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ACCESS WAYS TO OPTIMISE LAND VALUE

Introduction

Cars need to park, deliver and get access to land. With main roads increasingly congested, the existence of alternative access can be a core feature of land value. Without adequate access, land potential is highly restricted. Conversely, secured effective access clearly registered on title increase land value greatly and ensure notice to owners of the land used for access. Registration also often opens options for future development or subdivision that can further optimise land value.

Easements of way are legally complex. They tie a series of statutory arrangements with old English and Australian land law. Often it seems that incurring legal costs to unpick the legalities of an existing access situation is remote from any increased land value. To the contrary, particularly where neighbouring landowners have long-term access arrangements, this meticulous legal work unveils the best strategic path forward for securing title registration of such long-term access rights. The value add is great - far in excess of whatever legal costs arise in most cases.

Where adjoining land has development potential, it can be critical to ensure registration of the access lest it be overlooked or lost along with significant potential in lost to current land value

This Newsflash considers some legal elements involved in one registration option - the implied easement.

Implied Easement

An access easement can be implied by long-term usage or by statute.

Long User

An implied easement exists if:

*'there is an open and uninterrupted enjoyment of land for at least 20 years that is not explained by an express grant of an easement or permission to use the land.'*ⁱ

The enjoyment of the land must have been:

*'neither by violence, nor by stealth, nor by leave asked from time to time'.*ⁱⁱ

Statute

Subdivision Act 1988

The *Subdivision Act 1998 (SDA)* stipulates that certain easements of way are implied over land that is:

- land on a plan of subdivision of a building;
- part of a subdivision which subdivides a building;

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- land affected by an owners' corporation; and/or
- land on a plan which specifies under s12(2) SDA that certain easements exist over certain land. ⁱⁱⁱ:

Such an implied easement of way must be necessary for the reasonable use and enjoyment of the lot and common property consistent with the reasonable use and enjoyment of other lots and the common property.

Strata Titles Act 1967

The *Strata Titles Act 1967* (STA) was the predecessor to the SDA. It stipulated that:

'all common such rights of... all other services of whatsoever nature' were implied over "[t]he common property and each unit on a registered plan' of subdivision, although it did not explicitly mention rights of way.^{iv}

Transfer of Land Act 1958

S73B *Transfer of Land Act 1958* (TLA) prevents the Registrar of Land Titles from registering or recording 'an instrument that creates or surrenders a right of carriageway' unless satisfied that the relevant council has consented to the creation or surrender of the right.

The term 'right of carriageway' is not found anywhere else in the TLA but has been considered by the Victorian Supreme Court to be an example of a 'right of way'.^v

CONCLUSION

Land value is significantly affected by access and landowners should ensure that their rights to vital accessways are registered on their title. The rules surrounding implied easements of carriageway are scattered across different statutes and court decisions and can be complex and difficult to interpret across the history of land use. Nevertheless, legal assistance to secure accessway has vital cost- benefits.

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ⁱ *Laming v Jennings*ⁱ [2018]VSCA 335, [81].

ⁱⁱ *Ibid* [83].

ⁱⁱⁱ *Subdivision Act 1998* s 12(2)(a).

^{iv} *Strata Titles Act 1967* s 12(1).

^v *Mayberry v Mornington Peninsula Shire Council* [2019] VSC 623 at [34].