



This article aims to provide further information on easements generally and sets out case law on the imposition of an easement on someone's property.



A. INTRODUCTION

An easement is an interest attached to a parcel of land that gives another landowner or a statutory authority a right to use a part of that land for a specified purpose.

The easement is registered on the title of the property and affects a defined area of the land. *If the easement is not registered it will exist as an equitable easement.*

There are generally two categories of easements: positive easements and negative easements. The various types of easements fall within one of the following two categories.

• A positive easement

It allows the owner of the benefiting land (dominant tenement) to do things that would otherwise be considered as trespassing in the absence of an easement; and

• A negative easement

It restricts the owner of the land of the burdened land (servient tenement) from doing certain things - such as building a structure in a specific way.

If you wish to demolish or build over a statutory easement, consent from the local council is required.

For other forms of easements, consent must be sought from whoever the easement is vested in.

Upon the sale of a property, it is important to disclose the presence of an easement *registered or otherwise* in the contract documents to ensure transparency and integrity within the sale process.

B. THE DIFFERENT TYPES OF EASEMENTS

There are several types of easements including:

- Utility easements;
- Private easements;
- Easements by necessity, and;
- Prescriptive easements (acquired by an individual's use of property).

A **utility easement** is a designated area of land that *gives* utility companies the legal right to access private property for the benefit of the wider community. Although utility easements may *encroach* slightly on a homeowner's comfort, the positive impact on society outweighs the *potential* minimal inconvenience caused.



A **private easement** arises when an agreement is created between landowners. This primarily occurs when the easement benefits the dominant tenement and burdens the servient tenement.

An **easement by necessity** arises when one party is required to use another person's property. For example, when a person is required to use a neighbour's driveway to access his home, it is considered an easement by necessity.

A **prescriptive easement** is a property right obtained when an individual uses a property that is not owned by them. This occurs when a 'trespasser' continually and adversely uses a portion or parcel of land that is not legally held by them.

A prescriptive easement could be acquired using a part of another's land for at least 20 years without secrecy, permission, or force. There is no statutory recognition for this kind of easement. An example would be an access way to a popular community attraction.

Importantly, any substantial interference with a landowner's right of way is a nuisance in common law. The owner of the right (known as the "**dominant**" owner) can apply to court for an injunction and damages if the imposing party (or "**servient**" owner) blocks their land or severely obstructs their comfort.

C. CASE STUDIES REGARDING THE IMPOSITION OF AN EASEMENT

It is of course not to one's advantage to have an easement on their land granted to someone else. On the other hand, with the evolving landscape and growing demands of society, easements are sometimes the necessary evil.

Requests for a grant of an easement to secure rights of access and use of the land for utilities and infrastructure, including electricity, storm-water pipes and access ways are getting common.

As we can imagine, case law abounds with disputes between landowners of servient tenements and the dominant tenements.

Section 88K of the *Conveyancing Act 1919 (NSW)* gives the Supreme Court the power to make orders imposing easements over land in certain circumstances. For the Court to so grant the order, several criteria will have to be fulfilled with the Court bearing in mind the impact the easement may have on the burdened landowner.

One such case is *Westfield v Perpetual Trustee* [2007], a decision of the High Court of Australia. This concerned the properties and businesses within Sydney CBD and the conflicting interests of Westfield attempting to redevelop and increase vehicular access, imposing a burden on surrounding land.

This case determined that evidence is admissible to distinguish the terms of the contentious easement including surveying terms and abbreviations on the relevant plan.



In the facts of the case, it is concluded that the use of an easement is unable to be extended, beyond the scope of the grant, to create a burden much greater than what was previously agreed to by the owner.

Fundamental principles for the development of an easement were established in the English case of *Re Ellenborough Park* [1956]. This decision summarised the essential characteristics of an easement as follows.

1. There must be a **dominant** and a **servient tenement**.
2. An easement **must "accommodate" the dominant tenement**.
3. The dominant and servient owners must be **different persons**.
4. A right over land cannot amount to an **easement** unless it is the subject matter of a grant.

This summary has been adopted with approval by the Courts of Australia. In recent years, the terms 'benefited land' and 'burdened land' have been adopted in substitution for 'dominant tenement' and 'servient tenement'.

It is essential that the right to an easement does **not** result in the exclusive use of the burdened land. If this scenario occurs, the proposed easement will fail on common law grounds, as it will be equivalent to a transfer of ownership.

Comasters is able to advise clients on their land rights to an easement and how to navigate legal difficulties during its development.

© Comasters March 2023. **Important:** This is not advice. Clients should not act solely on the basis of the material contained in this paper. Our formal advice should be sought before acting on any aspect of the above information.