

# THE FUTURE OF PRESCRIPTIVE EASEMENTS IN AUSTRALIA AND ENGLAND

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*[The law of prescription — prescriptive easements in particular — has played a vital role in English and Australian land law. Prescriptive easements were easily accommodated into a land law system based on possessory, relative and defeasible titles. However, the advent of title by registration in both countries has raised the issue of whether prescriptive easements have any future value or utility. This article examines and compares the present state of prescriptive easements in Australia and England. It then considers arguments for changes to the law of prescriptive easements, and suggests what action would need to be taken if they were abolished. This article contends that abolition would not be a simple process, as prescription has not only had a role to play in protecting retrospective interests, but also in mediating claims for access and use between landowners.]*

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## I INTRODUCTION

In *R v Oxfordshire County Council; Ex parte Sunningwell Parish Council* ('*Oxfordshire County Council*') Lord Hoffmann stated on behalf of the House of Lords that: 'Any legal system must have rules of prescription which prevent disturbance of long-established de facto enjoyment.'<sup>1</sup> Unfortunately, Lord Hoffmann did not elucidate why the House of Lords considered that any legal system requires prescription. It was readily assumed to be the case. His Lordship's statement was made by the highest court of a country which has had 'a strong policy bias in favour of the legitimacy of a user which has been exercised de facto over extended periods of time.'<sup>2</sup> For centuries,<sup>3</sup> prescription has been an important basis for claiming easements and *profits à prendre*<sup>4</sup> in England.<sup>5</sup> Prescription is based on the rationale that over time a person may acquire an interest in land on the basis of de facto long continuous user. Lord Hoffmann's statement signalled that the House of Lords favoured the survival of prescription and, in particular, prescriptive easements in the ongoing reform of the land registration system. Broadly speaking, under the new *Land Registration Act 2002* (UK) c 9 prescriptive easements continue to constitute 'overriding interests' — namely, interests that will be enforceable against a proprietor of land although they do not appear on the land register.<sup>6</sup> Nevertheless, their status has been significantly modified.

<sup>1</sup> [2000] AC 335, 349. In *Delohery v Permanent Trustee Co of New South Wales* (1904) 1 CLR 283, 310 ('*Delohery*'), Griffith CJ pointed out that prescription 'is, in various forms, part of the law of most civilised societies'.

<sup>2</sup> Kevin Gray and Susan Francis Gray, *Elements of Land Law* (4<sup>th</sup> ed, 2005) 693.

<sup>3</sup> For a helpful historical introduction to prescription: see W S Holdsworth, *A History of English Law* (1937) vol 7, 343–52.

<sup>4</sup> This article will not consider *profits à prendre* in Australia or England. An owner of a *profit à prendre* is entitled to sever the subject matter (such as minerals, soil or natural produce) from the land: Gray and Gray, *Elements of Land Law*, above n 2, 616.

<sup>5</sup> In this article a reference to England includes Wales, as the same land law applies in both countries: see generally Gray and Gray, *Elements of Land Law*, above n 2, 4–5. Scotland has a different land law: see generally Kenneth G C Reid, *The Law of Property in Scotland* (1996) 159–223.

<sup>6</sup> Law Commission and H M Land Registry, *Land Registration for the Twenty-First Century: A Conveyancing Revolution*, Law Com No 271 (2001) 169; Jonathan Gaunt and Paul Morgan, *Gale on Easements* (17<sup>th</sup> ed, 2002) 244.

There have been concerns that the law of prescription is in an unsatisfactory state,<sup>7</sup> and even recommendations for the abolition of prescription altogether.<sup>8</sup> Therefore, English law is at an important crossroad. The issue is whether to retain, modify or even abolish prescription generally, and prescriptive easements in particular.

In the 19<sup>th</sup> century, the Australian law of prescription was modelled on English common law. However, there were a number of factors which led to significant differences between the two countries. These included English legislation,<sup>9</sup> which was not uniformly applied in the Australian colonies, the adoption of the Torrens system in Australia, and incremental changes to the law governing prescriptive easements in the states following Federation. However, a catalogue of differences between Australian and English law does not fully describe Australian developments in this area. There have been two important, overarching trends. First, the Australian states have failed to adopt a uniform approach to prescription and prescriptive easements. This is not an unusual problem with respect to Australian land law.<sup>10</sup> Secondly, Australian legislatures and courts have not readily assumed that prescription is an indispensable component of their land law. Recently, in *Williams v State Transit Authority of New South Wales* ('*Williams*') the Supreme Court of New South Wales held, with equanimity, that prescriptive easements have only a minimal role to play in the Torrens system in that state.<sup>11</sup>

The purpose of this article is to review the law of prescription in England and Australia, to describe the impact of title-by-registration systems in both jurisdictions, and to evaluate alternative avenues of law reform. This article is divided into five parts. Part II outlines the traditional English law of prescription, which operates independently of title by registration. It also examines the law governing prescriptive easements in Australia with special emphasis on how the fundamental principles have been changed by legislation (other than the Torrens system). Part III considers the impact of the Torrens system in Australia and the new *Land Registration Act 2002* (UK) c 9 in England on prescriptive easements. Part IV evaluates the arguments for retaining, modifying or abolishing prescriptive easements. In Part V some concluding remarks are made regarding important issues raised in the preceding Parts.

<sup>7</sup> Law Commission and H M Land Registry, *Land Registration for the Twenty-First Century: A Consultative Document*, Law Com No 254 (1998) 240.

<sup>8</sup> See, eg, Law Reform Committee, *Acquisition of Easements and Profits by Prescription*, Report No 14 (1966) 11.

<sup>9</sup> *Prescription Act 1832*, 2 & 3 Wm 4, c 71 ('*Prescription Act 1832*').

<sup>10</sup> See, eg, Marcia Neave, 'Towards a Uniform Torrens System: Principles and Pragmatism' (1993) 1 *Australian Property Law Journal* 114; Susan MacCallum, 'Uniformity of Torrens Legislation' (1993) 4 *Australian Property Law Journal* 135.

<sup>11</sup> (2004) 60 NSWLR 286.

## II THE LAW OF PRESCRIPTION OPERATING INDEPENDENTLY OF LAND TITLE REGISTRATION SYSTEMS

### A *The Common Law and Prescription*

The doctrine of tenure — under which a person did not own the land, but held it as a tenant of the Crown or a feudal superior — has shaped English land law. Therefore, in a highly technical sense, English law never employed the concept of ownership to land.<sup>12</sup> Instead, for much of the history of English land law, possession and physical control of land dominated legal reasoning about title and rights to land.<sup>13</sup> All titles to land were based on possession or ‘seisin’ — so that a person seised prevailed against all others who could not show a better right to seisin.<sup>14</sup> Title was relative. In an action to recover land, it was not necessary for the demandant (or plaintiff) to prove absolute title. The issue was whether the demandant could establish an earlier and better seisin.<sup>15</sup> Title was also defeasible because even if seisin was wrongfully taken by a disseisor, they had good title against all except the disseisee and their successors in title.<sup>16</sup> Lord Hoffmann’s statement in *Oxfordshire County Council* reflected this history. Similarly, several years earlier his Lordship had observed in another case that ‘[e]xclusive possession de jure or de facto, now or in the future, is the bedrock of English land law.’<sup>17</sup>

In contrast, Roman law operated very differently.<sup>18</sup> Under the Roman doctrine of dominium, the *dominus* was entitled to an absolute right in, and unlimited control over, land. However, in reality, ‘complete’ dominium did not exist. Rather, an investigation of Roman texts demonstrates that ownership was ‘hedged about by restrictions which [took] into account the normal everyday requirements of community living.’<sup>19</sup> One necessary accommodation of community living was the law of prescription. Claimants contended that they acquired a prescriptive right based on taking an interest by use or ‘*usucapio*’.<sup>20</sup>

English law adopted this principle of prescription and was influenced by the Roman law.<sup>21</sup> However, there was one major difference. At English common law,<sup>22</sup> a person did not simply acquire an interest in land because of their use of

<sup>12</sup> E H Burn, *Cheshire and Burn’s Modern Law of Real Property* (16<sup>th</sup> ed, 2000) 25.

<sup>13</sup> *Ibid* 25–6; Gray and Gray, *Elements of Land Law*, above n 2, 197.

<sup>14</sup> Burn, above n 12, 25–6.

<sup>15</sup> *Ibid* 26.

<sup>16</sup> *Ibid* 26–7. See also Gray and Gray, *Elements of Land Law*, above n 2, 214.

<sup>17</sup> *Hunter v Canary Wharf Ltd* [1997] AC 655, 703.

<sup>18</sup> Alan Rodger, *Owners and Neighbours in Roman Law* (1972) 1–2.

<sup>19</sup> *Ibid* 3.

<sup>20</sup> *Oxfordshire County Council* [2000] 1 AC 335, 349 (Lord Hoffmann). With respect to the Roman law origins: see Barry Nicholas, *An Introduction to Roman Law* (1962) 120–30; R W Lee, *The Elements of Roman Law with a Translation of the Institutes of Justinian* (4<sup>th</sup> ed, 1956) 119–24.

<sup>21</sup> Joshua Getzler points out that Bracton ‘was to raid the doctrine for many of his leading concepts of prescription’: Joshua Getzler, ‘Roman and English Prescription for Incorporeal Property’ in Joshua Getzler (ed), *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (2003) 281, 304.

<sup>22</sup> For the early history of the common law relating to prescription: see Holdsworth, above n 3, 343–52; Getzler, above n 21, 283–303.

that land. Rather, after a lapse of time, the law either barred an owner from asserting an interest contrary to the claimant or it was presumed that the owner or their predecessor in title had granted the claimant a lawful title.<sup>23</sup> The former was the basis for the law of adverse possession, while the latter established the legal rationale for the law of prescription.<sup>24</sup>

Prescription was not founded on exclusive possession, but on *de facto* enjoyment which fell well short of complete control. Nevertheless, prescription was based on a physical nexus with the land for a significant period of time. Prescription has been defined as ‘a title acquired by use or enjoyment had during the time and in the manner fixed by law.’<sup>25</sup> A party who successfully claimed an easement by prescription not only acquired an interest which was carved out of a larger estate, but also an incorporeal right or hereditament.<sup>26</sup> It was a legal proprietary interest in the servient land which would endure in favour of successive owners of the dominant land and would bind successors in title of the servient land.<sup>27</sup> It presented special problems because ‘[d]e facto use and possession of land implies (at least evidentially) a *de jure* ownership (and conversely *de facto* non-possession and non-use of the land implies *de jure* non-ownership).’<sup>28</sup> Nevertheless, the adoption of prescription indicated two concessions. One was the practical recognition that sometimes people need to use other people’s land and that it will be necessary to set down rules determining how rights are legitimately acquired. Another was that the law had to be inherently flexible. In some cases, over a long period of time, rights ought to be acquired outside the formal process.

Historically, prescription was accommodated into the overall scheme of English land law when the legal frame of reference was possession,<sup>29</sup> title was relative and defeasible,<sup>30</sup> and the means of transacting was decentralised.<sup>31</sup> However, as will be demonstrated below, the frame of reference has markedly altered and the process of transacting is now highly regulated. The issue is whether the law of prescription, created in a different era, will survive the legal climate change.

The law of prescription developed in England first. Therefore, it is appropriate to outline the English law and then consider the Australian law which was initially derived from England.

<sup>23</sup> *Oxfordshire County Council* [2000] 1 AC 335, 349 (Lord Hoffmann); Getzler, above n 21, 303–4.

<sup>24</sup> Gray and Gray, *Elements of Land Law*, above n 2, 693; Gaunt and Morgan, above n 6, 170.

<sup>25</sup> Gaunt and Morgan, above n 6, 169.

<sup>26</sup> Gray and Gray, *Elements of Land Law*, above n 2, 613; Burn, above n 12, 569.

<sup>27</sup> Gray and Gray, *Elements of Land Law*, above n 2, 613; Gaunt and Morgan, above n 6, 3; Burn, above n 12, 569.

<sup>28</sup> Getzler, above n 21, 283.

<sup>29</sup> Gray and Gray, *Elements of Land Law*, above n 2, 197–200.

<sup>30</sup> *Ibid* 354–6.

<sup>31</sup> See, eg, Alain Pottage, ‘Evidencing Ownership’ in Susan Bright and John Dewar (eds), *Land Law: Themes and Perspectives* (1998) 129, 136–42.

## B England

## 1 General Principles

Prescription in English law was never based solely on a long period of use, enjoyment or benefit of property, or ‘user’.<sup>32</sup> The essence of the English law was, and is, the acquiescence of the servient owner.<sup>33</sup> E H Burn has observed:

Why should long user confer a right protected by the courts? The answer is, that if the servient owner has allowed somebody to exercise an easement over his land for a considerable period and if he has omitted to prevent such exercise when he might very well have done so, it is only reasonable to conclude that the privilege has been rightfully enjoyed, for otherwise some attempt to interfere with it would long ago have been made by any owner who possessed even a modicum of common sense.<sup>34</sup>

Claimants bear the burden of proving that they acquired a prescriptive easement.<sup>35</sup> They must demonstrate that the user was of right, namely that the servient owner acquiesced in the use for the period prescribed by law.<sup>36</sup> Therefore, the claimant must establish that the servient owner had:

- knowledge of the user<sup>37</sup> or the means of acquiring the evidence of use;<sup>38</sup>
- the power to prevent or sue the claimant who exercises the act of prescription; and
- failed to take steps to prevent the act of prescription.<sup>39</sup>

Over the prescriptive period, the user must be *nec vi* (without force),<sup>40</sup> *nec clam* (without secrecy)<sup>41</sup> and *nec precario* (without permission).<sup>42</sup> The user must be

<sup>32</sup> Gray and Gray, *Elements of Land Law*, above n 2, 694.

<sup>33</sup> *Dalton v Angus & Co* (1881) 6 App Cas 740, 773 (Fry J), 803 (Lord Penzance) (*‘Dalton v Angus’*); *Sturges v Bridgman* (1879) 11 Ch D 853, 863 (Thesiger LJ); *Union Lighterage Co v London Graving Dock Co* [1902] 2 Ch 557, 568–9 (Vaughan Williams LJ), 574 (Stirling LJ); *Bakewell Management Ltd v Brandwood* [2004] 2 AC 519, 538 (Lord Scott).

<sup>34</sup> Burn, above n 12, 595; cf Colin Sara, ‘Prescription — What Is It for?’ [2004] *Conveyancer and Property Lawyer* 13, 16.

<sup>35</sup> *Thomas W Ward Ltd v Alexander Bruce (Grays) Ltd* [1959] 2 Lloyd’s Rep 472, 477 (Harman LJ).

<sup>36</sup> *Bright v Walker* (1834) 1 Cr M & R 211, 219; 149 ER 1057, 1060 (Parke B); Gray and Gray, *Elements of Land Law*, above n 2, 694; Gaunt and Morgan, above n 6, 207–8.

<sup>37</sup> Gaunt and Morgan, above n 6, 218–20. However, courts have drawn a distinction between acquiescence and neighbourly tolerance and forbearance of, for example, trespass as they have not considered that all users have matured into entitlements in the form of an easement: see, eg, *Mills v Silver* [1991] Ch 271, 284 (Dillon LJ); *Bridle v Ruby* [1989] QB 169, 176–8 (Parker LJ). So too, a temporary permission does not constitute a right of use: *Bridle v Ruby* [1989] QB 169, 178 (Parker LJ). Although, Colin Sara has also noted that the rule is one of expedience rather than true acquiescence: Colin Sara, *Boundaries and Easements* (3<sup>rd</sup> ed, 2002) 303.

<sup>38</sup> *Daniel v North* (1809) 11 East 372, 374–5; 103 ER 1047, 1048 (Ellenborough CJ); *Lloyds Bank Ltd v Dalton* [1942] 2 Ch 571, 574 (Bennett J).

<sup>39</sup> See *Dalton v Angus* (1881) 6 App Cas 740, 773–4 (Fry J); Gray and Gray, *Elements of Land Law*, above n 2, 701.

<sup>40</sup> Gray and Gray, *Elements of Land Law*, above n 2, 699; Gaunt and Morgan, above n 6, 210–12.

<sup>41</sup> Gray and Gray, *Elements of Land Law*, above n 2, 700; Gaunt and Morgan, above n 6, 212–14.

<sup>42</sup> Gray and Gray, *Elements of Land Law*, above n 2, 701; Gaunt and Morgan, above n 6, 214–17.

for and against a fee simple owner.<sup>43</sup> The enjoyment of the land based on a mistaken understanding of rights will not defeat the claim.<sup>44</sup> Moreover, some kinds of criminal wrong (as distinct from a civil wrong such as the tort of trespass) may be the subject of a legitimate claim when it was within the servient owner's power to eliminate the criminality or unlawfulness of the user.<sup>45</sup>

## 2 *Grounds for Acquiring an Easement by Prescription*

Initially, prescription in English law did not rely on any fictional presumption of lost grant. A W B Simpson points out that Bracton did not refer to such a presumption. Rather, the early theory of the law was closely analogous to local custom, in which the competing needs of landholders were accommodated on a practical but informal basis.<sup>46</sup> However later, the mere long-term user and physical connection to the land were not sufficient grounds for prescriptive acquisition.<sup>47</sup> As prescription was not exclusive control of the land supported by the 'mystery of seisin',<sup>48</sup> an additional legal artifice was necessary — a presumption or fiction that the actions of the dominant owner had been legally sanctioned. The emphasis on a legal (albeit artificial) sanction was a convenient tool to justify conduct which would otherwise have constituted trespass. It was apposite in eras when legal relations were regulated by informal and customary norms, conveyancing practices were slow and expensive, and documentation was prolix.

There are three grounds for acquiring a prescriptive easement. First, if a claimant could prove that the user commenced before 1189 (the year of the accession of Richard I), then it was presumed that the right of user had a lawful origin and that the freehold owner had made a grant before that date.<sup>49</sup> As proof of user before 1189 became increasingly difficult to demonstrate, courts held that evidence of enjoyment based on living memory raised a presumption that the right of user existed in accordance with the period of legal memory — namely that the user must have commenced before 1189.<sup>50</sup> However, this presumption

<sup>43</sup> Gray and Gray, *Elements of Land Law*, above n 2, 694; Gaunt and Morgan, above n 6, 205–6.

<sup>44</sup> *Earl de la Warr v Miles* (1881) 17 Ch D 535, 576 (Bacon V-C); *Bridle v Ruby* [1989] QB 169, 177 (Parker LJ); *Bosomworth v Faber* (1995) 69 P & CR 288, 293 (Dillon LJ); Gray and Gray, *Elements of Land Law*, above n 2, 699; Gaunt and Morgan, above n 6, 217–18.

<sup>45</sup> *Bakewell Management Ltd v Brandwood* [2004] 2 AC 519, 542 (Lord Walker); Gray and Gray, *Elements of Land Law*, above n 2, 697.

<sup>46</sup> A W B Simpson, *A History of the Land Law* (2<sup>nd</sup> ed, 1986) 110. Getzler points out that Bracton's theories of prescription were contradictory because Bracton relied on various and different rationales for prescription: see Getzler, above n 21, 304.

<sup>47</sup> Simpson, above n 46. Simpson points out that a doctrine of presumed grant is not found in the reports until the 17<sup>th</sup> century.

<sup>48</sup> This is the title of F W Maitland's famous essay concerning the difficulties faced by modern lawyers when attempting to differentiate ownership, possession and seisin: F W Maitland, 'The Mystery of Seisin' (1886) 2 *Law Quarterly Review* 481.

<sup>49</sup> *Oxfordshire County Council* [2000] 1 AC 335, 349 (Lord Hoffmann); Gray and Gray, *Elements of Land Law*, above n 2, 704; Gaunt and Morgan, above n 6, 170–1; Burn, above n 12, 598. Common law prescription was complex and confused: see Sir Frederick Pollock and Frederic William Maitland, *The History of English Law: Before the Time of Edward I* (2<sup>nd</sup> ed, 1968) vol 2, 140–2; J W Salmond, 'The History of the Law of Prescription' in J W Salmond, *Essays in Jurisprudence and Legal History* (1891) 73.

<sup>50</sup> *Oxfordshire County Council* [2000] 1 AC 335, 350 (Lord Hoffmann); Gray and Gray, *Elements of Land Law*, above n 2, 704–5; Gaunt and Morgan, above n 6, 171–2.

was defeated when the origin of the user was proven to be a date more recent than 1189,<sup>51</sup> when the right could not have been enjoyed before 1189,<sup>52</sup> or when there had been unity of possession of the dominant and servient tenements after 1189.<sup>53</sup> It is almost impossible to satisfy the criteria for the common law presumption,<sup>54</sup> so modern claimants are likely to pursue one or both of the other grounds.<sup>55</sup>

Secondly, in order to circumvent the difficulties inherent in common law prescription, the courts invented the doctrine of ‘lost modern grant’.<sup>56</sup> Courts relied on various patterns of reasoning to justify the protection of long user.<sup>57</sup> These patterns were finally rationalised and the doctrine was upheld by the House of Lords in *Dalton v Angus*.<sup>58</sup> Under the doctrine, a claimant may seek a prescriptive easement based on 20 years’ uninterrupted use when there is no evidence that the putative grantor was legally incompetent.<sup>59</sup> It is assumed that some time after 1189, a servient owner granted the incorporeal right of easement by deed to the dominant owner, but the deed was lost or misplaced.<sup>60</sup> The doctrine applies only in those cases where the state of affairs between the parties cannot otherwise be explained.<sup>61</sup> However, the doctrine is not displaced by evidence that in fact there had been no grant in the 20-year period.<sup>62</sup>

The doctrine was (and is) a judicial fiction.<sup>63</sup> Long user in itself was not a sufficiently convincing rationale for prescriptive acquisition. As such, judges conveniently hid behind a fiction. The doctrine of lost modern grant portrays the acquiescent servient owner as the active grantor of a deed which was lost. In fact, the active player is the dominant owner, who acquires an interest through a factual connection to the land and its de facto enjoyment. The other artifice is that only retrospective conduct matters. It is true that claimants must prove that the retrospective conduct of both parties was consistent with the fiction. Yet, it is clear that in most cases dominant owners would not pursue a claim for theoretical or historical reasons only. The physical connection to the land and the subject

<sup>51</sup> Gray and Gray, *Elements of Land Law*, above n 2, 705; Gaunt and Morgan, above n 6, 171–2.

<sup>52</sup> *Duke of Norfolk v Arbuthnot* (1880) 5 CPD 390.

<sup>53</sup> *Dynevor v Richardson* [1995] Ch 173, 182 (Knox J). For comments on what was meant by ‘unity of possession’: see also Gaunt and Morgan, above n 6, 172.

<sup>54</sup> *Simmons v Dobson* [1991] 4 All ER 25, 27 (Fox LJ); *Mills v Silver* [1991] Ch 271, 278 (Dillon LJ); Gray and Gray, *Elements of Land Law*, above n 2, 705.

<sup>55</sup> *Mills v Silver* [1991] Ch 271, 278 (Dillon LJ).

<sup>56</sup> Early signs of the doctrine appeared in the 17<sup>th</sup> century, although the principal features were determined during the last quarter of the 18<sup>th</sup> century: see Holdsworth, above n 3, 348.

<sup>57</sup> Stuart Anderson, ‘Easement and Prescription — Changing Perspectives in Classification’ (1975) 38 *Modern Law Review* 641.

<sup>58</sup> (1881) 6 App Cas 740. For a helpful discussion of the case: see Gaunt and Morgan, above n 6, 174–7.

<sup>59</sup> The kinds of legal incompetence capable of rebutting the presumption of a lost modern grant include mental incapacity and ownership of an interest which is less than the fee simple: see Gray and Gray, *Elements of Land Law*, above n 2, 706 fn 8.

<sup>60</sup> For a discussion of the various stages in which juries were instructed to assume the existence of a lost deed of modern grant: see *Bryant v Foot* (1867) LR 2 QB 161, 181 (Cockburn CJ); *Dalton v Angus* (1881) 6 App Cas 780, 812–13 (Lord Blackburn); Getzler, above n 21, 318.

<sup>61</sup> *A-G (UK) v Simpson* [1901] 2 Ch 671, 698 (Farwell J).

<sup>62</sup> *Tehidy Minerals Ltd v Norman* [1971] 2 QB 528, 552 (Buckley LJ).

<sup>63</sup> It is not a rebuttable presumption: see Sara, *Boundaries and Easements*, above n 37, 294.



matter of the easement will have a present, prospective and practical utility for the dominant owner.<sup>64</sup> This dichotomy between retrospective conduct and prospective benefit has caused significant problems for modern law reform bodies.<sup>65</sup> Nevertheless, the doctrine has filled what would otherwise constitute a significant legal vacuum when:

- express conferment was complex and expensive;
- the servient owner refused to grant a formal easement over the land, even though the dominant owner had used the land in a certain way for a considerable period of time; or
- a dominant owner could not rely on alternative bases for a claim for an easement such as necessity,<sup>66</sup> common intention<sup>67</sup> or the principle in *Wheeldon v Burrows*.<sup>68</sup>

Thirdly, a claimant may rely on the *Prescription Act 1832* — although it has been criticised for its poor and confusing drafting.<sup>69</sup> Moreover, the real purpose of the legislation has been questioned because it goes beyond its stated aim of preventing the defeat of claims based on immemorial user.<sup>70</sup> Indeed, the Act does not supersede the other two grounds, but supplements them.<sup>71</sup> It is unnecessary to discuss the provisions of the Act in detail<sup>72</sup> — what is important is that s 2 covers prescriptive easements generally, and s 3 sets out different rules for a claim for an easement of light. Under s 2, a claim cannot be defeated when there is evidence of 20 years' uninterrupted use, although the use commenced after 1189. When there is evidence of 40 years' uninterrupted use, such easements are 'deemed absolute and indefeasible' unless the right was enjoyed pursuant to consent or writing. Under s 3, the enjoyment of uninterrupted access to light for a period of 20 years is 'deemed absolute and indefeasible' unless the access was

<sup>64</sup> See Sara, 'Prescription', above n 34, 17.

<sup>65</sup> See below Part IV(C)(1).

<sup>66</sup> For a discussion of implied easements: see Gray and Gray, *Elements of Land Law*, above n 2, 671–4; Gaunt and Morgan, above n 6, 149–54.

<sup>67</sup> Gray and Gray, *Elements of Land Law*, above n 2, 678.

<sup>68</sup> (1879) 12 Ch D 31. Under this principle an implied easement arises when a grantor owns two parcels of land and uses one of those parcels (the quasi-servient parcel) to access or better enjoy the other (the quasi-dominant parcel) and then sells or transfers the dominant parcel to a grantee. The quasi-easement ripens into an easement in favour of the dominant parcel. The rationale for this implied easement is the principle of non-derogation from grant. A grantor cannot grant land and also deny an easement which is reasonably necessary for the enjoyment of that land. For a helpful discussion of these principles: see Gray and Gray, *Elements of Land Law*, above n 2, 678–84; Gaunt and Morgan, above n 6, 123–49.

<sup>69</sup> See Law Reform Committee, above n 8, 14; *Smith v Brudenell-Bruce* [2002] 2 P & CR 51, 63 (Pumfrey J); Gray and Gray, *Elements of Land Law*, above n 2, 706.

<sup>70</sup> Gaunt and Morgan, above n 6, 179.

<sup>71</sup> There have been a number of cases where parties have relied on the doctrine of lost modern grant in preference to the *Prescription Act 1832*: see Gaunt and Morgan, above n 6, 177–8.

<sup>72</sup> For an authoritative and comprehensive discussion of the *Prescription Act 1832*: see Gaunt and Morgan, above n 6, 178–98; Sara, *Boundaries and Easements*, above n 37, 287–93; Burn, above n 12, 601–8.

enjoyed pursuant to consent or writing.<sup>73</sup> Under s 4, prescription periods set down in ss 2–3 must be the period ‘next before some suit or action.’<sup>74</sup>

### 3 *Kinds of Prescriptive Easement*

The subject matter of prescriptive easements may vary widely. In this regard, it is helpful to differentiate between positive and negative easements. Positive easements are rights which allow the dominant owner to make use of or install certain facilities on the servient owner’s land.<sup>75</sup> The main condition is that the subject matter of the alleged prescriptive easement be capable of grant, although this condition does not generally cause difficulties.<sup>76</sup> Examples of positive easements claimed prescriptively are rights of way<sup>77</sup> and rights to parking.<sup>78</sup>

Negative easements claimed by prescription have been problematic. Negative easements entitle the dominant owner to receive something from or through the servient owner’s land. Accordingly the dominant owner may seek to restrain the servient owner from freely using the servient land. One problem is that courts did not consider that such negative rights were necessarily capable of grant.<sup>79</sup> Another problem is that it is not incumbent upon the dominant owner to act positively and so reveal the existence or utility of the alleged easement.<sup>80</sup> Negative prescriptive easements have been described as ‘an anomaly in the law’.<sup>81</sup> Therefore it has been held that the categories of negative easements by prescription ought to be closed.<sup>82</sup>

Nonetheless, there remain some well-established categories of negative easement, some of which are important when comparing and contrasting Australian law with that of England.

First, while it is not possible to claim a prescriptive right to air generally, it is possible to do so where the access is through a specific aperture in the dominant land or a definite channel over the servient land.<sup>83</sup>

<sup>73</sup> Rights of light have been further supplemented by legislation, most notably the *Rights of Light Act 1959*, 7 & 8 Eliz 2, c 56. For a comprehensive discussion of rights to light: see Gaunt and Morgan, above n 6, 186–9, ch 7.

<sup>74</sup> This is not required under the doctrine of lost modern grant: see Sara, *Boundaries and Easements*, above n 37, 294.

<sup>75</sup> Gaunt and Morgan, above n 6, 3–4, 21–2.

<sup>76</sup> *Ibid.*

<sup>77</sup> See, eg, *British Railways Board v Glass* [1965] Ch 538; *Woodhouse & Co Ltd v Kirkland (Derby) Ltd* [1970] 2 All ER 587; *Mills v Silver* [1991] Ch 271; *Loder v Gaden* (1999) 78 P & CR 223.

<sup>78</sup> Gaunt and Morgan, above n 6, 357.

<sup>79</sup> Therefore, a general right to the passage of air over an unlimited surface could not be acquired by prescription: *Webb v Bird* (1861) 10 CB NS 268; *Webb v Bird* (1862) 13 CB NS 841.

<sup>80</sup> *Ibid.* See also Alison Clarke and Paul Kohler, *Property Law: Commentary and Materials* (2005) 494–6.

<sup>81</sup> *Hunter v Canary Wharf Ltd* [1997] AC 655, 726 (Lord Hope).

<sup>82</sup> For example, in respect of an unsuccessful claim for a prescriptive easement for a television signal: see *ibid.* See also *Phipps v Pears* [1965] 1 QB 76, 82–3 (Lord Denning MR), in respect of a prescriptive easement for protection against the weather; Kevin Gray and Susan Francis Gray, ‘The Idea of Property in Land’ in Susan Bright and John Dewar (eds), *Land Law: Themes and Perspectives* (1998) 15, 32–3. In Scots law prescription only applies to positive servitudes: see Reid, above n 5, [458].

<sup>83</sup> *Bass v Gregory* (1890) 25 QBD 481; Gaunt and Morgan, above n 6, 318–19. Cf *Hall v Lichfield Brewery Co* (1880) 49 LJ Ch 665.

Secondly, a right to light may be acquired at common law, under the doctrine of lost modern grant or under the *Prescription Act 1832*.<sup>84</sup>

Thirdly, there is an automatic natural right of support between two parcels of land.<sup>85</sup> However, where it is established that adjacent land has supported a building for 20 years and the enjoyment has been as of right, then the owner of the land on which the building stands has a prescriptive right to continued support.<sup>86</sup> In addition, generally a right of support by buildings for buildings on adjacent land can only arise by prescription.<sup>87</sup>

## C Australia

### 1 General Principles

Australia initially adopted the English law of prescription, so many of the principles outlined above in Part II(B)(1) have generally applied throughout Australia both before and after Federation.<sup>88</sup> Indeed, to the extent that the law of prescription still applies in the land law of any Australian state, the English case law continues to be a source of persuasive authority.<sup>89</sup> Therefore, consistent with English law, parties claiming a prescriptive easement must demonstrate that:

- the user was ‘as of right’;<sup>90</sup>
- the servient owner had knowledge,<sup>91</sup> constructive knowledge, or means of knowledge, of the user;<sup>92</sup>
- the servient owner acquiesced in the user;<sup>93</sup>
- the user was against the fee simple owner;<sup>94</sup> and
- the user was *nec vi, nec clam, nec precario*.<sup>95</sup>

<sup>84</sup> Gaunt and Morgan, above n 6, 298. Rights to light have developed into a significant form of negative prescriptive easement: see generally Stephen Bickford-Smith, Andrew Francis and Elizabeth de Burgh Sidley, *Rights of Light: The Modern Law* (2000) ch 6.

<sup>85</sup> Gray and Gray, *Elements of Land Law*, above n 2, 30–2, 615.

<sup>86</sup> *Dalton v Angus* (1881) 6 App Cas 740. For a discussion of the complexity of the various judgments in that case: see Gaunt and Morgan, above n 6, 368–74.

<sup>87</sup> See, eg, *Lemaitre v Davis* (1881) 19 Ch D 281, 290 (Hall V-C); *Waddington v Naylor* (1889) LT 480, 482 (Chitty J); *Selby v Whitbread & Co* [1917] 1 KB 736, 751–2 (McCardie J).

<sup>88</sup> See generally Peter Butt, *Land Law* (5<sup>th</sup> ed, 2006) 451–60.

<sup>89</sup> See, eg, *Piomalli v Di Masi* [1980] WAR 173, 178 (Wickham J). See generally *Sunshine Retail Investments Pty Ltd v Wulff* [2000] V ConvR ¶54-618 (‘*Sunshine Retail*’); *Wayella Nominees Pty Ltd v Cowden Ltd* [2003] WASC 210 (Unreported, Roberts-Smith J, 4 November 2003) (‘*Wayella Nominees*’). In 1963, the High Court made it clear that it was no longer bound by decisions of the House of Lords: *Parker v The Queen* (1963) 111 CLR 610. In 1986, a formal severance between Australian and English courts was made in the High Court decision *Cook v Cook* (1986) 162 CLR 376.

<sup>90</sup> See, eg, *Gangemi v Watson* [1994] 11 WAR 505.

<sup>91</sup> *Sunshine Retail* [2000] V ConvR ¶54-618.

<sup>92</sup> *Gangemi v Watson* [1994] 11 WAR 505, 516 (Seaman J); *Fernance v Simpson* [2003] NSWSC 121 (Unreported, Windeyer J, 5 March 2003) [31]–[33].

<sup>93</sup> *Hamilton v Joyce* [1984] 3 NSWLR 279, 286 (Powell J).

<sup>94</sup> *Sunshine Retail* [2000] V ConvR ¶54-618; *Fernance v Simpson* [2003] NSWSC 121 (Unreported, Windeyer J, 5 March 2003) [35].

Nevertheless, some differences may exist. Adrian Bradbrook and Marcia Neave have identified several areas of the doctrine of lost modern grant where Australian and English authorities appear in conflict,<sup>96</sup> including who bears the onus of proof,<sup>97</sup> and whether the granting of permission before the commencement of the prescriptive period automatically prevents the acquisition of a prescriptive easement.<sup>98</sup> However, it must be emphasised that the Australian cases were decisions of single state supreme court judges. These decisions are either the only Australian case on the point<sup>99</sup> or have been contradicted by later Australian authority.<sup>100</sup>

## 2 *Grounds for Acquiring an Easement by Prescription*

Unlike England, the grounds for acquiring an easement by prescription have generally been more limited in Australia, leaving aside the impact of registration of title under the Torrens system.

First, the colonies received and adopted only so much of the English law as was necessary and appropriate for their legal system.<sup>101</sup> Although prescription at common law was in existence at the date set for reception of English law, it has never been part of Australian law because the grant of right could not have been

<sup>95</sup> *Milne v James* (1910) 13 CLR 168, 177–8 (Griffith CJ); *Hough v Taylor* (1927) 29 WALR 97, 98 (McMillan CJ); *Richardson v Browning* (1936) 31 Tas LR 78, 143–4 (Clark J); *Wayella Nominees* [2003] WASC 210 (Unreported, Roberts-Smith J, 4 November 2003) [222]; *Fernance v Simpson* [2003] NSWSC 121 (Unreported, Windeyer J, 5 March 2003) [22].

<sup>96</sup> Adrian J Bradbrook and Marcia A Neave, *Easements and Restrictive Covenants in Australia* (2<sup>nd</sup> ed, 2000) 130–2.

<sup>97</sup> In Victoria, Lowe J held that the onus of proof lies on the servient owner to displace the presumption when the user has been made under a claim of right: *Nelson v Hughes* [1947] VLR 227, 228. Bradbrook and Neave, above n 96, 130–1, contrast this decision with English authority, which held that the dominant owner bears the onus of proving that their user was not *precario*: *Thomas W Ward Ltd v Alexander Bruce (Grays) Ltd* [1959] 2 Lloyd's Rep 472; *Jones v Price* (1992) 64 P & CR 404. See also *Bakewell Management Ltd v Brandwood* [2004] 2 AC 519, 545–6 (Lord Walker). However, a partial solution to the apparent conflict in authorities may lie in the fact that once a claimant has established user in the manner and for the period set by law, the servient owner will bear an evidentiary onus: see Butt, above n 88, 456. In order to rebut the presumption, the servient owner must show positively that the user was unlawful, secret or by permission: *Patel v W H Smith (Eziot) Ltd* [1987] 2 All ER 569, 574 (Balcombe J). Alternatively, the servient owner bears an evidentiary burden to demonstrate that they did not have the requisite level of knowledge upon which to base acquiescence and user as of right: *Wayella Nominees* [2003] WASC 210 (Unreported, Roberts-Smith J, 4 November 2003) [223]; *Fernance v Simpson* [2003] NSWSC 121 (Unreported, Windeyer J, 5 March 2003) [33]. Recently, the Supreme Court of Victoria held that the onus of proof is on the owners of the dominant land to prove each of the requirements for the doctrine of lost modern grant: *Sunshine Retail* [2000] V ConvR ¶54-618, 64 411 (Hedigan J). See also *Wayella Nominees* [2003] WASC 210 (Unreported, Roberts-Smith J, 4 November 2003) [223]; *Williams* (2004) 60 NSWLR 286, 293 (Mason P).

<sup>98</sup> In England, any consent renders the acquisition of a right by user impossible, unless the consent expires and the user continues: *Healey v Hawkins* [1968] 3 All ER 836. In Australia, only permission during the alleged period of user will prevent a party claiming a right of user: *Wilkinson v Spooner* [1957] Tas SR 121, 126 (Burbury CJ). The English approach is preferable as it appears more consistent with the requirements that the user must be of right and *nec precario*.

<sup>99</sup> *Wilkinson v Spooner* [1957] Tas SR 121.

<sup>100</sup> Cf *Nelson v Hughes* [1947] VLR 227; *Fulwood Nominees Pty Ltd v Teitz* (1987) V ConvR ¶54-317.

<sup>101</sup> *Australian Courts Act 1828*, 9 Geo 4, c 83, s 24.

made prior to 1189.<sup>102</sup> However, as it is very difficult to rely on this ground in England,<sup>103</sup> the contrast here is probably more theoretical than real.

Secondly, the *Prescription Act 1832* has had only a limited application in Australia.<sup>104</sup> It currently operates in South Australia and Western Australia. In NSW, Victoria and Queensland the legislation has never applied,<sup>105</sup> nor was it expressly adopted at a later date.<sup>106</sup> The *Prescription Act 1832* did not apply to Tasmania.<sup>107</sup> In 1934, the Tasmanian Parliament enacted the provisions of the English legislation subject to minor changes.<sup>108</sup> This legislation operated for over 65 years until the Parliament repealed it in 2001 and enacted another ground upon which a prescriptive easement may be acquired.<sup>109</sup>

Only in WA was the *Prescription Act 1832* expressly adopted under Imperial legislation.<sup>110</sup> It remains in force in that state.<sup>111</sup> In SA, there was no express adoption of the legislation, although in the 19<sup>th</sup> century, the SA Supreme Court determined that the *Prescription Act 1832* constituted part of the law of that state.<sup>112</sup> This remains the situation.<sup>113</sup>

Thirdly, leaving aside the impact of the Torrens system generally, and the special situation in Tasmania, it is theoretically possible to make a claim for a prescriptive easement under the doctrine of lost modern grant.<sup>114</sup> This is due to the High Court's decision in *Delohery* and the fact that none of the Parliaments in the states and territories (other than Tasmania in an unusual sense) have directly abolished the doctrine of lost modern grant. However, it must be emphasised that it was not automatically assumed in the latter part of the 19<sup>th</sup> century that this doctrine was part of Australian law.

In *Delohery*, a very early High Court decision, the Court held that a prescriptive right could be acquired on the basis of the doctrine of lost modern grant. In contrast, Simpson CJ in *Eq* had held that the doctrine of lost modern grant was a

<sup>102</sup> *Stevens v McClung* (1859) 2 Legge 1226; *Richardson v Browning* (1936) 31 Tas LR 78, 140–1 (Clarke J); *Hamilton v Joyce* [1984] 3 NSWLR 279, 287 (Powell J); *Golding v Tanner* (1991) 56 SASR 482, 487 (DeBelle J).

<sup>103</sup> *Simmons v Dobson* [1991] 4 All ER 25, 27–8 (Fox LJ); Gray and Gray, *Elements of Land Law*, above n 2, 705.

<sup>104</sup> See generally Bradbrook and Neave, above n 96, 139.

<sup>105</sup> *Cooper v Corporation of Sydney* (1853) 1 Legge 765, 771 (Stephen CJ); *Delohery* (1904) 1 CLR 283, 298 (Griffith CJ); *Rodwell v G R Evans & Co Pty Ltd* [1978] 1 NSWLR 448, 451 (Reynolds, Hutley and Samuels JJA).

<sup>106</sup> See *Delohery* (1904) 1 CLR 283, 297–8 (Griffith CJ).

<sup>107</sup> Tasmania was originally part of NSW, but was later established as a separate colony known as Van Diemen's Land: *Justice, New South Wales Act 1823*, 4 Geo 4, c 96, s 44.

<sup>108</sup> *Prescription Act 1934* (Tas).

<sup>109</sup> *Land Titles Amendment (Law Reform) Act 2001* (Tas).

<sup>110</sup> *Prescription Act 1832* (Imp) 2 & 3 Wm 4, c 71. Cases applying the legislation include: *Austin v Wright* (1926) 29 WALR 55; *Hough v Taylor* (1927) 29 WALR 97; *Piromalli v Di Masi* [1980] WAR 173, 176 (Burt CJ); *Wayella Nominees* [2003] WASC 210 (Unreported, Roberts-Smith J, 4 November 2003) [221].

<sup>111</sup> *Wayella Nominees* [2003] WASC 210 (Unreported, Roberts-Smith J, 4 November 2003).

<sup>112</sup> *White v McLean* (1890) 24 SASR 97, 101 (Boucaut J).

<sup>113</sup> *Golding v Tanner* (1991) 56 SASR 482, 483 (King CJ).

<sup>114</sup> See, eg, *ibid*; *Sunshine Retail* [2000] V ConvR ¶59-618; *Wayella Nominees* [2003] WASC 210 (Unreported, Roberts-Smith J, 4 November 2003); *Fernance v Simpson* [2003] NSWSC 121 (Unreported, Windeyer J, 5 March 2003).

fiction which was neither beneficial to the law of NSW nor the country.<sup>115</sup> Therefore, his Honour decided against the plaintiff's claim to an ancient light.<sup>116</sup> The High Court recognised that the doctrine had been criticised in English case law and that it was arguable that it neither existed as part of the substantive law of England at the time of settlement of NSW in 1788, nor in 1828.<sup>117</sup> However, the claim for light did not simply rest on whether or not the doctrine was part of the law of England on those dates.<sup>118</sup> Instead, the Court carefully catalogued a number of specific decisions on ancient lights and determined that the principle behind these decisions had existed before 1828.<sup>119</sup> Therefore, a right to an uninterrupted access to light could be acquired by long, continued and peaceful possession in the absence of documentation.<sup>120</sup> To decide otherwise and simply reject the doctrine of lost modern grant on policy grounds would be a usurpation of the legislative function.<sup>121</sup>

*Delohery* confirmed the existence of the doctrine of lost modern grant in Australia.<sup>122</sup> Yet this is not without some irony. The Court recognised the doctrine because there was ample authority upon which the plaintiff could rely. Yet soon after the decision, various legislatures took action to abolish the right to ancient lights, leaving other kinds of prescriptive easement untouched.<sup>123</sup> Moreover, while Simpson CJ in *Eq* may have overstepped the line that separates judicial rulings from legislative enactments, commentators have readily acknowledged that the original doctrine was itself a judicial construct which evolved over a long period.<sup>124</sup> The High Court also appeared to provide a different explanation for the ongoing efficacy of the doctrine in Australia. The doctrine was not based on the fiction of a lost grant 'but in the sense of a contractual obligation which is implied by law from proved or admitted facts.'<sup>125</sup> Despite this subtle but evidently different approach, it is assumed that the doctrine, based on a grant that was lost, applies in Australia. Finally, the High Court displayed (consistently with the English law at the time) an understated 'bias' towards the acquisition of prescriptive rights over a long period. Prescription, the Court opined, was 'part of the law of most civilised countries.'<sup>126</sup>

The single exception to the application of the doctrine is Tasmania. In 2001 that state enacted legislation which both abolished and reinstated the doctrine of lost modern grant in a modified form.<sup>127</sup> Section 138J of the *Land Titles Act*

<sup>115</sup> *Delohery v Permanent Trustee Co of New South Wales Ltd* (1904) 4 SR (NSW) 1.

<sup>116</sup> *Ibid* 6.

<sup>117</sup> *Delohery* (1904) 1 CLR 283, 299 (Griffith CJ).

<sup>118</sup> *Ibid*.

<sup>119</sup> *Ibid* 301–7 (Griffith CJ).

<sup>120</sup> *Ibid* 307–8 (Griffith CJ).

<sup>121</sup> *Ibid* 310 (Griffith CJ).

<sup>122</sup> Butt, above n 88, 451.

<sup>123</sup> See below Part II(C)(3).

<sup>124</sup> Holdsworth, above n 3, 347–52; Anderson, above n 57; Getzler, above n 21, 316–21.

<sup>125</sup> *Delohery* (1904) 1 CLR 283, 313–14 (Griffith CJ).

<sup>126</sup> *Ibid* 310 (Griffith CJ).

<sup>127</sup> *Land Titles Act 1980* (Tas) s 138I. Recommendations for the abolition of the doctrine of lost modern grant were made by the Law Reform Commission of Tasmania, *Report and Recommen-*

1980 (Tas) permits the recording of rights which may amount to an easement at common law when a person has used or enjoyed those rights for a period of 15 years, or 30 years in the case of a person under disability. The reference to the 'common law' in s 138J must mean the doctrine of lost modern grant. Prescription at common law does not apply in Australia and Tasmania repealed the *Prescription Act 1934* (Tas). The legislation will be discussed further below.

### 3 *Kinds of Prescriptive Easement*

In Australia, the kinds of prescriptive easement which may be acquired are more limited than those in England.

In most states and territories, positive rights — most notably rights of way — may be claimed on one or more grounds. However, there have been important legislative abolitions in Queensland and NSW. In Queensland, s 198A(1) of the *Property Law Act 1974* (Qld) prohibits the creation of prescriptive rights of way, although such easements in existence before 1975 are preserved.<sup>128</sup> In NSW the creation of rights of way by prescription against the Crown has been expressly abolished.<sup>129</sup> It has been suggested that it is unlikely that such prescriptive rights of way could be claimed against the Crown in the other states.<sup>130</sup>

The situation in respect to negative easements is complex. Prior to the High Court's decision in *Delohery*, Australian courts were divided over whether it was possible to acquire prescriptive easements of light. In NSW, courts held that easements of light could not be acquired by prescription; such easements would prevent the ongoing development of towns and cities.<sup>131</sup> In other states, the prospect of easements of light was met with equanimity, courts preferring to determine whether the facts fitted within the doctrine of lost modern grant<sup>132</sup> rather than adopting a blanket rejection of prescriptive easements. This approach, favouring legal principle over pragmatism, prevailed in *Delohery*. Soon after that decision, state legislatures acted to abolish prescriptive easements of light. In NSW and Queensland prescriptive easements of light cannot be created after a prescribed date;<sup>133</sup> and any such easements which may have existed before those dates are retrospectively abolished because they are deemed not to exist. A similar position follows in the Australian Capital Territory.<sup>134</sup> In SA, Victoria and WA it is not possible to acquire prescriptive easements of light from certain dates,<sup>135</sup> but there is no retrospective abolition of them. However, from a

*ation for Reform of Fifteen Conveyancing Matters*, Report No 36 (1984) [2.6]. However, the original recommendations did not suggest a statutory reintroduction of the doctrine.

<sup>128</sup> *Property Law Act 1974* (Qld) s 198A(2).

<sup>129</sup> *Conveyancing Act 1919* (NSW) s 178; Butt, above n 88, 452–3.

<sup>130</sup> Adrian Bradbrook, Susan V MacCallum and Anthony P Moore, *Australian Real Property Law* (3<sup>rd</sup> ed, 2002) 692. Presumably, the same position would be followed in the two territories. Cf Butt, above n 88, 452–3.

<sup>131</sup> *Sheehy v Edwards, Dunlop & Co* (1897) 13 WN (NSW) 166, 168 (Manning J).

<sup>132</sup> *White v McLean* (1890) 24 SALR 97; *Thwaites v Brahe* (1895) 21 VLR 192.

<sup>133</sup> *Conveyancing Act 1919* (NSW) s 179; *Property Law Act 1974* (Qld) s 178. For NSW the date is 1 December 1904 and for Queensland 1 March 1907.

<sup>134</sup> The *Ancient Lights Declaratory Act 1904* (NSW), the initial legislation which dealt with the issue in NSW, applies to the ACT.

<sup>135</sup> *Law of Property Act 1936* (SA) s 22; *Property Law Act 1958* (Vic) s 195; *Property Law Act 1969* (WA) s 121. See also *Light and Air Act 1902* (WA) s 2, repealed by *Property Law Act 1969*

practical perspective it is unlikely that a person will be able to make a successful retrospective claim.<sup>136</sup> The legislative abolitions render s 3 of the *Prescription Act 1832* otiose in SA and WA. The relevant legislation in the Northern Territory is silent on the issue.<sup>137</sup> This silence may be explained by the fact that the legislation was implemented later in the 20<sup>th</sup> century within the context of a Torrens system which abolished adverse possession. This will be discussed further below.

Tasmanian legislation originally abolished prescriptive easements of light both prospectively and retrospectively.<sup>138</sup> However, the legislation was repealed and replaced by a statutory scheme of prescription in the *Land Title Act 1980* (Tas). The legislation does not exempt a claim for light from the right of application, so it is unclear whether such an application could be made, particularly taking into account *Delohery*.<sup>139</sup>

Additionally, the acquisition of prescriptive easements for air has been significantly circumscribed in Australia. In NSW and Queensland, the provisions that abolished the prescriptive acquisition of light also abolished prescriptive easements of air both retrospectively and prospectively.<sup>140</sup> The position is similar in the ACT.<sup>141</sup> In Victoria and WA, prescriptive easements of air were prospectively abolished.<sup>142</sup>

The position in SA, Tasmania and the NT remains unclear. SA has not abolished prescriptive easements of air, so it must be presumed that a prescriptive easement may be created under the doctrine of lost modern grant or the *Prescription Act 1832*. However, it is likely that such prescriptive easements would be limited to a claim for air through a specific aperture in the dominant tenement or a definite channel over the servient land.<sup>143</sup> In Tasmania, prescriptive easements of air were abolished prospectively under legislation<sup>144</sup> which has recently been repealed. It is unclear whether the abolition of the doctrine of lost modern grant and its legislative reintroduction in a modified form would allow the creation of prescriptive easements of air. The relevant legislation in the NT is silent on the issue.<sup>145</sup>

(WA). For SA the date is 26 October 1911; for Victoria, 7 October 1907; and for WA, 19 February 1902.

<sup>136</sup> Bradbrook and Neave, above n 96, 207–8.

<sup>137</sup> *Land Title Act 2000* (NT); *Law of Property Act 2000* (NT). While the NT was part of SA from 1863 until it was ceded to the Commonwealth on 1 January 1911, it is unlikely that the SA abolition of prescriptive easements for light which commenced on 26 October 1911 applies in that territory.

<sup>138</sup> *Prescription Act 1934* (Tas) s 9.

<sup>139</sup> The recommendation for repeal of the legislation does not indicate what is the appropriate approach to this issue: see Law Reform Commission of Tasmania, above n 127, [2.5].

<sup>140</sup> *Conveyancing Act 1919* (NSW) s 179; *Property Law Act 1974* (Qld) s 178.

<sup>141</sup> Bradbrook, MacCallum and Moore, above n 130, 696.

<sup>142</sup> *Property Law Act 1958* (Vic) s 196; *Property Law Act 1969* (WA) s 121. For Victoria the date of abolition is 30 October 1924 and for WA the date is 19 February 1902.

<sup>143</sup> *Bass v Gregory* (1890) 25 QBD 481.

<sup>144</sup> *Prescription Act 1934* (Tas) s 10, repealed by *Land Titles Amendment (Law Reform) Act 2001* (Tas).

<sup>145</sup> *Land Title Act 2000* (NT); *Law of Property Act 2000* (NT).



Finally, in most states and territories the common law principle of right to support applies.<sup>146</sup> However, the common law has been replaced by legislation in NSW,<sup>147</sup> the NT<sup>148</sup> and Queensland.<sup>149</sup> Simply stated, the legislation provides for the support of adjacent land and prohibits conduct which adversely affects that right. Rights for support of buildings on the adjoining land must be acquired by easement, except in the NT and Queensland, which impose the obligation that nothing will be done on the land that will withdraw support from a building, structure or erection on the other land.<sup>150</sup>

#### D Comment

In the past, English law has been underpinned by a strong and generally unifying desire to protect the rights of persons who could demonstrate a long-established de facto enjoyment of land. Indeed, the *Prescription Act 1832* legislatively entrenched prescription, and in particular, prescriptive easements.<sup>151</sup> The underlying assumption was that the principle of prescription was necessary to reconcile the conflicting interests of landowners. Prescriptive rights were not perceived to be antithetical to economic development. Overall, the courts actively developed the law of prescription both at common law and in the form of the doctrine of lost modern grant. Confronted with the different and inconsistent bases upon which the latter was rationalised,<sup>152</sup> the House of Lords ensured the ongoing efficacy of the doctrine on a principled basis in *Dalton v Angus*.<sup>153</sup> It is true that courts placed some important limitations on the kinds of prescriptive easement which could be claimed. However, these limitations were justifiable because a broadly constructed right of user would mean that a servient owner would not be able to develop or change the use of the land significantly. Modern courts have also demonstrated a disinclination to extend the kind of negative easements which may be claimed by prescription.<sup>154</sup> Although the reasoning may be criticised,<sup>155</sup> such cases indicate that the prescriptive easement in England has probably attained its widest reach.

What remains of the law of prescription in Australia is mainly due to judicial decision-making. In *Delohery*, the High Court preserved the doctrine of lost modern grant. In contrast, the state legislatures did not pursue policies which

<sup>146</sup> Bradbrook, MacCallum and Moore, above n 130, 693–4.

<sup>147</sup> *Conveyancing Act 1919* (NSW) s 177.

<sup>148</sup> *Law of Property Act 2000* (NT) s 162.

<sup>149</sup> *Property Act 1974* (Qld) s 179.

<sup>150</sup> *Law of Property Act 2000* (NT) s 162; *Property Act 1974* (Qld) s 179. It is arguable that the NSW legislation extends to these situations, but there are qualifications: see Butt, above n 88, 22–3.

<sup>151</sup> Subsequent legislation in the 20<sup>th</sup> century did not abolish the right to light but temporarily extended the period for prescription in unusual circumstances: see *Rights of Light Act 1959*, 7 & 8 Eliz 2, c 56.

<sup>152</sup> See Anderson, above n 57, 655.

<sup>153</sup> (1881) 6 App Cas 740.

<sup>154</sup> *Hunter v Canary Wharf Ltd* [1997] AC 655, 726 (Lord Hope).

<sup>155</sup> See Ian Dawson and Alison Dunn, ‘Negative Easements — A Crumb of Analysis’ (1998) 18 *Legal Studies* 510.

would securely embed prescription in Australian law. First, only the Tasmanian Parliament specifically enacted legislation significantly mirroring the *Prescription Act 1832*,<sup>156</sup> and the only form of prescriptive user based on an Australian statute exists in Tasmania.<sup>157</sup> In WA, claimants may rely on the *Prescription Act 1832*, but this is due to the operation of an old Imperial statute rather than state legislation. The *Prescription Act 1832* probably operates in SA because the legislation was in existence at the time SA was settled.<sup>158</sup> Secondly, while most state legislatures have not directly abolished the doctrine of lost modern grant, some have significantly reduced its scope by prohibiting prescriptive easements of air and light. Queensland has taken the most extreme step by prohibiting future prescriptive rights of way. In the later NT legislation, prescription is not even the subject of legislative consideration.

Both doctrinally and managerially, the actions of the legislatures of the Australian states in the early 20<sup>th</sup> century revealed a significant change in thinking. One shift was that the recognition and protection of long-established de facto user was no longer considered indispensable in the Australian legal system. In states such as NSW or Queensland it was not abolished because the idea of prescription had not been subject to complete theoretical condemnation. But long-established de facto enjoyment was no longer an appropriate way of accommodating a person's need to use the land of another in certain circumstances. Prescription was not necessary for the reconciliation of conflicting claims of landowners or for the requirements of everyday living. Instead, it was a messy legal inheritance that needed to be kept in check. However, the rights of the proprietors of land became increasingly paramount. The doctrine of lost modern grant was tolerated only to the extent that it was considered not to hinder economic development. Negative prescriptive easements which could have the unintended effect of hindering the growth of cities and economic development were abolished. Near the end of the 20<sup>th</sup> century, the NT appeared to have taken a further step — the absence of any legislative acknowledgment of prescription suggested that long-established de facto enjoyment had no role to play in the law of the NT.

The other shift was (and is) that the legal management of prescription passed from the judiciary to the legislature. In England, the actions of the legislature were limited to preserving the common law and preventing 'inconvenience and injustice'<sup>159</sup> by ensuring that claims under the common law were not defeated. It was assumed that prescription ought to be part of land law. In Australia, the state legislatures began to control and proscribe the nature and extent of prescriptive easements.

<sup>156</sup> *Prescription Act 1934* (Tas).

<sup>157</sup> *Land Titles Act 1980* (Tas) ss 138I–L.

<sup>158</sup> *Golding v Tanner* (1991) 56 SASR 482, 483 (King CJ).

<sup>159</sup> *Prescription Act 1832* (Imp) 2 & 3 Wm 4, c 71, Preamble.

### III IMPACT OF LAND TITLE REGISTRATION SYSTEMS ON PRESCRIPTIVE EASEMENTS

#### A *The Introduction of Land Title Registration*

The law of prescription was developed in the context of the old system of English conveyancing, in which title is acquired through title deeds, rather than registration. Such conveyancing practices functioned well enough when there were only a small number of aristocratic stakeholders who took great pains to protect their landholdings.<sup>160</sup> Initially, the Australian colonies adopted a similar system of title which is now generically called ‘old system title’ or ‘common law title’. In both countries there are still pockets of land which are essentially dealt with under the old system of conveyancing, but these are diminishing in number.<sup>161</sup>

The two countries diverged markedly in the adoption of land title registration systems. In England, the implementation of a universal land title registration system was notoriously slow. Although systems of land title registration had been enacted in the 19<sup>th</sup> century,<sup>162</sup> it was only in the 20<sup>th</sup> century that firm steps were taken to introduce a system of title by registration under the *Land Registration Act 1925*, 15 & 16 Geo 5, c 21 (‘*Land Registration Act 1925*’) that ultimately culminated in the *Land Registration Act 2002* (UK) c 9.

In Australia on the other hand, Sir Robert Torrens persuasively promoted the advantages of a system of title by registration. The Torrens system, as it became known, was considered appropriate for a country such as Australia which was set on rapid expansion and development. It was simpler, cheaper and quicker than the English alternative.<sup>163</sup> To use Pike’s phrase, Australia was ‘a land job.’<sup>164</sup> Land was ‘a common possession and a matter of daily bargain.’<sup>165</sup> The colonial legislatures responded swiftly.<sup>166</sup> Accordingly, title by registration has now

<sup>160</sup> Pottage, ‘Evidencing Ownership’, above n 31, 135–42.

<sup>161</sup> In England roughly 20 per cent of land and 10 per cent of land titles are still governed by common law rather than a registration system: Martin Dixon, *Modern Land Law* (5<sup>th</sup> ed, 2005) 93 fn 1. The position in Australia is difficult to gauge. However, there is only a small portion of land now governed by old system title. For example, in 1999 it was estimated that between 97 and 99 per cent of land in NSW was under the Torrens system, and that by 2004 there were only 15 000 old system parcels left for conversion to the Torrens system: Butt, above n 88, 721.

<sup>162</sup> For a discussion of some of the problems in the 19<sup>th</sup> century: see Simpson, above n 46, ch XI; Pottage, ‘Evidencing Ownership’, above n 31, 142–8. Sir Robert Torrens also highlighted the problems of the land registration schemes in England: see Sir Robert Torrens, *An Essay on the Transfer of Land by Registration under the Duplicate Method Operative in British Colonies* (1882) 9–17.

<sup>163</sup> Sir Robert Torrens, *Transfer of Land by Registration of Title as Now in Operation in Australia under the ‘Torrens System’* (1863) 2–4; Robert T J Stein and Margaret A Stone, *Torrens Title* (1991) 20–6.

<sup>164</sup> See, eg, Douglas Pike, ‘Introduction of the *Real Property Act* in South Australia’ (1960) 1 *Adelaide Law Review* 169, 169 where Douglas Pike used the phrase to describe the early settlement of SA.

<sup>165</sup> *Ibid.* See also Butt, above n 88, 717.

<sup>166</sup> For an overview of the early legislation: see Douglas J Whalan, *The Torrens System in Australia* (1982) 5–11; Butt, above n 88, 719–21.

operated in parts of Australia for well over a century and it is the predominant system in all states and territories.

For the purpose of this article, two practical features of a model title-by-registration system have particular importance.<sup>167</sup> One is that there is a register containing the details of each parcel of land and, ideally, all estates and interests which affect the land. Therefore, bona fide purchasers of the legal fee simple for value without notice may rely on the register. As registered proprietors, they will acquire their estates free from all unregistered interests, including any trusts or equitable interests which exist independently of the register and which may have been enforceable against the previous owner.<sup>168</sup> The other feature is that proprietors acquire interests which are guaranteed by the state. Persons who are deprived of their estate or interest in the land due to omission, mistake or wrongdoing by the registrar are entitled to compensation.<sup>169</sup>

The creation and implementation of a title-by-registration system represented a radical change in the way that land and interests in land were perceived. Remoulding casts of mind can be a subtle and almost imperceptible process. Nevertheless, the outcome can be dramatic over time. First, in a title-by-registration system, possession is no longer the bedrock of land law. It is not necessary for a person to demonstrate some kind of physical nexus with the land in order to acquire seisin or other interests in the land. As possession declines as the normative principle, so the legitimacy of registration is amplified because the only way of dealing with the land is through alteration of the register.<sup>170</sup> Secondly, in the common law, title was not absolute, but relative.<sup>171</sup> Some entitlements to possession were stronger than others. However, the common law did not conclusively and absolutely determine ownership in the land, because all land was ultimately the subject of a Crown grant.<sup>172</sup> Under a title-by-registration system, the registered proprietor of the legal estate in fee simple is identified as the owner of the land, even though what is acquired is an estate dependent upon a Crown grant. They become the registered proprietor of an indefeasible title.<sup>173</sup> Thirdly, as A M Honoré observed, the common law was multi-titular because acquisition of title by an act of possession allowed more than one party to acquire an estate in fee simple in the land. The acquisition of title was not derivative.<sup>174</sup> Title by registration tends to reverse this situation. It changes the land law from a multi-titular to a uni-titular system because,

<sup>167</sup> For a helpful discussion of these features: see Whalan, above n 166, 18–20. Douglas Whalan includes a third feature, that of protection against the fraud of a predecessor in title: at 20. This feature will not be discussed in this article. See also Butt, above n 88, 721–32.

<sup>168</sup> Torrens, above n 163, 9.

<sup>169</sup> *Ibid.*

<sup>170</sup> *Crowley v Templeton* (1914) 17 CLR 457, 463 (Griffith CJ); Butt, above n 88, 724–6.

<sup>171</sup> Gray and Gray, *Elements of Land Law*, above n 2, 355–6.

<sup>172</sup> *Ibid.* 67–9.

<sup>173</sup> See generally *ibid.* 365; Kevin Gray and Susan Francis Gray, ‘The Rhetoric of Realty’ in Joshua Getzler (ed), *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (2003) 204, 241, 243–6; Butt, above n 88, 725–6.

<sup>174</sup> A M Honoré, ‘Ownership’ in A G Guest (ed), *Oxford Essays in Jurisprudence* (1961) 107, 136–41. For a helpful discussion of this point: see Elizabeth Cooke, ‘The Land Registration Act 2002 and the Nature of Ownership’ in Alastair Hudson (ed), *New Perspectives on Property Law, Obligations and Restitution* (2004) 117, 117–18.

theoretically, one party must be divested of the legal estate in fee simple before it can be acquired by another. Fourthly, land becomes just another commodity, like shares and other forms of personalty.<sup>175</sup> The intricate and detailed conveyancing documents of the past<sup>176</sup> are replaced by a standardised system administered by a bureaucracy.<sup>177</sup> Finally, dealing with land is not an independent and autonomous action. Certainty of title no longer depends on historical record-keeping and a familial collective memory.<sup>178</sup> Rather, the popular understanding of land ownership (as distinct from the Crown grant of the estate in fee simple) is derived from and legitimised by a centralised state apparatus.

### B *Prescriptive Easements and the Torrens System in Australia*

Prescriptive easements are acquired by long-established de facto enjoyment, rather than through a system of title by registration. Therefore, it would be anticipated that they would be considered odd, difficult and even impossible to accommodate in a system where legal title is acquired by registration and registration is designed to disclose all interests which affect the land.<sup>179</sup> Indeed, it has been pointed out that there is a tendency for title-by-registration systems to deter the fragmentation of interests because most legal titles can only be conferred by registration.<sup>180</sup> Accordingly, Peter Butt has commented that ‘the place of prescriptive easements and profits in the Torrens system is conjectural.’<sup>181</sup>

A feature of the Torrens system as implemented in Australia is that the register does not necessarily disclose all interests which affect land.<sup>182</sup> Indeed, it has been pointed out that in the 19<sup>th</sup> century, the early framers of the Torrens system anticipated that land under the system would be subject to some unregistered easements.<sup>183</sup> In part, this may be explained by the experimental and innovative character of the early Torrens system. However, as registration displaced possession and indefeasibility replaced relative title, some legislatures further circumscribed prescriptive easements.<sup>184</sup> The result is that there are now several responses to prescription within the Torrens system in Australia. However, it is

<sup>175</sup> Indeed, Sir Robert Torrens was inspired by not only Hanseatic land registration systems, but also shipping registration: Butt, above n 88, 718.

<sup>176</sup> Pottage, ‘Evidencing Ownership’, above n 31, 135–42.

<sup>177</sup> Ibid 142–5; Alain Pottage, ‘The Originality of Registration’ (1995) 15 *Oxford Journal of Legal Studies* 371, 388–93.

<sup>178</sup> Cf Pottage, ‘Evidencing Ownership’, above n 31, 135–6.

<sup>179</sup> Certainly, one of the problems is that Torrens promoted the system without sufficient consideration of the rights acquired by user. Instead, he concentrated on simplifying common land transactions: Torrens, above n 163, 11–15, and an apparatus which could be used to protect the rights of beneficiaries under a trust: Torrens, above n 162, 33–4.

<sup>180</sup> Cooke, above n 174, 122.

<sup>181</sup> Butt, above n 88, 460.

<sup>182</sup> One important situation where this may occur is the operation of overriding statutes: see *Hillpalm Pty Ltd v Heaven’s Door Pty Ltd* (2002) 55 NSWLR 466; *Hillpalm Pty Ltd v Heaven’s Door Pty Ltd* (2004) 220 CLR 472; Butt, above n 88, 796–8.

<sup>183</sup> See generally *Dobbie v Davidson* (1991) 23 NSWLR 625, 647–56 (Priestley JA).

<sup>184</sup> *State Transit Authority of New South Wales v Australian Jockey Club* [2003] NSWSC 726 (Unreported, Young CJ, 8 August 2003) [80]. Cf *Real Property Act 1862* (NSW) s 40; *Real Property Act 1900* (NSW) s 42(1)(al).

clear that the doctrine of prescription is under pressure as legislatures modify, abolish or simply ignore it. Currently there are five strategies in place.

1 *Prescription as an Exception to the Principle of Indefeasibility and the Completeness of the Register*

In Victoria and WA, the legislation is widely framed to allow prescriptive easements to constitute exceptions to indefeasibility, not only in respect to old system title land which is brought into the Torrens system,<sup>185</sup> but also in respect to land which is already subject to the Torrens legislation.<sup>186</sup> Section 42(2)(d) of the *Transfer of Land Act 1958* (Vic) broadly provides that land will be subject to ‘any easements however acquired subsisting over or upon or affecting the land’ even though they are not specifically notified on the register.<sup>187</sup>

The legislation in WA is equally wide, stating that land is subject to ‘any easements acquired by enjoyment or user or subsisting over or upon or affecting such land.’<sup>188</sup> The legislation applies to prescriptive easements which existed before the land was brought into the Torrens system.<sup>189</sup> In *Di Masi v Piromalli*,<sup>190</sup> Jones J held that the legislation was inconclusive as to whether prescriptive easements could be acquired in respect to land which was already governed by the Torrens system. However, as the legislation did not preclude the creation of such easements and did not contain any specific means of creating an easement, Jones J held there was nothing in the legislation to prevent the acquisition of easements by prescription.<sup>191</sup>

2 *An In Personam Obligation Binding the Person Who Was the Registered Proprietor at the Time the Easement Was Acquired*

Assume for example that after a person became the registered proprietor of land under the Torrens system, that person acquiesced in the user of a right of way for 20 or more years. The user of the right of way then sold the dominant land. Would a successor in title be entitled to exercise the right of way? Some courts have held that a prescriptive easement would arise so long as the ownership of the servient land did not change during the course of the period for prescriptive user set by law.<sup>192</sup> The servient owner would be personally bound by the prescriptive easement, but any subsequent owners of the servient land would not. Therefore, the prescriptive easement was analogous to an equitable or in

<sup>185</sup> *James v Stevenson* [1893] AC 162.

<sup>186</sup> *Nelson v Hughes* [1947] VLR 227; *Sunshine Retail* [2000] V ConvR ¶64-377.

<sup>187</sup> Other provisions in the legislation do not preclude the creation of prescriptive easements over Torrens title land in Victoria: Bradbrook and Neave, above n 96, 251–2.

<sup>188</sup> *Transfer of Land Act 1893* (WA) s 68.

<sup>189</sup> *Stevens v Allan* (1955) 58 WALR 1.

<sup>190</sup> [1980] WAR 57.

<sup>191</sup> *Ibid* 59–60.

<sup>192</sup> See, eg, *Golding v Tanner* (1991) 56 SASR 482, 488–9 (Debelle J); *State Transit Authority of New South Wales v Australian Jockey Club* [2003] NSWSC 726 (Unreported, Young CJ, 8 August 2003) [83]–[89]; Bradbrook and Neave, above n 96, 248. See also *Australian Hi-Fi Publications Pty Ltd v Gehl* [1979] 2 NSWLR 618, 623–4 (Mahoney J), considering *Wheeldon v Burrows* easements, which are supposed to create personal as well as proprietary rights in favour of the owner of the dominant land.

personam claim which may arise against a registered proprietor after registration (due to their conduct) but did not survive after a new proprietor was registered.<sup>193</sup> In this way, the courts achieved a compromise between the objectives of the Torrens system and the old principle of prescription. The long-established de facto enjoyment of the servient land would not affect subsequent takers of the land.

The main problem with this approach is that it contradicts the fundamental principles governing easements. An easement in favour of the dominant land is a proprietary interest appurtenant to the land which binds the successors in title of the servient land.<sup>194</sup> Unless there is some sound basis for relying on equitable principles such as proprietary estoppel,<sup>195</sup> an easement based simply on in personam liability is a contradiction in terms and ought to be avoided. In any event, such a right ought not be labelled a prescriptive easement. A recent decision in NSW has made it clear that in personam prescriptive easements do not form part of the law in that state,<sup>196</sup> although it has been argued that the Court had not adequately and directly addressed the case law supporting in personam liability.<sup>197</sup> It is uncertain whether the in personam prescriptive easement still exists in SA. In *Golding v Tanner*,<sup>198</sup> the Supreme Court of SA held that it did apply. The Court relied on a provision of the *Real Property Act 1886* (SA) which gives the Registrar-General the power to enter on the certificate of titles for the dominant and servient lands easements which have been 'granted or created'.<sup>199</sup> The Court interpreted these words as covering in personam prescriptive easements. No such provision exists in the NSW legislation.<sup>200</sup>

### 3 *Transitional Provisions and Effective Abolition of Prescriptive Easements under the Torrens System*

In NSW, prescriptive easements which were acquired while the servient land was under old system title and before the land was registered under the Torrens

<sup>193</sup> *State Transit Authority of New South Wales v Australian Jockey Club* [2003] NSWSC 726 (Unreported, Young CJ, 8 August 2003) [83]–[88].

<sup>194</sup> See, eg. Burn, above n 12, 569.

<sup>195</sup> Gaunt and Morgan, above n 6, 77–80.

<sup>196</sup> *Williams* (2004) 60 NSWLR 286, 301–2 (Mason P). The NSW Court of Appeal has recently endorsed its approach in this case: see *McGrath v Campbell* [2006] NSWCA 180 (Unreported, Giles, Tobias and Hodgson JJA, 7 July 2006) [115]–[118] (Tobias JA).

<sup>197</sup> *Campbell v McGrath* [2005] NSWSC 496 (Unreported, Barrett J, 27 May 2005) [76]; Brendan Edgeworth, 'The Fate of Prescriptive Easements under the NSW Torrens System' (2004) 42(10) *Law Society Journal* 66, 69. However, the NSW Court of Appeal has not been troubled by such criticism. *McGrath v Campbell* [2006] NSWCA 180 (Unreported, Giles, Hodgson and Tobias JJA, 7 July 2006) [115]–[118] (Tobias JA), confirmed that prescriptive easements did not trump the registered proprietor's indefeasible title by means of *Real Property Act 1900* (NSW) s 42, or by reliance on an in personam exception. At present, *Wheeldon v Burrows* easements are enforceable against the original vendor of the land as a personal equity. However, the Court of Appeal left open the possibility that in future, such easements may be treated in the same way as prescriptive easements, but it was not necessary to decide this issue in the case before it: *McGrath v Campbell* [2006] NSWCA 180 (Unreported, Giles, Hodgson and Tobias JJA, 7 July 2006) [119] (Tobias JA).

<sup>198</sup> (1991) 56 SASR 482, 491 (Debelle J).

<sup>199</sup> *Real Property Act 1886* (SA) s 88.

<sup>200</sup> *Williams* (2004) 60 NSWLR 286, 301 (Mason P).

system are 'omitted' easements.<sup>201</sup> They constitute exceptions to indefeasibility and will bind the registered proprietor of the servient land.<sup>202</sup> In Queensland, the legislation appears to have the same effect.<sup>203</sup> Otherwise, only easements which were validly created and were at some time omitted or misdescribed will constitute exceptions to indefeasibility.<sup>204</sup> Until recently, the question was whether it was possible to create new prescriptive easements over Torrens land.<sup>205</sup> Some courts opined that easements could only be created validly by registration.<sup>206</sup> Therefore, a new easement by prescription could not be acquired over land under the Torrens system. Other courts considered that the question was an open one.<sup>207</sup> In a landmark decision for prescriptive easements generally, the NSW Court of Appeal adamantly rejected the operation of the doctrine of lost modern grant in the Torrens system of that state.<sup>208</sup> The Court relied on, inter alia, the narrowly drafted legislative exception to indefeasibility.<sup>209</sup> According to this view, the legislature had enacted a tightly framed provision and indirectly ensured that new prescriptive easements could not be acquired over land under the Torrens system.<sup>210</sup> In the light of the similarity of the legislative approach in Queensland,<sup>211</sup> it is unlikely that a new prescriptive easement may be acquired over Torrens system land in that state.

It is unclear whether prescriptive easements still bind a registered proprietor in the ACT. Section 58(1)(b) of the *Land Titles Act 1925* (ACT) states as an exception to indefeasibility, 'any right of way or other easement created in or existing upon the same land which is not described, or is misdescribed in the relative certificate of title.' The language of the provision appears sufficiently wide to include prescriptive easements which existed prior to registration or were subsequently created over the land. On the other hand, the reference to a lack of description may simply refer to easements which were registered, but later omitted.

<sup>201</sup> *Real Property Act 1900* (NSW) s 42(1)(a1). See also *James v Stevenson* [1893] AC 162; *Jobson v Nankervis* (1943) 44 SR (NSW) 277; *Dobbie v Davidson* (1991) 23 NSWLR 625; Bradbrook and Neave, above n 96, 242–3.

<sup>202</sup> Butt, above n 88, 776–8.

<sup>203</sup> *Land Title Act 1994* (Qld) s 185(1)(c); Bradbrook and Neave, above n 96, 249–50.

<sup>204</sup> Bradbrook and Neave, above n 96, 249; Butt, above n 88, 776–8.

<sup>205</sup> Mark Leeming, 'Dobbie v Davidson' (1992) 14 *Sydney Law Review* 106, 108–9.

<sup>206</sup> See, eg, *Jobson v Nankervis* (1944) 61 WN (NSW) 76; *Kostis v Devitt* (1979) 1 BPR 9231, 9238–9 (Powell J); *Dewhirst v Edwards* [1983] 1 NSWLR 34. See also *Dabbs v Seaman* (1925) 36 CLR 538, 558–9 (Higgins J).

<sup>207</sup> See, eg, *Yared v Glenhurst Gardens* [2002] NSWSC 11 (Unreported, Austin J, 28 February 2002) [134]; *Boulter v Jochheim* [1921] QSR 105, 124 (Shand J); *Wilkinson v Spooner* [1957] Tas SR 121, 126–7 (Burbury CJ).

<sup>208</sup> *Williams* (2004) 60 NSWLR 286. This case is discussed further: see below Part IV.

<sup>209</sup> *Ibid* 301 (Mason P). See also Butt, above n 88, 780–2.

<sup>210</sup> The Court also rejected the doctrine of lost modern grant because it clashed with the principle of legal title by registration: *Williams* (2004) 60 NSWLR 286, 301–2 (Mason P). See below Part IV.

<sup>211</sup> *Land Title Act 1994* (Qld) s 185(1)(c), (3).



4 *Abolition of the Doctrine of Lost Modern Grant and the Implementation of a Statutory System*

Uniquely in Australia, Tasmania has both abolished the doctrine of lost modern grant<sup>212</sup> and reinstated a statutory scheme based on the principles of prescription.<sup>213</sup> What was the creation of the common law has been appropriated to, modified by, and managed under, the Torrens system. The scheme allows a party to make an application to the Recorder for the registration of an easement. If the applicant is successful, the Recorder will record an easement. In order to be successful, applicants must provide evidence to the Recorder which is peculiarly consistent with the evidence necessary under the doctrine of lost modern grant. Briefly stated, applicants must show that:

- they enjoyed the land as of right;
- the easement was not enjoyed by force, in secret, or by agreement;
- there was no unity of seisin between the dominant and servient tenements;
- the servient tenement owner knew or ought to have known of the enjoyment;
- the easement is not of a temporary nature; and
- they own the dominant tenement in fee simple.<sup>214</sup>

The period of user is 15 years, or 30 years for a person under a disability.<sup>215</sup> An application may be made against a person who is under a disability (and may not have been considered a competent grantor under the doctrine of lost modern grant).<sup>216</sup>

Several important features differentiate the acquisition of an easement under the Torrens system from acquisition under the doctrine of lost modern grant and, in fact, make the prospect for success quite slim. These include: the fact that the source of an easement is registration, rather than a lost grant; the applicant must produce evidence from at least one other person in support of the easement as claimed;<sup>217</sup> and the servient owner may object to the application and in most cases bring the process to an end.<sup>218</sup> This statutory scheme of prescription will be considered further below.

5 *Silence*

The legislation in the NT does not make it clear whether prescriptive easements have any role there. However, the better view is that they have no ongoing

<sup>212</sup> *Land Titles Act 1980* (Tas) s 138I. See also Law Reform Commission of Tasmania, above n 127, [2.6].

<sup>213</sup> *Land Titles Act 1980* (Tas) ss 138J–L.

<sup>214</sup> *Land Titles Act 1980* (Tas) s 138L(1).

<sup>215</sup> *Land Titles Act 1980* (Tas) s 138J.

<sup>216</sup> *Land Titles Act 1980* (Tas) s 138J. A person is taken to be under a disability while they are an infant or incapable, by reason of mental illness, of managing their property affairs: *Land Titles Act 1980* (Tas) s 138G(2).

<sup>217</sup> *Land Titles Act 1980* (Tas) s 138L(1).

<sup>218</sup> *Land Titles Act 1980* (Tas) s 138K(2).

operation over land brought under the Torrens system. Silence on this issue arguably constitutes another form of indirect abolition of prescriptive easements.

The legislation provides for indefeasibility of title,<sup>219</sup> the ongoing effect of easements that were registered but subsequently omitted,<sup>220</sup> and a procedure for formally granting and registering easements.<sup>221</sup> However, unlike NSW, Queensland, Victoria and SA, there are no provisions explicitly subjecting indefeasibility of title to prescriptive easements in a narrow or broad fashion. Commentators have also drawn attention to the fact that adverse possession has been abolished in the NT. Therefore, perhaps it can be argued that the legislature also intended to abolish prescriptive easements.<sup>222</sup> Significantly, this suggests that in some jurisdictions, legal recognition of long-established de facto enjoyment may imperceptibly vanish. The register, rather than some kind of physical connection to land, is the only source of legal title.

### C England

A small proportion of interests in land known as ‘unregistered land’<sup>223</sup> remain governed by the earlier system of English conveyancing practice. Unregistered land is subject to the mandatory registration provisions of the *Land Registration Act 2002* (UK) c 9. The effect of these provisions is to compulsorily convert unregistered estates in land into registered estates so that ‘unregistered land’ is gradually phased out and over time little or none will exist.<sup>224</sup> Therefore, like Australia, the ongoing survival and utility of prescriptive easements will increasingly depend upon the intent of the legislature and the bureaucratically managed framework of title by registration.

In 1925, the *Land Registration Act 1925* began the process of moving to a system in which ‘registration of title’ replaced ‘deeds of title’ as the paramount proof of ownership of land or more accurately, estates in land. This legislation was repealed and replaced by the *Land Registration Act 2002* (UK) c 9 that came into force on 13 October 2003. Under this Act, the system introduced by the earlier legislation was considerably enhanced in anticipation of the introduction of electronic conveyancing in the foreseeable future. The underlying change wrought by the *Land Registration Act 2002* (UK) c 9 ought not to be underestimated. Kevin Gray and Susan Francis Gray have described the Act as confirming a philosophical shift ‘from the phenomenon of *possession* ... towards the ideology of *ownership*.’<sup>225</sup> They observe that:

<sup>219</sup> *Land Title Act 2000* (NT) s 188.

<sup>220</sup> *Land Title Act 2000* (NT) s 189(1)(c). The NT provision appears narrower in scope than the provision in the ACT. In the NT the exception to indefeasibility assumes that there was registration and that the particulars have been omitted or misdescribed in the land register.

<sup>221</sup> *Land Title Act 2000* (NT) div 4.

<sup>222</sup> Bradbrook, MacCallum and Moore, above n 130, 712.

<sup>223</sup> See generally Dixon, above n 161, 93 fn 1.

<sup>224</sup> *Land Registration Act 2002* (UK) c 9, ss 4–8. A wide variety of events trigger the requirement to register an unregistered estate in land.

<sup>225</sup> Gray and Gray, *Elements of Land Law*, above n 2, 364 (emphasis in original). Certainly, an important change is that a party is no longer able to acquire an interest by adverse possession alone: *Land Registration Act 2002* s 96, sch 6.

the ultimate achievement of the *Land Registration Act 2002* lies in its ruthless maximisation of rational legal order, an aim which is symbolised by the statutory vision of an electronic register of virtually indefeasible titles, transactable by automated dealings and guaranteed by the state. Under this tightly organised regime, estate ownership, as constituted by the register record, becomes a heavily protected phenomenon, leaving little room for the operation ‘off the record’ of some ancient and pragmatic principle of long possession.<sup>226</sup>

Therefore, there are some interesting similarities between the registration system in England and the Torrens system in Australia. The basis of both systems is that title is by registration rather than possession, that ideally the register ought to reflect all estates and interests that affected the land (with the effect that equitable interests off the register will be extinguished by registration of a new proprietor), and that the state guarantees registration of title.<sup>227</sup> Nevertheless there is an important difference between the *Land Registration Act 2002* (UK) c 9 and earlier 19<sup>th</sup> century models. The quest to develop a hard-edged system of land ownership was not so strong in the 19<sup>th</sup> century, perhaps because — at least in part — it was not so technologically achievable. The early Torrens system was new and highly experimental for the age. The main object was the implementation of a system for common land transactions which was cheap and simple. Therefore, long-established de facto enjoyment was accommodated in some way within the system. The main goal of the *Land Registration Act 2002* (UK) c 9 was a fully-integrated and computerised system in which reliance on any title or interest based on a physical connection to the land was significantly reduced. Ultimately, the result may be that old principles like prescription will be precluded, abolished or imperceptibly vanish altogether.

Under the previous legislation, the *Land Registration Act 1925*, prescriptive easements were protected as ‘overriding interests.’ Therefore, a prescriptive easement would automatically bind the registered servient owner although it did not appear as an entry on the register.<sup>228</sup> In 1998, the Law Commission, in conjunction with H M Land Registry, began the long process of reviewing the land registration system in England. They considered the law of prescription unsatisfactory and unsustainable.<sup>229</sup> Two matters were highly problematic — the grounds for claiming prescriptive rights,<sup>230</sup> and the fact that a purchaser may be bound by prescriptive rights which they could not have ascertained through

<sup>226</sup> Gray and Gray, *Elements of Land Law*, above n 2, 364; Gray and Gray, ‘The Rhetoric of Realty’, above n 173, 244–6. The English doctrine of adverse possession is being challenged. The European Court of Human Rights held that the traditional principles of adverse possession were unfair and placed an excessive burden on the registered proprietor: *J A Pye (Oxford) Ltd v United Kingdom* (2006) 43 ECHR 3. In its decision in the same case, the House of Lords referred to the lack of safeguards and compensation for the registered proprietor: *J A Pye (Oxford) Ltd v Graham* [2003] 1 AC 419, 446–7 (Lord Hope). The same concerns were expressed in *Beaulane Properties Ltd v Palmer* [2005] 4 All ER 461, 505 (Nicholas Strauss QC), where it was held that the law was unfair to registered proprietors. These proprietors do not rely on possession or seisin for title, but the fact of registration. The doctrine of adverse possession does not have the same significance in a title-by-registration system.

<sup>227</sup> See generally Gray and Gray, *Elements of Land Law*, above n 2, 358–9; Dixon, above n 161, 33–6.

<sup>228</sup> Gray and Gray, *Elements of Land Law*, above n 2, 1280; Gaunt and Morgan, above n 6, 240–1.

<sup>229</sup> Law Commission and H M Land Registry, *Consultative Document*, above n 7, 237, 240.

<sup>230</sup> *Ibid* 240–1.

reasonable enquiries and inspections.<sup>231</sup> The Law Commission and H M Land Registry recommended that subject to vested rights already in existence, no new prescriptive claim based on common law prescription or the doctrine of lost modern grant ought to be allowed.<sup>232</sup> As such, it would still be possible to make a claim under the *Prescription Act 1832*.<sup>233</sup>

These specific recommendations were not carried over into the *Land Registration Act 2002* (UK) c 9.<sup>234</sup> However, the legislation still limited the extent to which prescriptive easements could constitute overriding interests.<sup>235</sup> Moreover, the legislation put in place a framework to ensure that via an amalgam of registration, disclosure and reasonable inspection, purchasers would be protected from easements which were not easily discoverable.<sup>236</sup> This framework reflected the principal aim of the Law Commission and H M Land Registry that it ought to be 'possible to investigate title to the land almost entirely on-line with the bare minimum of additional enquiries.'<sup>237</sup>

Legal easements that were not created by a formal grant, such as easements by prescription, constitute overriding interests in several distinct and complex processes.<sup>238</sup> Simply stated for the purpose of this article, legal easements which were in existence before 13 October 2003 and/or before the first registration of title of the servient land, continue to qualify as overriding interests. They bind the servient land automatically.<sup>239</sup> However, it is anticipated that such easements will be registered when a person makes an application to register a disposition of a registered estate due to disclosure and registration requirements under the legislation.<sup>240</sup>

Legal easements created over registered land after 13 October 2003 will only constitute overriding interests and bind the servient tenement automatically until 12 October 2006.<sup>241</sup> After 12 October 2006, these prescriptive easements only constitute overriding interests in certain circumstances. For the purpose of this article, the important circumstances contained in sch 3 of the *Land Registration Act 2002* (UK) c 9 arise when:

<sup>231</sup> Ibid 241.

<sup>232</sup> This recommendation was framed in the light of a legal issue in the United Kingdom, but which is absent from the Australian context, namely, the impact of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953). The Convention will not be discussed in this article. However, any abolition of property rights or the removal of extant property interests due to the narrowing of the concept of 'overriding interests' could be affected by the Convention. The Law Commission did not contend that any recommendations for reform would be adversely affected by the Convention. Rather, this result was highlighted as a possibility: see Law Commission and H M Land Registry, *Consultative Document*, above n 7, 62–5.

<sup>233</sup> Law Commission and H M Land Registry, *Consultative Document*, above n 7, 241.

<sup>234</sup> Law Commission and H M Land Registry, *A Conveyancing Revolution*, above n 6, 168–7.

<sup>235</sup> Ibid.

<sup>236</sup> Ibid 169–71.

<sup>237</sup> Ibid 138 (citations omitted).

<sup>238</sup> Equitable easements created after the commencement of the *Land Registration Act 2002* (UK) c 9 do not constitute overriding interests: *Land Registration Act 2002* (UK) c 9, s 27(1), (2)(d).

<sup>239</sup> *Land Registration Act 2002* (UK) c 9, s 134(2), sch 12 para 9, sch 1 para 3.

<sup>240</sup> *Land Registration Act 2002* (UK) c 9, s 71.

<sup>241</sup> *Land Registration Act 2002* (UK) c 9, sch 12 para 10.

- the prescriptive easement was ‘within the actual knowledge’ of the *disponer*;<sup>242</sup>
- the easement was ‘obvious on a reasonably careful inspection of the land over which the easement or profit is exercisable’;<sup>243</sup> or
- the right of user was exercised within one year immediately preceding the date of the disposition.<sup>244</sup>

Therefore, after the transitional provisions have taken effect, the *Land Registration Act 2002* (UK) c 9 requires not only that claimants demonstrate acquisition of a prescriptive easement in accordance with one of the three traditional grounds, but that the alleged easement satisfies one of the statutory standards. Otherwise they will lose their overriding status.<sup>245</sup>

#### D Comment

The juxtaposition of the legislative approaches to prescriptive easements within the land title registration systems in Australia and England provides several remarkable contrasts and convergences.

In England, NSW and Queensland, prescriptive easements are not automatically expunged or lost because the servient land is brought into the title-by-registration system. Transitional provisions seek to take into account the existence of prior prescriptive easements. However, any similarity ends there, because in NSW and Queensland it is not possible to create new easements by prescription after registration. In England, the legislation does allow for new prescriptive easements after registration, but after the transition period they will only constitute overriding interests if they comply with one of the statutory standards in sch 3.

Leaving aside the fact that prescriptive easements may be claimed in a wider variety of circumstances in England, it should not be assumed that the *Land Registration Act 2002* (UK) c 9 provides a broader protection for prescriptive easements than any Australian legislation. It is more accommodating to claims for acquisition than NSW, Queensland and, arguably, the ACT and the NT. However, in Victoria and WA prescriptive easements are exceptions to indefeasibility or, using the English terminology, overriding interests once the criteria for the doctrine of lost modern grant or (in the case of WA) the *Prescription Act 1832* have been satisfied. Additional legislative requirements like those contained in sch 3 of the *Land Registration Act 2002* (UK) c 9 have not been imposed. To this extent, the English legislation is more restrictive than that of either Victoria or WA.

<sup>242</sup> *Land Registration Act 2002* (UK) c 9, sch 3 para 3(1)(a).

<sup>243</sup> *Land Registration Act 2002* (UK) c 9, sch 3 para 3(1)(b).

<sup>244</sup> *Land Registration Act 2002* (UK) c 9, sch 3 para 3(2). Another exception is where the easement is registered under the *Commons Registration Act 1965* (UK) c 64. This exception will not be discussed in this article.

<sup>245</sup> Law Commission and H M Land Registry, *A Conveyancing Revolution*, above n 6, 171.

A broad comparison may also be made between the Tasmanian and English legislation. Both legislatures have endeavoured to rein in claims for prescriptive easements by supplementing the traditional principles with further statutory requirements. In Tasmania, there are more controls over the acquisition of an easement within the Torrens system than those existing under the *Land Registration Act 2002* (UK) c 9. In England, a claimant may satisfy a traditional ground for prescription, but it may be possible to argue that the interest does not constitute an overriding interest. The traditional law technically remains, but on a particular set of facts it is rendered otiose by the legislative qualifications. Therefore, in the *Land Registration Act 2002* (UK) c 9, the legislature may have commenced the process of indirectly abolishing some easements which would have otherwise satisfied one of the traditional grounds.

It is clear that the responses to long-established de facto enjoyment of land in title-by-registration systems have varied. Nevertheless, the operation of these systems has squarely raised the issue of whether prescription has any role to play in modern land law. The discussion above highlights that most legislatures are increasingly unwilling to tolerate traditional prescriptive easements within the title-by-registration system. This is because the frame of reference for land law has markedly changed. The fluidity of the concepts of possession and title has been replaced by hardened rules of indefeasible ownership acquired through registration. To the extent that prescriptive easements still exist, law reformers have either called for a significant overhaul of the law of prescription or its total abolition.

#### IV PROPOSALS FOR REFORM OF THE LAW OF PRESCRIPTION

There are three possible approaches to the reform of prescription and prescriptive easements.

##### *A Retain Prescriptive Easements in Accordance with the Current Grounds of Acquisition*

One possibility is to retain prescriptive easements in conformity with the present law. This would only be feasible if the law were underpinned by policies which were considered appropriate and the law itself was clear and efficient. In England it appears unlikely that the current law will be retained. Several law reform bodies have expressed concern about the prospective impact of prescriptive easements and the uncertainty of the law.<sup>246</sup> In any event, it is arguable that the *Land Registration Act 2002* (UK) c 9 has already commenced the reform of the law of prescriptive easements. Easements created after the legislation took effect will only retain the status of an overriding interest if they fall within one of the statutory standards stated above. Indeed, the legislation introduces statutory standards which are unrelated to the traditional concepts associated with easements generally. For example, traditionally, if a person acquires an easement,

<sup>246</sup> Law Commission and H M Land Registry, *Consultative Document*, above n 7, 240; Law Reform Committee, above n 8, 11.

they have a legal interest in the land which is exercisable against a purchaser regardless of whether the purchaser has notice of the easement.<sup>247</sup> Yet two of the statutory standards which ensure that a prescriptive easement constitutes an ‘overriding interest’ concentrate on whether the *disponee* had notice or would have had notice on reasonable inspection.<sup>248</sup>

In Australian jurisdictions (with the exceptions of Tasmania and NSW), prescription and prescriptive easements have not been the focus of coordinated law reform in recent times. Those reforms in the law which largely took place in the 19<sup>th</sup> and early 20<sup>th</sup> centuries were reactive, incremental and uncoordinated. It would be unfortunate if there were no renewed debate on title by registration, prescription and the current condition of the law. It would be preferable if there were greater uniformity not only between the states but also within the law of each state.<sup>249</sup>

#### B *Retain the Law of Prescription Subject to Legislative Amendment*

Another approach is to retain the law of prescription, but with significant statutory modification. Some law reform bodies have considered this to be a possible fallback position in the event that the legislature did not wish to abolish prescription entirely.<sup>250</sup> Such recommendations recognise the need for significant legislative amendments, and do not constitute a ringing endorsement of long-established user by de facto enjoyment. Moreover, an examination of the underlying policy of land law is totally absent. It is assumed that prescription may be accommodated in a legal system which has achieved, or is on the road to implementing, title by registration. The advantage of a legislative modification of prescription is that it may clear away uncertainties and prescribe criteria which accord with modern assumptions and conditions. On the other hand, it may create further uncertainty and complexity.<sup>251</sup> It is arguable that this is precisely what occurred when the *Prescription Act 1832* was passed in the 19<sup>th</sup> century.

One form of statutory modification is the reform of some of the individual criteria which must be satisfied for acquisition. These include the prescriptive period, the persons against whom acquisition may arise, and the kinds of easement which may be acquired.<sup>252</sup> Alternatively, a new statutory scheme of prescription could be set up. This is what occurred under the Tasmanian legisla-

<sup>247</sup> Burn, above n 12, 569.

<sup>248</sup> *Land Registration Act 2002* (UK) c 9, sch 3 para 3(1)(a), (b).

<sup>249</sup> For example, in NSW different rules apply depending on when the easement was created and whether the servient land is old system title or land under the Torrens system: see *Real Property Act 1900* (NSW) s 42(1)(a1).

<sup>250</sup> Law Reform Committee of South Australia, *Prescription and Limitation of Actions*, Report No 76 (1987) 57.

<sup>251</sup> Getzler, above n 21, 323.

<sup>252</sup> See generally the recommendations of the minority in Law Reform Committee, above n 8, 14–24. These kinds of reform have been implemented in some of the jurisdictions discussed above.

tion referred to above,<sup>253</sup> which represents an extreme example of legislatively controlled prescription. Although the Tasmanian legislation could be equally dealt with below in Part IV(C), it is useful to consider it here.

The Tasmanian legislation explicitly acknowledges the old framework where a connection to the land through long-established de facto enjoyment created a legal interest. However, the applicant's position under the legislation is weaker than under the traditional principles. First, the acquisition of an easement is not automatic upon satisfying the criteria. An administrator decides whether or not to record the easement.<sup>254</sup> Secondly, it is open to the servient owner to object to the application; such an objection will bring the process to an end in most cases<sup>255</sup> unless the Recorder considers that the applicant may suffer serious hardship.<sup>256</sup> As it is unlikely that modern servient owners will often accede to the imposition of an easement without compensation, it is unlikely that many applicants will be successful. Thirdly, an administrator rather than a judicial officer makes the determination. No doubt the intent was to reduce costs associated with the application. However, whether this is likely to occur is questionable as the impact of the easement may be significantly burdensome on the servient owner. A servient owner who is dissatisfied with the decision of the Recorder based on serious hardship may seek some form of administrative review to the extent that it may be available. Fourthly, the dominant owner's serious hardship does not determine the application, but only leaves the door open for consideration in the event of the servient owner's objection.<sup>257</sup> Although the legislation does not define what kind of situation would constitute hardship, a complete lack of access to, or use of, the property would surely satisfy this criterion. In the light of other Tasmanian legislation which is discussed below,<sup>258</sup> it is questionable whether there will be many applications for an easement based on a long-established de facto user.

### C *Abolish the Law of Prescription*

A third approach is the abolition of prescription.

#### 1 *Arguments for Abolishing the Law of Prescription*

The arguments for abolition emphasise the parlous state of the law and the incongruity of allowing prescription in land registration systems. There are four broad and overlapping reasons which are considered below.

<sup>253</sup> *Land Titles Act 1980* (Tas) ss 138I–Q. See also Law Reform Commission of Tasmania, above n 127, [2.5]–[2.6].

<sup>254</sup> *Land Titles Act 1980* (Tas) s 138L(3).

<sup>255</sup> *Land Titles Act 1980* (Tas) s 138K.

<sup>256</sup> *Land Titles Act 1980* (Tas) s 138K(4).

<sup>257</sup> *Land Titles Act 1980* (Tas) s 138K(4).

<sup>258</sup> *Conveyancing and Law of Property Act 1884* (Tas) s 84J.



*(a) The Present Law Is Too Complex*

Law reform bodies in both England and Australia have consistently observed that the present law governing the acquisition of prescriptive rights is extremely complex.<sup>259</sup> In England, for example, the members of the Law Reform Committee disagreed about whether prescription ought to be abolished outright, although a small majority recommended its abolition.<sup>260</sup> However, the Committee unanimously considered that the law was ‘unsatisfactory, uncertain and out of date.’<sup>261</sup> The *Prescription Act 1832*, a significant ground on which claims are made, was described ‘as one of the worst drafted Acts on the Statute Book.’<sup>262</sup> In the event that prescription was retained, the Committee recommended significant changes.<sup>263</sup> Later, in 1998, the Law Commission and H M Land Registry doubted ‘whether any informed person would suggest that the present law on prescription ... is satisfactory.’<sup>264</sup> They stopped short of recommending outright abolition simply because the law of prescription was outside the scope of their review.<sup>265</sup>

For some law reform bodies, abolition of prescription presents the easiest and safest method of restoring certainty to the law.<sup>266</sup> However, to point to the complexity of the law does not address the fundamental issue as to whether prescription in some form is still necessary in land law. Simply abolishing prescription does not magically resolve all the problems posed by prescriptive easements.

*(b) A Party Should Seek a Formal Grant of Easement*

Law reform bodies have been sympathetic to servient owners faced with significant burdens which originated in neighbourly conduct, the terms of which they have neither negotiated nor committed to writing, and for which they are paid no fee or compensation. It has been contended that there is no longer any moral justification for the acquisition of prescriptive easements. The law operates in favour of the owner of the dominant land as

a process which either involves an intention to get something for nothing or, where there is no intention to acquire any right, is purely accidental. Moreover, the user which eventually develops into a full-blown legal right, is enjoyable not only by the dominant owner himself but also by his successors in title for ever ... There is no reason why a person who wishes to acquire an easement

<sup>259</sup> See, eg. Law Reform Commission of Victoria, *Easements and Covenants*, Discussion Paper No 15 (1989) [9]; Law Reform Committee of South Australia, above n 250, 41.

<sup>260</sup> Law Reform Committee, above n 8, 11.

<sup>261</sup> *Ibid* 10.

<sup>262</sup> *Ibid* 14.

<sup>263</sup> *Ibid* 14–29.

<sup>264</sup> Law Commission and H M Land Registry, *Consultative Document*, above n 7, 240 (citations omitted).

<sup>265</sup> *Ibid* 240. There was also the problem of the nature and extent of the requirement to comply with other treaty obligations: at 62–5.

<sup>266</sup> Law Reform Commission of Victoria, above n 259, [10]; Law Reform Committee of South Australia, above n 250, [33]. See also Clarke and Kohler, above n 80, 498–9.

over someone else's land should not adopt the straightforward course of asking for it.<sup>267</sup>

In past eras, legal relations may have been governed by informality, custom and the absence of written documentation. Claims for prescriptive easements were appropriate when the express creation of easements was difficult due to the complexity of conveyancing procedures. An efficient land law system will enable owners to seek, negotiate, pay for, and formalise obligations in writing. Therefore, it ought to be incumbent upon a potential dominant owner to take the necessary steps to formally and expressly create an easement.<sup>268</sup>

This proposition has merit. It is preferable for parties to directly and autonomously create their own rights and liabilities, rather than relying on general and often complex principles. However, the problem is that a putative dominant owner may not be able to acquire an easement in that way. A servient owner may be unwilling to grant an easement formally. In such cases, recourse to the law of prescription may be the only avenue open to prevent hardship to the dominant owner.

*(c) Incompatibility with a Scheme of Title by Registration*

Alternatively, it has been argued that prescriptive easements are incompatible with systems under which a party only acquires legal title by registration. The ideal system is where a prospective bona fide purchaser is able to inspect the register without the need for any further or significant investigations. All interests which burden the land (or the registered proprietor's estate in the land) are clearly and amply disclosed on the register. Accordingly, a common argument against prescriptive easements is that they constitute legal interests which arise off the register and have the potential to impair its reliability and consistency.<sup>269</sup> Indeed, in England, prescriptive easements have been considered 'one of the most troublesome of the "over-riding interests" which bind the land without being registered.'<sup>270</sup>

Despite the persuasiveness of this line of reasoning, there are two problems. One is that it has been accepted in Australia and England that despite the centrality of registration, there are, respectively, exceptions to indefeasibility or overriding interests which exist off the register.<sup>271</sup> The other is that in jurisdictions such as Victoria and WA, prescriptive easements remain as specific exceptions to indefeasibility.<sup>272</sup> In light of these examples, it is arguable that prescriptive easements do not pose a significant threat to the integrity of title by registration.

Another argument underlining the incompatibility of prescriptive easements is that the fundamental principles which govern prescriptive easements are

<sup>267</sup> Law Reform Committee, above n 8, 11.

<sup>268</sup> Law Reform Commission of Victoria, above n 259, [10]; Law Reform Committee of South Australia, above n 250, 54.

<sup>269</sup> Law Reform Committee of South Australia, above n 250, 47–8.

<sup>270</sup> Law Reform Committee, above n 8, 11.

<sup>271</sup> Butt, above n 88, 787–8, 796–8; Gray and Gray, *Elements of Land Law*, above n 2, 161.

<sup>272</sup> *Transfer of Land Act 1958* (Vic) s 42(2)(d); *Transfer of Land Act 1893* (WA) s 68(3)(c).

antithetical to modern registration systems. In this regard, the doctrine of lost modern grant is particularly notable. As previously discussed, the doctrine was a fiction created by judges to justify a claim for an easement based on long user. Courts hid behind the notion that a servient owner had acted autonomously and granted an easement in accordance with the conveyancing practice of the day. Unfortunately, the grant had been lost, but the parties had acted in a way which confirmed that the right of user had a legal origin. Importantly, the doctrine operated on the basis that a grant under the old conveyancing practice had created a legal easement which was appurtenant to the dominant land. The legal easement was not created by registration.

It is claimed that to apply this fiction to a title-by-registration system would stretch the underlying fiction beyond recognition. It would be necessary to presume that there has been compliance with the particular formalities required for creating a legal easement under the title-by-registration system, but for reasons unknown, the interest was later expunged from the register. In *Williams*, Mason P pointed out that in the context of NSW:

it is to pile fiction upon fiction to extend the doctrine of lost modern grant into the Torrens system, because (assuming no relevant exception to s 42 or its equivalents) that system contemplates title at law as arising only upon registration. To transpose the fiction of lost modern grant into a Torrens context one has to presume considerably more than the loss of an executed (and delivered) deed. At the very least, one would have to presume the execution and delivery of a registrable instrument. But logic suggests that one has to go further and presume delivery accompanied by certificate of title, since that is the normal way in which the person entitled to have an interest registered goes about perfecting such title so far as lies in the grantor's power. Indeed, the title is only perfected through the act of a third party (the Registrar-General), and there is no basis for inferring that officer's acquiescence in the user giving rise to the common law doctrine.<sup>273</sup>

It does appear incongruous to construct a streamlined and efficient registration system and then perpetuate a fiction which has no connection with reality. However, it is arguable that the archaic justification of a lost grant must be separated from the principle of entitlement based on long-established de facto enjoyment. An aversion to an archaic legal fiction does not address whether the underlying principle of prescription had inherent value.

*(d) It Is Preferable to Rely on Statutory Protections*

It has been suggested that prescriptive easements are no longer necessary in light of modern planning legislation and requirements.<sup>274</sup> Such legislation will normally govern such matters as rights of access and rights of support. Therefore, it is unlikely that parties will be disadvantaged by the abolition of prescription. However, it is arguable that unless it could be demonstrated that such legislation was comprehensive, this would not constitute a sufficient reason to

<sup>273</sup> (2004) 60 NSWLR 286, 300 (Mason P). Interestingly, the Court took an approach predicted by the Law Commission: see Law Commission and H M Land Registry, above n 7, 241.

<sup>274</sup> Law Reform Committee of South Australia, above n 250, 55. In this regard, the Committee expressed agreement with the Ontario Law Reform Commission.

abolish prescriptive easements. Indeed, in recent times parties have been compelled to seek prescriptive easements for such matters as parking access.<sup>275</sup>

The reasons for the abolition of prescription are instructive not only for what was explicitly argued, but also for what was not discussed. There has been no examination of whether the law of prescription had any inherent practicality. There is an intellectual *fait accompli* because the frame of reference had already changed. The implementation, or the prospect, of title by registration had rendered such considerations otiose. The transitions from possession to registration; relative title to absolute ownership; and acquisition by user to bargained-for rights were well underway.

## 2 *The Process of Abolition*

The decision to abolish prescription and prescriptive easements is possibly an easy one. The difficulty lies in doing so satisfactorily. To put it another way, will the opportunity to bargain for rights in land fill the legal vacuum left by prescription or will courts continue to play a role in determining claims for easements having regard to the ideology of absolute ownership? There are several ways to abolish prescription which would not adequately address the legal vacuum left by prescription.

### (a) *Absolute and Immediate Abolition*

The Law Reform Commission of Victoria recommended, *inter alia*, that the opportunity to acquire an easement by long user should be abolished immediately.<sup>276</sup> The Commission contended that immediate abolition would avoid the problem that inchoate rights could be allowed to mature into easements at a later time.<sup>277</sup>

This recommendation is practical and prudent because it would ensure that the law could be rendered completely certain. It would make sense in a jurisdiction like Victoria where the Torrens system has operated for well over 100 years, where parties have been able to bring land within the system, and where parties may expressly create easements.<sup>278</sup> It would make even more sense in NSW where new prescriptive easements cannot be claimed over land under the Torrens system.<sup>279</sup> However, immediate abolition of the opportunity to acquire prescriptive easements would prove more difficult in jurisdictions like England where prescriptive rights have had a wider role to play in the relationship between landowners and where there could be other legal obligations — such as the operation of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.<sup>280</sup> Nevertheless, immediate abolition may work where there were transitional provisions and an alternative statutory means by which a

<sup>275</sup> In relation to England: see Gaunt and Morgan, above n 6, 357. For Australia: see *Maher v Bayview Golf Club* [2004] NSWSC 275 (Unreported, Campbell J, 4 June 2004).

<sup>276</sup> Law Reform Commission of Victoria, above n 259, [11].

<sup>277</sup> *Ibid.*

<sup>278</sup> *Property Law Act 1958* (Vic) s 194.

<sup>279</sup> See *Williams* (2004) 60 NSWLR 286.

<sup>280</sup> Opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953); see also Law Commission and H M Land Registry, *Consultative Document*, above n 7, 63–5.

party could acquire easement rights. This was recognised by the Commission<sup>281</sup> and will be discussed further below.

*(b) Indirect but Almost Entire Abolition — Relying on the Land Registration System*

In some jurisdictions, legislatures have not enacted legislation which directly and explicitly abolishes prescription or all prescriptive easements. Instead, they have chosen not to accord prescriptive easements a special or protected status. In NSW, the legislature incrementally limited the kinds of easements which could be acquired and specified limited exceptions to the indefeasibility of title.<sup>282</sup> Accordingly, for practical purposes, the prescriptive easement is almost a historical relic of a bygone era. This approach is not commendable because the absence of a direct and explicit abolition may render the law subject to doubt.

*(c) Immediate Abolition and Replacement with a Statutory Scheme of Prescription*

As previously discussed, prescriptive easements have been abolished in Tasmania and replaced with a statutory scheme of prescription.<sup>283</sup> The fundamental problem with a statutory scheme is that the conditions for acquiring a prescriptive easement are likely to be so strict that it will be very difficult to make a successful application. Even if the conditions are not overly onerous, it may be argued that the scheme merely re-establishes prescription or that it permits persons to acquire rights accidentally or without payment of compensation.

### 3 *A Preferred Model of Abolition*

The adequate and appropriate abolition of prescription, and prescriptive easements in particular, requires the implementation of a scheme comprising three elements. It would be necessary to take into account both retrospective rights and prospective entitlements to an easement.

*(a) Transitional Provisions*

A set date for abolition coupled with transitional provisions would ensure that persons who had acquired a prescriptive easement had the opportunity to register it. For example, the Law Reform Committee of SA contemplated that existing claims based on prescription should be determined and, where appropriate, easements registered by a fixed date.<sup>284</sup> The Committee also relied on the recommendations of the Law Reform Commission of British Columbia that all prescriptive rights should be revoked within five years of the date of abolition unless persons entitled to such rights had brought a claim or taken procedural steps towards registration.<sup>285</sup> The transitional provisions recommended by the Law Reform Committee were time-based. The advantage is clear. Landowners

<sup>281</sup> Law Reform Commission of Victoria, above n 259, [13], [17].

<sup>282</sup> *Real Property Act 1900* (NSW) s 42(1)(a1).

<sup>283</sup> See above Part III(B)(4).

<sup>284</sup> Law Reform Committee of South Australia, above n 250, 47–8, 54.

<sup>285</sup> *Ibid.*

are placed on notice that they are required to take steps to secure their rights or lose them altogether. In this way, after a specified period, the law of prescription would be absolutely abolished.

Abolition subject to transitional provisions seems fairer than immediate abolition in jurisdictions such as England, where a wider array of prescriptive rights may be acquired than in Australia. However, it has two significant limitations. One is that it deals with retrospective claims only. The other is that it assumes that after abolition, prospective claims for easements will be subject to a bargain between the parties. Therefore, it would be necessary to implement concurrently two additional measures.

*(b) Legislative Protection for Certain Rights Acquired by Prescription*

One problem with a legislative approach which focuses exclusively on abolition is that it assumes that the abolition of prescriptive easements, or the abolition of the process for acquiring prescriptive easements, will have little practical impact in the long-term; or that parties can bargain for easements rights in the future. Sometimes what remains unacknowledged is that past conduct and legal fictions were employed (albeit imperfectly) to recognise acquired rights which were neither accidental nor based on a desire to get something for nothing. Instead, these rights were the result of an essential long user when an express grant was, for a variety of reasons, unfeasible or unlikely; and it was not possible to satisfy other criteria for implied or quasi-easements. Yet without the long user, the owner may not have been able to utilise the dominant land in a particular way or would have suffered significant hardship. Negative easements would appear in this category, particularly when the long user was indispensable, but not readily apparent as essential.

The effect of abolishing prescriptive easements when the user was essential will depend on the jurisdiction. Most Australian states and territories have abolished prescriptive rights to light and air (implicitly indicating that such rights are non-essential or better protected in other ways). However, in the absence of an express grant, some rights of support may only be acquired by prescription,<sup>286</sup> albeit subject to the impact of the Torrens system. In England, significant rights to light, air and support are still acquired by prescription. In an era where there was little or no municipal and building legislation, the *Prescription Act 1832* entrenched such rights acquired by long user. Accordingly, the abolition of prescriptive easements may cause unnecessary uncertainty without some overarching legislation that guarantees their survival.<sup>287</sup> However, any legislative abolition ought not to be followed by provisions to the effect that rights to light, air or support which were protected under the law of prescription remain protected. This would indirectly re-entrench the law of prescriptive easements without obtaining any significant benefits from abolition. Rather, in order to

<sup>286</sup> See above Part II(C)(3).

<sup>287</sup> Therefore, it is not surprising that successive law reform commissions in that jurisdiction have tried to construct a system to protect lateral support which could exist without reliance on prescriptive easements: see, eg. Law Reform Committee, above n 8, 27; Law Commission, 'Appurtenant Rights' (Working Paper No 36, 1971) 30–1; Tan Hang Wu, 'The Right of Lateral Support of Buildings from the Adjoining Land' [2002] *Conveyancer and Property Lawyer* 237.

successfully abolish prescriptive easements, a careful analysis of planning and building legislation would be necessary. Such an examination would determine whether and to what extent, general, permanent and overarching legislative provisions can and may protect landowners.

For example in England, the Law Commission and H M Land Registry envisaged several decades ago that the support of land and buildings ought to constitute a general right of ownership protected in legislation.<sup>288</sup> While the Commission's recommendations were not implemented in England,<sup>289</sup> some Australian jurisdictions enacted provisions which did augment ownership rights in this way. As previously discussed, Queensland significantly limited the kinds of prescriptive easement that a party may acquire and indirectly abolished prescriptive easements under the Torrens system.<sup>290</sup> The NT also limited the kinds of prescriptive easement which may be acquired and arguably abolished prescriptive easements in its Torrens system.<sup>291</sup> In the face of the dramatic gap in the protection of landowners, both legislatures enacted provisions which not only confirmed the natural right of land to support, but also a right for support for any buildings on land — support which was, in the absence of an express grant, previously acquired only by prescription.<sup>292</sup> All land is subject to the positive obligation that there will be no withdrawal of support to other land or the buildings, structures or erections on other land. Not only is a landowner bound by these obligations, but all persons whose activity on the land may lead to a withdrawal of support are bound.<sup>293</sup>

While such a provision would deal with situations where prescriptive rights were commonly acquired, they would not cover unusual or particular instances of prescriptive acquisition. Instead, the third component of the reform process is a forum where a party may seek and acquire easement rights.

(c) *A Judicial Power to Impose Statutory Right of User*

In 1971, the Law Commission of England published a working paper on appurtenant rights to land including easements and rights of support.<sup>294</sup> In that paper, the Commission recommended a procedure under which a person could seek the imposition of 'Land Obligations' including easements if certain conditions were met. In summary, these conditions were that:

- the proposed development was in the public interest;
- the proposed development would not be effective without the imposition of the obligation;
- the servient owner could be adequately compensated in money for any loss or disadvantage; and

<sup>288</sup> Law Commission, above n 287, 66–8.

<sup>289</sup> See generally Gray and Gray, *Elements of Land Law*, above n 2, 33–4.

<sup>290</sup> See above Parts II(C)(3), III(B)(3).

<sup>291</sup> See above Parts II(C)(3), III(B)(5).

<sup>292</sup> *Law of Property Act 2000* (NT) s 162; *Property Act 1974* (Qld) s 179.

<sup>293</sup> *De Pasquale Bros Pty Ltd v Cavanagh Biggs & Partners Pty Ltd* [2000] 2 Qd R 461.

<sup>294</sup> Law Commission, above n 287.

- the previous refusal of the servient owner to agree to the imposition of the obligation was unreasonable or there was no-one competent to enter into the agreement.<sup>295</sup>

The recommendations tapped into several emerging communitarian patterns of resolving disputes between parties who had relied on the ideology of absolute ownership.<sup>296</sup> One was that although land ownership was absolute, that ownership may be burdened by obligations. Another was that landowners must act reasonably towards one another. Courts had imposed standards of reasonableness for conduct and consent for centuries. So it was not surprising that the Law Commission recommended the transposition of the reasonableness standard into a legislative framework for determining obligations associated with land ownership. Moreover, the imposition of an obligation was justifiable if it were in the public interest, although it may be difficult to see in some cases how the imposition of an obligation between two private individuals with small landholdings serves the public. In all of this, there was the financial sweetener, a general provision for the payment of compensation to the extent that a landowner was burdened by unwanted obligations. In this way, obligations would be determined, settled and (grudgingly) accepted while acknowledging absolute ownership.

So far the recommendations of the Law Commission have not been enacted generally in England.<sup>297</sup> Nevertheless, they have proved influential in Australia,<sup>298</sup> as Queensland,<sup>299</sup> NSW,<sup>300</sup> the NT<sup>301</sup> and Tasmania<sup>302</sup> have enacted provisions which permit a court to impose statutory rights of user in respect to land. It will be readily recognised that there is an apparent correlation between the implementation of such legislation in the first three jurisdictions and moves to limit and abolish easements which do not arise by virtue of registration such as prescriptive easements. However, in the case of Tasmania, it is difficult to understand why it is necessary to have such a provision and also a scheme of statutory prescription that is difficult to satisfy and does not allow for compensation.

Broadly speaking, the provisions follow the thrust of the original criteria, except in Tasmania where they do not apply to subdivisions which breach certain planning controls.<sup>303</sup> Nevertheless, over time the other legislatures have refined,

<sup>295</sup> Ibid 118 proposition 15.

<sup>296</sup> Gray and Gray, 'The Rhetoric of Realty', above n 173, 253; Butt, above n 88, 461.

<sup>297</sup> Parties may seek limited and temporary access rights under the *Access to Neighbouring Land Act 1992* (UK) c 23: see Gray and Gray, *Elements of Land Law*, above n 2, 675–6. The *Countryside and Rights of Way Act 2000* (UK) c 37 allows for the compulsory grant of vehicular access over privately-held common land. However, a recent decision of the House of Lords in *Bakewell Management Ltd v Brandwood* [2004] 2 AC 519 may have rendered this legislation otiose: see Gray and Gray, *Elements of Land Law*, above n 2, 677.

<sup>298</sup> See, eg, Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No 16 (1973) [80].

<sup>299</sup> *Property Law Act 1974* (Qld) s 180.

<sup>300</sup> *Conveyancing Act 1919* (NSW) s 88K.

<sup>301</sup> *Law of Property Act 2000* (NT) s 164.

<sup>302</sup> *Conveyancing and Law of Property Act 1884* (Tas) s 84J.

<sup>303</sup> *Conveyancing and Law of Property Act 1884* (Tas) s 84J(7).



augmented and refashioned the requirements for the statutory right of user. The most important refinement is the greater reliance on standards of reasonableness. In the Law Commission's recommendations, the focus of the reasonableness standard was the servient owner's refusal to consent. However, the focus of the reasonableness standard in the Australian legislation is on whether the statutory right of user is reasonably necessary for the use of the dominant land.<sup>304</sup> Arguably, what the legislatures have done is to transpose a reasonableness standard necessary for the creation of easements by implied grant into the criteria for statutory rights of user.<sup>305</sup> Other modifications include: courts may have discretion whether to order that compensation be payable;<sup>306</sup> the statutory right may be permanent or for a shorter amount of time;<sup>307</sup> and the statutory right may be modified later.<sup>308</sup> Generally, such legislation has been strictly interpreted by courts and the applicant has borne a heavy burden of demonstrating that their application satisfied the relevant statutory requirements.<sup>309</sup> Therefore, it is unlikely that a court would grant an easement when the proposed easement was probably illegal;<sup>310</sup> desirable but not reasonably necessary;<sup>311</sup> not contemplated by the provision;<sup>312</sup> a substantial interference with the servient owner's property rights;<sup>313</sup> or not preceded by any attempt to acquire an easement by alternative means.<sup>314</sup>

The abolition of prescriptive easements may leave a legal vacuum with respect to pre-existing prescriptive rights based on retrospective conduct. This will be the case when prescriptive rights were not subsequently formalised or adequately appreciated by the dominant owner before the date set for abolition. Therefore, before abolishing prescriptive easements it would be highly desirable to imple-

<sup>304</sup> *Conveyancing Act 1919* (NSW) s 88K(1); *Law of Property Act* (2000) (NT) s 164; *Property Law Act 1974* (Qld) s 180(1). As to reasonable use: see *117 York Street Pty Ltd v Proprietors of Strata Plan No 16123* (1998) 43 NSWLR 504; *Pacific Coast Investments Pty Ltd v Cowlishaw* [2005] QSC 259 (Unreported, McMurdo J, 15 September 2005).

<sup>305</sup> *Wheeldon v Burrows* (1879) 12 Ch 31, 49 (Thesiger LJ) held that such easements must be 'necessary to the reasonable enjoyment of the property granted'. See also Gray and Gray, 'Rhetoric of Realty', above n 173, 253; Butt, above n 88, 448–9; Bradbrook, MacCallum and Moore, above n 130, 706–7.

<sup>306</sup> In Queensland, the court is required to order compensation 'except in special circumstances': *Property Law Act 1974* (Qld) s 180(4)(a). In respect of NSW: see *Conveyancing Act 1919* (NSW) s 88K(4); *Pasade Holdings Pty Ltd v Sydney City Council* [2003] NSWSC 515 (Unreported, Bryson J, 12 June 2003); *Busways Management Pty Ltd v Milner* [2002] NSWSC 969 (Unreported, Hamilton J, 16 October 2002).

<sup>307</sup> This is the case in Queensland. Under s 180(2)(d) of the *Property Law Act 1974* (Qld) the court has a number of options as to the nature and length of user: *Lang Parade Pty Ltd v Pelluso* [2006] 1 Qd R 42. See also *Law of Property Act 2000* (NT) s 164(4)(d).

<sup>308</sup> *Conveyancing Act 1919* (NSW) s 88K(6)(b); *Property Law Act 1974* (Qld) s 180(4)(d).

<sup>309</sup> Bradbrook, MacCallum and Moore, above n 130, 702.

<sup>310</sup> *117 York Street Pty Ltd v Proprietors of Strata Plan No 16123* (1998) 43 NSWLR 504, 511–12 (Hodgson CJ in Eq). See also *Conveyancing and Law of Property Act 1884* (Tas) s 84J(7).

<sup>311</sup> *Woodland v Manly Municipal Council* [2003] NSWSC 392 (Unreported, Hamilton J, 12 May 2003).

<sup>312</sup> Such as an easement in gross: see *Bonvale Enterprises Pty Ltd v Halfpenny Investments Pty Ltd* (2005) 62 NSWLR 698.

<sup>313</sup> *Blulock Pty Ltd v Majic* [2002] NSW ConvR ¶56-012.

<sup>314</sup> *Khattar v Wiese* [2005] NSWSC 1014 (Unreported, Brereton J, 7 October 2005).

ment legislation that permitted the future imposition of easements by statutory user by an impartial third party.

It is also likely that the abolition of prescriptive easements would create a legal vacuum in respect to prospective acquisition by prescription. As pointed out earlier, the law of prescription was important for long-established de facto users when there was no other way of acquiring an easement — particularly when the servient owner was unwilling to negotiate a bargain for easement rights. Yet the alleged easement served and continued to serve a practical or economic purpose for the dominant owner. Indeed, it was unlikely that a dominant owner would claim an easement by prescription for theoretical or historical reasons only. The claim based on retrospective long user was inextricably intertwined with present value.<sup>315</sup> Accordingly, early law reform in Australia — which concentrated on restricting the kind of prescriptive easements that could be claimed, and, ultimately, abolished them (albeit indirectly) in the Torrens system — was fundamentally flawed. It did not put in place a means to temper the inflexible excesses of an ideology of absolute ownership.

This was recognised in Queensland and NSW when it was observed that problems associated with the creation of easements were further exacerbated by title by registration, which precluded the recognition of easements imposed by law or equity.<sup>316</sup> Therefore, well after the process of statutory abolition began, legislatures in both jurisdictions enacted provisions which filled a legal vacuum and permitted the creation of a statutory right of user. It is true that the legislation is wider than prescription because it is unnecessary for an applicant to prove retrospective user. Nevertheless, persons who would have otherwise relied on prescription may bring a claim based on reasonable necessity. Parties may make an application when, for example, council development consent is dependent upon the existence of an easement,<sup>317</sup> a person who had requisite capacity to make an easement could not be found,<sup>318</sup> or the user rights could not be acquired by prescription in that particular jurisdiction.<sup>319</sup>

#### D Comment

In England, the legislative concessions in the *Land Registration Act 2002* (UK) c 9 which accord some prescriptive easements an overriding status, have provided an appropriate pause in reform before the issue of prescriptive easements is directly confronted. In the long-term, it is unlikely that the law of

<sup>315</sup> See also Sara, 'Prescription', above n 34, 16.

<sup>316</sup> See, eg, Queensland Law Reform Commission, above n 298, 80, which was quoted with approval in NSW Law Reform Commission, *Neighbour and Neighbour Relations*, Discussion Paper No 22 (1991) [6.21].

<sup>317</sup> *Blulock Pty Ltd v Majic* [2002] NSW ConvR ¶56-012, 58 312 (Windeyer J); *McConachie v Manly Council* [2002] NSWSC 434 (Unreported, Bryson J, 9 May 2002); *Khat-tar v Wiese* [2005] NSWSC 1014 (Unreported, Brereton J, 7 October 2005); *Gordon v Shaheen* [2005] NSWSC 1328 (Unreported, Hamilton J, 15 December 2005).

<sup>318</sup> *Re Trask Development Co (No 3) Pty Ltd* [2003] QSC 115 (Unreported, McMurdo J, 9 May 2003); *Pasade Holdings Pty Ltd v Sydney City Council* [2003] NSWSC 515 (Unreported, Bryson J, 12 June 2003).

<sup>319</sup> *Blulock Pty Ltd v Majic* [2002] NSW ConvR ¶56-012.

prescription will be retained in its present form. It is clear that in 1998, the Law Commission and H M Land Registry considered that far-reaching action was necessary.<sup>320</sup> Instead, the question will be whether to modify prescription or abolish it altogether. This will depend upon whether long-established de facto enjoyment can be accommodated within a land law system where the frame of reference is registration and the major goal is the protection of bona fide purchasers and their ownership. Perhaps prescription is so well-entrenched in England — and external obligations so prevailing<sup>321</sup> — that only extensive modification or a new statutory scheme of prescription (with all its potential problems) may be feasible. However, if it is determined that prescriptive easements are dispensable, then the Australian experience has demonstrated that prescription cannot be replaced simply by the prospect of an economic bargain between two landowners. Instead, a centralised statutory framework is needed to moderate the inflexible excesses of absolute ownership.

Any prospect of a satisfactory abolition must be tempered by three adjustments. First, transitional provisions must be established which are based on a certain timeframe for abolition for registered and unregistered land. Secondly, legislative protection must be provided for rights which landowners acquired through prescription in the past. Thirdly, a general judicial power to impose statutory rights of user should be entrenched.

Overall there is already less scope for prescriptive easements in Australia than in England, but legal complexity is exacerbated by the different approaches of the states. Legal reform has been incremental and in recent years has stalled. One pattern of law reform is not appropriate throughout Australia. In those states where significant steps have already been taken to abolish prescriptive easements directly or indirectly — such as Queensland and NSW — there ought to be serious consideration as to whether that task should be completed, particularly in light of the provision for a statutory right of user.<sup>322</sup> A re-examination of the law of prescription is necessary in states such as Victoria, SA and WA because prescriptive easements still constitute an exception to indefeasibility in Torrens systems which have existed for more than a century. For Tasmania, the question is whether a special statutory scheme of prescription is necessary. It would be preferable to abolish the scheme and bolster s 84J of the *Conveyancing and Law of Property Act 1884* (Tas) so that it had a general application. Jurisdictions such as the ACT ought to consider whether to implement a statutory right of user.

## V CONCLUSION

The survival or disappearance of prescription in English and Australian law will serve as an enlightening litmus test. It will reveal the result of significant transformations set in train more than 100 years ago. Old notions of possession

<sup>320</sup> Law Commission and H M Land Registry, *Consultative Document*, above n 7, 241–2.

<sup>321</sup> *Ibid* 62–5.

<sup>322</sup> For example, it may be appropriate that easements created by prescription before the land is brought under the Torrens system be unenforceable unless registered within a limited timeframe, such as five years: see Law Reform Commission of Victoria, above n 259, [16]–[17].

and relativity of title which were bedrocks of the common law are becoming irrelevant in modern land law. They are being replaced by hard-edged and minimalist registration systems, along with the concept (if not the reality) of absolute ownership of land. If prescription is abolished or simply disappears in the quest for quicker, cheaper and simpler electronic conveyancing practices, what will fill the legal vacuum it leaves behind? In the mid-20<sup>th</sup> century, the answer appeared to be bargained-for easement rights. By the end of the 20<sup>th</sup> century, it was clear that this would not suffice. The reason was, as Griffith CJ intimated in *Delohery*,<sup>323</sup> that prescription had a peculiarly civilising influence. It was underpinned by the acknowledgement that sometimes people will need to use the land belonging to another and exercise an apparent right. Occasionally, rights between landholders will be settled outside the formal apparatus of a grant. Therefore, it is not appropriate to abolish prescription without taking into account that it has had a valuable role to play. Unfortunately, that role was hidden by the emphasis on past conduct and the fiction of a lost modern grant. In its stead, it is likely that prescription will be overtaken by a statutory right of user. This will be all the more necessary as the public in both England and Australia expect to acquire absolute ownership in land. The result will be a centralised and bureaucratically-managed land law system combined with a statutory scheme of user based on reasonableness and compensation. The informality of mediaeval prescription may disappear, but the need to mediate claims for access and use between landowners remains.

<sup>323</sup> (1904) 1 CLR 283, 310.