



**Natural Resources
and Environment**

AGRICULTURE
RESOURCES
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LAND MANAGEMENT



CONSULTING SURVEYORS
V I C T O R I A

Land Registry Practice Easements

Reference Manual prepared For the
Association of Consulting Surveyors

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In conjunction with
Land Victoria

carriage way / way ^{everything} carriage way is specific ^{specific}

Easements :- gross - without dominant land.
ie - to authority.

acquisition by crown does not remove easements.
ie easements can exist over crown land

(22) remainder \rightarrow body corporate remain

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1.0 Preamble

The ACSV has had the good fortune to be able to negotiate the release from Land Registry the practice notes that they provide to their on-line Plan Registration Officers regarding easement practice within their Office.

The purpose of the notes is to give a general background on the methods of creating and removing easements. There are also several sections where various types of easements shown on sample easement tables for plans of subdivision and consolidation.

These notes are accurate at the date provided to us but it should be remembered that Land Registry practices can change over time. It is the responsibility of the individual member to ensure that the contents are still correct in their detail in future transaction.

We would like to thank John Hartigan, Ian Ireson, Barrie Bremner and Bob Morgan of Land Registry for their assistance and support in this initiative.

The notes before you were compiled from Land Registry information to us by Leigh Baker and Malcom Yates, who have also agreed to give presentations on the contents to ACSV members. Both Leigh and Malcolm have recently retired from Land Registry and are well known in the surveying community. Leigh has 33 years experience in Land Registry and Malcolm 37.

Both have give presentations to ACSV and other groups on behalf of Land Registry on many occasions. Both have written much of the original practice notes that now form Land Registry practice.

Leigh has been a member of several legislative reviews on behalf of Land Registry and has a long background as an advice officer application, easement, local government, new title and subdivisions. Malcom has specialised in advice on building subdivision, staging, body corporate issues in addition to managing the Land Registry electronic library.

2.0 The Nature of Easements

2.1 The 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.

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 recognised 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 e.g. 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.

2.2 Essentials of an Easement

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

1. There must be a dominant and a servient tenement
2. An easement must be appurtenant (or attached) to land. There cannot be an easement in gross i.e. an easement that is independent of the ownership of land by the person who claims the rights. The only exceptions are where specific Authorities have this power by virtue of their enabling legislation. See Chapter 3.3 for details.
3. A right belonging to a member of the public as such, irrespective of his ownership of any land, e.g. the right to use a public highway, is not an easement because there is no dominant tenement.

2.3 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.

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.

The size of the dominant tenement is immaterial - a parcel of land one square metre in area has been held to be a dominant tenement.

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

A man cannot have an easement over his 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.

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.

2.4 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 (e.g. 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.

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 as long as the dominant tenement is used in a particular manner, 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 - e.g. 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 - e.g. 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.

2.5 Divisibility of Easements

Easements prima facie are divisible - i.e. on a division of the dominant tenement into several parts the benefit of an easement appurtenant to the undivided tenement will ensure to each of the severed portions, provided this is consistent with the nature of the easement and the terms of the grant.

2.6 The Transfer of Land Act and Easements

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 interest 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.

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 to create a new folio recording the appurtenant easement, and to surrender the existing certificate of title so that an appropriate certificate of title can issue.

3.0 General information on creating and removing easements

These notes contain only condensed information on the appropriate Sections of the Transfer of Land Act and Subdivision Act setting out their purpose, effect and operation. It should be noted that it is almost impossible to set out all possibilities of actions of creation and removal of easements within the ambit of Land Registry. These notes are intended as a guide only and practices may vary in some circumstances.

3.1 Section 42 of the Transfer of Land Act

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 specially notified as encumbrances on the certificate of title.

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.

3.2 Section 45 Transfer of Land Act

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 Transfer of Land Act an Application pursuant to section 72, or the issue of titles following on approval of a plan of subdivision or consolidation, an easement may be entered in the Register Book if: -

~~not being reserved~~ (cannot not involved unless access/equity arrangements)

(a) it is granted by an instrument in the form of the 6th Schedule (modified to suit the circumstances) - e.g. the case of a normal creation of easement; or

(b) it is granted or reserved in a transfer; or

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

Cases (a), (b) and (c) 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. 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.

An instrument of creation of easement may be, but does not have to be, lodged in duplicate (Section 35 Transfer of Land Act). 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 Act (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.

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 (Section 77 Transfer of Land Act). Mutual creations of easement must be by separate instruments.

by owner - owner
on document
while titles ok.
not only 2 owners
re owners / not transfers

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.

As to an easement coupled with obligations or embodying a restrictive covenant. A creation of easement - as distinct from a transfer and creation or reservation - may not contain a restrictive covenant by the grantee burdening land of the grantee. If this is desired, a separate deed should be executed and entered pursuant to section 88(1).

Where the dominant tenement is under the general law the dealing is sent to the Registrar General's Office on completion to enable the appropriate entry to be made on the memorial and the General Law Register.

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.

Transfers containing a creation and or reservation of easement. Where a transfer creates an easement over land comprised in a different title from that for the land being transferred, production is required of the servient title for endorsement. Where a reservation is in favour of land in a different title from that for the land transferred, production is required of the dominant title so that the appurtenance can be noted thereon.

3.3 Easements in Gross

One of the essentials of an easement is that there must be both a dominant tenement and a servient tenement. 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 a practice has existed for many years of registering what are in effect easements in gross to municipalities and other statutory authorities.

3.4 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 title, 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 appurtenance recorded.

3.5 Section 72 of the Transfer of Land Act

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 appurtenance.
- (ii) It requires the Registrar upon application, to notify in the Register Book easements over or upon or appurtenant to land under the Act.
- (iii) It provides for a short form of carriageway easement.

Sub-section (2) of section 72.

This provision can only be used where an easement "has been created 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 easements on to the Register is by creation of easement or by transfer containing a creation or reservation or by appropriation on a plan of subdivision or consolidation. Where, for various reasons, none of these procedures can be followed - e.g. where land which had an easement appurtenant thereto has been brought under the Act without showing the appurtenance - application may be made under section 72 to have the easement shown 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.

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.

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 title or is so created or reserved in an instrument. The expression should therefore only be used in a title 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 on title and the endorsement or expression of appurtenance on any dominant title 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.

3.6 Section 73 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, the 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-use 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 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 his 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 him 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-use for a period of not less than 30 years constitutes evidence of abandonment. Apart from this provision non-use 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, either of express easements so shown on the Register Book, or easements implied under section 98 of the Transfer of Land Act.

The abandonment or extinguishment must be shown by evidence produced to the Registrar and the evidence is assessed by the Registrar. This is quite different to the provisions of section 23 of the Subdivision Act. Under those provisions the role of the Registrar is merely procedural.

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. If it is sought to rely on non-use 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 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-use 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-use 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 dominant land, e.g. 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 re-subdivisions. 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.

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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 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 actually 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, e.g. 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-use 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 were 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 use 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 rights. 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 1(C) 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(1). 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.

3.7 Section 73A of the Transfer of Land Act

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

3.8 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.

3.9 Section 98 Transfer of Land Act

Easements appropriated on a plan of subdivision

(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(1)(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. Under section 12 of the Subdivision Act any type of easement can be specified so long as it is recognised as an easement.

(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.

3.10 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 the section 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 "right or easement"

3.11 Section 106(e) of the Transfer of Land Act

This is a general section authorising the Registrar to make any amendment to the Register

wherever it is necessary to do so by reason of the operation of the Transfer of Land Act or any other Act. This includes the notification on the Register of any notice of intention to acquire easements etc by acquiring authorities.

3.12 Section 6 Subdivision Act 1989

Where the creation variation or removal is in accordance with any of the circumstances set out in section 6(1)(j) or (k) of the Act.

Section 6(1)(k) provides that the Council must certify the plan where it removes or varies the whole or part of an easement in accordance with the planning scheme or permit (previously mentioned) or if the Registrar has declared that the easement has been abandoned or extinguished. Such a declaration may be made pursuant to the provisions of section 73(1C) of the Transfer of Land Act 1958 however similarly to the declarations in regard to restrictive covenants it is anticipated that such declarations will be virtually non-existent.

Section 6(1)(k) also provides that the plan for removal or variation of the whole or part of an easement must be certified by Council if the Administrative Appeals Tribunal has given leave under section 36 to remove the easement and any conditions in that leave have been met.

Section 6(1)(k) provides that the Council must certify a plan where it removes or varies the whole or part of an easement and the easement was set aside for the purposes of the Council, public authority, or other person which has requested or consented to the removal variation or if all parties interested in an easement or the part of it have agreed to the removal or variation. The agreement should accompany the plan although it will not form part of the plan of subdivision or consolidation.

The plan should note on its front sheet that one of its purposes is the variation or removal of the easement by way of agreement. The variation or removal by agreement may include the variation or removal of an easement created pursuant to the provisions of section 98 of the Transfer of Land Act 1958. Prior to the commencement of the Act the only manner in which such easements were removed was by way of application under section 73 of the Transfer of Land Act 1958 Act or, more rarely by way of order of the arbitrator under the Sale of Land Act 1962 or possibly by way of Court Order. Section 98 easements were never removed pursuant to the provisions of section 45 of the Transfer of Land Act 1958 as they were not created in a manner that referred to a transfer of an interest in land and there was no provision other than those mentioned which seemed appropriate to their removal.

However the provisions of section 4(1) and section 6(1)(k)(iii) of the Act would seem to enable the removal of such easements by way of agreement. It is to be noted that removal of section 98 easements by agreement would not be expected to occur frequently due to the number of agreements which would be necessary i.e. the agreement of all of the registered proprietors of the benefited lots (being all of the lots on the plan of subdivision) and the consent of mortgagees, caveators, etc. being produced.

3.13 Section 12 Subdivision Act (excerpts only)

(1) A plan of subdivision or consolidation must specify -

(b) proposed easements (other than easements over land referred to in sub-section (2)(a)(i), (2)(a)(ii) or (2)(a)(iii)), the purpose of the easements and either the land which they are to benefit or, if they are authorised by or under an Act other than this Act or the Transfer of Land Act 1958, the public authority, Council, Minister or other person in whose favour they are to be created.

(1A) A plan of creation, variation or removal of an easement must specify the easement to be created, varied or removed, the purpose of the easement and either the land benefited or to be benefited or, if the creation, variation or removal is authorised by or under an Act other than this Act or Transfer of Land Act 1958, the public authority, Council, Minister or other person in whose favour the easement is or is to be created.

(2) Subject to sub-section (3), there are implied—

(a) over

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

(b) for the benefit of each lot and any common property--
all easements and rights necessary to provide--

(c) support, shelter or protection; or

(d) passage or provision of water, sewerage, drainage, gas, electricity, garbage, air or any other service of whatever nature (including telephone, radio, television and data transmission);
or

(e) rights of way; or

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

(g) maintenance of overhanging eaves--

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

3.14 Section 23 Subdivision Act

Easements and restrictions (restrictive covenants) may be created, varied or removed as authorised by a permit from council regulating or authorising the action or by a direction in a planning scheme amendment. A certified plan must be lodged for registration and on registration of the plan (not lodgement) the easement or restriction is created, varied or removed as specified in the plan.

The plans must be certified by Council and in the case of a plan relating to easements it must clearly specify (by diagram or text) the easements being dealt with but the plan does not have to show any others. These plans may have works requirements and they will be registered in their own right. Plans relating to creation, variation or removal of restrictions may be text only and not contain a diagram.

Applications under Section 23 are lodged as a dealing (i.e. not with a Plan of Subdivision Number) and must be supported by the original or certified copy of the planning permit or planning scheme amendment.

The applicant must be the proprietor of the servient land. An application under Section 23 cannot use as its grounds the consent or agreement of the parties. The duplicate title to the land to be burdened is required for registration of the application. Consent of any other

parties is not required. Duplicate titles to the dominant land are not required but can be lodged.

The Subdivision Act does not prevent a person using the existing methods of creating varying or removing an easement or restrictive covenant. (e.g. by using sections 45, 72, 73, 88 and 106 of the Transfer of Land Act 1958 as appropriate).

Easements in Gross can be created in some circumstances subject to the statutory capacity of the instrumentality. Acceptable Instrumentalities include MMBW, Municipalities, SEC, and GTC & GASCOR. [Note: the easement created cannot refer to any act i.e. 103(b) SEC Act].

Easements created in Deeds of agreement can be removed or varied in all situations.

The definition of "variation" of easement is quite limited. i.e. Easements appropriated on Plans can only be removed or varied in the terms of the original creation. i.e. if it is a Section 98 easement then both the purpose and the dominant tenement must remain in accordance with Section 98. To get around this limitation the Subdivision (Amendments) Act 1993 altered this section to allow a plan of variation to allow for the simultaneous removal of easement and creation of a new easement.

It is possible under the Subdivision Act to remove a condition in the nature of an easement that is contained in a Crown Grant. Some easements in favour of the Commonwealth may not be able to be removed.

Not all types of easement may be removed pursuant to Section 23. e.g. easements created using the provisions of Acts of Parliament such as 528(2)(e) LGA etc.

3.15 Section 36 Subdivision Act

Procedures for examination of Applications where leave has been granted to acquire or to remove easements pursuant to Section 36 of the Subdivision Act by the Administrative Appeals Tribunal (A.A.T.).

Section 36 refers to the Council or a referral Authority stating that the creation or removal of easements is required to facilitate economical and efficient servicing of land or access to land. It is not clear what "servicing of land" involves however evidence of the Council's or referral Authorities decision will presumably be necessary in order for the owner to apply to the A.A.T.

Regulations relating to Section 36 have been made and are called the Administrative Appeals Tribunal (Planning Appeals) (Subdivision) Regulations 1989. Regulation 7B requires the application for leave under Section 36 to be served on the Registrar of Titles. This regulation provides that the Registrar of Titles may make a written or oral submission on the application to the A.A.T. On receipt of the application under Reg. 7B a Report on the application will be prepared in the L.P.S.S. Branch and forwarded to Legal Branch for attention. This report is then used as the basis of a submission to the A.A.T by the Legal Branch. A copy of this submission will be filed in the Application Section and the original sent to the A.A.T.

Subsection 36(2)(a) relates to compulsory acquisition of an easement and Subsection 36(2)(b) relates to removal.

Acquisition

In respect of the acquisition of an easement, the A.A.T gives leave to acquire and the owner must then follow the Land Acquisition Compensation Act 1986. Applications to record easements on the folio should be lodged under Section 72 of the Transfer of Land Act. This procedure cannot be done in conjunction with a Plan of Subdivision or Consolidation.

Removal

Where leave is granted under Section 36(2)(b) a certified plan (in the form of Section 23 Plan or as a Plan of Subdivision or Consolidation) should be lodged and the A.A.T. order produced in support. Section 36(2)(b)(i) states that consents are not necessary unless the Tribunal otherwise directs. This procedure can be used in conjunction with a Plan of Subdivision or Consolidation.

Note. Section 36 cannot be used to acquire or remove roads.

4.0 Easements and Subdivision Act Plans

4.1 Determining which easements affect subject land

Probably the most important advice in this regard is to :

ALWAYS OBTAIN AN UP-TO-DATE COPY OF THE TITLE (S) TO THE LAND UNDER SURVEY

This may appear to be elementary or unnecessary advice, but there are still numerous occasions where an easement is completely omitted, because the surveyor has worked from a copy of a duplicate title or an old copy of an original.

Plan-based folio:

In the case of a computer or Plan based folio, ascertain that a current edition of the Plan of Subdivision or Title Plan is obtained from the imaging system in the Plan section of the L.T.O.

Paper Title

Check All Sheets of the title for easement endorsements

While most easements are shown on the face of titles, It is important to ensure that all sheets of an old style paper title are perused. Any easement created since the production of the title should appear in the form of a diagram, drawn on either an annexed sketch sheet or on the rear of the title, and as an endorsement. If there is no sketch, (it may be missing), check for an endorsement such as: -

CREATION OF EASEMENT
DATE _____
DEALING NUMBER _____

Or

TRANSFER AS TO PART &
CREATION OF EASEMENT
DEALING NO _____
Date _____
VOL _____ FOL _____

4.1 Recognising easements

There are a number of endorsements and / or notations to be found on paper titles which indicate the existence of an easement: -

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1. Firstly and most obviously, an easement may be shown on the title diagram, given a Distinctive colour or alpha-numeric identifier, and described on the face of title under "ENCUMBRANCES REFERRED TO".
This description will supply the origin and purpose of the easement, but NOT the land benefited, except if it is an easement in gross, in which case it will provide the origin and the name of the benefiting authority, but probably will NOT specify the purpose. (For exceptions see "any easements affecting" and "General Law easements" under "EXAMPLES AND EXPLANATORY NOTES")
2. If an easement in favour of other land (expressed easement) or in favour of an authority (easement in gross) was created after the production of the title an endorsement similar to one of those shown below will appear on the rear or on an annexed sheet. Similarly a sketch of the easement created will be drawn on rear of title or on an attached "sketch sheet"- this may also indicate the purpose.

CREATION OF EASEMENT
DATE _____
DEALING NUMBER _____

Or

TRANSFER AS TO PART &
CREATION OF EASEMENT
NO _____
Date _____
VOL _____ FOL _____

4.3 Recognising and identifying easements on title from general notations: -

1. Any Easement Notation On Title Which Refers To Section 98 Or 212 Of The Transfer Of Land Act - (These Sections Refer To Acts Of Different Eras) - or to Act No. 3168.
See Section on Sec.98 TLA
2. "The easements (if any) existing or subsisting over the same"
For a brief period this notation was used in reference to easements set apart in plans (see 1. above) but more frequently was a result of interpretation of old law deeds when land was brought under the Transfer of Land Act.
See Section on "General Law Easements"
3. "Any easements affecting the same"
See Section on "Any Easements"

4.4 Easements and Subdivision Act Plans of Subdivision

The Subdivision Act, together with the LTO change to a "Plan Based" title diagram system, has resulted in a fundamental change to attitudes related to the showing of easements on plans of subdivision (and consolidation).

The registered plan on the LTO imaging system is the title (now folio) diagram, actually forms part of the Register and is now the first accessed readily available source of easement information. It is therefore required to present clear and accurate information in relation to all

easements or similar rights or conditions affecting land. In addition the Act requires that the "Land benefited" or the benefiting authority or other party be shown.

The section of the Subdivision Act most directly addressing the depiction of easements is Section 12

4.4.1 Land Registry requirements for presentation of easement information

- Dimensions - fixing of easements
- Easement References
- Purpose
- Width
- Origin
- Land benefited
- What if information is not available

4.4.2 Fixing easements on Subdivision Act Plans

Sufficient dimensions must be shown on plans to enable the position of each easement to be fixed within each lot.

Traditionally, dating back to when titles were hand drawn for each lot it was always considered necessary to show complete dimensions to fix easements within each lot and this practice was strictly followed in all cases while diagrams appeared on the face of Certificates of Title.

Since the introduction of the Plan Based Diagram System whereby the whole plan is accessed as part of the title search we can now afford to relax this rule to some extent as long as the position of easements can reasonably be deduced from the plan.

4.4.3 Easements Limited as to Height (or depth)

A side effect of the introduction of the Subdivision Act 1988 was that building subdivisions which would previously have been "Strata" plans which showed only existing easements can now set apart easements in favour of lots, authorities or outside land which may be limited to only one or more of the storeys of a building.

In the past all easements limited as to height or depth were required to fixed by reference to "AHD" with full usual details relating to the Bench Mark used etc.

This does not appear realistic in a context where lot boundaries themselves are fixed only by reference to a building.

Under these circumstances: -

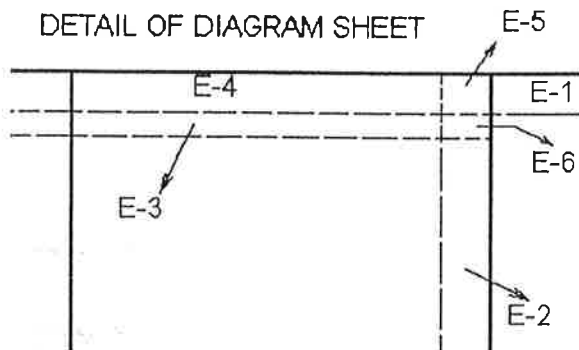
(a) "AHD" should be used in plans where upper and lower boundaries of lots are NOT defined by buildings.

(b) In building subdivisions "AHD" heights need not be used provided that the Sections or elevations clearly describe the upper and lower limits of the easements.

4.4.4 Easement References

Encumbering easements:

Existing encumbering easements will be shown on the diagram(s) on the plan and each encumbered piece of land identified by an easement reference such as E-1, E-2, etc. as on the diagram below.



The LTO has in the past expressed a preference for the easement table to mention each easement number only once and to list the easements affecting each numbered piece of land as shown in Easement table 1 (below).

Easement Table Number 1

Easement Reference	Purpose	Width	Origin	Land Benefited / In favour of
E-1	DRAINAGE	1.83	LP23759	LOTS ON LP23759
E-2	DRAINAGE AND SEWERAGE	1.83	LP85362	LOTS ON LP85362
E-3	SEWERAGE	SEE	LP94716	LOTS ON LP94716
E-4	DRAINAGE	DIAG.	LP23759	LOTS ON LP23759
"	SEWERAGE	"	LP94716	LOTS ON LP94716
E-5	DRAINAGE	"	LP23759	LOTS ON LP23759
"	DR'GE & S'R'GE	"	LP85362	LOTS ON LP85362
"	SEWERAGE	"	LP94716	LOTS ON LP94716
E-6	D'GE & S'R'GE	"	LP85362	LOTS ON LP85362
"	SEWERAGE	"	LP94716	LOTS ON LP94716

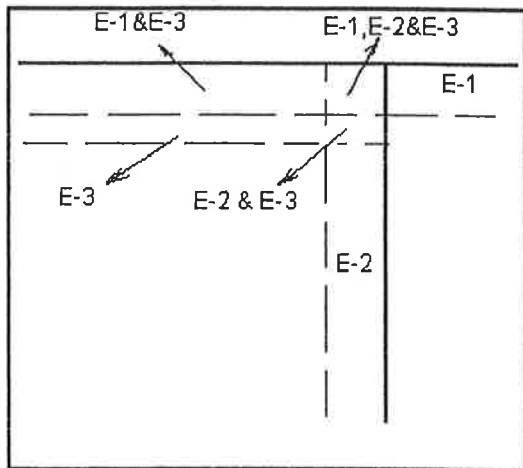
This is still the preferred method of presentation, but complex cases sometimes require a different approach to depiction of easements.

In extreme cases the Land Registry does accept an alternative way of setting out an easement table. This is as demonstrated in Easement Table 2 (below)

Easement Table Number 2

Easement Reference	Purpose	Width	Origin	Land Benefited / In favour of
E-1,E-4,E-5	DRAINAGE	1.83	LP23759	LOTS ON LP32759
E-2,E-5,E-6	DRAINAGE AND SEWERAGE	1.83	LP85362	LOTS ON LP85362
E-3,E-4,E-5, AND E-6	SEWERAGE	2.44	LP94716	LOTS ON LP94716

Various other variations have been suggested to the Land Registry including that shown at right. This method describes each easement by an identifier and therefore would require only one entry in the easement table for each. Against this, multiple identifiers are required where easements overlap.



Whilst there may be some advantages to this method in isolated cases the Land Registry is not disposed to accept this or any other changes to established procedure as it is considered that: -

- confusion will arise in the minds of surveyors as to which system to adopt and a "hybrid" may result.
- any new system will not be consistent with the hundreds of thousands of existing plans, complicating plan interpretation as far as the lay public are concerned.

Appurtenant easements:

Existing appurtenant easements, when shown, will be identified by references A-1, A-2, etc on the diagram and in the easement table.

4.4.5 Purpose

This must contain the purpose or purposes of the easement.

Often an instrument will contain details of numerous rights intended as ancillary to or a necessary component of the main purpose of the easement.

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e.g. An instrument creating a drainage easement may contain reference to associated rights of entry, with vehicles etc. and to lay and or maintain pipes.

Where these ancillary rights are very broad ranging, the purpose may be described as "drainage and ancillary purposes " for instance. However, where there are two or more clearly disparate purposes they must be noted in the "purposes " column.

Examples-

(a) Creations for drainage AND sewerage purposes.

(b) Some easements created in favour of the former SECV also included "Telephone" as an additional purpose to the usual "Transmission of Electricity"

Both of these examples should show 2 entries under "purpose".

4.4.6 Width

This column was intended to simplify the showing of easements on the diagram by eliminating the need for repetitive widths. It is not compulsory to show the widths in the easement table if this complicates the presentation.

- It is allowable to have no easement widths shown on the diagram if there is an entry in the width column.
- It is allowable to have the easement width only on the diagram with the entry in the width column being "see diagram". This is appropriate if the easement is of an irregular shape or if the width changes.
- It is allowable to have the width shown on the diagram and in the width column.

4.4.7 Origin

This is the source of the easement and refers to the document (instrument) or plan which first created the easement . e.g.B672346,LP202367B. It may also be a section of an Act of Parliament.

For new easements to be created upon registration of a plan the origin will be shown as "this plan".

4.4.8 What if information is not available

In exceptional circumstances, such as encumbrances shown on title as "Any easements affecting the same" or some easements derived from older applications to bring land under the TLA, ascertaining some of the information may be extremely difficult, if not impossible. Under such circumstances Section 12 (1B) of the Subdivision Act 1988 permits the exclusion of some information.

This is NOT intended to avoid the responsibility of surveyors to make or obtain adequate searches of plans, titles and instruments which are available from the Register.

The omission of information which is readily available from the Register may require re-certification to rectify.

4.4.9 "Any Easements affecting the same" - Acceptable Notations on plans

The Land Titles Office many years ago adopted the practice of using endorsements such as "Any easements affecting the same" to describe multiple easements encumbering the same piece of land.

To satisfy the original provisions of the Subdivision Act 1988 when preparing a plan it was necessary to identify each easement that was encompassed by that endorsement and to determine the purpose, origin and the land benefited.

The Subdivision (Amendment) Act 1993 inserted new Sub-Section 1B in Section 12 of the Subdivision Act 1988. This section now permits greater flexibility in the extent of the information required. The minimum requirement is that the easement table must indicate the land burdened by the "Any easement" encumbrance and in addition any other information regarding its purpose or the land benefited which appears on the folio or in any instrument or plan referred to in the folio. No further searching beyond this point is necessary. However any known further encumbrances which affect the said land must be identified fully and NOT incorporated as part of "Any Easements".

Example:

A Title (Vol 3479 Fol 768 being a lot on LP 5902) contains an encumbrance notation "Any easements affecting the same". If the said easement was shown or set aside on the plan for drainage purposes, the easement table would contain the following information.

Easement table

Easement Reference	Purpose	Width	Origin	Land Benefited / In favour of
E-1	DRAINAGE	3.05	LP5902	Lots on LP5902
E-1	Any Easements	3.05	See V.3479 F.768	Unspecified

It will still be acceptable for a plan to provide a full or partial breakdown of the easement details. In these cases all details will be checked as part of the plan examination within the Land Titles Office. The relevant search documents would still be required to be supplied by the applicant in support of the plan.

4.4.10 Land benefited:

The land benefited by the easement or the Council, public authority or other person in whose favour the easement was created must be entered in this column.

For some easement types this information is available from the easement notation on the relevant folio of the Register, either endorsed on a paper folio or set out on an imaged plan under the "Plan based diagram" system.

In other cases inspection of documents in the Register or at the Registrar General's office will be required to obtain the information.

There are occasions where the land benefited by an easement has been re-subdivided many times or for some other reason is extremely difficult to identify by current description.

It is acceptable to the Land Registry to refer to the description of the dominant land at the

time of the easement's creation. This reference may be to a "volume and folio" number or to a lot(s) on a plan. Various other examples are fully shown in "Easement Examples and explanatory notes"

4.5 Section 12(2) of the Subdivision Act 1988

4.5.1 New Implied easements :

The Implied rights set out in this Sub-section apply automatically in the case of a building subdivision or land affected by a body corporate. They may, however be brought into being in any plan of subdivision by an appropriate notation in the easement table - some councils or authorities insist on such a notation even when the rights automatically apply.

The notation is generally in the following form or similar-

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

Example Easement Table

Section 12(2) of the Subdivision Act 1988 applies to all the land in this plan.				
Easement Reference	Purpose	Width	Origin	Land Benefited / In favour of
E-1	Drainage	1.83m	This Plan	Lots in this plan

4.5.2 Limiting implied easements

Section 12(3) & (3A) SA.

If a surveyor chooses to limit the easements implied either as to purpose or as to the precise extent of the land to be affected the LTO raises no objection. In certain cases we may question the intention when only part of a lot is so affected, but ultimately our criteria are limited to considerations of clarity.

4.5.3 Existing implied easements

Any plan of subdivision or consolidation which includes land already subject to implied easements pursuant to Section 12(2) from a previous plan must recognise these easements.

In a simple case, where the whole of the land in the plan is affected in this manner this can be achieved by inserting a notation to the effect that –

"Implied easements by virtue of Section 12(2) Subdivision Act 1988 (for PURPOSE - if applicable-only) set apart in PS(previous plan) applies to land on this plan"

Example Easement Table

Implied easements by virtue of Section 12(2) of the Subdivision Act 1988 for (insert purpose if applicable) set apart in PS (previous plan) applies to the land in this plan.				
Easement Reference	Purpose	Width	Origin	Land Benefited / In favour of
E-1	Drainage	1.83m	This Plan	Lots in this plan

More complex cases will involve consideration on their merits.

Examples:

New plan creates new implied easements in addition to the old:

1. In order to show the "doubling" of these easements in favour of different land the standard notation may be expanded to –

"Pursuant to Section 12(2) Subdivision Act 1988 the land in this plan is affected by implied easements set apart in this plan and implied easements (for "purposes") set apart in PS333333K "

Alternatively, the pre-existing easement could be set out in the conventional manner, in the easement table as follows: - whole - PS333333 Sec 12(2) etc. - lots on PS333333

2. Whole of a lot on previous plan which now forms part(s) of one or more new parcels

Example Easement Table

Pursuant to Section 12(2) of the Subdivision Act 1988 the land in this plan is affected by implied easements set apart in this plan and implied easements for (? purpose) set apart in PS(old plan)

Easement Reference	Purpose	Width	Origin	Land Benefitted / In favour of
Whole or Lot x on PS313313	(Purpose if stated)	---	PS(old plan) - Section 12(2) Subdivision Act 1988	Land in PS (old plan)

4.6 Removal or variation of Easements in Plans of Subdivision

Easements may be removed or varied as part of a Plan of Subdivision or consolidation.

For this to occur: -

1. A notation must be shown on the plan in the appropriate panel giving details of the easement to be removed or varied and also the GROUNDS for such action.
2. There is no requirement by the L.T.O. for a separate plan showing the easement(s) or part to be removed or varied unless council requires it for clarification purposes .
3. **L.T.O. policy discourages the practice of showing on a Plan of Subdivision by hatching or otherwise the part or whole of an easement to be removed as this results, upon registration, in a plan showing outdated information.**

Grounds for removal of easement in a Plan of Subdivision may be: -

1. Authorisation / direction in a Planning Permit or Planning scheme.
In this case the removal/variation can be effected pursuant to Section 23 Subdivision Act 1988. See Notes re: Applications under Sec.23 Subdivision Act
2. Agreement of all relevant interested parties or authority.
3. The Registrar has declared that the easement has been abandoned or extinguished.
4. Various other grounds

4.7 Merger of easements in Plans of Subdivision or Consolidation

4.7.1 Common ownership

In case of an easement where the whole of the dominant tenement is included with the servient tenement (both in the same - or common - ownership) in a new plan of subdivision or consolidation the easement not only can merge but MUST.

A notation should be shown on the plan similar to the following:

"The easement for "xxxxx" purposes created by (instrument or Plan No.) merges upon registration of this plan"

There is no particular requirement for the consent of the surveyor or council to the addition of this notation as it is only advice of an action that must occur. It is preferable that both the Surveyor and Council are aware of the merger. Before the "Plan based diagram system" it was customary to place a pencil notation on the face of a paper title conveying the same message.

Where a plan contains the whole of the dominant and servient tenement but they are in diverse ownership (NICO) an easement technically cannot merge but can be removed using the procedure as for Removal of easement in a plan of Subdivision (above).

The following procedures apply in such a case: -

1. When the whole of the land in a previous subdivision is re-subdivided by a new Plan of Subdivision and is in the same ownership, then the earlier plan is deemed to be cancelled. All easements appropriated on the earlier plan (except easements to authorities) will no longer exist.
2. This can happen even if the splay corners Roads and Reserves are not included in the re-subdivision.
3. It should also be noted that appropriated easements in any number of earlier subdivisions may also cease to exist provided all the land is in the same ownership and is included within the boundaries of the new subdivision.

4.7.2 "Merger" of Easements in N.I.C.O. Plans

PROCEDURE:

1. If the application has been executed by the applicants and all necessary consents of mortgagees etc. have been supplied and the relevant notation setting out the removal of easement is on the plan, this can be taken as agreement of all parties.
2. Where the notation setting out the removal of easement is on the plan but the application is signed by the solicitors for the applicants, the consent of the applicants to the removal of the easement would be required.
3. If the application has been executed by the applicants but the relevant notation setting out the removal of easement is not on the plan, the consents of the applicants to the removal of the easement would again be required, and the notation placed on the plan by the surveyor or at his request. (The written consent of council will also be required).

The reason for 2 and 3 being to protect the interests of the parties by making them aware of the consequences of the registration of the Plan of Subdivision or Consolidation.

Notation to be placed on plan

"The easement appropriated on LP..... will be removed upon registration of this Plan by agreement of all interested parties"

5.0 Easement Table Examples

5.1 Express (or private) Easements

These include rights and easements which have been created in specific "creation of instrument" instruments as well as those reserved, granted or created in transfers, mortgages or leases. These are all regarded as being authorised by Sec. 45 TLA. Easements may be created in favour of a specific piece of land (dominant tenement) or, where authorised by legislation, in favour of a municipality or authority (an easement in gross). Examples of easements in gross are shown under relevant individual headings.

Easement Reference	Purpose	Width	Origin	Land Benefited / In favour of
E-1	Right of Carriageway	5m	Transfer No 12345	Land in dominant titles as set out in the originating Instrument

** Note: - unless the current dominant titles are fully known it will save a lot of searching to insert the original dominant titles from the instrument

5.2 New Appropriations under the Subdivision Act

5.2.1 Standard subdivisional easements in favour of Lots on the Plan

For more information on Section 12 – See the Subdivision Act 1988

1. The Subdivision Act does not specify or limit the purposes of easements which may be set apart on a Plan of Subdivision or consolidation as did the Transfer of Land Act 1958; thus all purposes which may legitimately be regarded as easements are acceptable.
2. It is acceptable to limit the land benefited to only some of the land in a plan. Note that the dominant land is specified, compared with Sec.98 TLA which implied easements in favour of registered proprietors of all lots which could reasonably enjoy such rights.
3. Easements may be set apart in favour of a number of authorities - See "easements to authorities"

Example easement table below: -

Easement Reference	Purpose	Width	Origin	Land Benefited / In favour of
E-1	Not limited as in Section 98 of the T.L.A., but must be a purpose within the definition of <i>easement</i>	---	This Plan	Lots on this plan (this may specify only some of the lots)

Some Special cases are: -

- * Multiple partywall easements
- * Easements in favour of land outside plan

5.2.2 Multiple partywall easements

From time to time surveyors are placed in the position of creating numerous easements for party-wall purposes in plans.

Due to the necessity to specify the dominant land in each case this has resulted in easements numbered E-1 to E-20 or so, which can be a nuisance to those preparing the plan and to those trying to read the plan in the future.

A simple solution to this problem and one advocated by the LTO is to give all the easements a common identifier, such as E-1 and then define the land benefited as –

"THE RELEVANT ABUTTING LOT ON THIS PLAN"

5.2.3 Easements in favour of land outside plan

If an easement is set apart on a plan of subdivision or consolidation which specifies land outside the boundaries of the plan as the land benefited by the easement, then the consent of the registered proprietor(s) of such land or a copy of the planning permit or amendment to planning scheme authorising or directing the creation of easement will be required by the LTO. Note. The Planning Permit must state that the easement is in favour of this land.

Standard requisition 32 states:

This Plan seeks to create an easement in favour of the registered proprietor/s of the land in Certificate of Title Volume..... Folio..... .

Under these circumstances either:

(a) a copy of the planning permit or amendment to the planning scheme which authorises or directs the creation of the easement should be produced and the Plan should be amended to show that the creation is so authorised

or

(b) the consent of the registered proprietor/s of the land in Certificate of Title Volume..... Folio... to the registration of the Plan should be supplied.

Upon registration of a plan creating such easements, the new appurtenant easement will be endorsed on the original dominant title (and duplicate, if available- this endorsement can be deferred on the duplicate until it is available).

ENDORSEMENT (or similar) TO BE PLACED ON DOMINANT TITLE –

AN EASEMENT FOR (.....) PURPOSES APPURTENANT TO THE WITHIN LAND HAS BEEN CREATED - SEE PS3333333X
--

If the dominant tenement is "plan based" the relevant plan will require amendment to show the appurtenant easement and a new edition will be placed on the imaging system.

5.3 Implied Easements (New & old -Using Section 98 TLA)

5.3.1 Existing Easements under Section 98 TLA

How they are shown on Plans of Subdivision - (typical easement table)

Easement Reference	Purpose	Width	Origin	Land Benefited / In favour of
E-1	<i>Purpose as shown on the old plan</i>	See Diagram	LP 89543	Lots on LP 89543

Use under the Subdivision Act - creating over land outside a plan

5.3.2 New Easements under Section 98 TLA

Background

1. Easements set apart on plans of subdivision prior to the Subdivision Act 1988, unless clearly in favour of an authority under a specific act (SEE LIST), may benefit only those owners of LOTS on that subdivision who may reasonably be supposed to need or be capable of exercising their rights. i.e. They CANNOT be construed or described as being in favour of any other person or body.
2. Easements under Section 98 TLA should always have been set apart over roads on plans of subdivision, there was no automatic conferring of rights of way over subdivisional roads.
3. Where the purpose of a reserve on a plan was one of those also available for easements (e.g. DRAINAGE) under Section 98, such reserve is deemed to be subject to the implied rights of lot owners on the plan because the act of creating the reserve is seen as setting apart, or "appropriating" land for that purpose.

5.3.3 Recognising Easements deemed to be under Sec.98 TLA

Notations on Title

Easements derived from older subdivisions under various statutes earlier than the 1958 act are regarded as the same.

Varieties of formats to be found on Titles of varying vintages include :-

"The Easements (If Any) Existing Over The Same By Virtue Of Section 98 Of The Transfer Of Land Act"

"The Easements Implied Under Section 98 Of The Transfer of Land Act"

"The Easements (If Any) Existing Over The Same Appurtenant To Lots On Plan Of Subdivision No. _____ By Virtue Of Section 98 Of The Transfer Of Land Act"

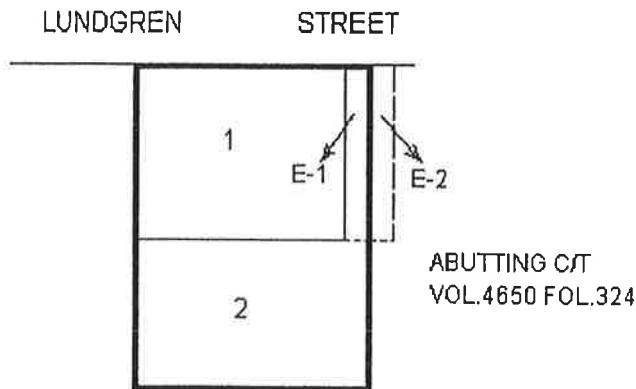
"Any Easements Affecting Vide Section 212 TLA" (The Earlier Transfer Of Land Act - Corresponding Section)

"Any Easements Affecting Vide Act 3168" (An Even Earlier Act Relating To Easements)

"The Easements existing Over the Same Appurtenant to Lots on Plan of Subdivision No. _____ By Virtue Of Section 98 Of the Transfer of Land Act.

5.3.4 Section 98 under the Subdivision Act - creating over land outside a plan

This procedure is of value where adjoining developments need to share a drive or party-wall easement :-



ABUTTING TITLE

- Land must be in same ownership as the land in the development.
- Duplicate title to be supplied and particulars included in Plan Application.
- Plan affects stamp on paper title or if Plan based title, new version of Plan prepared showing Section 98 easement.
- Consent of any mortgagee, caveator etc. affecting title to be supplied.

NOTE: - Section 98 easement must benefit all new lots.

Easement Reference	Purpose	Width (Metres)	Origin	Land benefited/In favour of
E-1	WAY	3	THIS PLAN SEC.98 TLA (THIS PLAN)	Lot 1 on this plan and C/T Vol.4650 Fol.324 Lots 1 & 2 on this plan
E-2		3		

5.4 Easements Which Cross Roads

There have been conflicting views regarding the numbering of subdivisional roads. The L.T.O. view is dictated by the requirement to produce a separate folio of the register for each numbered parcel, each such parcel having a single, unique identifier. In the case of roads the parcel numbers are R-1, R-2 etc. Where roads are not affected by intersecting easements there is no problem.

Confusion does arise, however, when intersecting easements are given a similar identifier. i.e. - Are we to assume that there is a parcel which is numbered R-1 and which is affected by easements numbered R-2, R-3 etc.? or are we to assume that there are three or more parcels? There appears no greater ambiguity in having easements which are numbered E-1, E-2 etc affecting a parcel numbered R-1 than if the same easements affect a parcel called "RESERVE No.1" or Lot 1.

It is therefore the L.T.O. view that encumbering easements should retain their "E- Number" type of description even where they cross roads.

5.5 Reservations and Conditions set out In Crown Grants

- Background information
- LTO policy -Theory and practice in regard to new plans
- Specifics - A Variety of conditions, rights, reservations, easements, & exemptions

Background information

Every Certificate of Title is declared by Section 42(2) of the TLA 1958 to be subject to the reservations exceptions conditions and powers contained in the Crown Grant, notwithstanding the same respectively are not notified as encumbrances.

Therefore no reference to them is made in the Certificate of Title except where an Act specifically requires it.

Unless specifically required by an Act, no notice is taken by this Office of apparent breaches of these conditions. However, when any part of the land in a Crown Grant is indicated by a distinctive colour and is subject to a reservation, etc., it must be set out as an encumbrance on any Certificate of Title

How shown on title

Titles derived from Crown Grants -----

NEVER use the word "RIGHT" in expressing an encumbrance being carried forward from the Grant, and

NEVER use the term "Easement reserved in Crown Grant" even when the diagram on the Grant uses the word Easement (this expression implies an Instrument lodged at the Titles Office).

An easement in a Crown Grant may be expressed as a RIGHT or Condition, but in any subsequent Certificate of Title, the word "RESERVATION" will replace the word "RIGHT" and the encumbrance will be expressed as either:

THE RESERVATION (or CONDITION) relating to (purpose) set out in Crown Grant Vol..... Fol..... or

THE RESERVATION (or CONDITION) in favour of (Authority/Commission etc.) set out in Crown Grant V..... F.....

"The Reservation in favour of State Electricity Commission of Victoria set out in Crown Grant Vol..... F..... " or

"The Condition in favour of State Rivers and Water Supply Commission set out in Crown Grant Vol..... F..... " or

"Theeasement created by an Instrument (created by Instrument No.....) referred to in Crown Grant Vol..... F....."

LTO policy -Theory and practice in regard to new plans

The large variety of types of conditions and reservations make the definition of a typical procedure hazardous, but the following matters should be considered whether drawing or

examining a plan of Subdivision or Consolidation:

1. Whilst the Subdivision Act requires full details of easements to be shown on a plan, the term "easement" is also taken to include conditions and reservations in Crown Grants, (as well as rights saved by authorities under the local govt. act - see that topic), which requires some interpretation.

Accordingly, the so-called "easement table" is not precisely named and it is for this reason that the pro-forma, commercially available, include reference to such conditions in the legend of the easement table, whilst the examples shown in the amended regulations now show a similar reference to :

" E - Encumbering Easement, Condition in Crown Grant in the Nature of an Easement or other encumbrance"

To be accurate all Plans should show this latter notation.

2. Some years ago the LTO, recognising the distinction between such conditions and easements, and in view of the wording of Sec.23 of the Subdivision Act which excluded conditions in the nature of an easement from the encumbrances which could be removed under that Section, published a request that these conditions and reservations be shown on plans in a precise manner.

This was intended to underline the different nature of the encumbrances and to make it clear that they were not able to be removed under Sec.23.

Whilst amendments to the Act have since included "a condition in the nature of an easement" (see Section 23(4) Subdivision Act 1988) and some of the imperative to precisely define them on plans is therefore removed, those published instructions are still regarded as a valid guide to the showing of conditions and reservations if precision is aimed for.

Direction as per "traverse" FEB.1992 - It is important that in an easement table any condition in the nature of an easement should be clearly defined as such as illustrated.

Easement Reference	Purpose	Width	Origin	Land Benefited / In favour of
E-1	Condition in Crown Grant Vol..... Fol..... for purposes (as on Grant)	15.24m	Crown Grant Vol.....Fol.....	Authority etc. (obtained from Grant)

3. It is realised that the above directions have not been universal knowledge within or without the LTO. Further, it is not the policy of the office to make requisitions which may be regarded as "educational" rather than essential.

Thus, many plans have been lodged and registered which do not show the full information.

On reflection, provided that the plan format recognises different types of encumbrances, as in 1(above), and The Crown Grant Vol. Fol. number is clearly quoted as the origin of the particular encumbrance there is now no apparent objection to the acceptance of a truncated type of entry in the easement table.

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Easement Reference	Purpose	Width	Origin	Land Benefited / In favour of
E-1	Drainage	10m	Crown Grant Vol.....Fol.....	Authority etc. <i>(obtained from Grant)</i>

5.6 General Law Easements

Recognising:-

In the simplest form these will be shown on a certificate of title (Folio of the Register) as :-

THE EASEMENT FOR (..... PURPOSE)
GRANTED BY INDENTURE/CONVEYANCE
REGISTERED BOOK..... No. (Application)"

Example of Typical Easement Table

Easement Reference	Purpose	Width	Origin	Land Benefited / In favour of
E-1	<i>As shown on Certificate of Title</i>	---	Indenture/Conveyance Book.....No..... (Application No.)	<i>To be determined from searching at Registrar-General's Office</i>

This form of notation may show considerable variation, such as :-

"The easements (if any) existing or subsisting over the same"

It may be that in some cases that this general encumbrance was entered on the title as a warning that the land may be subject to some rights which were not fully known or defined at the time it was brought under the operation of the TLA. If searching in the Registrar-General's Office fails to disclose full details it is acceptable to resort to the provisions of Section 12(1B) and refer to the Application, where necessary.

Example of Typical Easement Table

Easement Reference	Purpose	Width	Origin	Land Benefited / In favour of
E-1	See Appn. 53453	---	Appn. 53453	See Appn. 53453

5.7 Public Highways

As shown on Titles prior to LGA 1992

Where part or whole of an old style title is deemed to be or declared a public highway there are two usual ways this will be shown :-

1. As to the land shown marked
The Rights of the Public to use the same as a Public Highway by virtue of the provisions of Section 587 of the Local Government Act 1958", or
2. As to the land shown marked
The rights of the Public to use the same as a Public Highway by virtue of a proclamation

published in the Government Gazette date..... page.....

Example of Typical Easement Table

Easement Reference	Purpose	Width	Origin	Land Benefited / In favour of
Whole	Public Highway	---	Government Gazette Date.....Page..... or Section 587 Local Government Act	The public

5.8 Appurtenant Easements

The L.T.O. has not varied from its policy (Pre-Subdivision Act) in regard to showing appurtenant easements.

This is :-

(i) It is important to show existing appurtenant way or carriageway easements as they relate to access. They may be shown as an abuttal to a road over which the parent title(s) have an appurtenant right or by conventional delineation of the appurtenant easement on the plan and completion of the easement table, BUT, complete omission of a right of this type will result in a requisition.

(ii) Other types of appurtenant easements may be shown, if desired. If shown they must accord with title.

Under the Subdivision Act there is no provision to create an appurtenant easement in a Plan of Subdivision or Consolidation, but Section 98 Transfer of Land Act is still available for this purpose under some circumstances. See further entry re Section 98

5.9 Section 72 or 73 Applications

Applications under Section 72 of the TLA were a means to enter on the Register easements which exist either by Order of an Arbitrator, by private arrangement (creation) or other origin. An easement may therefore appear to have two origins - The order or document which creates the actual right and the number of the application used as a tool to show the right on the register. Thus, the format shown on title may vary considerably but generally fall into two main categories :

- (a) The (purpose) easement existing over the same pursuant to Arbitrator's order dated the 16th. June 1965 (with Application No.4567 Section 72)
- (b) The rights for the purpose of granted in-creation of easement dated the-27th May 1985 and shown on the sheet annexed thereto and filed with Application 60970Y Section 72.

Similarly, whilst Applications under Section 73 TLA are for the purpose of removing easements from the Register which have been abandoned or extinguished, there were occasions where the extinguishment resulted from an order of an Arbitrator, and further occasions where such an order substituted alternative rights in lieu of those extinguished.

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The land benefited by these substituted easements is thus the same as for the easements which were extinguished.

The title in such cases will show a notation similar to the following:

"The (.....) easement substituted by order of the Arbitrator dated 2nd April 1973 (with Appn. 34344Sec.73)"

6.0 Easement Table Examples - Authorities

6.1 Easements to Authorities

Existing Easements :-

To SECV or ESV
 To S.R. & W.S.C. or R.W.C.
 To D.V.A.
 To MMBW
 To Municipalities

New Easements :-

In Gross - Electricity
 Supply Companies
 To Municipalities
 To Gas & Fuel
 Corporation
 To Authorities Under
 The Water Act
 To Licensees Under
 The Water Industry
 Act 1994

Others

"GASCOR" & "G.T.C."
 Melbourne Water
 Corporation
 Rights Saved To
 Authorities Under Local
 Government Act
 Exemptions, conditions
 or reservations in Crown
 Grants
 TELSTRA

6.1.1 Background information

The usual concept or definition of an easement includes generally a right of the owner of one piece of land (dominant tenement) over another piece of land (servient tenement). This right is attached to the land (as an appurtenant easement), and not to the person or body who owns the land.

In the case of various authorities, which require to enter into land to install and maintain services, specific legislation exists; firstly, enabling them to obtain necessary rights over particular land without specifying any dominant tenement (termed easements in gross); and secondly, defining in full the intended meaning of such terms as "powerline", "channel" etc.

Thus the LTO has required originating statutes and the purpose of easements in gross to be specified - to put the meaning beyond doubt.

In the modern context, when we endeavour to avoid making requisitions which may be described as "educational" or unnecessary, the question arises as to whether we should insist on a full "chapter and verse" approach to these matters provided that we are satisfied that an authority has the power to acquire easements in gross. The subject has been given a considerable amount of thought in the Subdivision Section of the LTO. The resulting policy is designed to provide adequate information to those interpreting plans (particularly far into the future) and ascertain that the entries on plans mean what they are intended to mean.

6.2 Historic LTO directions

Easements to authorities - before the Subdivision Act

Land appropriated or set apart on Plans of Subdivision for the use of Authorities. Certain Acts provide that land may be appropriated or set apart for certain specified purposes for the use of specified Government or other Authorities as follows:

Easement Workshop Practice Notes

<u>Department/Authority</u>	<u>Plans Sealed on or after</u>	<u>Act / Section</u>
State Rivers & Water Supply Commission	10.4.1973	Water Act 32A
Dandenong Valley Authority	8.6.1976	D.V.A. Act 17A
Melbourne & Metropolitan Board of Works	1.6.1981	M.M.B.W. Act 258BA
Municipal Councils	1.6.1981	L.G.A. 656F
S.E.C.	2.3.1983	S.E.C. Act 103B

HOW SHOWN ON OLD STYLE PLAN & AND ON OLD TITLE

Specified purposes.

The Acts respectively set out the purposes for which easements may be appropriated or set apart, namely:-

- Pipeline - Channel - Carriageway (first four Acts)
- Powerline (S.E.C. Act)

EXAMPLE:-

Legend on Plan. (OLD TYPE -LP)

In the area set aside on the Plan of Subdivision for appropriations, the title of the Department/Authority should be set out in full with the purpose(s) and the relevant Section and Act.

Land	Purpose
Blue	Use of the City of Hawthorn for pipeline and channel purposes pursuant to Section 656F Local Government Act.

Encumbrance on title.

On approval of a plan by the Registrar pursuant to Section 97 T.L.A. the encumbrance on any title which is encumbered by an easement shall be worded in the form:

"As to the land
 The easement existing over the same by virtue of Sectionof the Act".
(Section 32A of the Water Act) or
Section 17A of the Dandenong Valley Authority Act. or
Section 258BA of the Melbourne and Metropolitan Board of Works Act or
Section 656F Local Government Act. Section 103B S.E.C. Act.)

6.3 Existing Easements in Gross to Electricity Distributors

Easements in gross which already exist on the Register in favour of a particular authority , remain so whether or not rights devolve, in practice, to another, unless action is taken to change the Register

Example - EASEMENT TO SECV SET APART UNDER SEC103B SEC ACT 1958

Easement Reference	Purpose	Width	Origin	Land Benefited / In favour of
E-1	Powerline	See Diagram	Sec.103B S.E.C. Act 1958 (PS--- -----)	S.E.C.V.

Example - EASEMENT TO ESV UNDER SEC.44 ELECTRICITY INDUSTRY ACT

Easement Reference	Purpose	Width	Origin	Land Benefited / In favour of
E-1	Powerline	See Diagram	PS323232G - Sec.44 Electricity Industry Act 1993	Electricity Services Victoria

Example - EASEMENTS CREATED BY INSTRUMENTS (SEC 45 TLA)

Easement Reference	Purpose	Width	Origin	Land Benefited / In favour of
E-1	Transmission of Electricity	See Diagram	C/E A123456	S.E.C.V.

6.4 Notifications of easement (relates to Lands compensation Act)

These result from a Notification by an authority that an easement has been acquired by it and may be found on title in two forms . (Note that SECV has been chosen for examples as that body is the major user of this Section.)

1. Face of Title

"The State Electricity Commission of Victoria pursuant to Section 103 of the State Electricity Act 1958 and Section 49 of the Lands Compensation Act acquired an easement for the transmission of electricity ."

2. Back of title

"State Electricity Commission of Victoria pursuant to Section 103 of the State Electricity Act 1958 and Section 49 of the Lands Compensation Act acquired an easement for the transmission of electricity over part of the land comprised herein."

DATE: 16/5/85

ENTERED: 12/3/85

M123456Q

Typical Easement Table

Easement Reference	Purpose	Width	Origin	Land Benefited / In favour of
E-1	Transmission of Electricity	See Diagram	Section 103 State Electricity Commission Act 1958 & Section 49 Land Compensation Act M123432S	S.E.C.V.

6.5 Why does the LTO insist on out of date descriptions?

With the proliferation of new Acts, distribution companies, licensees and authorities in the recent past, there has been a tendency to quote on plans the modern equivalent of the body formerly benefiting from a particular easement in gross. As far as the LTO is concerned, this constitutes a departure from the recording in the register which must be justified, but would require some formal action to effect.

Further, there may be cases where two or more new bodies may separately or jointly be able to claim some rights formerly only benefiting one former body whilst only one is shown on a new plan.

It is for these reasons that this office insists on showing easements as they were created, including the authority in whose favour they were created.

6.6 Existing easements in gross to S.R.&W.S.C & R.W.C.

Easements in gross which already exist on the Register in favour of a particular authority remain so whether or not rights devolve, in practice, to another, unless action is taken to change the Register.

Example - (Applies to R.W.C. also)

Easement Reference	Purpose	Width	Origin	Land Benefited / In favour of
E-1	Water Supply and Drainage (obtain actual purpose from Instrument)	See Diag.	C/E C434534	State Rivers and Water Supply Commission
E-2	Pipeline and Channel	See Diag.	LP213456 - Sec. 32A Water Act	State Rivers and Water Supply Commission

6.7 Existing easements in gross to Dandenong Valley Authority

Easements in gross which already exist on the Register in favour of a particular authority, remain so whether or not rights devolve, in practice, to another, unless action is taken to change the Register

Easement Reference	Purpose	Width	Origin	Land Benefited / In favour of
E-1	Water Supply and Drainage (obtain actual purpose from Instrument)	See Diag.	C/E C434534	Dandenong Valley Authority
E-2	Pipeline and Channel	See Diag.	LP213456 - Sec. 17A of the D.V.A. Act	Dandenong Valley Authority

6.8 Existing easements in gross to MMBW.

Easements in gross which already exist on the Register in favour of a particular authority, however created, remain so whether or not rights devolve (in practice) to another, unless action is taken to change the Register.

Easement Reference	Purpose	Width	Origin	Land Benefited / In favour of
E-1	Water Supply and Drainage (obtain actual purpose from Instrument)	See Diagram	C/E C434534	M.M.B.W.
E-2	Pipeline and Channel	See Diagram	LP213456 - Sec. 258BA M.M.B.W. Act	M.M.B.W.

6.9 Existing easements to municipalities (created prior to the Subdivision Act 1988)

These will either be easements in gross expressly created by instruments or easements appropriated or set apart in plans of subdivision. In either case it is the practice of the L.T.O. to describe easements in the way they were created REGARDLESS of changes to council names and/or municipal boundaries.

Thus, they should appear in one of the ways indicated in the following example.

Easement Reference	Purpose	Width	Origin	Land Benefited / In favour of
E-1	Water Supply and Drainage (obtain actual purpose from Instrument)	See Diagram	C/E C434534	City of Springvale
E-2	Pipeline and Channel	See Diagram	LP213456 - Sec. 656F L.G.A. Act	City of Springvale

6.10 New easements to power supply authorities or companies

Whilst the several companies now existing, and the SECV & ESV are empowered to take easements in gross for any purpose the normal appropriation of easement in favour of these bodies is for powerline purposes - the full intended meaning of that purpose being fully defined in schedules to the relevant Acts (see Sec.88 Electricity Industry Act 2000).

The various bodies have indicated that there will also be occasions when they may require easements "electricity supply" or "transmission of electricity" purposes.

It is therefore preferable, and expected, that plans will define the origin and the purpose in one of the ways indicated in the examples - variation from these norms will be queried at the examination stage in the LTO.

Easement Workshop Practice Notes

Note 1 The Electricity Industry Act 2000 became effective on 1st January 2001 and replaced Section 43 of the Electricity Industry Act 1993.

Note 2 For current information on Electricity Company Name changes see the web site at www.reggen.vic.gov.au/elec_5.htm

Land Registry now insists that the new legislation be used as the origin of new easements created in Plans of Subdivision and Consolidation.

i.e. the origin should be Section 88 Electricity Industry Act 2000 not Section 44 Electricity Industry Act 1993

Section 44 should be maintained for any easements that have been created on prior plans.

For the Origin of easements for Powerline purposes in favour of relevant corporations see the Easement Table.

Examples: -

SECV

Easement Reference	Purpose	Width	Origin	Land Benefited / In favour of
E-1	Powerline	See Diagram	This plan - Sec.103B S.E.C. Act 1958	S.E.C.V.
E-1	Transmission of Electricity	See Diagram	This plan	S.E.C.V.
E-1	Electricity Supply	See Diagram	This plan	S.E.C.V.

ESV

Easement Reference	Purpose	Width	Origin	Land Benefited / In favour of
E-1	Powerline	See Diagram	PS 400121C Sec.44 Electricity Industry Act 1993	Electricity Services Victoria
E-1	Transmission of Electricity	See Diagram	This Plan	Electricity Services Victoria
E-1	Electricity Supply	See Diagram	This Plan	Electricity Services Victoria

Power Supply Companies

Easement Reference	Purpose	Width	Origin	Land Benefited / In favour of
E-1	Powerline	See Diagram	This Plan - Sec.88 Electricity Industry Act 2000	See List
E-1	Transmission of Electricity	See Diagram	This Plan	"
E-1	Electricity Supply	See Diagram	This Plan	"

- Required most.
- MAIN LIN NOT DOMEST. USE.
- Domestic use.

Licensed Gas companies

- TXU Networks (Gas) Pty Ltd (formerly Westar Pty Ltd vide Cert. of Inc supplied)
- Also see list at Office of Regulator - General

Electricity Industry Act 1993

PART 3 - PROPERTY AND WORKS

44. Making of easements in subdivisions

(1) If a proposal for subdivision or consolidation of land is referred to an electricity corporation under the Planning and Environment Act 1987, the corporation may require easements for the use of the corporation for any one or more of the purposes set out in Schedule 2.

(2) The creation of an easement for a purpose specified in Column 1 of Schedule 2 gives to the corporation the rights specified in relation to an easement created for that purpose in Column 2 of that Schedule.

Schedule 2

45. Easements over lands held by Crown licensees or lessees

(1) If an easement acquired by an electricity corporation for any of the purposes of this Act is an easement over land held or occupied by any licensee or lessee of the Crown, a description of the easement and a notification it has been so acquired shall be forwarded forthwith by the corporation to the Secretary to the Department of Conservation and Natural Resources.

(2) If an easement referred to in sub-section (1) is over land held or occupied under licence, the description and notification shall be endorsed on the licence by the Secretary to the Department of Conservation and Natural Resources and be registered in that Department.

(3) If a Crown grant is issued to a person of the land over which any such easement has been taken, the grant is subject to the easement.

6.12 New Easements to Municipalities

Whilst it has been apparent that the functions of the former MMBW had been transferred to licensed retail companies, this is not a true impression. In fact, those companies are not directly involved in drainage works in relation to Plans of Subdivision and such responsibilities fall, for the most part, to council and for main drains (above a particular size), to Melbourne Water Corporation.

In general, though, subdivisional easements for drainage purposes should be in favour of council or lots on the plan.

Municipalities are empowered to obtain easements "in gross" by the provisions of Section 187A of the Local Government Act 1989.

There is no stated limitation to the kind of easement which may be obtained by them, nor is there any particular definition of easement types which may require specification. Plans may therefore be expected from time to time to also create easements for other purposes in favour of council.

Easement Workshop Practice Notes

Easement Reference	Purpose	Width	Origin	Land Benefited / In favour of
E-1	Pipeline or Ancillary purposes	5m	This Plan - (Sec.61 Water Industry Act 1994)	Yarra Valley Water Ltd.
E-2	Sewerage	3m	This Plan	Yarra Valley Water Ltd.
E-3	Drainage	See Diag.	This Plan	Melbourne Water Corporation
E-4	Drainage	See Diag.	This Plan	Lots on this plan
E-5	Drainage	See Diag.	This Plan	Shire of Yarra Ranges

6.13 Licensed Retail Companies

- City West Water Ltd.
- South East Water Ltd.
- Yarra Valley Water Ltd.

LOCAL GOVERNMENT ACT 1989

PART 9 - SPECIFIC FUNCTIONS, POWERS AND RESTRICTIONS
DIVISION 1 - GENERAL PROVISIONS 187A. Creation of easements

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.

To Gas & Fuel Corporation

These are not presently available as Section 30AA Gas & Fuel Act has been REPEALED

"GASCOR" & "G.T.C."

By operation of Sec. 61 of the Gas Industry Act 1994 Gascor and G.T.C. can obtain Easements in gross. These easements can be for any purpose recognised by this office.

*Under the purpose heading in any easement table the nature of the easement to be created on the registration of the plan should be specified. Under the origin heading reference should be made to "this plan" and in addition it would be desirable if the provisions of Sec.61 of the Act were referred to.

*In relation to the setting out in an easement table of any easement already created the purpose should contain reference to the nature of the existing easement and the "land benefited / in favour of " column should remain as now appearing in the register.

See Further Discussion

Rights etc. transferred to GTC

Typical example

Easement Reference	Purpose	Width	Origin	Land Benefited / In favour of
E-1	Gas Transmission	---	This Plan - (Gas Industry Act 1994)	G.T.C.
E-2	Distribution &/or Transmission of Gas	---	This Plan - (Gas Industry Act 1994)	Gascor
E-3	<i>Purpose as set out in Instrument</i> e.g.. Supply of Gas or Gas Pipeline	---	C/E C234324	Gas and Fuel Corp. <i>(older easements will refer to a dominant tenement which should be quoted - e.g.. Vol. 5647 Fol. 345 (Gas and Fuel Corp.))</i>

6.14 Gas Industry Act 1994

PART 6 - STATUTORY EASEMENTS CERTAIN RIGHTS DEEMED TO BE EASEMENTS

61. Certain rights deemed to be easements

(1) If a gas company--

- (a) becomes entitled under this Act to an easement in, over or affecting any land which, immediately before the gas company became so entitled, was an easement to which GFCV or another gas company was entitled; or
- (b) acquires an easement, right or privilege in, over or affecting land for the purpose of its functions under this Act that is not, and is not in any instrument, expressed to be, appurtenant to any land--
the easement, right or privilege is deemed to be an easement vested in the gas company and appurtenant to all land vested in the gas company from time to time.

(1A) The easement existing immediately before the commencement of section 37(2) of the Gas and Fuel Corporation (Repeal) Act 1995 over the land described in certificate of title volume 8758 folio 144 and appurtenant to the land described in certificate of title volume 7512 folio 120 is, by force of this section, an easement vested in GTC and appurtenant to all land vested in GTC from time to time.

- (2) Despite sub-section (1) or (1A) , if an easement referred to in that sub-section
 - (a) is, in the instrument which created it, expressed to be or to be granted as an easement appurtenant to any land; or
 - (b) is shown in the Register kept under the Transfer of Land Act 1958 as an easement appurtenant to any land--
then if that land, or any part of it, is disposed of by the gas company or transferred to another person in accordance with Part 7, the easement becomes and remains appurtenant to the land to which it is expressed to be, or is shown as, appurtenant and not to any other land vested in the gas company unless--
 - (c) if that gas company is entitled to the easement, that gas company certifies; or
 - (d) if the other gas company is entitled to the easement, both gas companies certify--
on a conveyance or transfer by the first-mentioned gas company of the land or any

part of it, that the easement is not required for the accommodation of the land or any part of it.

(3) If a gas company proposes to acquire an easement, right or privilege in, over or affecting land that would, if acquired by the gas company, be deemed to be an easement by virtue of sub-section (1), the gas company may give notice in the appropriate form of its intention to acquire the easement, right or privilege to the Registrar of Titles.

(4) Section 57 of the Transfer of Land Act 1958, with such modifications as are necessary, applies in relation to a notice of intention to acquire given under sub-section (3) as if--

- (a) a reference in that section to an acquiring authority included the gas company;
- (b) a reference in that section to a proposal to acquire any land included a reference to a proposal to acquire the right or privilege to which the notice given under sub-section (3) relates;
- (c) a reference in that section to a notice of intention to acquire included a notice of intention to acquire given under sub-section (3); and
- (d) sub-section (1) of that section did not form part of that section.

GAS INDUSTRY ACT 1994

PART 7 - TRANSFER OF PROPERTY

DIVISION 2 - TRANSFER BY OPERATION OF ACT

TRANSFER OF CERTAIN GFCV PROPERTY TO GTC

65. Transfer of certain GFCV property to GTC

(1) On the relevant date--

- (a) the property and rights of GFCV described in Schedule 2 (but not including property or rights referred to in Schedule 3 or 4) vest in GTC, subject to the encumbrances (if any) to which they were subject immediately before so vesting; and
- (b) the liabilities of GFCV described in Schedule 2 (but not including liabilities referred to in Schedule 3 or 4) become liabilities of GTC.

(2) The rights to which GFCV was entitled in respect of the liabilities to which sub-section (1)(b) applies immediately before they ceased to be liabilities of GFCV vest in GTC.

6.15 Easements appropriated in favour of authorities under the Water Act 1989

These authorities are given the power to obtain an easement in gross by Sec.130(3) of the Water Act 1989. This section does not limit the type of easement which may be obtained.

Sec.136 of the Water Act 1989 specifies five particular purposes but is intended to define them, not to confine the authorities to only these purposes.

1. easements may be appropriated on a plan of subdivision or consolidation in favour of authorities under the water act 1989 for any purpose consistent with the definition of an easement.

2. it is preferable to include reference to the Water Act 1989 in the origin column of the easement table to simplify future investigations. (suggestion - not direction- will not be enforced by the L.T.O.)
3. if authorities desire to acquire easements as defined by Sec.136, the easement table should reflect this.

Practical application for the subdivision section LTO :-

1. if a plan sets apart easements to an authority for a purpose which is NOT one of the five defined, reference to the Water Act 1989 may be shown in the "origin" column of the easement table in addition to the note "THIS PLAN"- - omission of this reference does not make the plan unregistrable.
2. if a plan set apart easements in favour of an authority which is one of the purposes defined in Sec.136, this precise reference should be shown in order to ensure that the rights created are precisely in accordance with the definition. The plan is still legally registrable whether the reference is shown or not

Typical Easement Table Example

Easement Reference	Purpose	Width	Origin	Land Benefited / In favour of
E-1	Drainage	5m	This Plan - (Section 136 Water Act 1989)	Coliban Region Water Authority
E-2	Sewerage	3m	This Plan - (Section 136 Water Act 1989)	Coliban Region Water Authority

Water Act 1989

PART 7 - GENERAL POWERS

130. Acquisition of land

(3) If an Authority acquires any right in the nature of an easement or purporting to be an easement, that right must be taken to be an easement even though there is no land vested in the Authority which is benefited or capable of being benefited by that right.

Water Act 1989

PART 7 - GENERAL POWERS

136. Subdivisional easements and reserves

(1) If a proposal for subdivision of land is referred to an Authority under the Planning and Environment Act 1987, the Authority may require the creation of easements or reserves, or both, for the use of the Authority for any of the following purposes:

- (a) Pipelines or ancillary purposes;
- (b) Channels;
- (c) Carriageways;
- (d) Waterway management;
- (e) Drainage.

(2) The creation of an easement or a reserve for a purpose specified in sub-section (1) gives the Authority for whose use it is created the rights prescribed in relation to an easement or reserve created for that purpose.

6.16 Water Industry Act (1994)

The licensees under this Act are given the power to obtain an easement in gross by Section 55A which was inserted on 29/6/95 (Inserted by Water Industry (Amendment) Act 1995). This section does not limit the type of easement which may be obtained.

Sec. 61 of that Act specifies five particular purposes but is intended to define them, not to confine the licensees to only these purposes.

L.T.O. POLICY

1. easements may be appropriated on a plan of subdivision or consolidation in favour of licensees under the Water Industry Act 1994 for any purpose consistent with the definition of an easement.
2. it is preferable to include reference to the Water Industry Act 1994 in the origin column of the easement table to simplify future investigations (suggestion - not a direction & will not be enforced by the L.T.O or the Licensees themselves).
3. if authorities desire to acquire easements as defined by Sec.61, the easement table should reflect this, otherwise there may be doubt as to the precise meaning of the easement created.

See typical easement notations

Practical application for the subdivision section LTO :-

1. if a plan sets apart easements to a licensee for a purpose which is not one of the five defined and reference to the Water Industry Act 1994 is included in the "origin" column of the easement table this is acceptable. - omission of this reference does not make the plan unregistrable.
2. if a plan sets apart easements in favour of an authority which IS one of the purposes defined in Sec.61, this precise reference should be shown. The examiner is authorised to add this reference without the consent of the surveyor or any other interested parties.

Section 55A Water Industry Act 1994:

55A. Easements

If a licensee acquires any right in the nature of an easement or purporting to be an easement (whether as a result of the disposal to the licensee of an interest in the land acquired by the Minister by compulsory process or otherwise and whether before or after the commencement of section 7 of the Water Industry (Amendment) Act 1995), that right must be taken to be an easement even though there is no land vested in the licensee which is benefited or capable of being benefited by that right.

Inserted by :
Water Industry (Amendment) Act 1995

Water Industry Act 1994

PART 3 - FUNCTIONS, OBLIGATIONS AND POWERS OF LICENSEES

Division 1 – General

61. Subdivisional easements and reserves

(1) If a proposal for subdivision of land is referred to a licensee under the Planning and Environment Act 1987, the licensee may (as appropriate to the kind of licence held by the licensee) require the creation of easements or reserves, or both, for the use of the licensee for any of the following purposes:

- (a) pipelines or ancillary purposes;
- (b) channels;
- (c) carriageways;
- (d) waterway management;
- (e) drainage.

(2) The creation of an easement or a reserve for a purpose specified in sub-section (1) gives the licensee for whose use it is created the rights prescribed in relation to an easement or reserve created for that purpose.

6.17 Melbourne Water Corporation

Whilst it has been apparent that the functions of the former MMBW had been transferred to licensed retail companies, this is not a true impression.

In fact, those companies are not directly involved in drainage works in relation to Plans of Subdivision and such responsibilities fall, for the most part, to council and for main drains (above a particular size) to Melbourne Water Corporation.

In general though, subdivisional easements for drainage purposes should be in favour of council or lots on the plan.

Melbourne Water Corporation empowered to obtain easements "in gross" by the provisions of Sec.232A of the Melbourne and Metropolitan Board of Works Act 1958.

There is no stated limitation to the kind of easement which may be obtained by them, nor is there any particular definition of easement types which may require specification.

MELBOURNE AND METROPOLITAN BOARD OF WORKS ACT 1958

232A. Statutory easements

Where any right in the nature of an easement or purporting to be an easement or an irrevocable licence is or has been acquired by the Board (whether before or after the commencement of the Melbourne and Metropolitan Board of Works (Amendment) Act 1974) the right shall be deemed for all purposes to be and to have been an easement, notwithstanding that there is no land vested in the Board which is in fact benefited or capable of being benefited by the right.

32. POWER TO MAKE BY-LAWS AND REGULATIONS AS TO MEETINGS, ETC.

32. Power to make by-laws and regulations as to meetings, etc.

Subject to the provisions of this Act the Board may make such by-laws and regulations as it thinks fit for or with respect to--

- (a) (repealed)
- (b) (repealed)
- (c) the duties, discipline, regulation and conditions of employment of all officers and employees of the Board;
- (d) the leave of absence, whether with or without pay, and long service leave for officers and employees of the Board; and
- (e) (repealed)

3. DEFINITIONS

(1) In this Act, unless inconsistent with the context or subject-matter--

"Board" or "Melbourne and Metropolitan Board of Works" means the Melbourne Water Corporation constituted under the Melbourne Water Corporation Act 1992.

"Chairperson" means Chairperson of the Board of Directors of the Board.

"council" means any municipal council.

"Director-General" means the Director- General of Water Resources.

"General Manager" means Managing Director of the Board of Directors of the Board.

"Member", in relation to the Board, means member of the Board of Directors of the Board.

"metropolis" means the area within 20.9215 kilometres of the site of the building known as the post office (corner of Bourke and Elizabeth streets) Melbourne and the area described in Schedule 2 to this Act, and also includes any land (whether within 20.9215 kilometres of the site of the said post office or not and whether within any municipal district or not) which by this Act or by Order of the Governor in Council under this Act is declared to be included in the metropolis, but excludes any area which by Order of the Governor in Council under this Act is excised from the metropolis.

"proper officer", in relation to a provision of this Act or of by-laws made under this Act, means officer of the Board appointed by the Board either generally or in any particular case for the purposes of that provision and whose duty or part of whose duties is to deal with or to act in regard to any acts matters or things in connexion with which the term "proper officer" is used.

"rateable property" means lands and tenements which are rateable land within the meaning of the Local Government Act 1989.

"retail licensee" means a water licensee or a water and sewerage licensee;

"sewered property" includes a property that is declared by a retail licensee in accordance with the Water Industry Act 1994 to be a serviced property for the purposes of the supply of sewerage services;

"town clerk" includes the secretary of a shire.

"water licensee" means the holder of a water licence issued under Division 1 of Part 2 of the Water Industry Act 1994;

"water and sewerage licensee" means the holder of a water and sewerage licence issued under Division 1 of Part 2 of the Water Industry Act 1994.

6.17 Rights Saved To Authorities under Local Government Act

These are rights saved by authorities when roads were closed and transferred. They are shown in a number of ways on certificates of title.

- (a) Right of Title power authority or interest possessed by (MMBW) pursuant to provisions of section 528(2)(e) / 526(3B) Local Government Act ; or
- (b) Right title power authority or interest of the (MMBW)saved by Section 528(2)(e) / 526(3B) of the Local Government Act ; or
- (c) The easements (if any) affecting the above described land by virtue of Section 528(2)(e) / 526 (3B) of the Local Government Act 1958.

Note : The above examples refer to the 1958 Act, similar entries will be found for the 1989 Act (Section207(c)), although these will usually affect a plan-based folio and the encumbrance will be clearly shown on a "title plan".

Typical Easement table entries

Easement Reference	Purpose	Width	Origin	Land Benefited / In favour of
---	As provided for in Section 528(2)(e) Local Government Act or As provided for in Section 526(3B) Local Government Act	---	Section 528(2)(e) Local Government Act or Section 526(3B) Local Government Act	Relevant Authority or Council

6.18 Telstra

Discussion with Corporate Solicitors for TELSTRA regarding identifying any powers of the corporation to acquire easements in gross revealed that in their opinion is that there is no such power.

Under these circumstances, any plans which show new easements in gross to that corporation should be stopped.

The lodging party will be required to establish how such easements can exist or to have the plan amended by the surveyor and re-certified by council.

Easement Workshop Practice Notes

- (a) Right of Title power authority or interest possessed by (MMBW) pursuant to provisions of section 528(2)(e) / 526(3B) Local Government Act ; or
- (b) Right title power authority or interest of the (MMBW)saved by Section 528(2)(e) / 526(3B) of the Local Government Act ; or
- (c) The easements (if any) affecting the above described land by virtue of Section 528(2)(e) / 526 (3B) of the Local Government Act 1958.

Note : The above examples refer to the 1958 Act, similar entries will be found for the 1989 Act (Section207(c)), although these will usually affect a plan-based folio and the encumbrance will be clearly shown on a "title plan".

Typical Easement table entries

Easement Reference	Purpose	Width	Origin	Land Benefited / In favour of
---	As provided for in Section 528(2)(e) Local Government Act or As provided for in Section 526(3B) Local Government Act	---	Section 528(2)(e) Local Government Act or Section 526(3B) Local Government Act	Relevant Authority or Council

6.18 Telstra

Discussion with Corporate Solicitors for TELSTRA regarding identifying any powers of the corporation to acquire easements in gross revealed that in their opinion is that there is no such power.

Under these circumstances, any plans which show new easements in gross to that corporation should be stopped.

The lodging party will be required to establish how such easements can exist or to have the plan amended by the surveyor and re-certified by council.

7.0 Easement Tables - Exemptions, conditions or reservations in Crown Grants

7.1 Reservation relating to drainage

And also reserving and excepting unto us our heirs and successors and to the said Board whenever We they or it are or is of the opinion that it is necessary for the effective draining, of any other land the right to grant upon such terms and conditions and subject to such qualifications as We they or it think or thinks fit authority to the owner or occupier of such other land to cut and use a drain through the land hereby granted such drain to run parallel with and within ten links where practicable of a boundary line of the land hereby granted and in respect to which drain the owner or owners for the time being of the land hereby granted shall not be entitled to receive or be paid any compensation by reason of the cutting or using of the same by the owner or occupier of such other land.

Appears on title as: THE RESERVATION relating to drainage set out in Crown Grant V.... F....

Will appear on Easement Table as:-

Easement Reference	Purpose	Width	Origin	Land Benefited / In favour of
Whole	The reservation relating to drainage set out in Crown Grant Vol.....Fol.....	---	Crown Grant Vol..... Fol.....	See Crown Grant Vol.....Fol.....

7.2 Reservation relating to pipeline

further Reserving unto the owner or owners for the time being of the adjoining allotment ... of Section... and his and their servants agents and workmen full and free right and liberty at all times hereafter to enter into and upon the land coloured red in the said map and to dig cut and excavate the same and to lay and place water pipes thereon and therein and also to repair alter cut off or remove any pipes now laid or placed or hereafter to be laid or placed thereon or therein and to replace them with others and also to go pass and repass for all purposes aforesaid with all necessary tools and appliances through over and along the said land coloured red as aforesaid causing as little damage as possible to the land hereby granted and making reasonable compensation for all damage done or occasioned thereby

Appears on title as: As to the land shown / marked THE RESERVATION relating to PIPELINE set out in Crown Grant V....F...

Will appear on Easement Table as:-

Easement Reference	Purpose	Width	Origin	Land Benefited / In favour of
E-1	The reservation relating to pipeline set out in Crown Grant Vol.....Fol.....	15.24m	Crown Grant Vol.....Fol... ...	Allotment Section (obtained from Crown Grant)

7.3 Channel condition

condition that Us Our heirs and successors and Our lessees and grantees the owner or owners or occupier or occupiers for the time being of Allotment ... Parish of and Our and their servants agents and workmen shall have the right at all times hereafter to enter in and upon and clear of obstructions that part of the said land approximately shown marked ... in the said map (hereinafter called "the channel area" and to dig cut excavate and construct a channel through in and upon the channel are in such a manner and of such width depth nature as Us Our heirs and successors and Our said lessees and grantees may deem ; advisable and to use the channel for drainage and to repair or alter it and to deposit or place and allow to remain on or along the channel area or any part thereof all timber earth soil stone gravel or other substance matter or thing which may be removed or excavated in clearing the channel area or in the construction repair or alteration of the channel and also to go pass and repass for all the purposes aforesaid either with or without horses or other animals carts or other carriages through over and along the channel area.

Appears on title as: As to the land shown / marked
THE CHANNEL CONDITION relating to drainage
set out in Crown Grant V....F...

Will appear on Easement Table as:-

Easement Reference	Purpose	Width	Origin	Land Benefited / In favour of
E-1	Channel condition relating to drainage set out in Crown Grant Vol.....Fol.....	15.24m	Crown Grant Vol.....Fol.....	Allotment..... Parish of (obtained from Crown Grant)

7.4 Condition re water supply - special case

condition that the grantee will join with the owners of the adjoining or adjacent allotments in keeping open the bore and in maintaining in proper working order and condition the wind-mill water-tanks pipelines and appliances which have been put down or erected for the purpose of providing a water supply for those allotments and the land hereby granted and will contribute in equal proportion of the labour costs and expenses owing but so that any extension of the water supply at any time shall be at the expense of the owner requiring the extension.

Appears on title as: THE CONDITION relating to the Supply of Water
set out in Crown Grant Vol Fol

Special Note

Current opinion and direction in the LTO is that only "Conditions in the nature of an easement" should be shown in an easement table on a new plan of Subdivision.

This condition does not relate to any particular land and does not appear to accommodate any particular dominant tenement etc.

7.5 Reservation in favour of State Rivers and Water Supply Commission

The right of the State Rivers and Water Supply Commission to maintain and use for water supply purposes the water pipes now laid in or under that portion of the land marked on the said map and of entering in and upon such portion of the said land for the purposes of inspecting cleansing repairing maintaining altering removing and enlarging the said water pipes AND the Grantee for himself his executors administrators assigns or transferees doth hereby covenant and agree with us our heirs and successors that he and they will not suffer or permit any trees to be grown on that portion of the said land marked ... on the said map nor do or suffer anything to be done upon such portion whereby the purity or flow of the water coming to or carried by or through the said pipes may be polluted or diminished or the pipes prejudicially interfered with.

Appears on title as: As to the land marked
THE RESERVATION in favour of the State Rivers
and Water Supply Commission set out in
Crown Grant Vol Fol

Will appear on Easement Table as:-

Easement Reference	Purpose	Width	Origin	Land Benefited / In favour of
E-1	Reservation in Crown Grant Vol.....Fol.....for water supply and other purposes	15.24m	Crown Grant Vol.....Fol.....	S.R. & W.S.C.

7.6 Condition in favour of 1st Mildura Irrigation Trust

The condition that the First Mildura Irrigation Trust its servants agents and workmen shall have the right at all times hereafter to enter upon and to clear of obstructions the said land coloured red and to dig cut excavate and construct a water channel and waterworks for the purposes of water supply through in and upon the said land coloured in such manner and of such width depth and nature as the said Trust may deem advisable and to use the said channel and waterworks for all purposes of water supply and to repair and alter the said channel and waterworks and to deposit or place and allow to remain on or along the said land coloured red or any part thereof all timber earth soil stone gravel or other substance matter or thing which may be removed or excavated in clearing the said land coloured red or in the making or construction of the said water channel and waterworks or in repairing or altering it and to go pass and repass for all the purposes aforesaid either with or without vehicles plant and equipment through over and along the said land coloured red.

Appears on title as: As to the land marked THE CONDITION in favour of the First Mildura
Irrigation Trust
set out in Crown Grant VolFol

Will appear on Easement Table as:-

Easement Reference	Purpose	Width	Origin	Land Benefited / In favour of
E-1	Condition in Crown Grant Vol..... Fol for water supply and other purposes	10.06m	Crown Grant Vol.....Fol.....	First Mildura Irrigation Trust

7.7 Reservation in favour of 1st Mildura Irrigation Trust

The right of the First Mildura Irrigation Trust and its successors and its or their officers agents servants contractors and workmen at all times hereafter to cut make and construct and from time to time use maintain and repair a pipeline for the purpose of conveying water in upon over under and along that portion of the land hereby granted shown by blue colour on the said map.

Appears on title as: As to the land marked
THE RESERVATION in favour of the First Mildura Irrigation Trust
set out in Crown Grant Vol.....Fol

Will appear on Easement Table as:-

Easement Reference	Purpose	Width	Origin	Land Benefited / In favour of
E-1	Reservation in Crown Grant Vol Fol for pipeline and other purposes	10.06m	Crown Grant Vol.....Fol.....	First Mildura Irrigation Trust

7.8 Reservation in favour of local municipal or "other" authority

The right of the Municipal or other Authority or body for the time being concerned with the control & management of public or municipal watercourses or drains in the vicinity of the land hereby granted and its officers agents servants contractors and workmen to cut make and construct and from time to time cleanse and enlarge a drain for purpose of conveying surface and other waters from any adjoining or adjacent land upon over under and along that portion of the land hereby granted shown and marked on the said map.

Appears on title as: As to the land marked
THE RESERVATION in favour of the Municipal or other Authority or body
set out in Crown Grant Vol.....Fol

Will appear on Easement Table as:-

Easement Reference	Purpose	Width	Origin	Land Benefited / In favour of
E-1	Reservation in Crown Grant Vol.....Fol.....for drainage and other purposes	20m	Crown Grant Vol.....Fol.....	The Municipal or other Authority or body as set out in Crown Grant Vol.....Fol

7.9 Reservation relating to drainage

subject as to the land coloured red to the right of the registered owner or owners for the time being of the adjoining allotment ... to use the said land for drainage purposes.

Appears on title as: As to the land marked
THE RESERVATION relating to DRAINAGE
set out in Crown Grant Vol.....Fol

Will appear on Easement Table as:-

Easement Reference	Purpose	Width	Origin	Land Benefited / In favour of
E-1	Reservation relating to drainage set out in Crown Grant Vol.....Fol.....	20m	Crown Grant Vol.....Fol.....	Allotment..... (obtained from Grant)

7.10 Exemptions from Crown Grants

the easement over the land coloured red on the said map which is exempted from this Grant and remains vested in the State Rivers and Water Supply Commission pursuant to Section 286 of the Water Act 1928.

Appears on title as: As to the land marked
THE EASEMENT which is vested in the State Rivers and Water Supply Commission
set out in Crown Grant Vol.....Fol

Will appear on Easement Table as:-

Easement Reference	Purpose	Width	Origin	Land Benefited / In favour of
E-1	The easement exempted from Crown Grant Vol.....Fol.....	10.06m	Section 286 of the Water Act 1928 See Crown Grant Vol.....Fol.....	S.R. & W.S.C.

7.11 Easement vested in the State Electricity Commission

On Grant

the easement over the land marked ... on the said map which is vested in State Electricity Commission of Victoria pursuant to Section 105 of the State Electricity Commission Act

Appears on title as: As to the land marked
THE EASEMENT which is vested in the State Electricity Commission of Victoria
set out in Crown Grant Vol.....Fol

Will appear on Easement Table as:-

Easement Reference	Purpose	Width	Origin	Land Benefited / In favour of
E-1	The easement vested in S.E.C.V. in Crown Grant Vol.....Fol.....	25.15m	Section 105 of the S.E.C. Act See Crown Grant Vol.....Fol.....	S.E.C.V..

8.0 What Sections of what Acts can be used to remove easements and rights in the nature of easements.

The removal of an easement is often prompted by a desire to build, subdivide or otherwise develop or sell a property. Which method of removal should be adopted is likely to depend on possible integration of easement removal processes with other actions to be taken by the owner. These notes are designed to canvas what choices are available and what choices are not. It is not intended in this Section to go into details of how to apply these options ;

Note: Consent of Council is required to the removal of any easements of way or carriageway (Section 45(3) Transfer of Land Act)

See Appendix for the form of consent required

CONTENTS : -

- 8.1 Merging of easements
- 8.2 Easements created by Instruments
- 8.3 Easements reserved in Transfers
- 8.4 Conditions in Crown Grants
- 8.5 Easements in gross created in Instrument

- 8.6 Easements created in Transfer of Land Act Plans
- 8.7 Easements created in Subdivision Act Plans
- 8.7 Easements in Gross created in Plans (i.e. where authorised by Statute)

Removal of other Rights

- 8.9 Removal of any Right/Title/Power etc (Sec. 526 & 528 LGA 1958 or Sec. 207C LGA 1989.)
- 8.10 Removal of Notifications of Intention to Acquire Easement [Sections 57, 106(e) TLA]
- 8.11 Easements Created in Government Gazettes
- 8.12 Easements recognised in Court Orders
- 8.13 Easements created under General Law
- 8.14 Rights in the nature of an easement notified under Section 88 (2)
- 8.15 Easement notified under Section 88 (2)
- 8.16 Removing "Reserve" Status
- 8.17 Removing "Road" Status
- 8.18 The removal / creation of easements when land is affected by a Body Corporate.

8.1 Merging of easements

One of the principles of easements created under the Transfer of Land Act is that you cannot have an easement to yourself. i.e. you do not need rights over your own lands.

If the dominant and servient tenements of an easement come into the same ownership the easement rights are considered to merge. These rights can be removed from the titles by any of the following means :-

1. An application under Section 73 of the TLA by extinguishment.
2. An application under Section 23 Subdivision Act.
3. The subdivision or consolidation of the properties. A note referring to the merger of easements is to be shown on the Plan.

4. An application under Section 32 of the Transfer of Land Act for the issue of new titles, such titles to not show the merged easements.
5. Instruments of surrender under Section 45.

8.2 Easements created by Instruments

6. Can be removed by another Instrument. It should be noted that these easements can be removed as to part of the lands encumbered and also removed as to part of the dominant land.

Consent of Council is required to the removal of any easements of way or carriageway (see Section 45 (3) of the Transfer of Land Act) and Council should also indicate whether the subject easement is, or ever has been a public highway.

7. Can be removed under Section 23 Subdivision Act without the consent of the dominant land owners. Council should also indicate whether the subject easement is, or ever has been a public highway if removing way or carriageway. (This requires a planning scheme amendment or planning permit)
8. Can be removed by consent under Section 6(1)(k) or Section 23, (This requires a planning scheme amendment or planning permit.), on registration of a Plan of Subdivision or Consolidation. Council should also indicate whether the subject easement is, or ever has been a public highway if removing way or carriageway.

8.3 Easements reserved in Transfers

(These easements come into existence when a parcel of land is transferred and an easement over the land transferred is reserved in favour of other lands owned by the transferor.) The easement is usually referred to as the easement in transfer No

1. Can be removed by another Instrument. It should be noted that these easements can be removed as to part of the lands encumbered and also removed as to part of the dominant land.
2. Can be removed under Section 23 Subdivision Act. . (This requires a planning scheme amendment or planning permit.) Council should also indicate whether the subject easement is, or ever has been a public highway if removing way or carriageway.
3. Can be removed by consent under Section 6(1)(k) or Section 23. (This requires a planning scheme amendment or planning permit.) on registration of a Plan of Subdivision or Consolidation. Council should also indicate whether the subject easement is, or ever has been a public highway if removing way or carriageway.

8.4 Conditions in Crown Grants

1. Can be removed in an application under Section 106(c) [and sometimes Section 106(e)] of the Transfer of Land Act supported by consent of the Governor in Council and a certificate under the Land Act. (Section 362A)
2. Can be removed under Section 23 (4) Subdivision Act where it is in the nature of an easement. (This requires a planning scheme amendment or planning permit.)

8.5 Easements in gross created in Instruments:

Such easements must have been authorised by Statute

Where the easement was originally set aside for an authority that has now been privatised, re-named or some other authority has taken the rights over it will be necessary for the new body to provide to the Land Titles Office evidence of their ability to deal. In most cases this is likely to be a notice of asset delegation.

1. Can be removed by an instrument of surrender from the Statutory Authority.
2. Can be removed in an application under Section 106(c) Transfer of Land Act supported by consent of the appropriate authority.
3. Can be removed under Section 23 Subdivision Act. . (This requires a planning scheme amendment or planning permit.)
4. Can be removed on registration of a Plan of Subdivision or Consolidation by consent under Section 6(1)(k) (a note re removal shown on the Plan at Certification) or under Section 23. (This later requires a planning scheme amendment or planning permit).

8.6 Easements created in Transfer of Land Act Plans

1. Can be removed in an application under Section 73 Transfer of Land Act supported by the appropriate evidence.
2. Can be removed under Section 23 Subdivision Act. . (This requires a planning scheme amendment or planning permit.)
3. Can be removed by consent under Section 6(1)(k) or Section 23. (This requires a planning scheme amendment or planning permit.) on registration of a Plan of Subdivision or Consolidation

8.7 Easements created in Subdivision Act Plans

1. Can be removed in an application under Section 73 Transfer of Land Act supported by the appropriate evidence.
2. Can be removed under Section 23 Subdivision Act. . (This requires a planning scheme amendment or planning permit.)
3. Can be removed on registration of a Plan of Subdivision or Consolidation by consent under Section 6(1)(k) (a note re removal shown on the Plan at Certification) or under Section 23. (This later requires a planning scheme amendment or planning permit).

8.8 Easements in Gross created in Plans (i.e. where authorised by Statute)

Note : Where the easement was originally set aside for an authority that has now been privatised, re-named or some other authority has taken the rights over it will be necessary for the new body to provide to the Land Titles Office evidence of their ability to deal. In most cases this is likely to be a notice of asset delegation.

1. Can be removed in an application under Section 106(c) Transfer of Land Act supported by consent of the appropriate authority.
2. Can be removed under Section 23 Subdivision Act. (This requires a planning scheme amendment or planning permit.)
3. Can be removed by consent under Section 6(1)(k) or Section 23, (This requires a planning scheme amendment or planning permit.), on registration of a Plan of Subdivision or Consolidation
4. Can be removed under Section 73 Transfer of Land Act supported by deed of abandonment by the appropriate authority or evidence of abandonment.

Removal of any Right Title Power Authority or Interest

Rights under Section 526 & 528 Local Government Act 1958 or Section 207C Local Government Act 1989.

Can be ONLY removed in an application under Section 106(c) Transfer of Land Act supported by a deed of abandonment from the appropriate authority.

- *Consent to remove is NOT sufficient.*
- *Section 23 and Section 6(1)(k) Subdivision Act **cannot** be used.*

8.10 Removal of Notifications of Intention to Acquire Easement

[Sections 57, 106(e) Transfer of Land Act]

Note: - Section 6(1)(k) or Section 23 doesn't apply as there is not yet an easement

1. Can be removed in an application under Section 106(c) Transfer of Land Act supported by consent of the appropriate authority.
2. An application under Section 32 Transfer of Land Act supported by evidence that the Authority does not intend to continue.
3. Can be superseded by a creation of easement.

8.11 Easements Created in Government Gazettes

Can be removed in an application under Section 73 Transfer of Land Act supported by consent of the appropriate authority.

8.12 Easements recognised in Court Orders

1. Can be removed in an application under Section 73 Transfer of Land Act supported by appropriate evidence.
2. Most easements can be removed under Section 103(1) supported by an order of the court.

8.13 Easements created under General Law

8.13.1 All land still general law

Nothing can be lodged in the Land Titles Office unless lands converted first.

8.13.2 Servient Land still under General law - dominant is Transfer of Land Act

An application under Section 73 should be lodged to remove the easement from the dominant title where a deed of surrender has been executed. It is preferable that this deed is registered with the Registrar Generals Office.

8.13.3 Servient Transfer of Land Act - dominant general law

1. An application under Section 73 may be lodged with appropriate evidence. On registration, a copy of the order is sent to the Registrar General so that the deeds to any dominant lands will be updated.
2. An application under Section 23 may be lodged with appropriate certified plan and a planning scheme amendment or planning permit. On registration, notice will be given to the Registrar General so that the deeds to any dominant lands will be updated.

8.14 Rights in the nature of an easement notified under Section 88 (2)

1. Can be removed in an application under Section 106(c) Transfer of Land Act supported by consent of the appropriate authority.
2. A Notification of a right in the nature of an easement may be superseded by a creation of easement

8.15 Easement notified under Section 88 (2)

1. Can be removed in an application under Section 106(c) Transfer of Land Act supported by consent of the appropriate authority.
2. Can be removed under Section 23 Subdivision Act. (This requires a planning scheme amendment or planning permit.)
3. Can be removed by consent under Section 6(1)(k) or Section 23, (This requires a planning scheme amendment or planning permit.), on registration of a Plan of Subdivision or Consolidation
4. A Notification of an easement can be superseded by a creation of easement. A Notification of a right in the nature of an easement may not be able to be removed in this fashion.

8.16 Removing Reserve Status

It should be noted that removing reserve status does NOT remove any easements over the land.

1. If there is a valid resolution of Council dated prior to the Subdivision Act then a transfer under Section 569BA of the Local Government Act can still be lodged. (25/06/1991)
2. A plan under Section 24A Subdivision Act.
3. A Plan of Subdivision or Consolidation by an Acquiring Authority under Section 35(8) ; Subdivision Act.

8.17 Removing Road Status

The provisions of Sections 6 and 23 of the Subdivision Act do not apply to roads.

1. Total Re-subdivision of Transfer of Land Act Subdivision. If the whole of the Land in a Subdivision is included in a later plan (i.e. the first Plan is cancelled) then any roads on that plan will disappear. This situation does not apply to reserves. If road(s) are public highways then this option is not available.
2. Section 73A
30 years proof of denial of rights by registered proprietor.
If road(s) are public highways then this option is not available.
3. Section 60 [and Section 62(1)] Adverse Possession for 30 years to be free from easements and road status. If road(s) are public highways then this option is not available.
4. Government Road closed under the Land Act - new Crown Grant to issue. No action in Land Titles Office.
5. Local Government Road Closure
The 1989 LGA removes ALL easements over the Road. The 1958 LGA only removes easements of way.
6. Road Closure under Section 16 Housing Act
Only removes easements of way.
7. Road Closure under Section 16 Urban Land Authority Act
Only removes easements of way.
8. Road Closure under Section 41 Transport Act
This process is tied to the LGA. Therefore after 1989 removes ALL easements over the Road. Prior gazettals only remove easements of way.
9. Planning Scheme Amendment
Only removes easements of way unless specified.

8.18 The removal / creation of easements when land is affected by a Body Corporate.

Some Common Scenario's involving Units and Common Property on Building Subdivisions

The scenarios below only deal with the creation of easements but the same processes are available to removals of easements. It should also be recognised that the manner in which the easement was created will influence how it is to be removed.

Example 1.

Creation of Easement over a lot affected by a Body Corporate in favour of another lot affected by the same Body Corporate. (i.e. dominant and servient land in same plan)

- (1) Section 23 Subdivision Act is available
- (2) Section 45 TLA is available (creation of easement to be executed by all lot owners)
- (3) Section 32 SA is available

Example 2

Creation of Easement over common property in favour of a lot affected by the same Body Corporate. (i.e. dominant and servient land in same plan)

- (1) Section 23 SA is available.
- (2) Section 45 TLA is available (creation of easement to be executed by all lot owners)
- (3) Section 32 SA is available

Example 3

Easement in gross over a lot affected by a Body Corporate (i.e. lots only affected)

- (1) Section 23 SA is available
- (2) Section 45 TLA is available (creation of easement to be executed by all lot owners)
- (3) Section 32 SA is available

Example 4

Easement in gross over common property affected by a Body Corporate

- (1) Section 23 SA is available
- (2) Section 45 TLA is available (creation of easement to be executed by all lot owners)
- (3) Section 32 SA is available

Example 5

The creation of Easement appurtenant to a lot affected by a Body Corporate - servient land not affected by Body Corporate. (i.e. a strata unit having the benefit of an easement over land outside the strata plan)

- (1) Section 23 SA is available.
Applicant to be the Registered Proprietor of Servient Land.
- (2) Section 45 TLA is available
- (3) Section 32 SA is not applicable
- (4) Section 72 TLA is available

Example 6

The creation of easements appurtenant to common property - servient land not affected by Body Corporate. (i.e. an easement in favour of all members of a body corporate over lands outside the strata plan)

- (1) Section 23 SA is available

- (2) Section 45 TLA is available
- (3) Section 32 SA is not applicable
- (4) Section 72 TLA is available

Example 7

Easements over common property (servient land) - the dominant land is either outside the plan or not affected by Body Corporate.

- (1) Section 23 SA is available
- (2) Section 45 TLA is available
- (3) Section 32 SA is available

9.0 Miscellaneous Easement Information

The notes below are excerpts only from more detailed practice notes. If further information is required a request giving details of the actual case should be made in writing to the Duty Legal Officer, Land Registry.

9.1 Conditional easements and easements coupled with obligations to be performed by grantor or grantee.

9.1.1 Easements subject to condition

An easement subject to a condition precedent (ie. a condition which must be fulfilled before the right to the easement arises) or a condition subsequent (ie. 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

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.

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

- (ii) subject to the condition that" or "so long as" the grantee keeps certain gates open; 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.

9.1.2 Easement coupled with an obligation not being a restrictive covenant

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) will" or "and the grantee (for himself 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;
- maintains or contribute to, or pay for maintenance of certain works or pipes; or
- maintain specified spouting etc.

No reference to the agreement or covenant should appear in the endorsement made on either servient or dominant title. The endorsement on the dominant title 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.

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 the user -

- (a) on the grantor in respect of the servient land; or
- (b) on the grantee in respect of the dominant land.

9.1.3 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 covenanted 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, the servient title should be endorsed (as separate endorsements) in respect of both the easement and the covenant. Where the covenant burdens the dominant land the dominant tenement will be endorsed under the memorandum of encumbrances, and in addition to the endorsement relating to the appurtenance of the easement, "the covenant contained in Instrument No....".

9.2 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 endorsement is to be made on the title to the servient land - either as part of the endorsement where all the land is in one title or as a separate endorsement where the servient land is in a separate title. No endorsement of appurtenance is made on the dominant title. Where a carriageway easement is created the usual requirement as to consent of Council applies.

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 title 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.

Where an easement has been granted in a mortgage and there is a transfer by the mortgagee or a foreclosure, the easement is regarded as becoming permanently appurtenant to the dominant land.

If a caveat affects the site of the easement, or affects a mortgage, charge or lease there over, 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.

In the Registration Branch endorsements as set out in the guide book for that Branch.

Any discharge of a mortgage containing an easement and any transfer by mortgagee or foreclosure where the mortgage contains an easement must be referred to the Survey Branch for appropriate action. In the case of a discharge, care must be taken to note the effect of the discharge on any endorsement of the easement encumbrance. In the case of a transfer by mortgagee or foreclosure a new title will normally be issued for the land transferred or foreclosed showing the appurtenance. Where practicable, a new title will also issue for the balance land, or for the relevant parcels showing the easement as an encumbrance. Where no new title issues for the servient land, any separate endorsement in respect of the encumbrance will remain. Where this had been embodied in the mortgage endorsement, an additional endorsement must be made. Wherever possible a new title should be prepared for the servient land. If it is not issued on the transfer or foreclosure, the draughtsman should note in pencil that, on the first appropriate dealing a new title should be issued.

Any mortgage or lease which purports to reserve an easement in favour of land of the mortgagor or lessor should be referred to the Chief Examiner of Titles for advice.

9.4 Instruments creating or reserving an easement

As stated, an easement may be created by a separate instrument (a "creation of easement") it may be granted or reserved in a transfer or it may be granted in a mortgage or lease.

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 Act (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.

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 can not 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. A suitable form of consent of a mortgagee or annuitant is as follows :-

"I (name of mortgagee or annuitant) the mortgagee (or 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, printing out that the consent has not been supplied and asking either for production of the consent or advice that no consent is being produced. "A suitable form of requisition is as follows :-

The Mortgagee in Mortgage No.....(or the Annuitant in Charge No.....) should consent to this Creation of Easement and the duplicate of such Mortgage (or Charge) should be lodged. If the consent cannot be obtained, please advise

Mutual creations of easement must be by separate instruments.

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.

As to easement coupled with obligations or embodying restrictive covenants. A creation of easement - as distinct from a transfer and creation or reservation - may not contain a restrictive covenant by the grantee burdening land of the grantee. If this is desired, a separate deed should be executed and entered pursuant to section 88(1).

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.

Transfers containing a creation and or reservation of easement.

Where a transfer creates an easement over land comprised in a different title from that for the land being transferred, production is required of the servient title for endorsement. Where a reservation is in favour of land in a different title from that for the land transferred, production is required of the dominant title so that the appurtenance can be noted thereon.

9.5 Easements in gross

One of the essentials of an easement is that there must be both a dominant tenement and a servient tenement. 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" - ie. 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, although perhaps not strictly justified, a practice has existed for many years of registering what are in effect easements in gross to municipalities and other statutory authorities. There can be no expression of appurtenance and the like.

9.6 Removal of easements from the Register Book

Sections 62, 73, 73A and 106(c) of the Transfer of Land Act may be applied where those easements have been abandoned or extinguished. In addition easements may be abandoned, extinguished or surrendered and removed as follows: -

9.6.1 By Statute

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

9.6.2 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 sections 269 71 72 and 73 of the Housing Act, the provisions of the Local Government Act and the Country Roads Act relating to the closing of streets and roads and to the sale of surplus land, and section 11 of the Sale of Land Act.

9.6.3 By Merger

Where all dominant and servient tenements are in the one proprietorship the easement may be removed from the Register Book following an application for the issue of a single consolidated title 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.

9.6.4 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 approval of the resubdivision and omitted from the titles to issue in accordance with the later plan. This follows a principle similar to that of merger.

9.6.5 By Instrument of Surrender

Just as an easement may be created and registered by the registration of an instrument of creation of easement 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 subdivisional easement will not be registered. In such a case applications should be made pursuant to section 73 with the consent of the municipal council supported by the necessary abandonments under seal. In certain other cases, the procedure of surrender is not available.

Lodging fee is assessed as for a transfer. The duplicate titles to both dominant and servient tenement must be produced except in the case of a surrender of an easement in gross where the servient title only can be produced. Any duplicate instrument must be produced. Both parties must execute the instrument and their signatures must be attested.

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

The surrender must be given to the registered proprietor of certain specified land - eg. 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 the one instrument.

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.

Any mortgage, charge or lease registered on the dominant tenement subsequently to the easement must be set out as an encumbrance and the consent of the mortgagee, annuitant or lessee obtained. The relevant duplicates instrument must be produced for endorsement. A mortgage, charge or lease registered before the easement need not be set out as an encumbrance and no consent is required.

Where an easement is coupled with a restrictive covenant and the covenant is noted on the titles 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 endorsement of the covenant as an encumbrance must remain. Past practice, where the covenant burdened the servient title was to endorse the servient title "Creation of Easement and grant of restrictive covenant". In such cases on surrender of the easement an additional endorsement of the surrender must be made and the original endorsement left untouched. If, before abandonment and removal of the covenant a new title issues, the easement will be omitted as an encumbrance, but the covenant will remain.

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 title or any mortgage etc. thereon, no action is taken. Usual procedure is followed if a writ affects the dominant title. No action is taken if the writ affects the servient title.

9.6.6 Abandonment under Seal

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. 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 appurtenance is known to title, an application for a new title omitting the relevant appurtenance and supported by an abandonment under seal by the dominant owner should be made. Where the easement is "floating" the abandonment will be sketched on the servient title. If the dominant title is subject to any mortgage, charge or lease, registered subsequent to the easement being abandoned the relevant consent is required. Production of the duplicate dominant title is required; but production of the duplicate servient title is not required. The same procedures are followed as in the case of a surrender of easement except that no endorsement is placed on the servient title. However the servient proprietor may at any time apply for a new title free from the

former encumbrance pursuant to section 106(c). This procedure is not allowed where a proprietor wishes to abandon easements implied in favour of a lot on an approved plan of subdivision.

Where the dominant land is under the Transfer of Land Act and the servient land is under the general law, the appurtenance being known to title I even though at the time of abandonment it is "floating" (ie. not shown on the face of the current title) - if it is sought to have the appurtenance removed from the Register Book, application should be made for the issue of a new certificate of title omitting the appurtenance. 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 Titles Office.

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 title, 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 duplicate title to the servient land and the deed title to the dominant land should be lodged.

10.0 Section 23 Subdivision Act

10.1 EASEMENTS AND RESTRICTIVE COVENANTS

Easements and restrictions (restrictive covenants) may be created, varied or removed as authorised by a permit from council regulating or authorising the action or by a direction in a planning scheme amendment. The permits and planning scheme amendment must be specific to the actions in the plans. A certified plan must be lodged for registration and on registration of the plan (not lodgement) the easement or restriction is created, varied or removed as specified in the plan.

Applications under Section 23 are lodged as a dealing (i.e. not with a Plan of Subdivision Number) and must be supported by a copy of the planning permit or planning scheme amendment. In the case of a planning scheme amendment in addition to the gazettal, details of the easement removal etc must be provided and signed by a responsible officer from Council.

The applicant must be the proprietor(s) of the servient land(s). The duplicate title to the land to be burdened is required for registration of the application. Consent of any other parties is not required. Duplicate Titles to the dominant land are not required but can be lodged.

10.2 Purpose of Section 23 Plans

The purpose of Section 23 was to facilitate the development of Land. Historically, the creating and removal of easements required many documents and steps in the process. As with Plans of Subdivision and Consolidation, these plans can be "Not in Common Ownership" and may deal with easement issues in multiple parcels and have multiple purposes. It can remove a series of easements and create a different series of easements over different parcels. These multiple purposes can all be based on the same permits or planning scheme amendment and can be effected in one or more certified plans.

An application under Section 23 cannot use as its grounds the consent or agreement of the parties. The Subdivision Act does not prevent a person using the existing methods of creating or removing an easement or restrictive covenant. (eg. by using sections 45, 72, 73, 88 and 106 of the Transfer of Land Act 1958 as appropriate).

Section 23 plans may have works requirements and they will be registered in their own right but as part of a dealing. All of the purposes defined in any one plan must come into effect on the one registration. That is, if a plan is to create easements over 2 parcels and the proprietor of one parcel cannot or will not agree then the plan cannot be registered.

The plans must be certified by Council and in the case of a plan relating to easements the plan must clearly specify (by diagram or text) the easements being dealt with but the plan does not have to show any other easements. If other easements are shown they must be correct.

Plans relating to creation, variation or removal of restrictions may be text only and not contain a diagram.

It is possible under the Subdivision Act to remove a condition in the nature of an easement that is contained in a Crown Grant. Some easements in favour of the Commonwealth may not be able to be removed. Refer to the Legal Branch if in doubt.

Not all types of easements may be removed pursuant to Section 23. eg easements created using the provisions of Acts of Parliament such as Section 528(2)(e) LGA etc.

Easements in Gross can be created in some circumstances but the type should be checked with Legal Examiners before registering. Acceptable Instrumentalities include: - MMBW, Municipalities, SEC, and Gas & Fuel Corp. [Note: the easement created cannot refer to any act ie 103(b) SEC Act as they are created by virtue of the Planning & Environment Act not the Agencies Act]. Easements created in Deeds of agreement can be removed or varied in all situations.

10.3 Variations of Easement

The definition of "variation" of easement is quite limited. ie Easements appropriated on Plans can only be removed or varied in the terms of the original creation. ie if it is a Section 98 easement then both the purpose and the dominancy must remain in accordance with Section 98. To get around this limitation the Subdivision (Amendments) Act 1993 altered this section to allow a plan of variation to allow for the simultaneous removal of easement and creation of a new easement. The origin of an easement remains the same AFTER registration of the variation (the initial Plan or instrument).

10.4 Removal, or Variation as part of a Subdivision or Consolidation.

Easements can be varied or removed as part of the registration of a plan of subdivision or consolidation using the provisions of Section 23 of the Subdivision Act. The plan must also comply with section 12 (1A) with regard to easement information.

For this to occur: -

1. A notation must be shown on the plan in the appropriate panel giving details of the easement to be removed or varied and also the GROUNDS for such action.
2. **L.T.O. policy discourages the practice of showing on a Plan of Subdivision by hatching or otherwise the part or whole of an easement to be removed as this results, upon registration, in a plan showing outdated information.**

The Plan must be supported by the permit or Planning scheme amendment. This permit must specify the direction or authorisation of the easement within the permit. It is preferable that the dominancy to the easement be specified as well.

In Addition to the provisions of Section 23 it is also possible to remove an easement as part of the registration of a Plan of Subdivision or Consolidation with the agreement of all parties using the provisions of Section 6(1)(k).

10.5 Lodging Requirements

At plan acceptance the following documents must be lodged.

1. Plan Certified by Council.
2. A copy of Planning Permit or Planning Scheme Amendment.
3. Application.
4. Duplicate Title(s) to servient lands.
5. Fees will vary with the number of land parcels being dealt with.
6. Compliance Statement

11.0 Acknowledgements

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