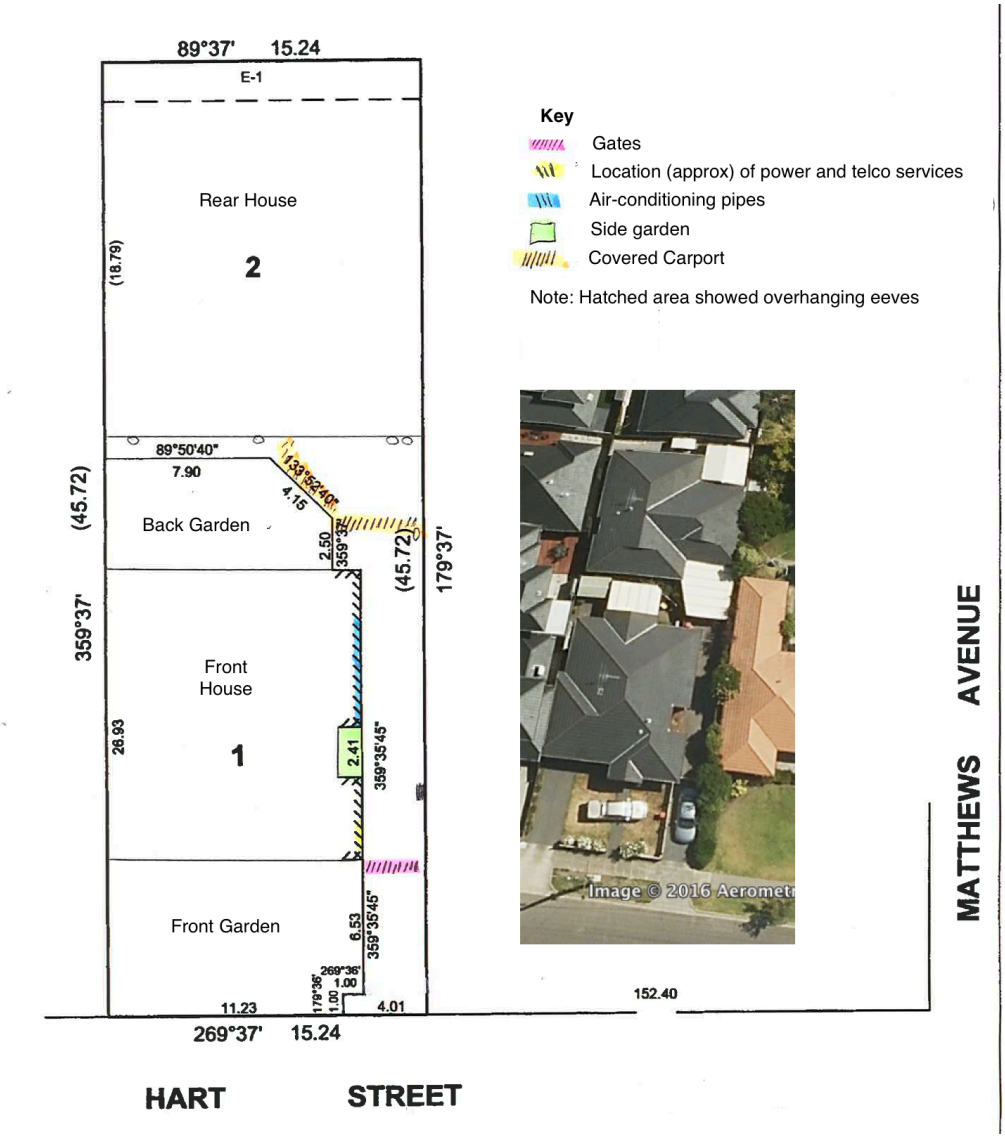
> the rights of interference with a right of way are by no means the same in the case of a public highway as in the case of a private road. In a public highway any obstruction is a wrong if it is appreciable… in the case of a private right of way the obstruction is not actionable unless it is substantial. There must be a real substantial interference with the enjoyment of the right of way.

75. The parties took polar opposite views in this matter, the dominant owner claiming the right to remove the gates, while the servient owner insisted on a right to put them up and keep them locked. The Court found the gates not inconsistent with the easement, but only if unlocked and open during business hours (as the right of way provided access to shops on the dominant tenement). Otherwise, they would represent an obstruction to the easement.[18]

VII. The battle-axe subdivision: a case study

76. A recent matter I was involved in, heard before VCAT, was *Frigo v Perry (Owners Corporations)* [2016] VCAT 730. The matter involved the following subdivision (the image is an annotated plan I provided at trial)–

[15] *Panfili v Lawless* (2010) 14 BPR 27, 288 (White J)
[16] *Pettey v Parsons* [1914] 2 Ch 653 (Headnote)
[17] Ibid. 662 (Lord Cozens-Hardy MR)
[18] *Pettey v Parsons* [1914] 2 Ch 666-7 (Lord Cozens-Hardy MR)



77. Some of what I discuss is not in the (short) written decision, having been contained in the evidence, or in the oral reasons of the Tribunal.

78. Lot 2 was located at the rear, but with a driveway running alongside Lot 1 providing street access. The subdivision occurred after dwellings were built on each lot. The eastern wall of the Lot 1 dwelling was the boundary with the driveway.

79. The subdivision is a "battle-axe subdivision" because of the shape of Lot 2 (which more closely resembles an axe than many other subdivisions given that colloquial description), featuring an **axe head** (dwelling), and an **axe handle** (driveway).

80. Some aspects of Lot 1 were only accessible using the driveway, specifically–
    - An electrical switchboard;
    - A smart metre (which replaced an earlier metre);
    - A lightwell in which a garden had been planted;
    - Overhanging eaves and gutters;
    - Downpipes;
    - Pipes connecting into an air-conditioning unit (installed after the subdivision);
    - A telecommunications conduit;
    - Windows facing onto the driveway;
    - Services connections; and
    - Bulk access to the back garden (a dividing fence at the rear of the driveway had been removed on a previous occasion, to enable delivery of furniture to the rear living area).

81. The generality of section 12(2) is such that Frigo could also, in my submissions, have made other uses of the easements, such as–
    - Establishing a carport in her backyard (noting that Perry had a double garage, plus a covered carport. Otherwise, this would be unreasonable, as it prevents use of the driveway for parking);
    - If the driveway fell into disrepair, repaving it as is 'reasonably necessary' to enjoy the easement;[19]
    - Construct and maintain new windows along the east of her home (looking onto the driveway), and use the driveway to carry out those works;
    - If demolishing and rebuilding on the front lot–
        - use the right of way during construction (as is reasonably necessary) to access that side of the lot;
        - construct a new entrance facing onto the axe handle;
        - construct a carport entered via the axe handle;
        - erect scaffolding above the right of way, so at to reach second level (for instance, to apply render or other façade work);

[19] *Butler v Muddle* (1995) 6 BPR 13,984

    - use the surface below the axe handle, if reasonable and necessary, for services such as drainage, electrical, and telecommunications.
    - if reasonable and necessary (and subject to providing compensation), excavating the driveway to install such new services.
- Install pneumatic tubes (also called a capsule pipeline) for document delivery using compressed air (which comes under the definition of '*any other service of whatever nature*') below the axe handle.

82. After some years of living alongside one another, the Lot 2 owner ('Perry'), without notice to Lot 1 ('Frigo'), erected gates across the driveway, which were locked. A key was not provided, and Perry insisted, if access was needed, that Frigo could ask and be given access (said not to be forthcoming).

83. What prompted the dispute was that, at first, it meant Frigo's switchboard became inaccessible. After a letter of demand (in *Calderbank* form),[20] Perry gave a key, but imposed further stipulations. An NBN installer was later prevented from accessing the telecommunications conduit, when Perry locked the gates.

84. This presented a significant problem, as the former Telstra copper network was to be decommissioned shortly after the scheduled hearing. This meant Frigo would not have an Internet or phone connection.

85. A colloquial objection of Perry to the NBN conduit (one of which was installed on Lot 2 already) was the addition of 'something new,' and that the conduit would 'wreck the aesthetics' of the driveway. He also argued the air-conditioning pipes, added after subdivision, were a 'new' use and should be removed.

[20] This is not found in the written decision, the Tribunal having formed the view that such an offer (at least on the particular facts of this case) was not determinative. I have chosen to include that detail so that readers understand the "feel" of the dispute (specifically that the lawyers were involved some time before the hearing, rather than that the parties had gone down a path at random).

86. The subdivision was designed with driveway use by Lot 1 in mind (which Perry knew when he purchased the property); and to the extent identified above, the Tribunal recognised that Frigo had rights of access.

87. It was not accepted, for instance, that if a garden were maintained in the lightwell, that watering the plants from a bathroom window was a reasonable outcome. This was not an '*alternative means of achieving the relevant function* [that] *was feasible or reasonably available*,' based on all the relevant circumstances (*Sheppard*).

88. I also contended that as the encumbered land was a driveway, not, for instance, a loungeroom, the uses by Frigo were not inconsistent with the same reasonable use and enjoyment of it by Perry.

89. The Tribunal also found Perry was not entitled to notice when Frigo intended to use the driveway, as such use was likely to be uncommon, and unintrusive.

90. As noted above, gates may be consistent with an easement. I contended that due to the particular circumstances, they should be removed, or at least moved further down the driveway where they could not be used to deny access. The Tribunal did not agree with this contention, but made explicit orders preventing the changing of the locks without provision of a new key.

VIII. Jurisdiction – Section 34B and VCAT

91. A question of jurisdiction was raised in *Frigo v Perry*, but not dealt with in much detail. The question is whether, if there is no owners' corporation, VCAT has jurisdiction over a section 12(2) dispute. The consensus that it did was, in my view, correct, but I feel it is worthwhile fleshing it out more.

92. Section 34B of the *Subdivision Act*, simply titled '**Disputes About Easements**,' grants jurisdiction over section 12(2) disputes to VCAT. It makes no reference to an owners' corporations. But it was inserted by the *Owners Corporation Act* 2006, and

is located in Part 5 ('*Subdivisions Within Owners Corporations*'), Division 5 ('*Disputes and other proceedings relating to owners corporations*').

93. Does this mean VCAT only has jurisdiction over section 12(2) disputes where an owners' corporation exists (such as in *Gordon*)?

94. The Explanatory Memorandum to the 2006 Bill, which contained amendments to the *Subdivision Act*, provides little help.[21] No reference is made in the Second Reading speech either (or in the general debate).

95. The *Interpretation of Legislation Act* 1984, subsection 36(1)(a), indicates that headings to Chapters, Parts, Divisions or Subdivisions comprise part of the Act. Subsection 36(2A) indicates Section headings do as well.

96. Is the section to be read in isolation from the headings?

97. The problem is aptly described in *Statutory Interpretation in Australia* (LexisNexis, 14th ed, 2014) at [4.53], where the authors state:

> *The other context in which problems occur is where a section expressed in general terms is included in a Part headed in a way that could limit its operation. The issue is complicated further if other sections in that Part fall within the description contained in the heading. Prima facie it would appear that the general section should be confined by its context. However, the context of the Act as a whole may demonstrate that this was not the intention*.

98. Without going into the detail, the question might be resolved either way.

99. In my opinion, the unambiguous words of the section – in giving jurisdiction over section 12(2) disputes to VCAT – should not be fettered by the heading. The

[21] It only states that: 'New section 34B provides that if a dispute arises between the owners of lots, roads or reserves on a plan, in relation to an easement, they may apply to VCAT for an order determining the dispute. VCAT may make any order it thinks fit'

Subdivision Act is not limited to subdivisions with common property and an owners' corporation. Indeed, the switch from the *Strata Titles Act* 1967 to the 1988 Act meant section 12(2) could create easements in all subdivisions.

100. Given Parliament abandoned this distinction for section 12(2) easements arise, did it intend to reintroduce it in the context of disputes concerning them?

101. Absent guidance in the Explanatory Memorandum or the Second Reading Speech, it is not apparent that Parliament only intended for recourse to VCAT to be available if there is common property. Indeed, there is no reason why, if read as limited to subdivisions with an owners' corporation, a section 12(2) dispute has to concern the common property, or affect all the lot owners.

102. That section 34B was drafted and passed in the process of reforming the legislation for owners' corporations – which also saw the operative headings introduced – does not mean Parliament intended to so limit the reform (indeed, it might be said the section is only under the heading because the drafters simply wanted to keep all the "new" provisions together). It could also have included an express limitation in the terms discussed, but did not.

103. A final, relevant observation is that, while the Act includes a definition of '*lot affected by an owners corporation*,' it does not use it in section 34B (unlike in section 34A, which concerns owners corporation disputes).

J A SILVER

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