



OWNERS CORPORATIONS BE AWARE OF EASEMENTS

BY ANTHONY WILKINSON



Easements are essential rights for the operation of an Owners Corporation and the use and enjoyment of lots within a subdivision.

WHAT IS AN EASEMENT?

An easement is a limited interest that an owner of land acquires over land belonging to someone else. In essence, an easement is a non-possessory right which entitles landowner A to exercise certain rights over landowner B's land. A's rights over B's land are additional to the rights A already enjoys over A's land.

The best known example of an easement is a right of way, by which A is allowed to walk or drive a vehicle across B's land to get to A's land. The benefit of the easement attaches to A's land ("the dominant tenement") and is exercisable over B's land ("the servient tenement"). The easement thus restricts the servient owner B in the full enjoyment of B's land.

An easement is not a licence as a licence is a non-proprietary arrangement between two parties X and Y, whereby X gives Y permission (either for free or for consideration, generally a sum of money) to do something on X's land.

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Seasons greetings to all our clients from the Partners and Staff of McKean Park.



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Easements can either be positive or negative.

- **A positive easement entitles a dominant owner to do a specified act on the servient owner's land.**

An example of a positive easement is the right of an Owners Corporation to access a private court yard to repair and maintain plant and equipment situated within the courtyard of a unit as it operates the security gate for the basement car park of the development.

- **A negative easement allows the dominant owner A, to stop the servient owner B, from doing something on B's land, which B would otherwise lawfully be entitled to do.**

An example of a negative easement is the right of individual lot owners not being allowed to increase the height of fences between adjoining lots without the consent of the other lot owners as it may adversely impact the amount of light received in the respective court yards.

In other words a positive easement gives rights over servient land and a negative easement gives no right of access to the servient land but restricts the servient owner in the use of that land.

HOW ARE EASEMENTS CREATED?

An easement can be created by express grant or reservation, by implied grants and reservation, by statute, by prescription and by a court. An easement granted, and other interests in land, must be registered to be legal. If the easement is not registered then it exists in equity. Pursuant to Section 32 of the *Subdivision Act 1988* ("Act") an easement may be created, altered or removed.

Easements that are automatically created on registration of a plan of subdivision are considered statutory easements and are typically for support, utility services and infrastructure, shelter, projections and building maintenance. The easements are in favour of and against relevant lots and common property on the plan of subdivision.

Any easement created by registration of the plan of subdivision should be noted on the front page of the plan of subdivision. Should the information table noting applicable easements fail to identify a particular easement on the plan of subdivision a catch all notation is included as follows:

"Section 12 (2) of the Subdivision Act 1988 applies to the land in this plan"

or

"Easements and rights implied by Section 12 (2) of the Subdivision Act 1988 apply to the whole of this land in the plan."

As a result of Schedule 2 of the Act, Section 12 (2) of the Act equally applies to any strata plan or cluster title registered prior to the commencement of the Act.

HOW DOES AN OWNERS CORPORATION ESTABLISH WHETHER AN (IMPLIED) EASEMENT EXISTS?

Where a plan of subdivision fails to express the existence of an easement it is necessary for the affected person or entity, usually the Owners Corporation in a multi-unit development, to establish that the easement actually exists.

Implied easements exist, by virtue of Section 12 (2)-(4) of the Act ("the Section"), which states:

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

(a) Over:

- all the land on a plan of subdivision of a building; and
- that part of a subdivision which subdivides a building; and
- any land affected by an owners corporation; and
- any land on a plan if the plan specifies that this subsection applies to the land; and

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

all easements and rights necessary to provide:

- support, shelter or protection; or
- passage or provision of water, sewerage, drainage, gas, electricity, garbage, air or any other service of whatever nature (including telephone, radio, television and data transmission); or
- rights of way; or
- full, free and uninterrupted access to and use of light for windows, doors or other openings; or
- maintenance of overhanging eaves if the easement or right is necessary for the reasonable use and enjoyment of the lot or the common property and is consistent with the reasonable use and enjoyment of the other lots and the common property.

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

(4) Any person, Council or referral authority entitled to use an easement can gain access to that easement over the common property and any lot for the purpose of using the easement and must repair any damage caused in gaining access to or using the easement."

In short the Section sets two essential conditions to establish an implied easement:

1. **the easement or right must be necessary for the reasonable use and enjoyment of the lot or the common property; and**
2. **the easement must be consistent with the reasonable use and enjoyment of the other lots and the common property.**

Is the easement or right necessary?

Determining whether an easement or right is necessary is a matter of debate and is dependent on the relevant set of circumstances. The Supreme Court of Victoria has determined that an easement or right will not be implied because its existence is 'substantially preferable' to the alternative solution which does not interfere with another person's use of land. The easement must be essential to achieve a specified function, in the sense that no alternative means of achieving the specified function is feasible or reasonably available.

A good example of where this threshold was not met is the case of *Body Corporate No 413424R –v- Shepherd & Anor*, where it was determined by the Supreme Court of Victoria that an easement did not exist in favour of the Owners Corporation to access the roof of the building through a penthouse apartment when the Owners Corporation could access the roof via a 15 floor stairwell. Yes climbing 15 floors of stairs is highly inconvenient but it does not stop access to the roof. Access to the roof through the apartment is just greatly more convenient and cost effective.

It should be noted that a person asserting an implied easement need not show that enjoyment of their land is impossible without use of the implied right. Factors contributing to determining whether the easement or right is essential include, without limitation, the convenience or lack thereof of alternative means to achieve the specified purpose and or whether executing the alternative means is cost prohibitive or not.

Is the easement consistent with the reasonable use and enjoyment of a servient or burdened lot?

The second condition to establish an easement is that its use must not be inconsistent with the use of the servient or burdened lot and common property generally. If the easement causes a detriment to the enjoyment and or use of the burdened lot, it is evidence against the existence of an easement. Of particular significance is whether the easement is intrusive to the use of the servient lot and how much so.

Factors irrelevant to determining whether an easement is consistent with the use of a servient lot include whether:

- **the existence of the easement will cause a loss in value of the servient lot; and**
- **the owners of the servient lot were aware of the existence of a potential easement.**

To establish that an implied easement or right is consistent with the use and enjoyment of the servient lot, the person asserting the easement must in essence establish that the intrusion of an easement is not as significant as the adverse effect suffered by a lot owner who requires the easement for reasonable use and enjoyment of his or her lot.

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THE CENTRO DECISION

WHAT DOES IT MEAN FOR DIRECTORS? BY JOHN WHELAN



The decision of the Federal Court in June 2011 in *Australian Securities and Investments Commission v Healey* (the Centro decision) was a big win for ASIC. This was a high-profile court case involving the collapse of the Centro retail and property trust group back in 2007-08. The court stated that proceeding was about financial reporting and the role and responsibilities of directors in relation to that task.

The judgement from the Federal Court arguably does not make new law, but simply reminds directors of their existing responsibilities. But there is an alternative view that the decision has raised the bar for company directors, especially public company directors. In the end, it will remain to be seen if the decision is confined to its facts, or is seen as an opportunity to clarify and expand the responsibilities of directors.

Seven directors, one of whom was an executive director, and the chief financial officer (CFO), who was not a director, were the defendants in an application by ASIC for pecuniary penalties and banning orders. The CFO admitted contraventions of section 180(1) and s 601FD(3) of the *Corporations Act 2001*.

Essentially, Middleton J stated that directors have "core" responsibilities. He stated that it is the core, irreducible requirement of directors to be involved in the management of the company and to take all reasonable steps to be in a position to guide and monitor. There is a responsibility to read, understand and focus upon the contents of those reports which must be approved or adopted by the directors. His Honour stated that this was the effect of many prior decisions, and, on that reasoning, His Honour did not state anything new. However, what may yet come to be determined as "core requirements" is the real impact of this case. In Centro, funding arrangements were considered to be core, and that the incorrect classification of the funding arrangements as non-recurring liabilities (and therefore not needing to be shown in the financial reports) instead of current was a breach of the duty of honesty in s180 of the *Corporations Act*. His Honour indicates that what are "core" requirements may well vary between companies, depending on the type of business conducted by it. It is up to each director to therefore assess what are the core requirements for his or her particular business, and to ensure that he or she is very familiar with them. This assessment process may well pose a risk to directors in the future.



No doubt, as a result of Centro, other decisions will expand upon the "core requirements" in a case by case process. But it can always be argued that when the directors knew of liabilities of approximately \$5 billion were not correctly classified in the financial accounts, on any interpretation that is a failure to meet the core requirements test. As Middleton J stated, the proceeding was not about a mere technical oversight. The information not disclosed was a matter of significance to the assessment of the risks facing the Centro companies.

The judge said the directors were intelligent and experienced men in the corporate world. He did not find any dishonesty on the part of the 8 defendants. The penalties handed down were not severe, and in fact were considered by many to be extremely lenient, but the action and findings themselves undoubtedly will have caused significant harm to the reputations of the defendants.

At the least, this decision will cause directors to consider what are the core responsibilities of a company to ensure that they fully understand those responsibilities and ensure that a company is meeting the requirements of the core responsibilities. As well, financial statements and directors statements will be examined with a great deal of personal attention by directors.

At the other extreme, if the courts decide that this decision has opened a new range of responsibilities, then it may result in higher standards for directors. This will result in higher costs for companies and possibly greater challenges by shareholders. Increasing standards is not a bad thing, and the costs incurred, when spread over an organisation and ultimately recovered from consumers who may as a result find that they can more readily trust a company's board, may be a desirable outcome.

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NATIONAL BUSINESS NAME REGISTRATION



BY JOHN WHELAN

The national business names registration system is expected to be operational from mid-2012, replacing existing state based business name registrations.

Business names registration will be managed and administered by the Australian Securities and Investments Commission (ASIC).

A business operating and registering in every State and Territory currently faces a cost of more than \$1,000 to register for three years. Under the new system, businesses will only face one fee of around \$70 to register for the same period.

On commencement of the new national system, businesses will be able to register for an ABN and a national business name in a single integrated online registration process by visiting www.abr.gov.au. Businesses that already have an ABN can register the business name separately online at www.asic.gov.au.

A paper based form will also be available which can be mailed to ASIC.

AUSTRALIAN BUSINESS NUMBER (ABN)

New businesses will need to have an ABN or be in the process of applying for an ABN and not have been refused an ABN in order to register a business name. The combined ABN/business name online registration process will help facilitate this. Existing business owners will still be able to renew their business name without an ABN.

Registering for an ABN will remain free.

EXISTING BUSINESS NAMES

The registration of existing State or Territory business names will be transferred into the national system at the introduction of the new national service. This is called 'grand-fathering'.

This will include some identical business names that have been registered (by different owners) in different jurisdictions. For identical business names, ASIC may insert a distinguishing mark or expression on the Register. The business name itself will not include the distinguishing word or expression; therefore businesses will not need to change their business name on their signage or stationery.

Business name registrations will still need to be renewed when the original registration period expires. On commencement of the new national business names registration system, all renewals due after the change-over date will occur through the national system. The national renewal fee will apply and renewal reminders will be issued by ASIC.

If a business has the same business name registered in more than one state or territory, ASIC will communicate to the business,

confirm the list of identical names that belong to the business, notify them that only one name will be renewed and the renewal date (which will be the latest renewal date).

Importantly the business will only have one business name registered on the national system.

BUSINESS NAMES THAT CAN BE REGISTERED

Proposed business names that are identical or nearly identical to names already on the Register will not be available for registration. A name will not be registered if it is inappropriate, or likely to offend, mislead or deceive consumers and businesses.

An online and automated test will be used to determine registrable names, allowing the process to be fast and objective. Restrictions on what can be registered are similar to what is allowed for company names and under State and Territory business name legislation.

Updates on progress are available by checking: <http://www.innovation.gov.au/businessnames>
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NEW DIRECTOR LIABILITIES

BY STEPHEN ROACHE

The Federal Government has introduced legislation designed to make directors personally liable for their Company's failure to pay employee superannuation payments.



At present, the Australian Taxation Office may issue a Director Penalty Notice (DPN) giving rise to personal liability for a Company's Director in respect of unpaid Pay As You Go Withholding Tax should the Company fail to pay any outstanding amounts.

Not only will the new Legislation once passed make Directors personally liable for the Company's failure to pay employee superannuation guarantee amounts, it will allow

the ATO to commence immediate recovery procedures where a company fails to comply with its reporting obligations for a period of more than three months and its PAYG and SGC liability remains unpaid. It will also allow the ATO to deny directors and their associates an entitlement to PAYG credits where the company of which they are a director has failed to remit PAYG Withholding Tax.

The legislation once passed will allow the

ATO to target companies with a poor statutory compliance history and in addition, hold recalcitrant company directors personally liable for the company's unpaid PAYG and SGC obligations. Outstanding PAYG obligations on the date the legislation is given royal assent will be captured meaning there will be an element of retrospectivity about the changes insofar as those changes relate to PAYG obligations.

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HOW DOES LITIGATION WORK? PART 1



BY DAVID BRETT

The Courts are seeing more and more proceedings issued every day. Many of these are by parties who are first time litigants. These parties are faced with an unfamiliar set of terms and processes, which adds to the stress of an already stressful situation. This article is designed to provide a brief overview of how litigation works, and what to expect when starting the whole process. It might not make the process any easier, but it will hopefully make it less confusing.

ALTERNATIVES TO LITIGATION

Litigation is not the only means available for settling disputes. Four alternative dispute resolution processes are as follows:

1. Negotiation

In simple terms, negotiation is informal discussion between the parties to see whether a settlement can be achieved. Negotiation can occur before litigation is commenced or up until a final determination by a Court and it is in this way that many disputes are settled without a decision by a Court.

2. Mediation

Mediation is a structured process of negotiation whereby an independent person helps the parties to arrive at a solution to a dispute. There is no rigid procedure but mediation will usually involve a preliminary conference at which the mediator will arrange for any preliminary steps to be taken which may assist in bringing the parties to a solution such as arrangements for exchange of information or reports.

Mediation will usually begin by the mediator making an opening statement followed by statements by each party. Joint or private sessions may then be held to suggest possible strategies for resolving the dispute.

A mediation agreement is often signed by the parties prior to conducting the mediation in which the parties agree among other things that:

- **Discussions at mediation are without prejudice;**
- **To split the costs of the mediation equally; and**
- **The impartiality of the mediator and frank and open communication with the mediator cannot be disclosed to the other party without your consent.**

3. Conciliation

A conciliator usually works by attempting to negotiate between the parties without necessarily bringing the parties together.



In some jurisdictions, such as Workers Compensation, it is compulsory for the parties to attempt conciliation before commencing litigation.

4. Arbitration

Arbitration is similar to a Court hearing in that an independent person, called an arbitrator, hears the evidence and makes a decision. It is possible for the parties to agree to submit to the decisions of an arbitrator and in some jurisdictions the Court will have its own arbitration scheme to which it may refer matters.

FACTORS INFLUENCING YOUR CHOICE OF PROCESS

The strength of your case

Usually your lawyer will start assessing the strength of your case by conducting an initial interview with you. At this initial interview your lawyer should be in a position to give you some preliminary advice about the strength of your case. Often, additional investigations are required. Your lawyer will analyse the information you provide and the results of any investigations in terms of the law which might apply and whether there is sufficient evidence to prove all of the elements necessary to be successful in Court. Your lawyer may well advise you at this point that you have no case or that your chances of success would not justify the expense of litigation. In analysing the evidence available to prove your case there may be other factors which would adversely affect the presentation of your case in Court.

For example, if an important witness would not be convincing when giving evidence this might influence your lawyer to advise an alternative method of dispute resolution.

Future relationships

In some cases where there will be an ongoing personal or business relationship between the parties it may be preferable to attempt a more informal method of dispute resolution in order to preserve the ongoing relationship. It may also be the case that because the parties will have an ongoing relationship that they are more amenable to settling a dispute outside the Court system.

Costs

Litigation is an expensive exercise. Your lawyer should be able to give you detailed information about how much your case will cost and the risks involved if you lose. The high cost of litigation will be an important factor in your decision as to whether to proceed and if so by what method. At the same time, the expense of litigation is a deterring factor for both sides of the conflict and is an incentive for the four alternative dispute resolution methods described.

Time

Although the time taken to reach a hearing has reduced considerably over recent years, many people are surprised by the time it takes to resolve many matters in the Court system. It could take years to obtain a final decision. Your lawyer will be able to give

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you an estimate of the time it will take to complete the various steps required in your case but ultimately the time it takes to complete various steps in litigation will depend on the reaction and action taken by the other party. This may mean that the costs you incur increase due to your opponent's chosen course of action. Whilst a Plaintiff has more control over a proceeding than a Defendant, the Plaintiff cannot properly chart the course of the proceeding as it will depend on the Defendant's conduct.

Enforceability

This refers to the fact that the outcome of some less formal methods of dispute resolution are difficult to enforce against the other party, that is, it may be difficult to get them to do what has been negotiated. In some circumstances it is possible to have the Court approve negotiated settlements so that those settlements have the force of a Court Order.

Urgency

Sometimes your case will involve something that needs the urgent intervention of a Court and there is no option but to proceed to litigation. For example, you need to prevent something being done or enforce someone to do something.

COMMENCING LITIGATION

Preparation of the case

Once your lawyer has conducted an initial interview with you he or she should be in a position to give you preliminary advice about your case.

There are three main factors which your lawyer will consider at this stage.

- 1. Cause of Action. This refers to whether the information you have given your lawyer, or which can be gathered later will give you a case under existing law;**
- 2. What further information or documents need to be gathered; and**
- 3. The appropriate jurisdiction. The jurisdiction of a Court or Tribunal refers to the authority of the Court to hear and determine a matter. Different Courts can hear different causes of action and there are different monetary limits in different Courts. The Magistrates Court has jurisdiction up to \$100,000.00, and the County and Supreme Courts have unlimited jurisdiction. The Federal Court and the Federal Magistrates Court have jurisdiction in matters involving Commonwealth law, such as family law, bankruptcy etc. Your lawyer will discuss with you the appropriate jurisdiction in which to issue proceedings.**

Commencing the proceedings

The rules of each Court prescribe different methods for commencing different types of proceedings. In most cases the document required is known as a statement of claim. The statement of claim sets out in detail the nature of the claim against the other party or parties, and the relief that you are seeking.

It must provide sufficient details to allow the other party to know and understand the allegations being put against it, and to enable a defence to be lodged.

A defence sets out the response of the defendant to the statement of claim, including what aspects are admitted, and what areas of the claim are in dispute and why. The statement of claim and the defence are known as pleadings.

If the defendant claims that the plaintiff owes him money or damages, he may bring a counterclaim, which allows the defendant to defend against the allegations made against him and seek to recover monies or damages from the plaintiff. The plaintiff must then lodge a defence to the claim against him.

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GEOFF PARK DOES IT AGAIN!

A strong contingent of runners and walkers from McKean Park entered the Law Institute of Victoria Fun Run Walk around the Tan on the evening of Monday the 7th November. In quite warm conditions, all of the entrants performed admirably but Geoff Park did exceptionally well. Geoff managed to streak away from his opposition in the strongly contested over 60 Walk section to receive a gold medal.

In addition Geoff finished with a silver medal in the all ages Walk section, finishing second overall!

Congratulations from all at McKean Park. Geoff continues to win medals following up on his success at the World Masters Rowing Championships.



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