SECTION 5

DEALINGS IN LAND

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1994 UPDATE

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SECTION 5 - DEALINGS IN LAND

Introductory Note for 1994 Revision

This Section has been considerably revised, and as it is largely concerned with freehold title documents setting out ownership and rights to land, it is important that all users now be aware of changes in terminology and practice relating to land registration which follow from the Transfer of Land (Computer Register) Act 1989. The long standing Certificate of Title first introduced with the passing of the Transfer of Land Statute 1862, now after 130 years, does not have the same significance, and the following changes in terminology, and title registration and searching are set out below:

Background

Since 1989, as part of the Land Titles Office automation projects, current title information has been keyed from paper titles to a computer database.

Until the Transfer of Land Act was recently amended by the Transfer of Land (Computer Register) Act 1989 which commenced on 3 February 1992, the computer information could only be used to provide a computer search of the paper title (see Example A). It could not be used to replace the paper title Registration of dealings eg proprietorship change, had to occur on the paper title, with the computer title information being subsequently updated.

The amendments to the Transfer of Land Act provide for the Register to be in a variety of forms and on any medium, including a computer.

The computer title information can now comprise part of the Register and can be updated by registering new dealings on the computer database without having to update any paper title.

New Terms

Two important new terms have been included in the Transfer of Land Act following from the Transfer of Land (Computer Register) Act 1989. These are:

(a) "Folio of the Register", (section 27(7))

A folio is a recording of land information relating to a land parcel. A folio must include land description, description of proprietorship and any other particulars of any estate or interest affecting the land. For titles in computerised form, the folio is the data stored on the computer database. For titles still in paper form, the folio consists of the original title held at the Land Titles Office.

(b) "Certificate of Title", (section 27(B))

This is a document, which contains the information, or an extract of the information, on a folio.

For titles in computerised form, the Certificate of Title is a computer printout (see Example B). For titles still in paper form, the Certificate of Title is what has been commonly called the duplicate title.

A new Certificate of Title, the duplicate title, will be issued each time a dealing is registered and will be the document required to be lodged with a future dealing. A new certificate is not produced for dealings where it is not necessary to lodge the existing certificate (e.g. caveats). Some notes on the use of the Certificate of Title for conveyancing transactions follow.
Enquiry no : 1
Security no : 51682216296N     Volume 09614 Folio 746
Customer code: 3S             Printed 24/06/1994 09:49am

LAND

Unit 2 on Strata Plan 021944U and an undivided share in the common property for the time being described on the plan.

PARENT TITLE Volume 03461 Folio 127
Created by instrument SP021944U 13/06/1985

REGISTERED PROPRIETOR

ESTATE FEE SIMPLE
Tenants in common
As to 1 of a total of 2 equal undivided shares
SOLE PROPRIETOR
    GRAHAM, SCOTT DRYSDALE; UNIT 2 8 PINE AVENUE ELWOOD

As to 1 of a total of 2 equal undivided shares
SOLE PROPRIETOR
    BROWN, ARIARNE; UNIT 2 8 PINE AVENUE ELWOOD
Registered T124257X 03/06/1994

ENCUMBRANCES, CAVEATS AND NOTICES

MORTGAGES AND CHARGES IN PRIORITY
RANKING 1 T124258U 03/06/1994
MORTGAGE NATIONAL AUSTRALIA BANK LIMITED

Any easements created by Section 98 Transfer of Land Act 1958 or Section 12 Strata Titles Act 1967 and any other encumbrances shown or entered on the plan.

UNREGISTERED DEALINGS

Obtain Final Search Statement for unregistered dealings

STATEMENT END
EXAMPLE B

CERTIFICATE OF TITLE
UNDER THE TRANSFER OF LAND ACT

I certify that the registered proprietor is the proprietor of the estate and interest in the land subject to the encumbrances, caveats and notices described.

REGISTRAR OF TITLES

LAND

Unit 2 on Strata Plan 021944U and an undivided share in the common property for the time being described on the plan. PARENT TITLE Volume 03461 Folio 127 Created by instrument SP021944U 13/06/1985

REGISTERED PROPRIETOR

ESTATE FEE SIMPLE

Tenants in common

As to 1 of a total of 2 equal undivided shares

SOLE PROPRIETOR

GRAHAM, SCOTT DRYSDALE; UNIT 2 8 PINE AVENUE ELWOOD

As to 1 of a total of 2 equal undivided shares

SOLE PROPRIETOR

BROWN, ARIARNE; UNIT 2 8 PINE AVENUE ELWOOD

Registered T124257X 03/06/1994

ENCUMBRANCES, CAVEATS AND NOTICES

MORTGAGES AND CHARGES IN PRIORITY RANKING

1 T124258U 03/06/1994 MORTGAGE

NATIONAL AUSTRALIA BANK LIMITED

Any easements created by Section 98 Transfer of Land Act 1958 or Section 12 Strata Titles Act 1967 and any other encumbrances shown or entered on the plan.

END OF CERTIFICATE
### EXAMPLE C

<table>
<thead>
<tr>
<th>Security No:</th>
<th>51682206942F</th>
</tr>
</thead>
<tbody>
<tr>
<td>Customer Code:</td>
<td>0001W</td>
</tr>
<tr>
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<td>Volume 096:14 Folio 746</td>
</tr>
<tr>
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</tr>
<tr>
<td>Parent Title(s):</td>
<td>Volume 03461 Folio 127</td>
</tr>
</tbody>
</table>

#### RECORD OF DEALINGS

<table>
<thead>
<tr>
<th>Date Lodged for Registration</th>
<th>Date Recorded on Register</th>
<th>Dealing Number</th>
<th>Dealing Type and Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>24/06/1993</td>
<td>31/08/1993</td>
<td>S549903W</td>
<td>DISCHARGE OF MORTGAGE M375155R</td>
</tr>
<tr>
<td>03/06/1994</td>
<td>22/06/1994</td>
<td>T124257X</td>
<td>TRANSFER GRAHAM, SCOTT DRYSDALE BROWN, ARIARNE</td>
</tr>
<tr>
<td>03/06/1994</td>
<td>22/06/1994</td>
<td>T124258U</td>
<td>MORTGAGE NATIONAL AUSTRALIA BANK LIMITED</td>
</tr>
</tbody>
</table>

A copy of further information can be obtained by searching the dealings.
Use of Certificates of Title

The delivery of the Certificates of Title or its control at the settlement of a conveyancing transaction is a basic aspect of conveyancing practice in Victoria. The delivery at settlement is required by Condition 12, Table A of the Seventh Schedule of the Transfer of Land Act 1958 (the Act), a condition incorporated in standard contracts of sale. If the Certificate of Title cannot be delivered at settlement because it is already lodged in the Land Titles Office in an earlier dealing, the granting of an “order to register” by the person who controls the Certificate of Title is invariably accepted as a substitute for actual delivery.

A Certificate of Title exists for nearly all folios of the Register. The Act requires a Certificate of Title to be produced for every folio of the Register, and for every Crown Grant to be in duplicate (see sections 27B(7) and 28(1)). The only exception provided for in the Act is found in section 28(3). The section permits the production of a folio only for a prescribed authority, of which the Rural Water Corporation is one example. There have been further inroads into the requirement that a Certificate of Title should exist for every folio by virtue of sections 24(2A)(b) and 28(e) of the Subdivision Act 1988. These provisions enable the creation of a folio only for common property.

The Act requires that a Certificate of Title must be submitted to the Registrar of Titles to enable a dealing to be registered (see section 27E(a)(n)). Section 54 of the Act provides an express exception in relation to an application by an acquiring authority to be registered as proprietor. In addition, section 104(5) empowers the Register of Titles to dispense with submission of any Certificate of Title. The discretionary power of dispensation is rarely used. This view of the Registrar’s responsibilities has been strongly supported in the cases Dotter v Evans [1969] V R 41, Casella v Casella [1969] V R 49 and Marshall v Williams [1974] V R 592.

Reference to the Certificate of Title should not be seen as an alternative to a search of the folio of the Register as only the folio contains a conclusive statement of encumbrances. The information recorded on the Certificate of Title does not include all the information recorded on the folio of the Register in relation to the land. For example, caveats and agreements under section 173 of the Planning and Environment Act 1987 are recorded only on the folio. The Act provides that recordings on a folio prevail over those on a Certificate of Title if there is any inconsistency (see sections 27(D)(6) and 28(2)).

The purpose of producing a Certificate of Title and requiring its submission to enable the registration of a dealing is not clearly spelt out in the Act. In practice, for both conveyancing purposes and the purposes of the Registrar of Titles, its delivery at settlement or submission at the Land Titles Office is evidence that the party concerned has authority to deal with the land.

Creation of Computer Folios

These are currently being created in two ways:
(a) directly from newly registered plans of subdivision for lots, roads and reserves on those plans, in this situation there is no paper folio for the land, only the computer folio information.
(b) through the registration of a dealing affecting a paper folio (title) for which there is computer “search” data available. This transforms the computer data from being used for “computer” search purposes only to computer folio data, which can be subsequently updated instead of the paper title.

Information on Computer Folios

Computer folios only contain current information. Previous information is available through the paper folios or from a computer “audit” which records dealings registered on the computer folios (see Example “C”). A fee is applicable for this information.

Computer folios and “computer search” outputs do not contain a diagram of the land and do not generally provide easement or depth limitation information. This is available from the relevant diagrams. The folio identifies which diagram must be inspected through the note “see LP or PS (as appropriate), for further detail and boundaries.”
A Certificate of Title and a computer search contain a unique security number and contain information current at the date and time of their production.

**Folio Diagrams**

Certificates of Title and computer "searches" do not contain a diagram. The approach adopted by the Land Titles Office is to use plans (such as strata, subdivision or consolidation) to provide diagram information. If there is no plan the Office produces its own internal plan called a "Title Plan". The plan will be produced as part of the search.

Under section 27(6) of the *Transfer of Land Act*, the information on the plan relating to the land in the folio is deemed to be part of the folio.

**Creation of Computer "Search" Information**

In addition to the creation of computer folios, the Office is continuing to key information from paper folios to provide computer search of those paper folios.

### 5.1 Bringing General Law Land under the Operation of the *Transfer of Land Act*

"When an original purchaser sells the land to another he shall transfer it by a simple memorandum which, being brought to the office of the Registrar-General, the original land grant must be surrendered, and then the Registrar will issue a new title to the second purchaser direct from the Crown. This will get over the difficulty of tracing title through all manner of intricate transactions between purchasers, and instead of a man having to carry about an immense bale of papers he would have one simple document, which would nevertheless be a title valid and indisputable, because it would be an original land grant".

(From an Address to the Electors of the City of Adelaide on 31 January 1857 by Robert Torrens.)

The Torrens system of land registration was widely accepted and was introduced in all Australian States and New Zealand between 1858 and 1874.

In Victoria all land alienated by the Crown in fee simple on or after the 2 October 1862 is under the operation of the *Transfer of Land Act* (TLA). Land alienated prior to such date was under the general law, which involved a chain of deeds described by Torrens as a "bale of papers".

There are a number of ways in which general law land can be brought under the operation of the *Transfer of Land Act* ("the Act").

#### 5.1.1 Traditional Applications

On a voluntary basis an applicant can use the provisions of Division 1 of Part II of the Act to bring general law land under the Act. The claim can rely either upon deed, title or adverse possession, or a combination thereof.

The application is made on Form 1 of Schedule 2 of the Transfer of Land (General) Regulations 1994 and lodged under section 9 of the Act, and is supported by the chain of deeds and, in practically all cases, a plan of survey, abstract of field notes and licensed surveyor's report.

Despite the restrictions on the subdivision of general law land an annual average of only 200 traditional applications was received for the decade spanning the years 1976 to 1985 (both inclusive). From 1990, only one per year has been lodged on average.

From 1862 until the introduction of the Accelerated Conversion scheme in 1988, approximately 59 500 traditional applications had been granted bringing approximately 1 380 000 hectares of general law...
land under the Act - approximately 700,000 hectares remained. Since then, up to January 1994, about another 6800 applications have been granted.

5.1.2 Accelerated Conversion Methods

The Act was amended in 1986 by the *Transfer of Land (Conversion) Act* 1986 No 128 which came into operation on 1 March 1988 to introduce simpler methods for bringing land under the *Transfer of Land Act 1958*. The Registrar of Titles is empowered, in Division 3 of Part II, to rely on a solicitor's certificate that a good marketable title exists and is thus relieved of the need to make skilled searches of the records or to examine the legal title claimed by the applicant.

There are now three additional methods of conversion under this system which is completely voluntary. Real incentives (such as reduced conversion fees, abolition of assurance contributions, greatly reduced processing times etc) have been offered to encourage conversion of general law land. Briefly these three methods are:

5.1.2.1 Deed Registration Conversion (section 26C TLA.)

A folio of the Register can be issued if a solicitor's certificate is lodged with a chain of title when a deed representing a transaction (e.g., sale or mortgage) under the general law system is registered. No survey is required but a qualified folio usually issues with a warning as to dimensions.

5.1.2.2 Certificate (Non-Survey) Conversion (section 26D TLA.)

This part of the scheme operates the same as deed registration conversion, it is designed for the situation where an application can be made without the need to register a transaction.

5.1.2.3 Certificate (Survey) Conversion (section 26E TLA.)

An application must be supported by survey in addition to a solicitor's certificate. This method is provided for the case where the marketable title is based on possession or in the situation where the land cannot be sufficiently identified from the deed.

The Registrar has recently introduced a scheme under which aerial photography can suffice in lieu of a survey. See Section 5156.

5.1.3 Qualified Folio of the Register

The amending Act introduced the concept of a qualified folio, and such can issue with either a "Warning as to title" or "Warning as to dimensions or both.

5.1.3.1 Warning as to Title

The folio is noted that it is subject to certain qualifications in the solicitor's certificate, which would relate to any defects found in the general law chain. A warning as to title will lapse after 15 years or can be avoided or removed upon payment of an appropriate indemnity (Sections 21K and 26N).
5.1.3.2 Warning as to Dimensions

The folio is noted: "Any dimensions and connecting distance shown is based on the description of the land as contained in the General Law Title and is not based on survey information which has been investigated by the Registrar of Titles."

It is expected that most conversions made on a deed basis will be qualified and bear a warning as to dimensions. With the introduction of qualified folios, it was accepted that the costs and times involved in surveys and investigations thereof would prevent the accelerated rate of conversion desired. A warning as to dimensions is determined by the Registrar-General's Office and applies to most cases proceeding under the provisions of sections 26C and 26D of the TLA. Deed description of a parcel is accepted "warts and all" and no comparison with adjoining folios or perusal of survey information is made in processing cases using the provision of sections 26C and 26D of the TLA.

The parish plan and/or Land Titles Office compiled sheet will on occasion be sufficient to show that the deed agrees with the original Crown measurements and that no surveys have been registered to alter the original pattern. In such a case a folio will issue without the warning as to dimensions. A warning as to dimensions will remain indefinitely until appropriate action for removal is taken, which usually involves survey.

5.1.3.3 Discrepancy with Abutting Folios

There is potential for the issue of new folios with connections and/or dimensions not in agreement with existing folios. It is important to note that when surveying the land in a qualified folio which has a warning as to dimensions, a search of abutting folios should be made. Despite close agreement between occupation and boundaries purporting to represent the land described in a folio carrying a warning as to dimensions the warning cannot be removed until a complete search establishes no discrepancy. When there is a discrepancy, occupation must be proved by statutory declaration and notices served.

5.1.3.4 How is a Warning as to Dimensions Removed?

Application is made under section 26M of the TLA supported by survey documents (certified plan of survey, transparency, abstract of field notes and licensed surveyor's report).

This section is particularly convenient as there is provision to amend the dimensions of the land in the folio irrespective of the quantity of land involved. As required an applicant using these provisions can:

(a) remove the warning as to dimensions;
(b) amend a boundary to adopt occupation on a bona fide basis as in section 99 TLA;
(c) separately define in the plan any land claimed by occupation or otherwise as in sections 9 or 60 TLA.

Here, measurements can be amended to accord with occupation without the need for a series of applications.

In some cases the survey qualification is capable of removal as part of a survey based subdivision. This situation only applies in cases of minimal, or no, variation from the dimensions of the land in the folio and no encroachment on either TLA or general law land. Licensed surveyors are well advised to use the existing boundary plan facility in these cases.
5.1.3.5 When is it Necessary to Remove a Warning as to Dimensions?

It is not necessary to remove the warning prior to sale transfer etc of the land in the qualified folio. Experience in other places has shown that folios with qualifications (or limitations) as to dimensions, do not create undue concern.

Where it is proposed to develop the land it may be desirable for survey to be undertaken.

5.1.3.6 Subdivision of a Qualified Folio with Warning as to Dimensions

In most cases, a subdivision will be required to be based on survey and an abstract of field notes and licensed surveyor's report lodged. Unless there are exceptional circumstances, non-survey plans of subdivision will not be accepted. Partial survey may be appropriate in the case of a subdivision of a large rural allotment to create one or more small lots - sufficient survey evidence would be required to issue 'ordinary folios' (unqualified) to the small lots.

5.1.3.7 Determination of Boundaries and Procedures

Having regard to the purpose of the subdivision, the location of any occupation on or close to the boundaries and the location of the boundaries of any abutting folios the following alternatives may be appropriate:

(a) adopt dimensions and connection in accordance with the folio,
(b) depart from dimensions of the land in the folio to accord with occupation and/or the boundaries of abutting folios (See Titles Office Practice Notes 1985 which include a review of circumstances under which some variation or disagreement with dimensions may be accepted without a requirement for prior amendment of the folio),

(c) Advise client to make application under section 26M

Note: If procedure under alternative (a) or (b) is proposed, it would be advisable that a boundary plan is lodged prior to the plan of subdivision being prepared.

5.1.3.8 Consolidation of Qualified Folios with Warning as to Dimensions

Provided the folios 'fit together' the consolidation of two qualified folios or qualified and ordinary folios is acceptable. In other cases, an application under section 26M will be necessary.

5.1.4 Other Methods of Conversion

These are of minimal application and consist of

5.1.4.1 Registrar's Direction

Division 2 of Part II of the Act provides for a compulsory process in which the Registrar can direct that general law land be brought under the Act. This was based on New Zealand legislation but resources have not been sufficient to utilise the provisions except on a very few occasions.
5.1.4.2 Compulsory Acquisition

A public statutory body, acquiring the whole of a disposable parcel of land by statute, can apply pursuant to section 54 of the Act for the issue of a folio, even though ownership may have been held previously under the general law.

5.1.4.3 Miscellaneous Conversions

The Local Government Act 1989, Housing Act 1983 and the Associations Incorporation Act 1981 are examples of legislation which provide for the bringing of general law land under the operation of the Transfer of Land Act under special circumstances.

In addition there are a variety of statutes which provide similar powers in relation to particular parcels of land the subject of the legislation concerned (eg. Brighton [Cramer Street] Land Act 1962).

5.1.5 Some General Provisions

5.1.5.1 Discharge of General Law Mortgage by an Instrument under the Transfer of Land Act 1958:

A provision has been included such that a Torrens discharge has effect to discharge a general law mortgage carried forward on to a folio of the Register.

5.1.5.2 Assurance Fee Abolished

To encourage the conversion of general law land the assurance fee based on a percentage of the land value has been abolished. However, the Registrar of Titles is able to levy a fee where there is a special risk.

5.1.5.3 Refusal to Convert

The Registrar has discretion to refuse conversion in special circumstances. However, the applicant still has the facility to apply under section 9 TLA.

5.1.5.4 Searching Folios to Converted Land

Folios are searched in the normal way. In respect of any warning as to a defect in title the searcher is provided with a copy of the relevant solicitor's certificate.

5.1.5.5 Registration of General Law Deeds Affecting Converted Land

A general law deed can be registered at the Registrar's discretion under the Torrens system, provided it is dated within six months after the conversion of the land.

5.1.5.6 The Use of Aerial Photography in Support of Applications Based on Possession

Early experience with the operation of the Accelerated General Law Conversion Scheme revealed a number of cases for which substantial effort had been devoted to deed based conversion under section 26C or 26D TLA, only to find a distant break in the chain of title; perhaps 100 years ago in some cases. The applicant was then left with the situation of paying for work which had produced no result or having a formal survey made and appropriate documents produced at additional cost.
The Registrar of Titles has instituted a scheme in which in certain cases an aerial photograph is admissible instead of a survey plan for an application based on possession, i.e., for applications under sections 26E or 60 (or 9, but this section is now rarely used). The Registrar relies upon powers to make such a dispensation under the provisions of section 95 TLA. This discretion is in practice delegated to a committee of experienced staff at the Land Titles Office of which 2 experienced licensed surveyors are members.

The scheme is outlined in a booklet issued by the Land Titles Office dated May 1992, titled *Guidance Notes on the Use of Aerial Photography in Support of Adverse Possession Applications*.

The steps involved are as follow:

1. The applicant applies to VicIMAGE for an aerial photograph of the land claimed.
2. Once the aerial photograph is received, the applicant prepares a transparent overlay for attachment to the photograph and has both signed.
3. The applicant applies to the Registrar of Titles requesting that the usual requirement of a survey of the land be waived, and enclosing the aerial photograph and the transparent overlay.
4. If the Registrar consents to accept an aerial photograph in lieu of a survey plan, the applicant applies for title on the basis of possession in the usual way, supported by an aerial photograph.

As at January 1994, approximately 70 cases based on the use of aerial photography had been accepted. These have all been related to complete parcels of land.

### 5.1.5.7 Bibliography


### 5.2 Adverse Possession

#### 5.2.1 Notes on Applications under the *Transfer of Land Act* 1958 based on Adverse Possession

Section 9 and section 26E give the Registrar power to convert either a general law deed or possessory title to a title under the *Transfer of Land Act* 1958. Section 26E provides for the Registrar to do so in reliance upon a solicitor’s certificate that there is good title as distinct from the Registrar satisfying himself that there is a good title.

Sections 60 to 62 of the *Transfer of Land Act* give the Registrar power to make an order, vesting land under the Act in a person who the Registrar is satisfied has acquired a title to the land by adverse possession.

Broadly speaking, the majority of applications are made by persons in the following categories:

(a) By a trespasser, or adverse possessor, against a registered proprietor, to acquire title to the subject land.

(b) By a registered proprietor-mortgagor, to bar the interest of a mortgagee in the land.

(c) By a mortgagee in possession, where the right of the registered proprietor-mortgagor to redeem the mortgage is barred.
5.2.2 The Basis of the Applications

The basis upon which applications are made is the running of time against a right of action which has accrued in a person with a registered interest in the subject land (sometimes called the paper owner) and when time has run against the right of action, the consequent extinguishment of that person's interest by section 18 of the Limitations of Actions Act 1958, coupled with the establishment of a possessory title, indefeasible by the paper owner or any other person, in the applicant. There is much misunderstanding concerning periods of time which must run to extinguish the paper owner's title. Attention is therefore drawn to the summary of principles set out in Vance "Examination of Title" at page 142:

"A person who has been, or whose predecessors in possession and himself together have been, in continuous possession of land adversely to the owner thereof for a period of 15 years after the right to bring an action for the recovery of land has first accrued will acquire a title by possession, provided that-

- during that period no acknowledgment in writing or payment has been given or made to the owner by, or on behalf of the applicant or any of the persons through whom he claims, and that

- at the commencement of that period the owner was not under any of the disabilities mentioned in section 289 of the Property Law Act 1928" (now section 23 Limitation of Actions Act 1958).

The statement in Vance continues:
"While this statement recognises 15 years possession as sufficient yet, in as much as adverse possessors are almost invariably unable to supply proof negativing disability on the part of the owner, practically every application based on possessory title has to establish 30 years possession which section 290 of the Property Law Act makes an absolute bar." (now paragraph (c) of the proviso to section 23(1) Limitation of Actions Act 1958).

It should be noted that the statutory provisions referred to by Vance in his book (published 1941) have now been superseded, but, it is submitted, the principles are unchanged. Accordingly, where the adverse possessor and his predecessors have been in possession in excess of 15 years, but short of 30 years, it is still open to the paper owner to prove that he was under a disability at the time the rights of action accrued, "disability" being as defined in section 3(2) of Limitation of Actions Act as follows:
"For the purposes of this Act a person shall be deemed to be under a disability while he is an infant or of unsound mind."

Note that there is a conclusive presumption that a person is of unsound mind if he falls within one of classes referred to in section 3(3), but the words "unsound mind" are not exhaustively defined. Generally speaking, therefore, proof of 30 years possession is required by the Registrar, where the paper owner was a natural person, and therefore capable of being under a disability. An exception to the general rule is where possession is claimed against a corporation (e.g. a company incorporated under the Companies Act.) which, of course, cannot be under a disability, as defined. Attention is directed, in particular, to the provisions contained in sections 8 to 20 (inclusive) and 23 of Limitation of Actions Act 1958, which contain most of the current provisions concerning the running of time. At the same time the other provisions of the Act, and the relevant case law should be taken into account.

5.2.2.1 The new approach taken by the Registrar of Titles (August 1993)

The provisions of section 108 of the Act confer a discretion on the Registrar to take a calculated risk in granting an application and to levy an assurance contribution on account of that risk. The Registrar has assessed the general risk of relying on 15 years possession in the light of the history of section 9 and section 60 applications and now relies on proof of 15 years adverse possession as sufficient to grant an application for title by possession on the presumption that the true owner was not under a disability at the time he or she was dispossessed. An applicant and the certifying solicitor in a section 26E
application remain subject to the 30 year limitation outlined above because only the Registrar has the benefit of section 108

This approach places the onus on the true owner or those claiming through the true owner to raise the issue of disability. Experience shows that claims of disability existing in the true owner were very seldom raised. However, there will be a small risk of dispossessing an owner whose title has not been extinguished, should the Registrar rely on 15 years adverse possession in order to make an order vesting the land in the adverse possessor.

Under the Torrens system of land registration, title to land once granted to an adverse possessor cannot be recovered by the true owner. The adverse possessor to whom the Registrar grants title gains immediate indefeasibility of title. This means that, should the Registrar grant title to an adverse possessor on proof of 15 years possession, a true owner who is dispossessed whilst under a disability will be precluded from obtaining the return of his or her land. He or she will be limited to a claim for compensation.

The Registrar of Titles uses advertising and the sending of notices to affected persons in order to maximize the opportunity for the true owner to take action before granting the application. The applicant will also be required to make a larger contribution to the Consolidated Fund. This is to cover the risk of the true owner coming forward after the granting of the application and proving that his or her disability has prevented time from running against his or her title to the land.

A synopsis of this new approach to be adopted by the Registrar in relation to adverse possession applications under sections 9 and 60 of the Transfer of Land Act 1958 is contained in Circular 8 issued by the Registrar of Titles dated 31 August 1993. This circular has been published in full in Traverse 128, November 1993.

The requirements to mount a successful application are discussed in the following sections.

5.2.3 The Application

The forms prescribed in Schedule 2 of the Transfer of Land (General) Regulations 1994, should be adapted in the case of applications by corporations. Forms 1, 6 and 24 relate to applications under sections 9, 26 and 60 (1) respectively.

5.2.3.1 The Requirement of Survey

The application must be accompanied by a plan of survey and abstract of held notes of the land certified by a licensed surveyor together with the transparency of the plan and the licensed surveyor’s report or an aerial photograph as discussed in Section 5156.

In exceptional circumstances, e.g., the land claimed being wholly surrounded by the land of the applicant, this requirement may be waived. The request to waive lodging of a plan of survey may be contained in the application. Survey may be dispensed with on the basis of either of the following:

1. The boundary is determined by the nature of the abuttal. See Section 5233.

2. The application concerns the extent of the legal interest and the boundary is not at issue. For example:
   - Where the applicant is registered as proprietor but claims free of a mortgage.
   - Where the applicant claims the interest of a co-owner.
   - Where the applicant is a mortgagee in possession.

3. The Registrar has approved the use of an aerial photograph on about 70 occasions for whole parcels.
5.2.3.2 The Role of a Surveyor in an Adverse Possession Application under section 9, section 26E or section 60 TLA

The surveyor's role is twofold.

To measure the actual occupation boundaries in order to provide measurements for a new title.

To provide supporting evidence in the form of expert information and evidence of observations regarding the physical features indicating the land which is in the possession of the applicant. It should be appreciated that this information must relate to the total enclosure which may include land other than the land applied for.

The instructions to a surveyor must indicate the following:

(a) That the survey is commissioned for the purposes of a possessory claim.
(b) The type of application to be made. This will indicate whether or not the land is under the Act.
(c) The length of the period of possession relied upon.
(d) The nature of the possession, eg. As a residence, rental, farm, other business, holiday home etc.
(e) The extent of the land claimed by possession.
(f) The extent of the land in the applicant's possession.
(g) Details of the applicant's title to any land other than that applied for which is in his possession.
(h) Details of the true owner's title to the land claimed.

The surveyor should note whether the land claimed is a separate holding or is part of a larger enclosure containing the land applied for and other land. In the case of a larger enclosure, it will be relevant to show that the applicant has sole possession of the whole enclosure. The applicant's title to the balance of the enclosure does not establish possession of the land claimed. It is not generally necessary to fully survey the larger enclosure if it is extensive. It may be shown "not to scale" on the plan.

The surveyor should also note any encumbrances referred to in the folio of the Register (or relevant diagram) of the true owner to the land claimed. The surveyor's observations may indicate that the land should be claimed free of a particular encumbrance, eg. a disused easement.

5.2.3.3 Measurement of Boundaries

This needs no discussion except to say that as a practical rule the adopted boundaries of the land claimed by adverse possession must be those delineating the occupation of the applicant. Exceptions may only be made where the boundary is determined by the nature of the abutting land. Examples would be abutting title of the applicant, abutting Crown land, road alignment, railway land etc.

5.2.3.4 Survey Information as Supporting Evidence

The survey information provides the most impartial and professional corroborative evidence of occupation and its relationship to the title boundaries. The plan and abstract of field notes should indicate all features which can be relevant to the claim or to the removal of any encumbrance. The marking on the survey plan of all fences, walls, gates etc. and the nature and apparent age, and the offsets to title boundaries is critical in this context. The surveyor's specialised experience gives the Licensed Surveyor's Report the status of expert evidence on matters such as estimated age of features eg. fences and buildings.
Other features may be relevant -
If they indicate demarcation of the extent of the land in the applicant's possession and the nature of the possession. Such features would be, for example, paving, cultivation, residence, buildings, machinery, water tanks, stored materials, and the remains of past fencing

OR
If they form an effective barrier to other trespassers Examples would be a creek, a ditch, a cliff, heavy scrub, or blackberries

OR
If they show non-use of an easement. Examples may be fences, buildings and old trees. It may be relevant for the surveyor to report on the absence of paving, wheel ruts, hacks etc, if it is sought to prove non-use of a carriageway or footway easement. The licensed surveyor's report should give details of the state of roads, tracks, gates and doors whether or not they are nailed, closed or apparently used or not.

5.2.4 Evidence to Support the Application

A circular, prepared in the Land Titles Office, sets out the minimum requirements of the office to justify the making of a vesting order (The evidentiary requirements are identical for Torrens System and Old Law land)

These may be summarised as follows

- Proof of the circumstances in which the applicant, and each of those through whom he claims, went into possession,
- Proof that the applicant, and those through whom he claims, have been in possession for the requisite limitation period,
- That such possession has been adverse to the true owner,
- That the acts of user relied on, or the "dominion" over the land have been so open, notorious, and hostile as to put an ordinarily prudent owner having the opportunity of observing such acts, on notice of the fact that his lands are in the adverse possession of another, and have been to the exclusion of any user by the possessor
- Mere entry onto the land is insufficient - there must be exercise of dominion over land with the intention to oust the paper owner,
- That user by the applicant and those through whom he claims has been frequent and continuous in nature. If the land ceases to be in adverse possession, the right of action shall no longer be deemed to have accrued, and no fresh right of action shall be deemed to have accrued until the land is again taken into adverse possession - section 14 (2) Limitation of Actions Act,
- That during the period that time ran against the paper owner, no acknowledgment or payment was given to the paper owner or his representatives. Once time has run and right of action has been extinguished, there is no reviver of paper owner's title by acknowledgment - section 18 Limitation of Actions Act Vance op cit pp 142/3

In addition to the evidence of possession, which will be set out in statutory declarations as stated on the circular, it is necessary to prove that the applicant has acquired the rights of all who have been in possession during the last 15 years. The Land Titles Office therefore requires assignments and possessory rights to be produced in respect of the possessory lights for the past 15 years.

Documents to be produced with the application are

- Certified plan of survey and abstract of field notes,
- Transparency and licensed surveyor's report Also see Section 5 1 5 6 as to use of aerial photography in hen of survey
- Statutory declarations from the applicant, his predecessors in possession, two disinterested witnesses, and the Municipal Rate Collector (reference - circular)
- Assignments, contracts of sale, receipts, probates and copy wills, and any other documents of title
A list of documents should be set out in the schedule to the application, and the applicant must declare in the application that such documents are the only documents in his possession or control affecting the land. This paragraph, *inter alia*, must be verified in the final stages of the application, by statutory declaration of the applicant.

5.2.5 Comments on Aspects of Application and Evidence

5.2.5.1 Terms "Possession" and "Occupation"

Possession means "possession in law", that is, controlling the land as if the owner of it, whereas occupation refers to "occupation in fact". A person may have possession by his tenants etc., the tenants being the persons in occupation.

5.2.5.2 Quantum of User.

This is a matter on which it is usual to find deficiencies.

It is necessary that there should be a full statement of whatever acts of user there have been. In the case of a suburban block of land, it is just as necessary to establish user, as in the case of a paddock in the country, although the user would be expected to differ according to the nature and value of the land.

Acts of user may be no more, in the case of a suburban block, than maintaining fencing, regular removal of weeds and grass, complying with municipal council requirements etc. Nevertheless the frequency with which such acts occur may be relevant to the success of the application. In case of country land, a description of "grazing" as an act of user is, in itself, generally inadequate. There should be a full statement of the facts, setting out, for example, the numbers of cattle grazed from time to time, the frequency with which land is used, whether other acts of user occurred (such as maintenance of fencing, removal of noxious weeds, spreading of fertiliser, or erection of "Trespassers Prosecuted" signs).

5.2.5.3 Easements Affecting the Land Applied For.

Although the common law position is that non-user of an easement by the owner of the dominant tenement does not constitute abandonment, section 62(1) *Transfer of Land Act* 1958 contains what appears to be a statutory exception to that rule. Under that subsection the Registrar is empowered to make a vesting order "free from any easement notified as an encumbrance which has been proved to the satisfaction of the Registrar to have been abandoned by reason of non-user for a period of not less than 30 years". In such cases, positive evidence from all the witnesses is required of non-user of the easement, and, depending on the nature of the easement, (eg. drainage or sewerage easements) expert evidence may also be required of an examination of the soil of the easement, to see whether it has ever been trenched, and, if so, whether it contains any pipes.

In such cases notice of the application is sent to the owners of the dominant tenement, pursuant to the provisions of section 60(2), and the caveat provisions in section 61(1) apply. (See Sections 5.2.5.4 and 5.2.8 below).

5.2.5.4 Mortgages or Charges Affecting the Land Applied For

In these cases positive proof from the possessors is required, of non-payment of any principal or interest thereon, or non-acknowledgment of the mortgage or charge debt (as the case may be), during the relevant period. Upon such proof the Registrar would treat such a mortgage or charge as an "encumbrance, which has been determined or extinguished by such possession" and would issue title to the applicant free from the mortgage or charge encumbrance, pursuant to his powers under the abovementioned section 62(1).
Such an application would, of course, be subject to the abovementioned notice and caveat provisions

5.2.5.5 Restrictive Covenants Recorded on the Folio of the Register for the Land Applied For

As such interests are not determined by adverse possession, the adverse possessor's title is issued encumbered by any registered restrictive covenants See Voumard - Sale of Land in Victoria 4th Ed p 391

5.2.6 Adverse Possession - Effect on Future Interests

In relation to future interests the statutory period (or what remains of it) only commences to run against such an interest when it becomes an estate in possession (See section 10(1) Limitation of Actions Act)

Where the person entitled to the preceding estate or interest was not in possession at the date of the determination thereof, a special limitation period is set by section 10(2) Limitation of Actions Act in relation to the right of action of the person entitled to the succeeding estate or interest

5.2.7 Advertisement of Application

This is provided for in section 60(2) and (3) The form of notice is prepared in the Land Titles Office, which will direct the manner of publication, including the posting of such advertisement on the land

5.2.8 Caveats Against Applications

Attention is directed to section 12, (which refers to caveats against old law applications, but is, by the operation of section 61, also applied to adverse possession applications)

The section (with necessary adaptations) provides that a caveat lodged shall lapse after expiration of 30 days from lodgment, unless, in the meantime, proceedings have been commenced to establish the title of the caveator to the estate or interest specified in the caveat, and written notice thereof has been given to the Registrar, or there has been obtained and served on the Registrar an injunction or order of the court restraining him from granting the application

If such notice has been given to the Registrar, in accordance with section 12(4), that proceedings have been commenced, or an injunction has been served on the Registrar in accordance with that subsection, the Registrar is forbidden to proceed with the application until a judgement or order is obtained from the Supreme Court (section 12(2) Transfer of Land Act)

5.2.9 Bibliography

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Fox M Transfer of Land Act with Annotations 1954 p 61 et seq , Law Book Company of Australia 1957

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5.3 Amendment of Boundaries of Land

5.3.1 Section 99 Transfer of Land Act 1958

Section 99 (1)(a) provides that a proprietor may apply for amendment of his folio of the Register in any case in which the boundaries area or position of the land described differ from those of the land "actually and bona fide occupied by him and purporting to be so occupied under the title in respect of which the folio of the Register was created." The application is made on form 54 of Schedule 2 of the Transfer of Land (General) Regulations 1994.

The provision, with minor amendments, was introduced by the Transfer of Land Statute Amendment Act No.872 in 1885.

Any overlap or encroachment on abutting land must be relatively small and must be assessed in the context of the criteria prescribed in the Act. The location of the land and derivation of title are relevant in considering whether an application to amend title dimensions or an application by adverse possession under section 60 Transfer of Land Act may be required. It should be borne in mind that section 99 provides for adjustment of title boundaries to take in land "bona fide" occupied pursuant to the folio being amended. It does not provide for the inclusion of land held by possession which is not purported to be held pursuant to that folio. The shape and size of the parcel will give some indication of which is the case.

A discussion between the client, solicitor and surveyor would, in most cases, resolve whether procedure under one or other of the sections would be appropriate.

A certified plan of survey, abstract of field notes and licensed surveyor's report should be lodged with the application. The certificate(s) of title together with any necessary orders, consent of mortgagee etc. must be lodged.

Evidence of continuous occupation extending over fifteen years and upwards should normally be lodged with the application. Such proof, by the statutory declarations of two disinterested persons (ie. having no proprietary interest) is required in all cases where abutting folios are affected. Where a road or easement of way is affected by bona fide occupation, proof of thirty years occupation is necessary (section 73ATLA.). Notices of proposal to amend are sent to proprietors, mortgagees etc. of affected folios together with diagrams showing the overlap or other proposed amendment.

Affected persons have twenty-one days to respond to notices, after which the application may be granted unless a caveat is lodged forbidding such granting. (See Section 5.2.8 for details as to Caveats Against Applications). The boundaries of the land described in the affected folios are amended and the proprietors are sent a further notice as to the amendment of the boundaries of the land described in the certificate(s) of title. Upon the granting of the application appropriate amendments are made in accordance with the plan of survey. This could take the form of the amendment of a separate map or part thereof related to the land in the applicant's folio or to individual map(s) shown on the folio(s) and certificate(s) of title or the preparation of new map(s) and the issue of new folio(s) of the Register and certificate(s) of title.

5.3.2 Section 103 Transfer of Land Act 1958

Sections 102 and 103 of the Transfer of Land Act relate to the adjustment of discrepancies in boundaries and the correction of errors. Section 103 (1) concerns the making of entries etc. in Land Titles Office records by direction of a court.

Applications to amend folios on the basis of survey are accepted by the Registrar in some cases. These are restricted to situations where no abutting folios are affected and the differences between title and survey dimensions are relatively minor. Typical cases are -
• the amendment of a folio to a whole or part Crown allotment where there are erroneous measurements in the original survey

• the amendment of a folio containing a number of Crown allotments to enable the distribution of excess or deficiencies in the surround dimensions

• the introduction of bearings and/or connecting distance

• the inclusion of general excess land revealed by survey and occupied by the applicant

• consolidation of land comprised of two or more folios where the dimensions do not fit together due to diverse original surveys or differing occupation as the origins of dimensions See also Section 533

Applications are made under section 103 by the registered proprietor(s) on Form 58 Schedule 2 of the Transfer of Land (General) Regulations 1994

The supporting survey and survey documentation are the same as required for applications under section 99

Statutory proofs of occupation are usually not required, and reliance is placed on evidence and comments in the licensed surveyor's report

5.3.3 Consolidation of Lands Not Possible in a Section 99 or 103 Application

A plan of consolidation is necessary unless a plan of subdivision is lodged concurrently In that instance, the application will not be granted until the plan is registered. The alternative approach is to amend the application to request amendment of individual folios and to show the individual dimensions on the plan of survey

5.3.4 Role of the Surveyor

The survey should be sufficient to relate the boundaries occupied to those shown on the client's folio(s) and to establish the nature and location of any encroachment on adjoining folio(s)

The Surveyors (Cadastral Surveys) Regulations 1985 include requirements as to survey and the preparation of plans, abstracts of field notes and licensed surveyors' reports Regulations 16, 24 and 28 are particularly significant in relation to surveys made in connection with applications to amend folios of the Register

Occupation defining adjacent properties should be located to assist in the assessment of any effects on the folios

Generally, occupation should be adopted on all boundaries, but certain exceptions may be considered, such as "straightening" of very irregular fencing, and adoption of title position inside occupation, where such occupation is recent or to be removed. Adoptions outside occupation in applications under section 99 are seldom appropriate in view of the conflict with the bona fide requirements. Where adoptions are based on the position of former occupation, suitable evidence must be furnished.

5.4 Abuttals Unknown to Documents of Title

5.4.1 Abuttals Must Be Justified

The approval or registration of any plan at the Land Titles Office cannot occur if any abuttals shown are unknown to documents of title until such abuttals have been justified
In the case where the only access to a lot on a plan is over Crown land, section 6 of the Subdivision Act 1988 debars the council from certifying the plan unless either a road is reserved or proclaimed or the Minister has consented in writing to the use of the land for access.

The need to justify an abuttal can normally be readily anticipated and should be organised prior to lodgement of the plan at the municipal council. It is often convenient to obtain a planning permit authorising the creation of an easement and to create the easement in the registration of a plan of subdivision or consolidation.

The licensed surveyor's report should include comments on all abuttals and specific information on any abuttals that are unknown to documents of title.

This specific information should include date and page numbers of Government Gazettes, reference numbers of all instruments and applications, reference numbers of folios of the Register etc.

5.4.2 Forms of Justification

5.4.2.1 Access Over Unreserved Crown Land

(a) Reservation or proclamation as a road under the provisions of the Land Act; or
(b) Consent of the Minister for Lands to the use of the Crown land for access to the allotment;
(c) Information concerning either (a) or (b) is required by the municipality before certifying or sealing the plan.

5.4.2.2 Government Road

(a) Consent of the Surveyor-General endorsed on a copy of the plan showing the abuttal;
(b) Proclamation under section 25(3)(c) of the Land Act;
(c) Declaration (or proclamation) of the abuttal as a public highway or lodgement of a letter or certificate from the council that the road is a public highway.

5.4.2.3 Roads Other Than Government Roads

(a) Creation of easement over the servient land in favour of the applicant's land. Such creation may be by instrument, plan of subdivision, plan of consolidation or plan under section 23 of the Subdivision Act (easement authorised or regulated by a planning scheme or permit). See Survey Practice Handbook - Part 1 for an example;
(b) Applications made pursuant to section 72(2) of the Transfer of Land Act supported by an order of a court or an arbitrator; or notice of compulsory acquisition and an Administrative Appeals Tribunal order under section 36 of the Subdivision Act.
(c) Proof as a public highway as in Section 5.4.2.2(c);
(d) Proof as a public highway pursuant to section 24(2)(c) of the Subdivision Act;
(e) The fee of the road being in the name of the Roads Corporation and the consent of a responsible officer of the corporation produced. It should be noted that declaration of a Freeway, State Highway, Main Road, Tourists Road, Forest Road or Stock Route is not sufficient;
(f) The fee of the road being in the name of the Public Transport Corporation (successor to the State Transport Authority and earlier the Victorian Railways Commissioners) and the consent of a responsible officer of the corporation is lodged;
(g) The fee of the road being in the name of the subdivider(s) in another folio of the Register, the certificate of title for which must be provided when the plan is lodged. In addition, on the panel sheet of the plan of subdivision the road should be vested in the council and the easements set out in the easement table. See (d) above.

5.4.3 Other Abutments (Channel, Railway etc.)

Normally lodgement of the consent of a responsible officer of the relevant authority.

5.5 Easements

5.5.1 Nature of an Easement

An easement is a right attached to one particular piece of land which allows the owner of that land either to use the land of another person in a particular manner (e.g., by walking over it or draining water over it) or to restrict the uses by that other person to a particular extent, but which does not allow him to take any part of its natural produce or its soil.

The proprietor of land who has a right over another's land is the "dominant" proprietor. The proprietor of land who has to submit to the exercise of that right is the "servient" proprietor.

The land in respect of which the right is claimed is called the 'dominant tenement'. The land over which the right exists is called the "servient tenement". If A, as the owner of Whiteacre, has a right over Blackacre which is owned by B, A is the dominant owner and Whiteacre is the dominant tenement, while B is the servient owner and Blackacre is the servient tenement.

As regards the owner of the dominant tenement, an easement involves an enhancement of his ordinary rights, as regards the owner of the servient tenement it involves a corresponding diminution of his ordinary rights.

An easement relates only to uses of land – it is an interest in land.

An easement does not confer upon its owner any proprietary right or possessory right in the land affected. It imposes a definite and limited restriction upon the proprietary rights of the owner of the servient land. A grant of the exclusive or unrestricted use of land for all purposes passes the ownership of that land - it cannot be an easement. In one case, the Court held that a claim to leave vehicles for an indefinite time on a strip of land belonging to a neighbour and to enter on that strip to do repair work thereon was not a claim which could be the proper subject matter of an easement. It amounted to a claim to joint possession of the land and went beyond the ordinary bounds of an easement.

The effect of an easement being appurtenant, i.e., annexed to the dominant tenement is that the benefit of it runs at law with the dominant tenement into the hands of every successive owner or possessor of a legal estate or interest in that tenement and passes on every assurance thereof, although not mentioned either specifically or in general words.

An easement is classed as an 'incorporeal hereditament'. Real property comprises both corporeal and incorporeal hereditaments. Corporeal hereditaments are lands, buildings, minerals, trees, and all other things which are part of or affixed to land – in other words, the physical matter over which ownership is exercised. Incorporeal hereditaments are not things at all, but rights of property of certain special classes. These concepts are discussed more fully in Section 47 Land Law.

Easements may be either positive or negative. A positive easement is one which confers a right to do something upon the land of another (e.g., to walk upon it, to erect a signboard upon it). A negative easement imposes a restriction upon the use which another person may make of his land, somewhat similar to a restrictive covenant. Easements of light and air are examples of negative easements recognized by the law. There is some conflict whether an easement for support to a building is a positive or a negative easement. It is also difficult to classify other types of easements either as positive or...
negative eg. the right to cause what, except for that right, would be a nuisance, by noise or by noxious odours, or the right to send smoke up another's chimney.

The right to support of land (as opposed to buildings on land) by adjacent land is a natural right - part of the land itself. It cannot arise from grant or implication and cannot be the subject matter of an easement. This natural right of support can only be limited or restricted by the grant, as appurtenant to adjacent land, of rights which are inconsistent with or limit the full enjoyment of the land concerned with all its natural rights, including the right of support. If the grant of such inconsistent rights amounts to an easement, it may be registered as such. From the point of view of the dominant owner the easement may be negative or positive. It may, for example, entitle him to require the servient owner to refrain from erecting a building which would obstruct a right to light or it may entitle him to walk over the land.

From the point of view of the servient owner, easements properly so called are negative in the sense that they merely require him to suffer something to be done or to refrain from doing something himself. He cannot be called upon to perform an act or to expend money. An easement of support for a semi-detached house, for example, does not require the servient owner to keep the supporting premises in repair. The general principle is that the dominant owner may enter and execute repairs upon the servient land - all this is implied in the concept of grant.

5.5.2 Essentials of an Easement

For any right over land to be regarded as an easement it must possess the following attributes:

5.5.2.1 There must be a dominant and a servient tenement

An easement must be appurtenant (or attached) to land. There cannot be an easement in gross ie. an easement that is independent of the ownership of land by the person who claims the rights. (See also Section 5.5.10). In Gapes v Fish (1927) V.L.R. 88 a grant contained a reservation in the following terms "saving and reserving a right of way 24 feet wide running along the southern boundary of the land above described for him the said vendor his heirs and assigns ............ at all times to pass ............ over and along the same .........". No reference was made to any dominant tenement for the advantage of which the way might be reserved. It was held that this was an attempt to create an easement of way in gross which conferred only a personal licence upon the person for whose benefit it was reserved. If some reference to an unidentified parcel of land had been made in terms which indicated an intention to annex the enjoyment of the way to it, evidence to identify the parcel might be admitted.

A right belonging to a member of the public as such, irrespective of his ownership of any land, eg. the right to use a public highway, is not an easement because there is no dominant tenement.

It is doubtful whether or not an easement can be granted over or be made appurtenant to an undivided share in land or granted by or in favour of one of a number of joint proprietors.

5.5.2.2 An easement must accommodate the dominant tenement

An easement must confer a benefit on the dominant tenement as such - it must be connected with the normal enjoyment of the dominant tenement. What is required is that the right accommodates and serves the dominant tenement and is reasonably necessary for the enjoyment of that tenement. If it has no necessary connection with it, although it confers an advantage upon the owner and renders his ownership of the land more valuable, it is not an easement at all but a mere contractual right personal to and enforceable between the two contracting parties.

It is not sufficient that the right should give the owner for the time being some personal advantage; the test is whether the right makes the dominant tenement a better and more convenient property. A right granted to the purchaser of a house to attend football and cricket matches at the Melbourne Cricket Ground without payment would undoubtedly increase the value of the property, but it is not an easement. That right is extraneous to, and independent of the use of a house as a house. But if a man sold a flat and granted to the purchaser, his heirs and assigns, the right, appurtenant to that flat,
to use a garden in common with the vendor and his assigns, the test of accommodation, or connection, is satisfied. This test may also be satisfied if the general usefulness of a dominant tenement is improved, for example, by giving means of access or of light.

In *Hill v Tupper* (1863) 2 H & C 121, the owner of a canal leased land on the bank of the canal to Hill and granted him the sole and exclusive right of putting pleasure boats on the canal. Tupper, without any authority, also put pleasure boats on the canal. Hill brought an action against Tupper. If Hill's right was an easement he could sue anyone who interfered with it because it was a right of property enforceable against all the world. If it was not an easement it was only a licence and not a proprietary interest. It was held that the right was not an easement - it was a personal or commercial advantage unconnected with the use of land as such. The result would have been different if the right granted had been to cross and recross the canal to get to and from Hill's land and Tupper's boats had been so numerous as to interfere with it. Of this case it was said (in *Re Ellenborough Park*) that what the plaintiff was trying to do was to set up, under the guise of an easement, a monopoly which had no normal connection with the ordinary use of his land, but was merely an independent business enterprise. So far from the right claimed accommodating the land, the land was but a convenient incident to the exercise of the right.

The servient tenement may be severed from the dominant tenement but it must be close enough to confer a practical benefit on the dominant tenement. There could be, for example, a right to maintain some construction, such as a sign, upon a nearby servient tenement. You cannot however have a right of way over land in Dandenong appurtenant to land in Williamstown because the right of way in Dandenong cannot possibly be advantageous to the Williamstown land.

It is not necessary to the continuance of an easement that the dominant tenement should always be in such a physical state as to permit of the easement being used in connection with it. Such a condition would involve the destruction of easements of certain classes attached to a house should the house be pulled down even for the purpose of being immediately rebuilt. If, indeed, the dominant tenement should be so permanently destroyed or altered that it is put for ever out of the power of the owner to restore it so as to be capable of receiving any benefit from the easement, this would, it seems, necessarily put an end to the easement. An easement is not lost by an alteration of the dominant tenement unless the alteration is of such a character or made under such circumstances as to show an intention to abandon the right or to raise an estoppel precluding the owner from denying such abandonment.

The size of the dominant tenement is immaterial - a parcel of land one square link in area has been held to be a dominant tenement (*The King v The Registrar of Titles ex parte Waddington* (1917) V L R 603). In that case the Registrar had refused to register a transfer containing a creation of an easement of way in which the piece of land of one square link was the dominant tenement. He contended that it was impossible that any right of carriageway could be required in connection with such a small piece of land and that it sought to create an easement in gross. In other words he said that the easement was not connected with the enjoyment of the dominant tenement. The court agreed that it was difficult to see what benefit could be derived in the enjoyment of a piece of land one link square from a right of carriageway over an adjacent street, but did not rule out the possibility of any benefit. It was suggested for example that a water pipe or a letter box could be erected on the square link but this was not the real purpose of the grantee of the easement. So long as the right claimed is connected with the beneficial use of the land in question it is a valid easement.

5.5.2.3 The dominant and servient tenements must not be both owned and occupied by the same person.

A person cannot have an easement over his or her own land. As long as the unity of ownership remains, the common owner of two tenements cannot, even by an express grant, create an easement over the one in favour of the other which would have any legal effect. The same person must not only own both tenements but also occupy both of them before the existence of an easement is rendered impossible. There can exist, therefore, an easement in favour of a tenant against his own landlord, or another tenant of his landlord, although the landlord owns the freehold of both dominant and servient tenements.
5.5.2.4 The easement must be capable of forming the subject matter of a grant

An easement cannot be vague or uncertain, or incapable of definition. If it is any of these things, it cannot exist as an easement but it may be enforceable as a covenant.

5.5.3 Types of Easement

Rights of way, light, water and support are some of the most common types of easements but there can also be easements for the access of air, or easements which amount to a right to commit a nuisance (eg. an easement allowing one to emit vibration and noise from his tenement over a servient tenement). In one case the State Electricity Commission purchased land which to the knowledge of the vendor was intended to be used for the erection and operation thereon of an electrical sub-station, the working whereof involved the transmission of noise over the adjoining land of the vendor. It was held that the Commission was entitled to have included in the transfer of the land which it had purchased an easement of transmitting into and across the adjoining land of the vendor such noise as might arise from the proper use and operation, under statutory powers, of an electrical sub-station properly constructed on the purchased land. (Re State Electricity Commission of Victoria and Joshua's Contract (1940) V.L.R. 121).

It is possible to have an easement to hang clothes lines over the servient tenement, to affix and maintain a name plate upon another's premises or to stand vehicles for such time as it is necessary to load and unload. A wind-break may be the subject of an easement. On the other hand, a right to privacy, to peace and quietness, to a view, to protection from the weather are examples of rights which cannot exist as easements. The Land Titles Office also takes the view that an easement of carriageway for aircraft purposes is not an easement known to the law, nor is a right to park a motor car an easement.

The class of easements is not closed, and the courts are mindful of the fact that the law must adapt itself to the conditions of modern society and trade. A recent instance of this can be found in a case decided in England in 1955 where it was held that a right to use a pleasure ground was capable of subsisting as an easement. Prior to the decision in that case there had always been controversy whether a right to walk about on the land of another for the purpose of recreation or amusement could exist as an easement. The facts in that case were that conveyances of certain building plots granted to each purchaser "full enjoyment............. at all times hereafter in common with the other persons to whom such easements may be granted of the pleasure ground............". The vendors covenanted at the expense of the purchasers to keep Ellenborough Park as an ornamental pleasure ground. The court held that the enjoyment contemplated was the enjoyment of the vendor's ornamental garden in its physical state as such. The court also held that the right to use the garden was undoubtedly of benefit to the dominant tenement as a tenement. (Re Ellenborough Park (1955) 3 A.E.R. 667). As a result, an easement to use land "for the purposes of recreation and/or pleasure" may be registered -but only after reference to the Registrar.

An easement may be limited in duration so long as the period is either certain or capable of being determined. Thus an easement may be granted for a period of years, or for the life of A and B and the survivor of them so long as they or the survivor are registered as proprietors or proprietor of the dominant tenement. In any such case the recording in the folio of the Register to the dominant tenement will indicate that the easement is limited as to duration.

An easement may be limited or qualified in other ways - eg. in the case of an easement of way - as to height; in the case of light and air as to the height above which access of light and air is permitted and so on. Other examples appear in Forbes and Currey - vide Bibliography. Here again the limitation or qualification must in its terms be certain or be capable of being rendered certain. No objection is taken to the grantor of an easement expressly limiting qualifying or restricting what would otherwise be normal incidents of the easement - eg. the grantor of a right of carriageway may reserve the right to erect gates; the grantor of a right to use land for water supply or drainage may reserve or make the grant subject to the right of the dominant owner to plant vines or carry on farming etc.

5.5.4 Ancillary Rights

The grant of an easement is also the grant of such ancillary rights as are reasonably necessary to its exercise or enjoyment. Where the use of a thing is granted, everything is granted by which the grantee
may have and enjoy such use The ancillary right arises because it is necessary for the enjoyment of the right expressly granted The owner of a building entitled to support from an adjoining building is entitled to enter and take the necessary steps to ensure that the support continues by effecting repairs to the part of the building which gives the support See also Section 5 5 16 as to creation of easements over Crown land

5.5.5. Divisibility of Easements

Easements _prima facie_ are divisible -ie on a division of the dominant tenement into several parts the benefit of an easement appurtenant to the undivided tenement will enure to each of the severed portions, provided this is consistent with the nature of the easement and the terms of the grant

5.5.6 The _Transfer of Land Act_ and Easements

5.5.6.1 General

The subject of easements is not dealt with fully by the _Transfer of Land Act_ To a great extent the Act leaves untouched the matter of the creation and extinguishment of easements - these matters being governed by the common law Easements, unlike other interests in land, do not depend on registration for their existence. The Act does make provision for the registration of easements and for the removal of easements from the register, but these provisions are of a fragmentary character

The omission by the Registrar to record an easement as an encumbrance in the folio of the servient tenement will not relieve the servient tenement of its liability See section 42(2)(d) of the _Transfer of Land Act_

In no case will a folio now be issued in respect of an easement only The proper course for a registered proprietor who has acquired an easement appurtenant to his land is to apply to the Registrar pursuant to section 72 of the _Transfer of Land Act_ for recording the appurtenant easement on the folio of the Register of the land

5.5.6.2 Applications under Section 9 to bring land under the Act and easements where either dominant or servient tenement is under the general law

(a) If an applicant to bring land under the operation of the _Transfer of Land Act_ is entitled to any appurtenant easement which was created by deed and desires that the easement should be set out 111 his folio he must specify the easement in his application and apply accordingly The examiner investigates the title to that easement and will show it as appurtenant to the subject land if he is satisfied that it was properly granted Should the applicant fail to include a request to show the appurtenant easement, he, or any subsequent registered proprietor of the dominant tenement, may apply to have that easement shown as appurtenant to his land, pursuant to the provisions of section 72 of the _Transfer of Land Act_ See Section 5567

(b) A person entitled to a right of way over land is the owner of such an interest as entitles him to lodge a caveat against the application under section 12 of the _Transfer of Land Act_ when an application is made to bring the land under the Act

(c) In every application to bring land under the operation of the _Transfer of Land Act_ the applicant must disclose any encumbrance affecting that land Any easements so disclosed and any others noted by the examiner in his examination of the title deeds will be shown as encumbrances in the folio to issue An example of the usual form of encumbrance is ’ As to the land marked E-1 the easement for drainage purposes granted by Indenture registered Book……..No……..”

(d) The survey information will often disclose features which may indicate that others have rights over all or part of the subject land Gates opening onto the land, drains, a watercourse, over-hanging eaves and spouting, projecting footings or foundations of an adjoining building are examples of some of the features which will result in the examiner seeking further information as to the
existence of any easement—its created by writing. The former practice of showing possible rights or
easements has been discontinued. An example of the form of encumbrance formerly used in such cases is "As to the land marked E-1. Any rights or easements subsisting over or upon or affecting the same". This general encumbrance, which in no way defines the nature of the right or the dominant tenement, has caused difficulty when a proprietor seeks to have the encumbrance removed or it is necessary to define the easement more accurately, eg. section 12(1) of the *Subdivision Act* 1988. (Section 12(1B) has been recently included in the *Subdivision Act* to overcome difficulties in subdividing land subject to such a general encumbrance. See Section 5.5.15.4). If it becomes evident that there are specific grants of easements over the subject land, they are specifically referred to in the encumbrances in the folio to issue.

(e) Where a registered proprietor of land under the *Transfer of Land Act* subsequently seeks the removal of an easement which has been saved as an encumbrance on the title to issue out of an application to bring land under the operations of the *Transfer of Land Act*, he should make an application pursuant to the provisions of section 73 of the *Transfer of Land Act* and lodge the necessary proofs. See Section 5.5.6.6(d).

(f) Should it be uncertain whether there is a dominant tenement and yet the title is encumbered as set out in Section 5.5.6.2(d), an application to remove that encumbrance may be made pursuant to section 106(c) of the *Transfer of Land Act*. If an irrevocable licence, which does not affect the land but only the owner thereof, is notified as an encumbrance in the folio, the *Transfer of Land Act* does not give it, by such notification as an easement, any efficacy that it would have without it. The licence, although irrevocable between the licensor and licensee, does not of itself affect the land. (In *Re Ridgeway and Smiths Contract* (1930) V.L.R. 111). In that case it was held that there was nothing in the document called "creation of easement" from which there could be implied any covenant the burden of which would run with the land and bind the assignee at law or in equity, whether the assignee had notice thereof or not, and that the language used in such document negatived any such implication.

(g) Where the servient tenement is land under the general law and the dominant tenement is land under the *Transfer of Land Act* a creation of easement cannot be registered. If the requirements of section 72 of the *Transfer of Land Act* can be met, the registered proprietor of the dominant tenement may apply under that section to have the Registrar notify that easement as appurtenant to his land. See Section 5.5.6.7.

(h) An owner of land not under the operation of the Act may acquire an easement appurtenant thereto over land under its operation and the instrument creating the easement will be registered and appear as an encumbrance in the folio to the servient tenement. Such an easement will no doubt pass by conveyance of the dominant tenement, but no transfer of the easement can be registered. The evidence of title to the easement in this case would be the original instrument creating it and the conveyance of the dominant tenement.

5.5.6.3 Section 42 of the *Transfer of Land Act*

(a) The effect of this section is to protect easements even though they are unregistered. The rights of a registered proprietor are subject to any public rights of way and to any easements howsoever acquired subsisting over or upon or affecting the land notwithstanding that they are not specifically notified as encumbrances in the folio of the Register.

(b) The easements protected by section 42 are not confined to those in existence at the time the land was brought under the Act, but include easements coming into existence at any later stage. Easements arising by user or by implication of law - even though they are not subject of an express grant or creation are also protected by this section.

5.5.6.4 Section 45 of the *Transfer of Land Act*

(a) Apart from easements shown in the Register Book as the result of an application to bring land together with an appurtenant easement under the operation of the Act (see Section 5.5.6.2), an application pursuant to section 72 (see Section 5.5.6.7), or the issue of folios following on registration of a plan under the provisions of the *Subdivision Act* or approval of a plan of
subdivision (*vide* the former section 97 of the *Transfer of Land Act*), an easement may be entered in the Register Book if

(i) it is granted by an instrument on Form 13 of Schedule 2 of the Transfer of Land (General) Regulations 1994 (modified to suit the circumstances) - e.g. the case of a normal creation of easement, or

(ii) it is granted or reserved in a transfer, or

(iii) it is granted in a mortgage or a lease

(b) Cases (i), (ii) and (iii) in Section 5564(a) are regarded as being authorised by section 45. An easement is an interest in land. The creation or reservation of an easement is thus regarded as a transfer of an interest in land Section 45 is also regarded as justifying the registration of a surrender of easement on the same ground. The form of instrument is set out in Form 14 of Schedule 2 to the Transfer of Land (General) Regulations 1994. This view is strengthened by the language of section 72(3) where reference is made to an easement being 'created or reserved' in an instrument.

(c) Section 45(2) provides that the "Registrar must not register an instrument that creates or surrenders a right of carriageway unless satisfied that the municipal council has consented to the creation or surrender". The Land Titles Office takes the view that this provision does not apply to footway, pedestrian way and like descriptions

(d) The practice and procedure relating to the creation and reservation of easements by an instrument is set out in Section 559. That in relation to the surrender of easements is set out in Section 5510

### 5.5.6.5 Sections 54 and 57 of the *Transfer of Land Act*

Although section 54, with its requirement that an acquiring authority be registered as the proprietor of land in fee simple by the issue of a new folio, is regarded as being inapplicable to the acquisition of an easement as such, section 57 is considered to authorise - and indeed requires - an authority to lodge a notification in the scheduled form whenever it serves notice of its intention to acquire an easement. Where, on an application by an acquiring authority pursuant to section 54, title is sought for general law land together with an existing easement granted as appurtenant thereto under the general law, the application may be granted and the appurtenancy recorded

### 5.5.6.6 Sections 62, 73, 73A and 106(c) of the *Transfer of Land Act*

(a) These are the sections which relate directly to the removal or extinguishment of easements affecting land under the *Transfer of Land Act*. Apart from these provisions there are other means by which registered easements may be extinguished and removed from the Register. These are discussed in Sections 5511 and 5515.

(b) Section 62 of the *Transfer of Land Act*

This section provides that the Registrar may on an adverse possession application under section 60 vest land in an applicant free from all encumbrances which have been determined or extinguished by the possession and free from any easement notified as an encumbrance which has been proved to the satisfaction of the Registrar to have been abandoned by reason of non-user for a period of not less than thirty years.

(c) Section 73A of the *Transfer of Land Act*

This enables the Registrar upon an application to bring land under the Act, or to amend a folio, to issue a folio to a private road, street or way or part thereof free from easements of way where it is proved to his satisfaction that the road, street or way or part affected has been exclusively, continuously and adversely occupied by the applicant and those through whom he claimed for a period of not less than thirty years.
(d) **Section 73 of the Transfer of Land Act**

This is the general section relating to removal of easements. This section was widened considerably in the 1954 legislation, but amendments introduced by the *Subdivision (Amendment) Act* 1989 prevent the use of the section in certain circumstances discussed in a later paragraph. Prior to the 1954 legislation, provision related only to easements of carriageway.

The present section is not so limited and applies to easements of any type. It is significant also to note that, whereas in the earlier provision the only ground on which easements could be removed was non-user for not less than thirty years, the present section is much wider. It provides simply that a registered proprietor may apply for an easement to be removed in whole or in part where it has been abandoned or extinguished. The Registrar is required to give notice to everyone who appears by the Register Book to have any estate or interest in the dominant tenement and any person claiming such an estate or interest is empowered to lodge a caveat forbidding the removal of the easement.

Caveats lodged against an application of this type and indeed against an application to bring land under the Act or to amend a folio are very different from the normal caveat lodged to protect an equitable interest and to prevent registration of hostile dealings. Unlike this latter type of caveat, caveats against applications under section 73 and caveats forbidding the granting of applications to bring land under the Act or to amend folios of the Register lapse unless the caveator within 30 days from the lodging of the caveat commences proceedings in a court of competent jurisdiction to establish his right and gives written notice of those proceedings to the Registrar, or alternatively obtains and serves on the Registrar an injunction or order of the court restraining the Registrar from continuing with the application. In common with other caveats once a caveat has lapsed it cannot be renewed.

The Land Titles Office takes the view, that if it can be established that the easement has, in accordance with normal principles of common law, been abandoned or extinguished, then an application will lie under this section. The section itself also provides, as did the earlier section, that non-user for a period of not less than 30 years is sufficient evidence of abandonment. Apart from this provision non-user of itself would not at law be sufficient to establish abandonment or extinguishment. The Land Titles Office also takes the view that this section can be used in the case of express easements so shown in the Register Book, easements implied under section 98 of the *Transfer of Land Act*, or easements specified under section 12(1)(b) of the *Subdivision Act*.

Abandonment of the easement may be shown by:

(i) deeds of abandonment by all dominant land owners with written consents of mortgagees, caveators and others with an interest in the dominant land;

(ii) proof of 30 years continuous non-use of the easement.

Extinguishment may occur by merger of the dominant or servient lands or sometimes by legislative provisions.

It is clear, of course, that an application supported by deeds of abandonment is sufficient. One difficulty arises here, however, in the case of easements implied under section 98. This section implies in favour of lot holders on a plan of subdivision such easements over the land appropriated or set apart on the subdivision for way, drainage etc. as may be necessary for the reasonable enjoyment of the allotment and of any building or part of a building at any time thereon. Accordingly, any or all of the lots on the plan may have the benefit of the easement, and the initial approach is that deeds from all lot owners should be produced. Clear evidence as to why a lot owner does not and could not in the past have the benefit of the easement should be available to support non-production of a deed of abandonment. This may be difficult to prove.

In practice, reliance may be placed upon evidence from licensed surveyors and engineers, and particularly from the municipal engineer, as to which land could not have the benefit of an easement. One other point is worth noting in relation to easements implied under section 98 of the *Transfer of Land Act* or specified under section 12(1)(b) of the *Subdivision Act*. If it is sought to rely on non-user for 30 years, then the Office takes the view that the easement must have been created at least 30 years prior.
to the date of the application. The date of plan approval or registration should be checked to see that it is at least 30 years old. Removal of easements implied under section 98 of the Transfer of Land Act or created under section 12 of the Subdivision Act 1988 require the consent of council under seal. As mentioned, section 23 of the Subdivision Act is proving a useful alternative to create, remove or vary an easement if a planning scheme or permit so regulates or authorises. It will be particularly useful on many larger subdivisions.

The evidence necessary under section 73 will depend upon the nature of the easement and the facts and the circumstances of each case. Generally, where reliance is placed upon non-user for 30 years, reference can be made to Vance's Examination of Title at pages 191 and 192. In these cases, so far as easements of way are concerned it is usually necessary to produce the following evidence:

- production of the consent of council under seal or by a council delegate to the application for easement removal.
- production of a letter from council that the servient land is not a public highway.
- production of evidence in the form of a statutory declaration by the applicant that the servient land has not been used as a right of way for at least 30 years.

The evidence by statutory declaration should show:

- that the land has been fenced off for at least 30 years so as to exclude all dominant land owners from using it. A plan of survey may be necessary to make this clear if, for example, easements of way which parallel an existing road are to be removed. It may, for example, be necessary to locate exactly a fence separating the road and easement of way in the application because evidence as to non-user may depend upon evidence as to enclosure.
- what use the land has been put to and by whom? This evidence must show that the use is inconsistent with the use of the land as a carriageway easement or a road.
- that the land has not been used at all as a road or right of way by foot or vehicular traffic at all for at least 30 years.
- that from the appearance of the ground or surface it would not be known from its appearance that it is or has ever been used as a road or right of way.

If the applicant has not been the registered proprietor for the entire 30 years, then the prior owners should provide the same type of evidence required of the applicant as to fencing, use and appearance for the period of their proprietorship. Together, the evidence provided by the applicant and prior owners must cover a continuous period of not less than 30 years. The evidence should be corroborated by at least one independent witness. The statutory declarations should indicate means of knowledge.

If the evidence is sufficient, then the application may be granted. Notice of intention to grant the application is to be served on all dominant land owners prior to granting the application. Notice is also sent to those with an interest in the land, eg. mortgagees, caveators.

For a section 98 easement appropriated on a plan, notice will be sent in respect of all lots on the plan, including later resubdivisions. These notices are sent at the cost of the applicant and the cost can become significant. An average of 3 notices per parcel of dominant land are sent to account for more than one proprietor and mortgagees.

In this context, it is noted that a road vested in a council upon registration of a plan of subdivision under the Subdivision Act becomes a public highway by virtue of the operation of section 24(2)(c) of that Act.

The task of establishing that an easement of drainage has not been used or enjoyed for a period of 30 years is obviously difficult to achieve. The evidence required for the removal of a drainage and/or sewerage easement is:

- production of evidence by way of statutory declaration of the applicant that, to the applicant's knowledge, the land has not been used a drainage/sewerage easement for at least 30 years.
The evidence should show:

- that drains have not existed on the surface (for drainage) for at least 30 years and that the surface has not acted as a drain.
- that the drains have not existed under the surface.
- evidence of non-user is strengthened by proof that drainage/sewerage services are supplied by an alternative drainage/sewerage system but no requisition is made for the production of such evidence.

If the applicant is unable to give personal evidence for the period of 30 years, then the statutory declaration should refer to the period in relation to which the evidence is given.

The evidence should be corroborated by the statutory declaration of at least one independent witness. The independent witness might be, say, a neighbour or a paid expert witness. The independent witness should be a person whose knowledge arises from personal observation over 30 years or a person whose particular expertise, eg. municipal or civil engineer, and investigation of the land or records or both enables that person to conclude that the easement has not been used for at least 30 years. In all cases, the statutory declaration must clearly set out the means of knowledge.

Evidence of non-user of an easement for less than 30 years without the production of any other evidence is insufficient. An intention to abandon the easement must be proven. That intention may be inferred from the conduct of the dominant owner or owners. Thus, if an easement of water supply was granted originally for the benefit of land used as a farm and subsequently the dominant tenement was subdivided and a new system of water supply installed in a different position, it could well be argued that the original easement had been abandoned by reason of the change in user of the dominant tenement and the conduct of the owners thereof. Alteration to the dominant tenement which makes the enjoyment of an easement impossible or unnecessary may show an intention to abandon the right. It is however, extremely onerous to show intention to abandon by conduct of the dominant owners.

Prior to the introduction of the Subdivision Act, section 73 could be used in conjunction with section 11 of the Sale of Land Act where a subdivider had, pursuant to the Local Government Act, given to the council notice of intention to subdivide, and the council had certified that it was necessary for the economical and efficient subdivision of the land that any existing easements should be extinguished, and an arbitrator under the Sale of Land Act could order that the easement be extinguished. This is no longer available, and the provisions of section 36 of the Subdivision Act deal with the compulsory removal of easements.

Sub-sections (1A), (1B) and (1C) have been introduced to section 73 by the Subdivision Act and they now read as follow:

(1A) Sub-section 1 does not apply to the removal of an easement in whole or in part if -
(a) the removal is part of a plan of subdivision or consolidation; or
(b) the removal is authorised by a planning scheme or permit under the Planning and Environment Act 1987; or-
(c) section 36 of the Subdivision Act applies to the removal.

(1B) A registered proprietor may make application in the appropriate approved form to the Registrar for a declaration that the whole or part of an easement has been abandoned or extinguished if the removal of the easement is mentioned in sub-section (1A)(a).

(1C) The Registrar must give to each person who appears by the Register to have an estate or interest in the land benefited by the easement notice of the application and, if the Registrar is of the opinion that the easement has been abandoned in whole or in part, must issue a written declaration to that effect to the applicant.

The outcome of the introduction of section 73(1A) is not to deny an applicant access to methods of removal of an easement but rather to place the provisions under the umbrella of the Subdivision Act. Sub-sections (1A)(a) and (b) include removal under section 23 of the Subdivision Act. Section 36 of that Act is an expanded version of both sections 10 and 11 of the Sale of Land Act. It is important to note that whereas section 11 of the Sale of Land Act was only available where land was being subdivided, section...
36 of the Subdivision Act provides an owner access to the Administrative Appeals Tribunal if a council or referral authority acts under the circumstances set out in sub-section 36(1)

If the council or referral authority considers that the economical and efficient subdivision or consolidation or servicing of, or access to relevant land requires the owner to remove a right of way over the owner's land or to acquire or remove an easement over other land, the owner may apply to the tribunal for leave to take the action concerned

As at April 1994, the provisions of section 73(1B) of the Transfer of Land Act have not been used. This is because the evidence required to obtain a declaration from the Registrar is identical to that required to obtain a deletion of the easement from the Register under section 73(l) In addition, the easement removal will generally occur before or after a plan of subdivision is first lodged. As all that is obtained under section 73(1B) is a declaration, a further step must be taken to delete the easement from the Register In addition, if an easement is to be removed as part of a plan of subdivision or consolidation, section 23 of the Subdivision Act may apply to more efficiently achieve the same result

(e) Section 106(c) of the Transfer of Land Act.

This is a general section authorising the Registrar to remove any encumbrance which no longer affects. Having regard to the express provisions of section 73 (see Section 556 6(d)) it is not considered appropriate in the case of easements where both dominant and servient tenements are under the Transfer of Land Act. It is used, for example, when, following earlier practice, land was brought under the Act subject to a vague or indefinite rights or easement - See Section 556 2(d)

5.5.6.7 Section 72 of the Transfer of Land Act

(a) This section deals with three separate matters

(i) It provides specific authority for the notification of easements on title - whether as an encumbrance or as an appurtenancy, (sub-section (1))

(ii) It requires the Registrar upon application, to notify in the Register Book any easement over or upon or appurtenant to land under the Act, (sub-section (2)), but excludes certain matters relative to the Subdivision Act (sub-section (2A))

(iii) It provides for a short form of carriageway easement, (sub-section (3))

Sub-section (1) requires no comment Sub-sections (2), (2A) and (3) are dealt with in the following sections

(b) Sub-section (2) of section 72

This provision can only be used where an easement has been created by compulsory acquisition in accordance with section 36 of the Subdivision Act or by any instrument deed or other written document or recognised by an order of any court or award of an arbitrator. The usual method of bringing an easement on to the Register is by creation of easement or by transfer containing a creation of reservation (see Section 5 5 6 4) or by specification or appropriation on a plan of subdivision (see Section 5 5 6 10). Where, for various reasons, none of these procedures can be followed - eg where land which had an easement appurtenant thereto has been brought under the Act without recording the appurtenancy - application may be made under section 72 to have the easement recorded as appurtenant to the dominant land If the servient land is under the Act, a corresponding encumbrance will be recorded over the servient land. Similarly the section is used to show in the Register Book an easement compulsorily acquired after leave to do so has been given by the Administrative Appeals Tribunal under section 36 of the Subdivision Act. It would be expected that a copy of the page of the Government Gazette in which the easement was acquired would accompany the application Form 30 in Schedule 2 to the Transfer of Land (General) Regulations 1994 sets out the application

(c) Sub-section (2A) of section 72

This sub-section excludes from the operation of the Transfer of Land Act certain matters relating to the creation of an easement for which similar, but wider, powers have been placed in sections 23
and 12 of the Subdivision Act. The discussion in Section 5.5.6.6(d) regarding removal of easement applies.

(d) Sub-section (3) of section 72

This sub-section gives to the expression “together with (or reserving) a right of carriageway over .....” the extended meaning set out in the 12th Schedule to the Act. The expression has this extended meaning when an easement is so referred to in a folio or is so created or reserved in an instrument. The expression should therefore only be used in a folio without qualification where the precise words of the expression (or alternatively the precise words in the 12th Schedule) are employed in the creation or reservation. If there is any difference at all, the expression “right of carriageway” must not appear in the folio and the expression of appurtenancy in any dominant folio will refer merely to "an easement of way". Otherwise there would be a difference between the easement as created or reserved and the easement actually registered.

5.5.6.8 Sections 77(4) and 79(4) of the Transfer of Land Act

Section 77(4) (in the case of a transfer by mortgagee or annuitant) and section 79(4) (in the case of a foreclosure) preserve, inter alia, an easement registered subsequent to the relevant mortgage or charge so long as the mortgagee or annuitant has consented in writing to the easement. This is the reason for the requisition for the consent of a mortgagee or annuitant and for the endorsement of the relevant mortgage or charge when an easement is created or reserved after registration of that mortgage or charge. If the consent is not forthcoming, then the easement will be extinguished on a sale by mortgagee or annuitant or a foreclosure.

5.5.6.9 Section 88(2) of the Transfer of Land Act

Although in its terms this section concerns "rights in the nature of an easement" and not easements properly so called, it is used in practice to show on title easements that have been compulsorily acquired. The only exception to this is that an easement acquired as a result of leave under section 36 of the Subdivision Act may be recorded pursuant to section 72 of the Transfer of Land Act 1958. See also 5.5.6.7(b).

5.5.6.10 Easements appropriated on a plan of subdivision - section 98 of the Transfer of Land Act

(a) Despite the introduction of the Subdivision Act, provisions relating to subdivisional easements contained in section 98 of the Transfer of Land Act have been retained. This retention was undoubtedly made for the purpose of the continuing operation of easements appropriated on plans of subdivision approved under the Transfer of Land Act.

(b) The Land Titles Office takes the view that the section can be utilised for the purpose of appropriating easements on plans of subdivision certified and registered under the Subdivision Act.

(c) The operation of section 98 (a) of the Transfer of Land Act differs from section 12(l)(b) of the Subdivision Act as:

(i) it operates in respect of plans of subdivision only, whereas easements can be created on subdivision or consolidation under Subdivision Act plans.

(ii) the proprietor of an allotment or lot on an approved plan of subdivision or on a lot of a registered plan of subdivision is entitled to the benefits of the easements appropriated or set apart as are reasonably necessary for the use and enjoyment of the allotment or lot and any building or part of a building thereon. Under the provisions of the Subdivision Act there is the choice of specifying the benefiting lots (whether some or all) or easements in gross.

(iii) the easements that can be appropriated are limited to way and drainage, party wall purposes and for the supply of water, gas, electricity, sewerage and telephone and other services to the allotment or lot on over or under the land appropriated or set apart for those purposes. See also Section 5.5.6.6(d). Under section 12 of the Subdivision Act any type of easement can be specified so long as it is recognised as an easement. See also Section 5.5.3.
(d) Paragraph (b) of section 98 implies certain specified easements in favour of allotments in a building subdivision. Two additional types of easement are implied - e.g., support and protection. Apart from this statutory provision, it is doubtful whether an easement of "protection" would be recognised by the court. This particular paragraph was introduced into the Transfer of Land Act to facilitate the subdivision of buildings and was the basis of the earlier type of "stratum" subdivision. Section 12(2) of the Subdivision Act now provides for a more comprehensive group of implied easements which may operate in the subdivision of buildings.

5.5.7 Conditional Easements and Easements Coupled with Obligations to be Performed by Grantor or Grantee

5.5.7.1 Conditional easement

(a) An easement subject to a condition precedent (i.e., a condition which must be fulfilled before the right to the easement arises) or a condition subsequent (i.e., a condition upon breach of which the easement will cease to exist) cannot be registered under the Transfer of Land Act. In either case, there would, if such an easement were registered, be a conflict between the effect of that registration on the one hand and the result of a failure to observe the condition on the other. The Register would show (and guarantee) the existence of an easement which may not exist or may have ceased to exist. In many cases, practically the same result can be achieved by imposing an obligation by way of covenant or otherwise on the owner of the dominant tenement. See Sections 5.5.7.2 and 5.5.7.3.

(b) The following are examples of easements subject to a condition precedent which should therefore not be registered.

(i) an easement of drainage "subject to" or "conditional upon" the grantee laying pipes etc.,

(ii) an easement of way for all purposes connected with the use of the dominant land as a service station "subject to", or "on condition that" the grantee concrete the servient land in accordance with certain specifications,

(iii) an easement of way "subject to" or "on condition that" the grantee construct drains so as to drain the servient land to the satisfaction of named persons or bodies,

(iv) an easement of way "subject to" or "on condition that" the grantee pay one half the cost of paving the servient tenement.

Any such conditions may be deleted with consent of the parties. Where, at the date of lodgment of the relevant instrument, a condition precedent has been complied with but consent to amendment cannot be obtained, the instrument may be withdrawn and lodged in support of an application under section 72 accompanied by proof of satisfaction of the condition precedent. When the application is granted, an appropriate endorsement should be made on the relevant instrument to the effect that the condition has been satisfied.

(c) The following are examples of easements subject to a condition subsequent which therefore should not be registered.

(i) an easement of way "conditional upon" or "subject to the condition that" or "so long as the grantee keeps certain gates open,

(ii) an easement of way or drainage conditional upon" or "subject to" or "so long as" the grantee maintains (or contributes towards or pays for the maintenance of) certain works or pipes etc.,

(iii) an easement conferring the right to maintain overhanging eaves "subject to" or "on condition that" or "so long as" the grantee maintains certain spouting etc.
5.5.7.2 Easement coupled with an obligation not being a restrictive covenant

(a) So long as an easement is created which in its terms comes into existence immediately and will remain in existence until surrendered or extinguished, no objection is taken to obligations being imposed upon the grantor or the grantee (and their successors) in regard to the servient land - either in respect of works to be carried out or maintained thereon, or as to the contribution to be paid by either party towards the cost of such works or maintenance. It may well be that if such obligations are not honoured the parties have contractual or other rights to compel performance. It may also be that the servient owner can restrain the enjoyment of the easement by the dominant owner so long as he does not comply with his obligations. However the view is taken in these cases that the easement, although its enjoyment may be prevented, still remains in operation and therefore can properly be shown on the Register. The important thing is to ensure that the performance of these obligations is not expressed to be a condition upon which the easement either arises or ceases to exist. In the cases given above the desired results could perhaps be achieved and the easement registered if it were granted free from any condition and there were added in each case an expression such as “and it is hereby agreed and declared that the grantee (and his successors in title) covenants with the grantor (and his successors in title) that he will:

• lay pipes of a certain type or in a certain manner;
• concrete the servient land;
• construct drains;
• pay half the cost of paving;
• keep certain gates open;
• maintain, or contribute to, or pay for maintenance of certain works or pipes; or
• maintain specified spouting etc.

(b) No reference to the agreement or covenant should appear in the recording of the easement made in either servient or dominant folio. The recording of the easement in the folio for the dominant land should refer to the dealing number of the instrument. In these cases, where a right of way is created, the expression ‘carriageway’ should not be used in any endorsement or in any subsequent reference to the easement on title. See Section 5.5.6.7(d).

(c) Normally positive obligations are imposed on the grantee (the dominant owner) in respect of the servient land. However, in some cases obligations may be imposed (by way of agreement or covenant) requiring work to be done or payments to be made or restricting user -

(i) on the grantor in respect of the servient land; or
(ii) on the grantee in respect of the dominant land.

5.5.7.3 Easement coupled with an obligation imposed by way of restrictive covenant burdening land of one party for the benefit of specified land of the other party

Where the obligations restrict the user of specified land of the covenantor (whether the covenantor is the dominant or servient owner) and are imposed expressly for the benefit of named land of the covenantee and not merely as part of the easement, or include obligations which are restrictive of user of specified land of the covenantor and are imposed by way of a covenant which is expressed to be for the benefit of named land of the other party (whether the servient or the dominant land) the instrument is to be regarded as both creating an easement and imposing a restrictive covenant. Where the covenant burdens the servient land, separate recordings should be made in the folio of the Register in respect of both the easement and the covenant - see Section 5.5.11.5(h). Where the covenant burdens the dominant land the encumbrance over the dominant tenement will be included under the memorandum of encumbrances, and in addition to the recording relating to the appurtenancy of the easement, "the covenant contained in Instrument No..."
5.5.8 Easements Contained in a Mortgage or Lease

An easement may be granted in a mortgage or lease to the mortgagee or the lessee over other land of the mortgagor or lessor as an appurtenance to the land mortgaged or leased. In such a case an appropriate recording is to be made in the folio to the servient land. No record of appurtenancy is made on the dominant folio. Where a carriageway easement is created the usual requirement as to consent of council applies. See Section 556(4(c)).

When the mortgage is discharged or the lease is surrendered or expired or is determined pursuant to section 70, the easement is extinguished and the appropriate endorsements must be made. Where a lease expires no action is taken until a new folio issues or an application is made under section 106(c).

An easement created in a mortgage or lease may be surrendered by the mortgagee or lessee. The usual procedure as to surrender is followed.

If a caveat affects the site of the easement, or affects a mortgage, charge or lease thereover, notice is sent but the caveat is not lapsed. The usual procedure is followed in regard to caveats affecting the land mortgaged or leased. The usual procedure also is followed in respect of writs affecting either the land mortgaged or leased or the land the site of the easement.

5.5.9 Instruments Creating or Reserving an Easement

5.5.9.1 General

As stated in Section 5564 an easement may be created by a separate instrument - a creation of easement - (see Section 5592), it may be granted or reserved in a transfer (see Section 5593) or it may be granted in a mortgage or lease (see Section 558).

5.5.9.2 Creation of easement

(a) An instrument of creation of easement may be, but does not have to be, lodged in duplicate. Stamp duty is payable and the duplicate must be stamped as a counterpart. A consideration should be expressed. The lodging fee is assessed as for a transfer. The form is set out as Form 13 in Schedule 2 of the Transfer of Land (General) Regulations 1994. The certificates of title to both dominant and servient tenements must be produced. Both parties must execute the instrument and their signatures must be attested.

(b) Where the land of the grantor is subject to a mortgage or charge, the mortgagee or annuitant should consent to the easement and the relevant duplicate mortgage or charge should be produced. If the consent of the mortgagee or annuitant cannot be obtained the easement may be registered but is liable to be extinguished on a sale under the mortgage or charge or on a foreclosure. See Section 5568. A suitable form of consent of a mortgagee or annuitant is as follows:

I (name of mortgagee or annuitant) the mortgagee (or annuitant) under mortgage (or charge) number…..consent to the registration of the within creation of easement

An easement may also be identified in any consent by reference to its number or to the parties and the date of the easement. Where the relevant consent is not lodged with the dealing, a requisition should be made, pointing out that the consent has not been supplied and asking either for production of the consent or advice that no consent is being produced.

(c) Mutual creations of easement must be by separate instruments.

(d) A creation of easement over land under the Transfer of Land Act in favour of land under the general law will be registered, but a creation of easement over land under the general law in favour of land under the Transfer of Land Act will not be registered. See Sections 556(2)(h) and 556(2)(g) respectively.
(e) As to easements coupled with obligations or embodying restrictive covenants see Sections 5.5.7.1 to 5.5.7.3.

(f) Where the dominant tenement is under the general law the dealing is sent to the General Law Branch where the dominant tenement is investigated, and the Issuing Book marked so that the dealing may be referred to that Branch on completion to enable the appropriate entry to be made on the memorial and the General Law Register.

(g) Where the servient tenement is subject to a general law mortgage or charge, the consent of the mortgagee or chargee is required together with production of the relevant deed of mortgage or charge. The instrument is referred to the General Law Branch where the identity of the consenting party is checked and appropriate entries made on the mortgage or charge and in the General Law Register.

(h) Where it is proposed to create an easement through common property on a registered plan, the body corporate acting under unanimous resolution of the members must lodge a certified plan under the provisions of section 32 of the Subdivision Act to alter registered plans.

(i) Where an easement for a right of carriageway is being created consent of council must be produced. See Section 5.5.6.4(c).

5.5.9.3 Transfers containing a creation and/or reservation of easement

Where a transfer creates an easement over land comprised in a different folio from that for the land being transferred, production is required of the servient certificate of title. Where a reservation is in favour of land in a different folio from that for the land transferred, production is required of the dominant certificate of title. The requirements as to consents of mortgagees, annuitants or lessees as set out in Section 5.5.9.2(b) apply. Generally the provisions of Sections 5.5.9.2(a) to (g) apply.

Easements in Gross (Statutory Easements)

One of the essentials of an easement is that there must be both a dominant tenement and a servient tenement - see Section 5.5.2.1. In law there cannot be an easement properly so called unless it is created as appurtenant to land of the grantee. There cannot, apart from statute, be "an easement in gross" - i.e. an easement without a dominant tenement.

Certain statutes provide expressly that an authority can acquire an easement, notwithstanding that the right in question is not taken for the benefit of land of that authority. These rights are statutory easements in gross and may be registered as easements under the Transfer of Land Act. Section 43 of the Electricity Industry Act 1993 is an example.

In some cases a statutory authority may be given power to acquire rights in the nature of an easement. These rights bind the land by virtue of the particular statute and are thus similar to easements. For this reason, by virtue of the statute, a practice has existed for many years of registering what are in effect easements in gross to municipalities and other statutory authorities.

The provisions of Sections 5.5.9.2 and 5.5.9.3 apply to easements in gross except in so far as a dominant tenement is concerned. There can be no expression of appurtenancy and the like.

5.5.11 Removal of Easements from the Register Book

5.5.11.1 Provisions of the Transfer of Land Act

Section 5.5.6.6 discusses the removal of easements pursuant to sections 62, 73, 73A and 106(c) of the Transfer of Land Act where those easements have been abandoned or extinguished. In addition easements may be abandoned, extinguished or surrendered and removed as follows:
5.5.11.2 By other statutes

Particular statutes may expressly or impliedly extinguish easements and either directly or indirectly result in their removal from the Register Book. In some cases, an application pursuant to section 73 or section 106(c) of the *Transfer of Land Act* may be required. In others, it may not. Examples are seen in the *Housing Act*, the provisions of the *Local Government Act* and the *Transport Act* relating to the closing of streets and roads and to the sale of surplus land.

5.5.11.3 By merger

Where all dominant and servient tenements are in the one proprietorship, the easement may be removed from the Register Book following the registration of a plan of consolidation and the issue of a single consolidated folio of the Register free from encumbrance. In the case of an easement in gross, where the servient tenement is acquired or transferred to the grantee of an easement, the easement will be "merged on request of the authority concerned." Where it is sought to remove implied subdivisional easements by merger, the consent of the municipal council is required.

An example of an easement merging in a plan of consolidation is included in the plans in *Survey Practice Handbook* Part 1, - *Diawing Practice*.

5.5.11.4 By resubdivision

Upon the resubdivision in a different manner by the proprietor of the whole of the land in an existing subdivision, all existing subdivisional easements will be regarded as extinguished on registration or approval of the resubdivision and omitted from the folios issuing in accordance with the later plan. This follows a principle similar to that of merger.

A resubdivision is not regarded as extinguishing the easement in favour of a public authority. See Section 5.5.14.

5.5.11.5 By Instrument of Surrender

(a) Just as an easement may be created and registered by the registration of an instrument of creation of easement (Section 5.5.9.2), so also it may be surrendered and removed from the Register Book by the registration of an instrument of surrender. A surrender of an implied or specified subdivisional easement will not be registered. In such a case, application should be made pursuant to section 73 with the consent of the municipal council supported by the necessary abandonments under seal, or a plan of removal of easement made under the provisions of section 23 of the *Subdivision Act*, could be lodged for registration.

In certain other cases, the procedure of surrender is not available - see Section 5.5.11.6.

(b) The form is set out as Form 14 in Schedule 2 to the Transfer of Land (General) Regulations 1994. Stamp duty is payable. Lodging fee is assessed as for a transfer. The certificates of title to both dominant and servient tenements must be produced except in the case of a surrender of an easement in gross, where the servient certificate only can be produced. Any duplicate instrument must be produced. Both parties must execute the instrument and their signatures must be attested.

(c) A surrender of easement must be a separate instrument. It cannot be embodied in a transfer.

(d) The surrender must be given to the registered proprietor of certain specified land - e.g., the servient land encumbered by the easement. No objection is taken where the servient land is in different proprietorship, to a surrender to all proprietors in one instrument.

(e) Both dominant and servient tenements must be under the *Transfer of Land Act* and the easement must have been created under that Act. When one or other is under the general law or the easement was created while one or other was under the general law, see Section 5.5.16.
(f) The consent of the mortgagee, annuitant or lessee must be obtained. The relevant duplicate instrument must be produced for endorsement. No consent is required from the mortgagee, chargee or lessee whose mortgage, charge or lease was registered before the easement. The form of consent set out in Section 5.5.9.2(b) (modified by substitution of a reference to surrender rather than creation) is acceptable.

(g) Where it is proposed to surrender an easement through common property on a registered plan, the body corporate acting under unanimous resolution of the members must lodge a certified plan under the provisions of section 32 of the Subdivision Act to alter registered plans.

(h) Where an easement is coupled with a restrictive covenant (Section 5.5.7.3) and the covenant is recorded in the folio to the land burdened thereby, a mere surrender of the easement will not extinguish the restrictive covenant. In such a case the covenant should be abandoned under seal by the registered proprietor or proprietors of the land entitled to the benefit thereof and a separate application made for its removal pursuant to section 88(1) of the Act. Alternatively, where the covenant burdens the servient land, application may be made by the servient proprietor under section 106(c) for the removal of both the easement and covenant supported by a surrender or abandonment of easement and abandonment of the covenant - both under seal. Both may be included in the one document. Otherwise the recording of the covenant as an encumbrance must remain. Past practice, where the covenant burdened the servient folio, was to endorse the servient folio - "Creation of Easement and grant of restrictive covenant".

In such cases on surrender of the easement, an additional recording of the surrender must be made and the original recording left untouched. If, before abandonment and removal of the covenant a new folio issues, the easement will be omitted as an encumbrance, but the covenant will remain.

(i) Where a caveat affects the dominant tenement or a mortgage or charge or lease over the dominant tenement, notice is sent and the caveat is not lapsed. Where a caveat affects the servient folio or any mortgage etc. thereon, no action is taken. Usual procedure is followed if a writ affects the dominant folio. No action is taken if the writ affects the servient folio.

(j) Where an easement for a right of carriageway is being surrendered, consent of council must be produced. See Section 5.5.6.4(c).

5.5.11.6 Abandonment under seal

(a) Where both dominant and servient tenements are under the Transfer of Land Act and the easement was created under that Act, the usual method of removing an easement from the Register Book is that of surrender (see Section 5.5.11.5). However, in some cases a dominant proprietor may desire to divest himself of an easement but is unable to obtain the acceptance of a surrender by the servient proprietor. In such cases, where the appurtenancy is known to title, an application for a new folio omitting the relevant appurtenancy and supported by an abandonment under seal by the dominant owner should be made. Where the easement is "floating" ie. not recorded on the dominant folio, the abandonment will be recorded on the servient folio. If the land in the dominant folio is subject to any mortgage, charge or lease registered subsequent to the easement being abandoned, the relevant consent is required. Production of the dominant certificate of title is required, but production of the servient certificate of title is not required. The same procedures are followed as in the case of a surrender of easement except that no recording is included in the servient folio. However the servient proprietor may at any time apply for a new folio free from the former encumbrance pursuant to section 106(c). This procedure is not allowed where a proprietor wishes to abandon easements either implied in favour of a lot on an approved plan of subdivision or specified in favour of a lot on a registered plan of subdivision.

(b) Where the dominant land is under the Transfer of Land Act and the servient land is under the general law, the appurtenancy being known to title - even though at the time of abandonment it is "floating" (ie. not recorded in the folio) - if it is sought to have the appurtenancy removed from the Register Book, application should be made for the issue of a new folio omitting the appurtenancy. This applies whether or not the easement was granted before or after the dominant land came under the Transfer of Land Act. This application must be supported by a deed of abandonment executed under seal by the registered proprietor of the dominant land and accompanied by the consent of any mortgagee, annuitant or lessee of the dominant land whose interest was created after the granting of the easement. The application is referred to the General Law Branch where
the title to the servient land is investigated and the Issuing Book marked so that the dealing will be referred to the General Law Section on completion for noting of the General Law Register. It is desirable that the deed of abandonment should be prepared in duplicate so that one part can be retained by the solicitor with the general law title. This duplicate should not be lodged in the Land Titles Office.

(c) Where the dominant land is under the general law and the servient land is under the Transfer of Land Act, whether or not the easement was granted before or after the servient land came under the Transfer of Land Act, if it is desired to remove the encumbrance from the servient folio, the registered proprietor should apply pursuant to section 73. The application should be supported by an abandonment executed under seal by the dominant owner duly registered by memorial under the Property Law Act. Any mortgagee, chargee or lessee of the dominant land should be a party to the deed of abandonment and not merely consent to the application. The certificate of title to the servient land and the deed title to the dominant land should be lodged.

5.5.11.7 Abandonment of easement appurtenant to land taken for road deviation

Where a parcel of land is purchased or acquired by a statutory authority (eg. the Roads Corporation or a municipal council) for purposes of road deviation, and the land so taken has an easement appurtenant to it, if the use of the easement is not required by the authority no objection is raised if an abandonment of the easement is included in the transfer or acquisition application.

The following is an acceptable form of abandonment which may be included immediately after the description of land in a transfer or application:

"and the said C.D. (the statutory authority) being satisfied that the easement hereinafter referred to is no longer required for the accommodation of the land hereby transferred (or acquired) Doth Hereby Abandon as appurtenant thereto All That and Those the rights which by virtue of instrument of creation of easement Registered No...... are or may be appurtenant to the land hereby transferred (or acquired) to the intent that such right (if any) shall henceforth be deemed to have ceased and been determined in so far as they are appurtenant to the land hereby transferred (or acquired) and each and every part thereof".

5.5.12 Provisions of the Transfer of Land Act affecting the Creation and Surrender of Easements other than those implied pursuant to section 98

5.5.12.1 Easements of carriageway created by Instrument of Creation (Section 5.5.9.2) or created or reserved in a transfer (Section 5.5.9.3) or in a mortgage or lease (Section 5.5.8)

Wherever an easement of carriageway is created, reserved or surrendered, consent of the relevant municipal council is required. See Section 5.5.6.4(c).

5.5.12.2 Surrender or abandonment of easement

On any surrender or abandonment of easement of any type, where that easement was created or reserved in an instrument or a transfer to comply with the requirements of a municipal council in connection with a subdivision sealed or certified by that council pursuant to the Subdivision Act provisions regulating subdivision, so that it could be regarded as an essential part of the subdivision, the consent of the municipality must be lodged in support.

5.5.13 Easements in favour of electricity corporations - Section 43 of the Electricity Industry Act 1993

By way of example prior to the State Electricity Commission (Amendment) Act 1972, easements in favour of the State Electricity Commission were created as appurtenant to land in a specified folio standing in the name of the Commission. This gave rise to problems where the easement was required by the
Commission for the purposes of its undertaking and not for the accommodation or benefit of the dominant land - eg. an easement for the transmission of electricity as opposed to, say, an easement for drainage or carriage purposes - and the Commission disposed of the dominant land. It could then be argued that the Commission could no longer enjoy the easement.

Sub-section (1) of section 103A overcame this problem by providing expressly that any easement to which the Commission was entitled before 19 December 1972 is an easement vested in the Commission and is appurtenant to all lands of the Commission. A similar provision now exists in section 43 of the *Electricity Industry Act* 1993 enabling the creation of easements in favour of any of the three corporations created in that Act.

Sub-section (2) deals with the case of easements created to accommodate particular land - eg. easements of way, drainage etc. In these cases, on sale of that land by the corporation, the easement should be annexed to and pass with that land and be no longer vested in the Corporation. In the absence of any other provision, by virtue of sub-section (1) the easement would remain vested in the Corporation as appurtenant to all lands of the Corporation and would not remain appurtenant to the land sold and transferred. Sub-section (2) overcomes the difficulty by providing that, in such cases, unless the Corporation certifies on the transfer that the easement is not required for the accommodation of the land transferred, then it is to remain appurtenant to the land for the benefit of which it was created, and not to the other land of the corporation.

Where such a certificate is endorsed on the transfer:

(a) the easement remains vested in the Corporation as appurtenant to all its land and ceases to be appurtenant to the land transferred;

(b) no appurtenancy will therefore be shown in any new folio to issue to the land transferred;

(c) where the appurtenancy is shown in the folio the transfer must not be registered by endorsement but a new folio must be issued omitting the appurtenancy;

(d) where a recording of an appurtenancy appears in the folio the recording must be cancelled;

(e) where the dominant folio has annexed sheets setting out the appurtenancies, these sheets will be endorsed to indicate that the easements set out are no longer appurtenant to the land in the folio but are vested in the Corporation.

Where no such certificate is endorsed the transfer is registered as at present and any appurtenancies remain.

Sub-section (3) in effect provides for an easement in gross to the Corporation.

### 5.5.14 Easements Appropriated in Favour of Public Authorities

#### 5.5.14.1 Easements under Former Legislation

Prior to the introduction of the *Subdivision Act*, certain Acts were amended to enable the public authorities concerned to require easements to be created in their favour upon approval of plans of subdivision. As there are a number of plans and folios of the Register referring to such easements, details of the legislation are set out hereunder:

<table>
<thead>
<tr>
<th>Department/Authority</th>
<th>Plans Sealed on or after</th>
<th>Act</th>
<th>Section</th>
<th>Specified Purposes</th>
</tr>
</thead>
<tbody>
<tr>
<td>State Rivers &amp; Water Supply Commission</td>
<td>10.4.1973</td>
<td><em>Water Act</em></td>
<td>32A</td>
<td>Pipeline Channel</td>
</tr>
</tbody>
</table>
Dandenong Valley Authority 861976  *DVAAct*  17A  Pipeline Channel
Melbourne & Metropolitan Board of Works 161981  *MMBWAct*  258BA  Pipeline Channel

**Municipal Councils** 161981  *LG Act 1958*  656F  Pipeline Channel

State Electricity Commission of Victoria 231983  *SEC Act*  103B  Powerline

With regard to pre-existing easements, it is considered prudent to maintain information, as sometimes there is not a direct translation from one department or authority to its successor or from one section of an old Act to the new section of a new Act. This specification of existing easements would be acceptable if set out in the following format

<table>
<thead>
<tr>
<th>Subject</th>
<th>Purpose</th>
<th>Width (Metres)</th>
<th>Origin</th>
<th>Land Benefited/ Land In favour of</th>
</tr>
</thead>
<tbody>
<tr>
<td>E-1</td>
<td>Channel</td>
<td>6m</td>
<td>LP123456(section 32A of the <em>Water Act 1958</em>)</td>
<td>State Rivers &amp; Water Supply Commission</td>
</tr>
<tr>
<td>E-2</td>
<td>Pipeline and Channel</td>
<td>See Diagram</td>
<td>LP201356(section 656F of the <em>Local Government Act 1958</em>)</td>
<td>City of Hawthorn</td>
</tr>
</tbody>
</table>

### 5.5.14.2 Easements under Current Legislation

Similar provisions have been included in the *Water Act 1989* and the *Electricity Industry Act 1993* for the specification of easements in Plans of Subdivision to be certified and registered. These should be set out in a Plan of Subdivision as follow

<table>
<thead>
<tr>
<th>Subject</th>
<th>Purpose</th>
<th>Width (Metres)</th>
<th>Origin</th>
<th>Land benefited/ Land In favour of</th>
</tr>
</thead>
<tbody>
<tr>
<td>E-1</td>
<td>Pipelines or Ancilliary Works</td>
<td>See Diagram</td>
<td>This plan (Section 136 of the <em>Water Act 1989</em>)</td>
<td>Ballarat Water Board</td>
</tr>
<tr>
<td>E-2</td>
<td>Power Line</td>
<td>20</td>
<td>This Plan (Section 44 of the <em>Electricity Industry Act 1993</em>)</td>
<td>National Electricity</td>
</tr>
</tbody>
</table>

### 5.5.14.3 Easements in Favour of Public Authorities etc. under the *Subdivision Act*

The *Subdivision Act* provides a facility to specify easements in favour of a 'Public Authority, Council, Minister or other person', but only if the Act governing the authority so permits.

Section 187A of the *Local Government Act 1989* permits a council to take such an easement and a like provision was made by the inclusion of section 30AA in the *Gas and Fuel Act 1958* (operative from 16 November 1993).

In using these general easement provisions, the Origin in an easement table is "This Plan" only.
5.5.14.4 Further Reading

For further information on the preparation of easement tables related to section 103 B of the State Electricity Commission Act 1958 and section 136 of the Water Act 1989, see Traverse 121, February 1992

5.5.15 Easements and the Subdivision Act 1988

5.5.15.1 General

The Subdivision Act came into operation on 30 October 1989. Little change was made to existing legislation in other Acts dealing with easement matters, but new procedures and flexibility in the specification, creation and removal of easements have been provided for applicants in the subdivisional process. An example of the change can be seen in the comparison of section 98(a) of the Transfer of Land Act with section 12(l)(b) of the Subdivision Act as discussed in Section 556 10(d)

5.5.15.2 Section 4 of the Subdivision Act

Sub-section 4(l)(c) provides that the Act applies to the creation, variation or removal of an easement or restriction,

(i) as part of a plan of subdivision or consolidation, or
(ii) in accordance with a planning scheme or permit, or
(iii) in any other circumstances set out in section 6(l)(j) or (k), or
(iv) under section 32 or 36, and

Sub-section 4(5) states that this Act does not prevent a person from using other methods to create, vary or remove an easement or restriction

5.5.15.3 Section 6 of the Subdivision Act

This section requires a council to certify a plan within the prescribed time if the requirements set out are met Sub-section 6(l)(k) deals with a plan removing or varying the whole or part of an easement The requirements are,

• accordance with a planning scheme or permit,
• a declaration of abandonment or extinguishment by the Registrar,
• consent to removal or variation by the person with the benefit of the easement,
• agreement of all interested parties, or
• the meeting of conditions concerning leave given by the Administrative Appeals Tribunal to remove the easement

5.5.15.4 Section 12 of the Subdivision Act

Sub-section 12(l) requires the plan submitted to the council to specify existing registered easements that burden the land and proposed easements (apart in each case from the easements implied over the land n a plan of subdivision of a building, that part of a subdivision which subdivides a building or
any land affected by a body corporate) Further the plan must specify the purpose of the easements and either the land benefited or to benefit or, if authorised by or under an Act other than the Subdivision Act or the Transfer of Land Act, the public authority, council, Minister or other person in whose favour they are created or are to be created See also Section 5 5 14 3

Sub-section 12(1B) provides however that if the folio, instrument or plan relative to the subject land does not describe the purpose of the easement, the land benefited or the person or authority in whose favour it is created, a plan complies with the requirements if it specifies the land burdened and any other information about the purpose or benefit of the easement appearing from that folio, instrument or plan

Sub-section 12(2) provides for implied easements over

(i) all the land on a plan of subdivision of a building,
(ii) that part of a subdivision which subdivides a building
(iii) any land affected by a body corporate, and
(iv) any land on a plan if the plan specifies that the sub-section applies to the land

Sub-sections 12(3) and 12(3A) allow a plan to make variations to implied easements in particular cases

Sub-section 12(4) deals with access to easements and the repair of damage, but sub-section 12(5) exempts a person entitled to use an easement from repairing damage to buildings or works constructed or located so as to interfere with the exercise of the appropriate rights if reasonable care is taken

Sub-section 12(6) provides that section 12 does not operate to imply an easement or right to a public authority, council, Minister or other person if an easement is so specified on the plan

Sub-section 12(7) indicates that section 12 does not prevent the exercise of rights conferred by

(i) an easement created other than under the Subdivision Act or the Transfer of Land Act, or
(ii) an agreement to create an easement

Sub-section 12(8) states that specified or implied easements are in addition to easements under section 98(a) of the Transfer of Land Act

Sub-section 12(9) provides that section 98(b) of the Transfer of Land Act (i.e additional easements in the subdivision of a building) does not apply to a plan registered under the Subdivision Act

5.5.15.5 Section 23 of the Subdivision Act

This section provides for the creation, removal or variation of an easement or restriction on the registration of a plan, and includes the situation where an easement can be created despite the benefited and burdened land having the same registered proprietor

Sub-section 23(1) provides that if a planning scheme or permit regulates or authorises the creation, removal or variation of an easement or restriction, the owner of the land burdened or to be burdened by the restriction must in accordance with the planning scheme or permit and with the Planning and Environment Act, lodge a certified plan at the Land Titles Office for registration. The planning scheme amendment or permit must accompany the plan when it is lodged for registration - Regulation 18 of the Subdivision (Procedures) Regulations 1989

Sub-section 23(2) states that the consent of any person who has an interest or claim is not required to the certification and registration of a plan referred to in the previous sub-section

Sub-section 23(3) permits a certified plan to be a plan of subdivision or consolidation if a planning scheme or permit also relates to the subdivision or consolidation of land Examples of the use of section 23 are shown on plans included in Survey Practice Handbook, Part 1, Drawing Practice
Sub-section 23(4) provides for the variation or removal of a condition in the nature of an easement in a Crown grant in similar terms to the application of sub-section 23(1) to an easement. It should be noted that any other condition in a Crown grant must be removed in accordance with the provisions of the Land Act.

Sub-section 23(5) provides that sub-section 23(4) applies despite anything to the contrary in the Land Act or in a Crown grant.

5.5.15.6 Section 24 of the Subdivision Act

Section 24 defines when a plan is registered and deals with the effect of registration.

Sub-section 2(d) states that upon registration "any easement, restriction or other right is created, varied or removed as specified in the plan".

Sub-section 2(e) provides that upon registration "any easements or rights implied by section 12(2) are created".

5.5.15.7 Section 32 of the Subdivision Act

Section 32 deals with the alteration of a subdivision containing a body corporate and includes therein some provisions relating to easements. It should be noted that strata and cluster subdivisions and redevelopments come under the umbrella of section 32. See section 46 and schedule 2 of the Act.

Sub-section 32(1) sets out the various powers of a body corporate acting under the unanimous resolution of the members. Included as sub-section 32(l)(i) is the power to create, vary or remove any easement or restriction, including an implied easement.

5.5.15.8 Section 36 of the Subdivision Act

This section sets out in sub-section 36(1) the circumstances in which a council or referral authority can empower an owner to apply to the Administrative Appeals Tribunal for leave to remove a right of way over the owner's land or acquire or remove an easement over other land in the subdivision or consolidation or other land in the vicinity.

Sub-section 36(2) provides that if leave is given, the owner may compulsorily acquire the easement, (and the Land Acquisition and Compensation Act applies), or the owner may submit for certification and lodge for registration a plan to remove the easement in accordance with any conditions to which leave is subject. Consent of any person having an interest in land benefited is not required for its removal unless the Tribunal otherwise directs and there is no requirement to provide the Registrar of Titles with the consents set out in sub-sections 22(l)(c), (d) and (da). If an easement is acquired, application will be be made under section 72 of the Transfer of Land Act for its recording on title once the acquisition is complete.

5.5.15.9 Section 37 of the Subdivision Act

This section defines a staged subdivision as a scheme for the subdivision of land in stages and, inter alia, provides in section 37(3) that if a planning scheme or permit authorises a staged subdivision a plan for the second or subsequent stage may create, vary or remove an easement or restriction over land in that stage.

5.5.15.10 Schedule 2 of the Subdivision Act

This Schedule has effect as to strata and cluster subdivision and item 2(1) includes a provision that there are implied over land in a strata or cluster plan the easements referred to in section 12(2) of the
Subdivision Act, the easements and rights implied under section 12 of the Strata Titles Act or section 20 of the Cluster Titles Act being extinguished.

5.5.16 Easements over Crown Land Ancillary to Alienations in Strata

Section 339B of the Land Act 1958 provides, inter alia, that the Minister may in accordance with the section create easements over Crown land to enable access to a stratum of Crown land or a support of that land or a building or structure erected or to be erected on it or for the passage or provision of services to that stratum.

5.5.17 Bibliography

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Vance, Eric S. Examination of Title by Deed under the General Law and of Possessory Title to Land in Victoria and Powers of Attorney etc., Law Book Co. of Australia Ltd., 1941.

Forbes, L. Titles Office Practice Notes, Unpublished, c 1952.


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5.6 Subdivision Act 1988

The purposes enumerated in section 1 of the Act are to:

(a) set out the procedure for the subdivision and consolidation of land, including buildings and airspace, and for the creation, variation or removal of easements or restrictions, and

(b) regulate the management of and dealings with common property and the constitution and operation of bodies corporate.

5.6.1 Background to the Development of the Subdivision Act

This Act owes its origins to the amalgamation of various aspects of local government, land transfer, cluster and strata legislation and divides the subdivision approval process into two levels, namely;

Conceptual - permit based, to be dealt with under planning legislation; and

Procedural - to be dealt with under the Subdivision Act.

A by-product of the Act has been the removal of some of the aberrations in subdivision registration which have existed in Victoria for many years, and which have caused some difficulties in the introduction of a computer based land information system.

The concept of amalgamating all elements of land subdivision approval procedures gained its initial impetus from the findings of the Building and Development Approvals Committee (BADAC) in the late 1970s.

The Committee was made up of representatives of industry, local government and planning bodies with the prime objective of undertaking a major review of the approval process for all forms of development. The Committee operated over a two year span and brought forward recommendations.
which resulted in the Building Control Act with its attendant regulations, the Planning and Environment Act and the Subdivision Act.

It should be recalled that planning legislation was first introduced into Victoria by the Town and Country Planning Act 1944. At that time local government was concerned with the burden of the cost of implementing planning when it was struggling to handle the pressures which were being thrust upon it as World War 2 drew to a close. As a result, the subdivision procedures in the Local Government Act were left in that Act.

Following the rapid expansion in Victoria in the post-war period, the Local Government Act became extremely voluminous. It had grown over a century through successive amendments aimed at meeting the increasing responsibilities being directed towards local government who were also endeavouring to respond to some of the pressures occurring in society as development took place. In addition, as more specialised forms of land subdivision were being sought, the Strata Titles Act and the Cluster Titles Act emerged.

The BADAC Committee considered there should be an amalgam of all subdivision processes in a single Subdivision Act and there should be a positive interface with the planning process. It also sought to introduce procedures directed towards minimising approval times and coordinating elements of the approval process by running some aspects of approval in parallel rather than end on.

One of the prime features of the BADAC report was to have municipal councils as the focal point of the approval process, and to propose the creation of the position of Development Approvals Coordinator. A further principal feature was that planning legislation and its inter-relationship with planning documentation should form the core of the conceptual elements of the development approval process.

The introduction of the Planning and Environment Act 1987 set the scene for a coordinated framework as set out in the objectives of the Act. Some of these objectives relevant to the Subdivision Act are:

1. To ensure sound, strategic planning and coordinated action at State, regional and municipal levels;
2. To establish a system of planning schemes based on municipal districts to be the principal way of setting out objectives, policies and controls for the use, development and protection of land;
3. To facilitate development which achieves the objectives of planning in Victoria and planning objectives set up in planning schemes;
4. To provide for a single authority to issue permits for land use or development and related matters, and to co-ordinate the issue of permits with related approvals;
5. To provide an accessible process for just and timely review for decisions without unnecessary formality.

5.6.2 Summary of Concepts

The Subdivision Act was formulated against these objectives and its concepts can be generally summarized as follow:

- One kind of title;
- One straightforward subdivision process;
- Consolidation of all major discretions in the planning approval phase;
- Clear recognition that the certification process is technical and administrative;
- A process which allows for the inevitable adjustments along the way;
- Flexibility for the developer to structure the subdivision to suit market demands;
• Flexibility and variety in the operation of the body corporate, while preserving the advances made in the *Strata Titles Act*,

• Position the municipal council at the centre of the process, complementing its planning, building control, drainage, traffic and other powers,

• Enhancing the information base available at the municipal council office as well as ensuring each disposable piece of land is uniquely cadastrally specified,

• One simple Act which can be read and understood by laymen, which after all, includes most developers and nearly all members of bodies corporate

### 5.6.3 Provisions of the Subdivision Act in Dealings with Land

The concepts discussed in the previous Section did create a number of legal problems which has taken a series of amendments to settle, but with the proclamation of the *Subdivision (Amendment) Act* 1993, the process is operating smoothly and providing opportunities for innovative development. Brief notes follow on the more important aspects

#### 5.6.3.1 Subdivision Encompasses Land, Buildings and Airspace

The proclamation of the *Subdivision Act* had the effect of revoking the provisions of the *Local Government Act* relating to land subdivision, the *Strata Titles Act* and the *Cluster Titles Act*. Actions commenced under the former legislation can be dealt with under the new provisions or under generous transitional arrangements, which allow dealings to continue under former provisions

#### 5.6.3.2 Easement Provisions

Easements are extensively discussed in Section 5 5, but briefly the *Subdivision Act* permits

• The specification of easements in favour of some or all lots in the plan, land outside the plan and/or public statutory bodies,

• The creation, removal and variation of easements or restrictions if a planning scheme or permit so authorises,

• The existence of implied easements as well as specified easements,

• The specification of a road to imply easements for prescribed services in favour of the appropriate authority or council,

• The acquisition or removal of easements in cases where a council or referral authority states in writing that the economical subdivision, consolidation or servicing requires same (The owner then applies to the Administrative Appeals Tribunal)

#### 5.6.3.3 Fragmentation of Land Without Subdivision Virtually Eliminated

The exemptions available under the *Local Government Act* to sell part of a parcel without registering a plan of subdivision, e.g. to a neighbour or to an acquiring authority, have been removed. There is however, the ability to transfer anything which previously existed and could be sold separately, or any transfer to or from the Commonwealth
5.6.3.4 Roads and Reserves Vest Upon Plan Registration

Roads and Reserves automatically vest in the person or body named in the plan upon plan registration without transfers. Any road vested in a council becomes a public highway.

5.6.3.5 Plans Containing Bodies Corporate

Very flexible arrangements relating to bodies corporate offer a number of options previously unavailable.

A plan of subdivision can have:

- One or more bodies corporate with or without common property (but not the reverse);
- Lots which are not members of any body corporate on the plan;
- Lots which are members of an unlimited body corporate and also of one or more limited bodies corporate;
- Ownership of common property vesting in an unlimited body corporate with the right to use the common property being available to members of a limited body corporate only.

Facilities to alter a plan containing a body corporate include:

- The disposition of common property;
- The acquisition of land to be included in common property;
- The addition to, or removal from, land affected by a body corporate;
- The changing of lot entitlement and liability;
- The addition of lots to, or removal from, the land affected by a body corporate;
- The consolidation or re-subdivision of lots;
- The creation, variation or removal of easements;
- The dissolution of bodies corporate or the creation of new bodies corporate (provided no lot is affected by more than one unlimited body corporate).

The above mentioned items apply equally to bodies corporate originally created in strata or cluster subdivisions.

5.6.3.6 Acquisition of Land by an Acquiring Authority

A pre-condition to the acquisition, by compulsory process or by agreement, of part of a parcel of land is the registration of a plan of subdivision creating the land concerned as a separate parcel.

This can be established by the registration of a conventional plan of subdivision by the registered proprietor, but an acquiring authority can register a particular form of plan of subdivision over land owned by another under the provisions of section 35 of the Subdivision Act.

Such a plan creates the parcel structure upon plan registration, but vestings and easement arrangements often cannot take place until acquisitions subsequently occur. Consequently a special table is required as part of the plan with such table being up-dated as transactions are registered or notified to the Registrar.
5.6.3.7 Staged Subdivision

A process exists to produce a master plan of subdivision specifying certain lots as the first stage and providing
a single or multiple balance lot/s for subsequent subdivision.

A single planning permit controls the whole operation, the permit being obtained at the beginning of the
process. Another benefit of using stage development is the flexibility which allows changes to be made to take account
of consumer demands etc. With staging a number of matters can be handled by the developer without the need
for the unanimous consent of the body corporate as would normally apply.

In a later change, developers have:

- altered lot dimensions to suit client demands;
- changed the location of roads and reserves;
- re-routed the path of an easement;
- re-calculated lot entitlements and liabilities.

Another significant feature of the process is the ability to defer the payment of open space contributions to a
later stage.

5.7 Licences and Leases for Strata of Crown Land

5.7.1 Definition

The Conservation, Forests and Lands Act (Amendment) Act No.90/1989 permitted the issue of a licence for a
stratum of Crown land under specified conditions. This amendment added section 138A to the Land Act and
defined a "Stratum of Crown Land". When Royal assent was given to the Land (Further Amendment) Act
1993 on 3 November 1993, this definition was added to section 3 of the Act and it reads:

"stratum of Crown land" means a part of Crown land consisting of a space of any shape below, on or above
the surface of the land or partly below and partly above the surface of the land, all the dimensions of which
are limited.

5.7.2 Leasing of Strata of Crown Land

Section 134A of the Land Act 1958 enables the leasing of strata of Crown land, and provides that the Minister
must not grant such a lease unless he or she:

- has first consulted the Council of the municipal district in which the stratum is located; and
- is satisfied that the lessee can meet certain requirements as to access to and rights of support of the
stratum.

It also provides that a lease may be granted for a stratum of Crown land above or below, but not including the
level of, a road.

5.7.3 1993 Amendments to Land Act 1958

Section 339 of this Act provided that Crown land was to be alienated only as regards the surface and down to
such depth as the Governor in Council may have directed, but the 1993 amendment clarifies that Crown land
may now be alienated to any height above the surface.
Section 339A enables the alienation of Crown land in strata. Section 339A in essence replicates the provisions relating to the leasing of strata of Crown land. Section 339B permits the creation of easements over Crown land to facilitate the alienation of Crown land in strata.

A new section 412 limits the jurisdiction of the Supreme Court to prevent it from awarding compensation in circumstances where the Act provides that no compensation is payable.

5.7.4 Local Government Act 1989

Although, since the introduction of the Subdivision Act the provisions of the Local Government Act have been considerably reduced, a number of matters remain which are applicable to the land development process. The following matters are relevant:

5.7.4.1 Councils Incorporated under the Local Government Act 1989

From the commencement of section 4 of the Local Government Act 1989 (LGA 1989) on 1 November 1989, a council may be constituted only as a -

- City Council;
- Rural City Council; or
- Shire Council.

Prior to the LGA 1989, a council was constituted as a shire, borough, town or city under the LGA 1958.

5.7.4.2 Standardised Name

Pursuant to section 5A of the LGA 1989, in all proceedings and in all Acts, regulations and documents, it is sufficient for all purposes to refer to -

A City Council as - "(name of municipal district) City Council"
A Rural City Council as - "(name of municipal district) Rural City Council"
A Shire Council as - "(name of municipal district) Shire Council"
A Council that has "Borough" as part of its name as - "(name of municipal district) Borough Council"
A Council that has "Town" as part of its name as - "(name of municipal district) Town Council.

5.7.4.3 Practice in the Land Titles Office (LTO)

The LTO has adopted the standard format for council's names as the basis for all entries in the Land Titles Register for reasons of efficiency and simplicity. While the Office will encourage councils to adopt the standard format in instruments to be lodged for registration that decision is one for each council, nevertheless any entry in the Register will be made only in that format.
Licensed surveyors preparing plans for council certification are similarly encouraged to adopt the standard format.

5.7.4.4 Powers of Council

Pursuant to the provisions of section 8(3) LGA 1989, the powers of a council are related to:
• all things necessary or convenient to be done for or in connection with the performance of its duties, and
• to enable it to achieve its purposes and objectives

Schedule 1 sets out the functions of a council

Section 6 sets out the purposes of a council

Section 7 sets out the objectives of a council

The breadth of a council's powers are such that in the context of statutory interpretation they are as broad and encompassing as any normal corporation and possibly broader in that there is no memorandum of association.

Section 8(4) states - "The generality of sub-section (3) is not limited by the conferring of specific powers on a council by or under this Act or any other Act". Furthermore, section 8(5) states that "Schedule 1 does not limit the functions or powers conferred on a council by or under this Act or any other Act'.

Thus, in most circumstances, the LTO will make no inquiry as to the power of a council to enter into a transaction. There are, however, limitations to a council's powers to enter into some transactions. These limitations which arise as a result of particular provisions of the LGA 1989 have specific requirements. Those of likely interest to surveyors are set out in the following paragraphs.

5.7.4.5 Delegation pursuant to the provisions of section 98(1) of the LGA 1989:

"(1) A Council may by instrument of delegation delegate to a member of its staff any power, duty or function of a Council under this Act or any other Act other than -

(a) this power of delegation, and

(b) the power to declare a rate or charge, and

(c) the power to borrow money except as provided in section 149, and

(d) the power to approve any expenditure not contained in a budget approved by the Council, and

(e) any power, duty or function of the Council under section 223, and

(f) any prescribed power"

It is common today to see plans of subdivision certified and endorsed by a council delegate instead of the council seal. No requisition is made by the LTO as to the authenticity of the delegation.

5.7.4.6 Transfers by a Council

(a) Generally

The LGA 1989 has significantly changed the structure and power of a council from the LGA 1958. Where formerly a council could only transfer land pursuant to specific statutory provisions, its capacity to transfer land is now unbridled and limited only by its incorporation and a few prescriptive sections. Consequently, subject to the few qualifications which are clear and obvious, the LTO considers it should not be necessary to make any inquiry into the power of a council to transfer land if all the usual requirements of a transfer have been met. The following paragraphs examine more unusual dealings and detail those that may require requisitions beyond those to which any dealing is subject.
(b) Transfers pursuant to section 181 of the LGA 1989 following a sale for rate recovery.

Background.

Where a default is made on the payment to a council of rates or other money charged on rateable land and the due amount has been unpaid for at least 3 years, a council may sell the land or cause it to be transferred to itself for a consideration equivalent to or greater than its value as determined under sub-section (3) or it may sell the land by auction without valuation. The council is required to publish notice of its intention and serve a notice on any person appearing to have an estate or interest in the Register. The LTO is not concerned to inquire about these requirements.

Form

Section 181(8) provides as follows: "The Registrar of Titles may register a transfer of land by a Council under this section if the transfer is in a form approved by the Registrar of Titles".

A form of transfer pursuant to section 181 and section 207D of the LGA 1989 has been designed for use in these circumstances and can be purchased at the LTO. Photocopies of such forms are not accepted, but a form typed on good quality paper can be lodged for registration. Prior to this enactment a form of transfer as required by section 376 of the LGA 1958 was provided in the 24th Schedule of that Act.

Monetary Consideration

Section 181(1) sets out that if a council sells any rateable land or causes it to be transferred to itself then there must be a consideration equivalent to or greater than its value as determined by a registered valuer giving a valuation of the land made not more than 6 months prior to the date of the proposed sale or transfer (see sub-section 3(b)), or there must be a sale by auction without valuation.

It is not the intention of the LTO to inquire as to whether the consideration was equivalent to or greater than the valuation or whether there was an auction, and a requisition as to the value of the consideration is unlikely.

However, all transfers for rate recovery under section 181 must contain a monetary consideration. Where no monetary consideration is shown, a requisition will be made for this to be shown.

Certificate of Title

Section 181(9) provides as follows: "The Registrar of Titles may dispense with production of the certificate of title for purposes of registering the transfer".

Consequential Amendments

Section 181(4)(b) provides that "If the land is under the Transfer of Land Act 1958, when the Registrar of Titles registers a transfer of the land under this section, the Registrar must cancel any mortgages or charges registered as encumbrances on the land".

However, section 181(4)(d) qualifies the interests that may be cancelled.

Priority of Council's Charge

Section 181(4)(d) states "The sale of the land is free from all estates and interests over which the council's charge has priority".
Accordingly, a transfer under section 181 of the LGA 1989 for rate recovery must be free from all estates and interests over which the council’s charge has priority. Failure to transfer land free from such an estate or interest will be the subject of requisitions.

Examples of cases in which the council's interest is subject to other statutory charges include section 20(4) of the Vermin and Noxious Weeds Act 1958 and section 66(1) of the Land Tax Act 1958.

**Vesting**

Section 181(10) provides that "The registration of the transfer vests in the transferees all the estate and interest in the land".

### 5.7.4.7 Transfers related to roads pursuant to section 207D of the LGA 1989 following the exercise of a power under Schedule 10

**Background**

Under the provisions of section 206(1) of the LGA 1989, the powers of a council in relation to roads include those powers set out in Schedule 10. This Schedule is headed "Powers of Councils over Roads" and the relevant clauses are 2, 3, and 8 which deal with -

- the power to deviate roads;
- the power to discontinue roads; and
- the power to narrow or widen roads.

These notes are concerned only with the circumstances that lead to a transfer by a council.

The power to deviate a road is more likely to lead to an exchange which is dealt with under section 207E. However, where a council exercises its power to discontinue or narrow roads, it is likely a transfer may result.

Section 207D is multi-functional in that it provides for notice of an action as well as a transfer.

Section 207D is the successor to sections 526 and 528 of the Local Government (Miscellaneous) Act 1958 which later became part of Part XIX of the Local Government (Miscellaneous) Act 1958. Part XIX was repealed on 7 December 1993 by the Local Government (Miscellaneous Amendments) Act 1993. However, section 25(2) of the 1993 Act provides that "Any Act, matter or thing started under that Part may be completed as if that Part was still in force".

**Vesting**

Land which is the subject of a transfer under this section must have been vested in the council pursuant to section 207B. Such vesting takes place upon publication in the Government Gazette of notice of the exercising of the particular power by the council.

**Form**

Section 207D(2)(a) provides that a council must give a transfer (if it takes any action that requires a transfer) that is in a form approved by the Registrar.

A form of transfer pursuant to sections 181 and 207D of the LGA 1989 has been designed for use in these circumstances and must be used. Copies can be purchased at the LTO.
Certificate of Title

Section 207D(4)(b) provides that -

“(4) Without limiting the power given to him or her by subsection (3) the Registrar may -

(a) register the transfer of land; and

(b) if the transfer is not accompanied by a certificate of title, register it in the same way as if it had been accompanied by a certificate of title in the name of the Council as proprietor”.

5.7.4.8 Exchange application pursuant to Section 207E

Background

Notes on exchanges are included under the general heading of Transfers by a Council rather than separately because the effect of the exchange is to transfer land to one party in exchange for land taken from that party for the purpose of a road. Similar provisions were formerly contained in section 527 and Schedule 29 of the LGA 1958.

Application of provisions

Section 270E(1) provides: “This section only applies if a Council agrees to exchange any land it acquires under Schedule 10 with other land owned by it”.

Technically a council does not acquire land under Schedule 10 nor does it usually "own" the land being exchanged.

Under section207B(2)(b), land in a discontinued road, which is the subject of an exchange where a road is being deviated, is not even vested in a council. Furthermore, it is not clear that Crown land, or land that is the subject of a discontinued Government Road, is capable of being the subject of an exchange. (Legislative amendments are proposed to clarify these provisions).

Exchange

An exchange is a give and take situation and involves only two parties, the council and the registered proprietor/s. The application is to remove from the registered proprietor's title the land being acquired for the road deviation and by way of exchange putting the land from the discontinued road into the title of the registered proprietor. The value of each part is not necessarily the same. This is of no concern to the LTO.

Title to deviated road (excluded land)

Although section 207E(4)(b) does not specifically state all the steps required, it does anticipate that a new title, free of certain encumbrances, would issue to the council. This is the land of the registered proprietor that is being taken for the new road, and, if the title is subject to a mortgage, charge, lease or sub-lease, it is freed from these encumbrances.

Title to closed road (included land)

Pursuant to section 207E(4)(a) the registered proprietor's title is amended to include the closed road and that portion of land becomes subject to any mortgage, charge, lease or sub-lease already encumbering the title.
**Consents**

Written consents of the proprietors of any mortgage, charge, lease or sub-lease are required to the application under section 207E(3)(c)

**Subdivision Act 1988**

Section 207E(5) states that - "The Subdivision Act 1988 does not apply to land to which this section applies"

**5.7.4.9 Restriction on power to sell land**

**Generally**

The provisions of section 189 set out the restrictions on a council before it can sell or exchange land. These are -

- the requirement for public notice - section 189(2)(a),
- the obtaining a valuation - section 189(2)(b), and
- the right to make a submission under section 223

Section 181 is excepted (section 189(1)) from these requirements and the right to make a submission does not apply if there is a sale of land from a road discontinuance under clause 3 of Schedule 10 (Section 189(4)). The LTO will not concern itself about these requirements but will presume regularity and, subject to the normal examination requirements of a transfer being satisfied, will register a transfer by a council.

**Transfer without consideration**

It is anticipated that in most circumstances a transfer by a council will contain a monetary consideration. A specific power to transfer, exchange or lease land without consideration is given by section 191(1) where the transfer, exchange or lease is to -

(a) "(a) the Crown; or
(b) a Minister, or
(c) a public body/ or
(d) the trustees appointed under any Act to be held in trust for public or municipal purposes, or
(e) any hospital within the meaning of the Hospitals and Charities Act 1958 being a public hospital or other hospital carried on by an association or society otherwise than for profit or gain to the members of the association or society"

**Validity**

Section 191(2) provides - Any transfer, exchange or lease under this section is valid in law and equity.
Non application

Section 191(3) provides - "Sections 189 and 190 do not apply to any transfer, exchange or lease under this section".

5.7.4.10 Power to lease land

Background

Under section 237 of the LGA 1958, a council was empowered to lease any land vested in it provided the term did not exceed 30 years. Certain conditions applied but if the term was for 30 years or less no requisition was made.

Term

The LGA 1989 has increased the possible term of a lease. Section 190(1) of the LGA 1989 provides: "A Council's power to lease any land to any person is limited to leases for a term of 50 years or less".

Lease without consideration

See Section 5.8.4.9 for transfer or exchange without consideration. Section 191 of the LGA 1989 applies here.

Leases entered into prior to 1 March 1984

If a lease is dated prior to 1 March 1984, earlier procedures are applied for examination and registration at the LTO.

5.7.4.11 Creation of easement by a council

There is no express provision in the LGA 1989. However, because of the broad non-prescriptive nature of the Act, an easement may be registered over land of a council. Section 189 would seem to be the most appropriate provision to apply. This would require that the council observe certain procedural steps in regard to notice and to the right to make a submission under section 223. See Section 5.8.4.9.

5.7.4.12 Transfer to a council

Generally

As pointed out earlier, the LGA 1989 has significantly changed the powers of a council from those given by the LGA 1958. Nevertheless, when a council seeks to acquire land, there may not be a great deal of difference. All acquisitions by a council would be expected for the purpose of executing its works and undertakings.
Acquisition and compensation

Section 18.7(1) of the LGA 1989 provides that - "A Council may purchase or compulsorily acquire land which is or may be required by the council for or in connection with, or as incidental to, the performance of its functions or the exercise of its powers". See Section 5.8.4.4.

Land Acquisition and Compensation Act 1986

Section 187(2) of the LGA 1989 provides that -

"The Land Acquisition and Compensation Act 1986 applies to this Act and for that purpose -

(a) the Local Government Act 1989 is the special Act; and
(b) the Council is the Authority".

5.7.4.13 Power to accept gifts

Section 188 of the LGA 1989 provides that -

"A Council's powers in relation to property include the power -

(a) to accept any devise of real property or any donation, gift or bequest; and
(b) to agree to carry out any lawful condition to the devise, donation, gift or bequest".

5.7.4.14 Creation of easements to a council

Background

The concept of easements in gross which has been around for many years has always been supported by a statutory provision. Section 509(1B) of the LGA 1958 was the former provision which enabled a council to take the benefit of any easement even though it was not the owner of any land.

Deeming to be an easement

Section 187A of the LGA 1989 provides that -

"If any right in the nature of an easement or purporting to be an easement or an irrevocable licence is or has been acquired by a Council whether before or after the commencement of the Local Government Act 1958, the right is deemed for all purposes to be and to have been an easement even if there is no land vested in the Council which is benefited by the right".

5.8 Synopsis of Legislation Relative to Land Registration

The following listings are provided as an index only to the provisions of the Acts most commonly required by the surveyor and do not pretend to be exhaustive.
5.8.1 Transfer of Land Act 1958

Section

4
Definitions
Part I. The Office of Titles (sections 5 - 7)

5
Registrar of Titles
Part II. Bringing Land Under the Act (sections 8 - 26P)

Division 1 - On Application

8
Land hereafter granted by Crown to be under TLA. Crown grants to be in duplicate
9
Bringing under Act land alienated before 2 October 1862 (by application)

Division 2 - By Direction

17
Bringing land under the Act (Ordinary or limited folio of the Register to issue)

Division 3 - On Solicitor's Certificate

26A
Definitions
26C
Deed registration conversion scheme
26D
Application (non-survey) conversion scheme
26F
Search of title
26G
Solicitor's certificate
26K
Registrar may waive qualifications in solicitor's certificate
26M
Removal of warning as to title dimensions (on application)
26N
Removal of warnings relating to title
26O
Registration of instruments affecting land

Part III. - The Register Book (sections 27 - 44)

27
Register of Land
27A
Recordings in the Register (includes folios of the Register)
27B
Certificates of Title
27C
Record of dealings
27G
Record of plans
28
Grants to be in duplicate
31
Lost or damaged Crown grant or certificate of title (Issue of replacement)
32
Issue of new folios of the Register (Consolidation or partition into component parcels)
Instruments entitled to priority according to date of lodgement for registration

Dealings may be registered together

Instruments not effectual until registered

Certificate to be conclusive evidence of title

Estate of registered proprietor paramount except as to registered and certain other interests etc.

**Part IV - Registration of Dealings with Land (sections 45 - 88)**

*Division 1 - Transfers*

Form of Transfer (Section applies to creation and surrender of easement also)

Power of Registrar to make a vesting order in cases of completed purchase

Adoption by reference of "Table A" conditions of sale in Seventh Schedule

*Division 2 - Transmissions*

Registration of personal representatives (On application)

Registration of survivor of joint proprietors of fee-simple lease mortgage etc. (On application)

Registration of trustee of bankrupt

*Division 3 - Sales by Sheriff, etc.*

Sale under writ of fieri facias or decree of Supreme Court etc.

*Division 4 - Acquisition by Statute, Order of Court, etc.*

Acquiring authority

Creation of new folio of the Register in respect of lands vested in acquiring authority (On application)

Notice to be given to Registrar of intention to acquire land compulsorily

*Division 5 - Acquisition by Possession*

Application for order by person claiming title by possession

*Division 6 - Repealed*

*Division 7 - Leases*

*Division 8 - Easements*

Notification of easements in Register (On application an easement created by instrument, deed etc. or order of court shall be notified in Register)

Removal of easement etc. (On application)

Abandonment of easement of right of way
Division 9 - Mortgages and Annuities

Division 10 - Restrictive Covenants, Charges, etc.

Notification of restrictive covenants in register

Part V. - Incidental Provisions (Sections 89-106)

Division 1 - Caveats Against Dealings

Division IA - Recorded Common Provisions

Division 2 - Search Certificates and Stay Orders

Division 3 - Powers of Attorney

Division 4 - Surveys and Subdivisions

Requirements as to surveys

Abutitals used in description of land in a folio of the Register

Requirements as to plans of subdivision etc.

Creation of folio after registration/approval of plan of consolidation

Easements arising from plan of subdivision (Appropriations)

Conversion of building subdivisions

Cancellation of plan of building subdivision and registration of plan of subdivision

Effect of registration of plan of subdivision

Division 4A - Share Interests

Division 5 - Amendment of the Register etc.

Application by proprietor for amendment of register to make boundaries coincide with boundaries occupied (bona fide Application)

Adjustment of discrepancies in boundaries

General provisions as to correction of errors etc. (Used for amendment of title without encroachments)

Division 6 - General Powers of Registrar

Part VI - General

Division 1 - Financial

Division 2 - Miscellaneous

5.8.2 Property Law Act 1958

Section

Part not to extend to registration of instruments under Transfer of Land Act 1958
Office of Registrar-General to be the office of registration

Deeds etc may be deposited with Registrar-General

As to aliquot parts of Crown sections having excess of area

How Crown survey boundaries may be proved in the absence of survey marks

Margin of error allowed in description of boundaries

Provisions of Part to apply to land under general law and Transfer of Land Act

5.8.3 Land Act 1958

Section

3 Interpretation (Definitions)

12A Exchange of Crown land for private land (for public purposes)

22E Surrendered land (Private land surrendered to the Crown)

24 Validity of Crown grant

25 Counties, parishes, townships, roads and streets

27-29 Land Officers and Land Offices

89-100 Auction or tender or sale to public authority

132 Fences

134A Leasing of Strata of Crown Land

138A Licence for a stratum of Crown land

163-177 Residence Areas

172 Roads and streets (Reduction in width - Residence Areas)

175 (2) Adjustment of boundaries (Residence Areas)

175 (3) Detached portions of Crown land (Addition to Residence Areas)

179-185 Commons

192 Boundary marks (Obliteration)

206 Boundary marks (temporary) and adjustment of boundaries (leases)

208 Roads exchange

209 (1) Roads (Resumption of land for access purposes)

209 (2) Detached portions of Crown land (Sale to adjoining owner)

209 (4) Grant subject to condition requiring consolidation

210 Appraiser (Declaration in respect of valuation)
216 Right of entry onto private land.
265 Fences with gates on roads
266 Road construction deprives owner of use of fence
267 Roads (Unused in Mallee)
331-333 Resumption of land for public purposes
334-338 Electric power lines
339 Depth condition
339A Alienation of Crown Land in Strata
339B Easements ancillary to alienation in Strata
340 Metals and minerals rights
346 Detached portions (Addition to leases)
348 Roads used for railways (Issue of Crown grant)
349 Roads (Power to close)
350 Roads (Power to set apart for tree planting)
362A Removal of conditions in a Crown grant
384-386 Bed and banks of certain watercourses
399-411 Unused roads and water frontages
412 Supreme Court - Limitation of jurisdiction
413

- Crown Reserves are now dealt with pursuant to the *Crown Land (Reserves) Act 1978* - No. 9212.

**5.8.4 Local Government Act 1989**

Section

3 Definitions of public highway and road
181 Disposal of land for unpaid rates
202 Crown has absolute property (in land reserved as a road under *Crown Land (Reserves) Act* or proclaimed under the *Land Act*)
203 - 204 Public highways
206 Power of councils over roads
207C - 207E Registrar of Titles and *Transfer of Land Act*

**5.8.5 Sale of Land Act**

8A Land which can be disposed of without being subdivided
9AA     Sale of land prior to approval of plan
9AB     Disclosure of works
9AC     Amendments to plan
9AD     Possession
9AE     Recission of prescribed contract
9AF     Repayment of deposit monies
9AH     Where land sold does not accord with land in plan
10      Amendment affecting pre-sold lots
32      Statement of matters affecting land being sold (Vendor's Statement)

5.8.6 *Subdivision Act 1988*

A synopsis of this Act is included at the end of Section 8.
5.9 Legislative Requirements Relating to Licensed Surveyors and the Making of Surveys for Dealings With Land

5.9.1 Surveyors Act 1978 No.9180

The control over the profession of land surveying and the establishment of the Surveyors Board is contained in the Surveyors Act.

The history of the evolution of the law and the contemporary legislation affecting land are discussed in Sections 2.4.1 and 2.4.2 of this part of the Survey Practice Handbook.

5.9.2 Surveyors (Registration) Regulations 1980 S.R. No.446

The regulations for the training and registration of land surveyors were made under powers provided under the Surveyors Act. The list of the regulations and schedules is included in this part in Section 2.4.2.2.

5.9.3 Surveyors (Cadastral Surveys) Regulations 1985 S.R. No.209

These regulations were also made under powers provided in the Surveyors Act, and have been similarly listed, in this case in Section 2.4.2.3. Discussion follows on several regulations of particular relevance to this topic.

5.9.3.1 Classification and Accuracy of Surveys - Regulations 9 and 10

Regulation 9 sets out a requirement for measurements of angles and lengths to be made and tested to the standard of accuracy required under the provisions of the Survey Co-ordination (Surveys) Regulations, and specifies limits of error, allowable misclosures etc.

Regulation 10 deals with the case where a cadastral survey is made at least partially without measuring angles and lengths and the requirements for all points determining boundaries. It further sets out the need for independent checks.

5.9.3.2 Survey Marks - Regulations 11 to 15

These regulations deal with the use of pegs and trenches, where they should be located and alternatives. The blazing of trees and types of reference marks are also discussed.

5.9.3.3 Survey Boundaries - Regulation 16

This regulation requires a licensed surveyor to relate the survey to the boundaries referred to in the documents of title, to re-establish a Crown boundary where the subject land is related thereto, and in the absence of original survey marks to survey occupation which requires consideration under the terms of section 271 of the Property Law Act.

5.9.3.4 Field Survey - Regulation 17

A licensed surveyor making a cadastral survey (other than an identification survey), is bound by the requirements of regulation 17 as to datum, connection, location of survey marks and features, conformance with requirements in a Proclaimed Survey Area, and determination of dimensions and marking of boundaries. In addition, measuring an irregular boundary and reference marks (as to numbers required and the timing of their placement) are also discussed.
5.9.3.5 Draughting Standards and Other Information Required in Survey Documents - Regulations 18-22

These specify requirements for the presentation and standardisation of abstracts of field notes and plans.

5.9.3.6 Field Notes - Regulation 23

This is devoted to the recording of information obtained during a survey and provides for field notes to be readily available for perusal or submission as required by the Surveyors Board, Surveyor-General or Surveyor and Chief Draughtsman.

5.9.3.7 Abstract of Field Notes and Plans - Regulations 24 and 25

Regulation 24 spells out the requirements for the production of an abstract of field notes and the documentation of particulars of, and connections to, all survey marks included in the survey, paying particular attention to the requirements of Regulations 9-17 (both inclusive).

Regulation 25 treats the production of a plan of a cadastral survey in a similar way.

5.9.4 Survey Co-ordination Act 1958 No.6388

This legislation is discussed at some length in Section 2.3.3.1 of this part of the Survey Practice Handbook, and discussion here is limited to:

5.9.4.1 Connexion of Surveys to Standard or Local Traverse - Regulation 12(3)

This regulation requires the connexion of all surveys in or contiguous to a Proclaimed Survey Area to a standard or local traverse. In addition, the regulation provides that:

"no plan of any such survey shall be lodged with or accepted or otherwise used in any department or public authority or be of any validity whatever for any purpose under any Act unless it shows such connexion as aforesaid certified by the surveyor who carries out the survey or is accompanied by a sketch plan showing such connexion so certified."

5.9.5 Transfer of Land Act 1958

5.9.5.1 Definition of Licensed Surveyor and Survey

Section 4 includes provisions that Licensed Surveyor and Survey have the same meaning as in the Surveyors Act.

5.9.5.2 Surveys and Subdivisions

Division 4 Part 5 encompasses sections 95 to 98CF (both inclusive), but sections 95 and 97 are the most relevant to this topic and are set out hereunder:

"95 Requirements as to surveys
 (1) In respect of any application under this Act or of any proposed subdivision of land under this Act the Registrar may
require such surveys and plans to be made and lodged and such particulars of the boundaries and abutments to be furnished at the cost of the applicant or registered proprietor as the Registrar thinks fit.

(2) All surveys required by the Registrar and except in accordance with the regulations or with prior consent of the Registrar all plans lodged under this Division shall be made and certified by a licensed surveyor and, subject to the requirements of the Surveyors Act 1978, shall comply with any requirements of the Registrar.

(3) The Registrar may dispense with surveys in so far as there is sufficient survey information available to the Office of Titles.

97. Requirements as to plans of subdivision etc.

(1) This Act and any subordinate instrument (within the meaning of the Interpretation of Legislation Act 1984) made under it apply to the Subdivision Act 1988 as if that Act formed part of this Act, and that Act must be read as one with this Act.

(2) If a provision of the Subdivision Act 1988 or the regulations made under that Act is inconsistent with a provision of this Act or a subordinate instrument made under this Act, the provision of that Act or those regulations prevails.”

5.9.6 Subdivision Act

5.9.6.1 Land to be Marked Out

Section 20A sets out requirements for an applicant submitting a plan of subdivision to provide written advice to the council by a licensed surveyor as to the marking out or definition of boundaries and a further requirement as to conformance with the Surveyors Act or the Survey Co-ordination Act in respect of monumentation. Different circumstances apply depending on when "works" are completed.

5.9.6.2 Prescribing Standards

Section 43(l)(f) allows the Governor in Council to make regulations "prescribing standards for plans, survey marks and the laying out of subdivisions".

5.9.7 Subdivision (Procedures) Regulations 1989

5.9.7.1 Signing of Plans

Regulation 8(5) states that by signing a plan a licensed surveyor certifies that the plan and any related survey is accurate and was undertaken under the supervision of the signatory.

5.9.7.2 Special Information for Office of Titles

Regulation 24(1) acknowledges, inter alia, that abstracts of surveyor's field notes, licensed surveyor's reports, transparencies of plans, or other supporting documents required by the Registrar need not be submitted to council for certification but must be submitted to the Registrar when the plan is lodged.
5.9.7.3 Advice that Land has been Marked Out or Defined

Regulation 56 provides, as Form 19, the form of the written advice to be prepared by a licensed surveyor following the completion of relevant works, and supplied to the council.

5.9.8 Sale of Land Act

5.9.8.1 Where Land Sold does not accord with Land in Plan

Section 9AH provides that in particular circumstances as set out therein, a purchaser may avoid a sale if the advice under section 20A of the Subdivision Act by a licensed surveyor discloses a substantial discrepancy between any boundary of the land and that boundary as shown on the plan.

5.9.9 The Exercising of Discretion as to When Surveys are Required in Dealing with Land

5.9.9.1 Enabling Provisions

The Registrar of Titles has the authority to exercise discretion as to the requirement for surveys and plans by virtue of the provisions of section 95 of the Transfer of Land Act and section 97 extends the authority to the Subdivision Act. These sections are quoted in Section 5 10 5 2.

5.9.9.2 Use of the Discretion

Long standing practice at the Land Titles Office had been to accept transfers and applications without production of survey documents in a number of cases in which part only of the land in the folio of the Register was the subject land.

5.9.9.3 Change Introduced with the Promulgation of the Sale of Land Act

When the Sale of Land Act came into operation on 1 March 1963, the practice of accepting a transfer and/or application dealing with part of the land in a parcel was virtually eliminated by the legislation, although subsequently mechanisms were partially restored. This gave rise to the preparation of formal plans of subdivision on a non-survey basis.

5.9.9.4 Non-Survey Guidelines

The Land Titles Office issued guidelines for licensed surveyors preparing non-survey plans of subdivision in 1963, and has made some small amendments over the years. The guidelines have been largely based on the kind of situations in which the lay person can reasonably be expected to locate boundaries without the benefit of survey marks.

The following notes reflect guidelines issued in November 1993 by the Land Titles Office for use in deciding if a plan of subdivision will be accepted on a non-survey basis. A number of examples are included to illustrate the guidelines.

Even if a proposed subdivision falls within the category acceptable to the Land Titles Office, a licensed surveyor should not prepare a non-survey plan if aware of any particular circumstances which would make it inadvisable to proceed without survey, e.g., fencing out of position on boundaries or connection, obvious difficulty in the location of boundaries without the placement of survey marks, variations from title position of boundaries abutting streams etc. Where the Land Titles Office is aware of such problem situations, non-survey plans of subdivision may not be accepted even if the proposal falls within the normal guidelines.
It is not necessary to obtain prior consent to the preparation of a plan of subdivision in a non-survey form. However if a licensed surveyor is in doubt as to whether a particular proposal will be accepted without survey, inquiry may be made to the Survey Services Branch, Lands Titles Office, preferably by letter. All relevant information, including the number of the folio of the Register and a dimensioned sketch should be supplied.

GUIDELINES

1. Subdivisions are restricted to two lots.
2. Re-subdivision of a lot on a non-survey plan is not usually acceptable. Exception

   may be made where small “remote” lots are created. Example of exception:

   ![Subdivision Diagram]

3. The length of any new boundary should not normally exceed 805 metres (5 chains).
4. New boundaries should be at right angles or parallel to an existing title boundary. Examples:

   ![Boundary Examples]

5. No more than two new boundaries should be introduced.
   Exception may be made where new boundaries are in accord with previously marked lines; where necessary a copy of the relevant survey information should be lodged.

   Example of exception:

   ![Boundary Exception Diagram]
6. The creation of a new lot with "dual" connection is not acceptable.

   Example - *not acceptable.*

![Diagram](image1)

7. Joining corners marked in an earlier survey is acceptable.

   Example:

   ![Diagram](image2)

8. A new boundary meeting a curved title boundary is acceptable providing the "ordinate" does not exceed 0.20 metres.

   Example:

   ![Diagram](image3)

9. A new boundary meeting an irregular boundary is not acceptable.

   Example - *not acceptable.*

   ![Diagram](image4)
Note: Where the irregular boundary is not subject to movement, a non-survey subdivision may be acceptable if satisfactory information in relation to the boundary is available.

10. The introduction of a party wall easement (whether or not a wall exists) is not acceptable.

11. The creation of a new road is usually not acceptable. Exceptions are normally made where simple splay corners are created, or the new road has been marked on the ground for the Roads Corporation or a Municipality.

12. Any subdivision of a folio of the Register with a "warning as to dimensions" must be based on survey.