



HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

M43/2026

BETWEEN:

LES DENNY PTY LTD (ACN 652 661 955)
AND OTHERS ACCORDING TO THE SCHEDULE

Appellants

and

10

DELMA ANNE VALMORBIDA

Respondent

APPELLANTS' SUBMISSIONS

PART I—CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II—ISSUES

2. Can a prescriptive easement arise at general law based on 20 years of use of the putative servient tenement despite a change in ownership of that land during the 20 year period?
- 20 3. Does s 42 of the *Transfer of Land Act 1958* (Vic) have the effect that a registered proprietor of land holds the land subject to any inchoate prescriptive easement based on less than 20 years of use prior to registration of the registered proprietor's estate or interest?

PART III—SECTION 78B NOTICE

4. Consideration has been given to the question whether notice pursuant to s 78B of the *Judiciary Act 1903* (Cth) should be given with the conclusion that this is not necessary.

PART IV—CITATIONS

5. The citation of the reasons of the primary judge is *Valmorbida v Les Denny Pty Ltd* [2023] VSC 680. The citation of the reasons of the Court of Appeal of the Supreme Court of Victoria is *Les Denny Pty Ltd v Valmorbida* [2025] VSCA 319.

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PART V—FACTS

6. On 9 October 1996, the respondent and her late husband became the registered proprietors of the land at 33 Ivanhoe Street, Sorrento, which is Lot 4 on Plan of

Subdivision LP75564 (the **Plan**). The respondent is now the sole registered proprietor of that land (CA [2]).

7. On 4 October 2021, the appellants became the registered proprietors of the land at 31 Ivanhoe Street. That land is a battle-axe shaped block, and is Lot 7 on the Plan (CA [1]).
8. The respondent's land abuts a strip of land that is the 'handle' of the battle-axe shaped block at 31 Ivanhoe Street. For reasons that are unknown, that strip of land — which is the appellants' property — is known as Stevens Court (CA [2]).
9. The respondent has always accessed her land from the land known as Stevens Court.
10 There is a fence running roughly along the boundary between that strip of land and the respondent's land, with a pedestrian gate towards the front of the respondent's property, and another gate providing vehicle access towards the rear (CA [3]).
10. At the following relevant times, the registered proprietors of the land at 31 Ivanhoe Street were (CA [11]): (a) from 17 May 1984 to 10 April 2015, Wistari Pty Ltd; (b) from 10 April 2015 to 4 October 2021, Les Denny Pty Ltd (ACN 156 618 825) (now named A.C.N. 156 618 825 Pty Ltd (in liq)); and (c) from 4 October 2021, the appellants. Wistari Pty Ltd is not related to the appellants in any way.
11. In May 2022, the respondent commenced a proceeding in the Supreme Court of Victoria, seeking declaratory and other relief to enable her to continue to use the land
20 known as Stevens Court. She alleged that the land known as Stevens Court was a public highway, alternatively that her property had an easement of way over that land. The appellants denied the respondent's claims, and by way of counterclaim sought a declaration that the respondent was not entitled to enter or use the land known as Stevens Court and an injunction restraining her from doing so (CA [4]). In seeking to establish a prescriptive easement, the respondent only relied on her own use of Stevens Court since October 1996 (PJ [84]; CA [23]).
12. The primary judge dismissed the respondent's public highway claim, but held that the respondent's land enjoyed an easement of way over that part of the appellants' land
30 known as Stevens Court based on the respondent's use of that land between October 1996 and October 2016. The primary judge made that finding notwithstanding that that 20 year period spanned two successive registered proprietors of the servient land.

13. In dismissing an appeal from the primary judge’s orders, the Court of Appeal held that at general law a prescriptive easement can arise based on 20 years of use of the putative servient tenement notwithstanding a change in ownership of that land during the 20 year period (CA [55]–[67]). The Court of Appeal further held that, for the purposes of s 42 of the *Transfer of Land Act* — the Victorian provision which grants ‘indefeasibility of title’ to a registered proprietor — a registered proprietor of land holds the land subject to any inchoate prescriptive easement based on less than 20 years of use prior to registration of their interest (CA [85]–[133]).

PART VI—ARGUMENT

10 A Introduction

14. This appeal concerns the question whether a prescriptive easement can be formed on the basis of 20 years of use spanning multiple successive owners of the putative servient tenement. The appellants contend that a prescriptive easement cannot so arise, and that that is the position both at general law and by operation of s 42 of the *Transfer of Land Act*.
15. As to the first issue, the appellants contend that a prescriptive easement cannot arise at general law where there have been multiple successive owners of the putative servient tenement during the relevant 20 year period. The law of prescription rests upon the acquiescence of the owner of the servient land. Although the law will, in certain
20 circumstances, impose a prescriptive easement upon a landowner who has acquiesced in use of the land for a period of 20 years, a landowner should not be affected by their predecessors’ acquiescence, of which they may have no knowledge. It is therefore not possible to aggregate periods of acquiescence of successive owners of the servient land for the purpose of establishing a prescriptive easement. In order for a prescriptive easement to arise at general law, there must have been only one owner of the servient tenement during a relevant period of 20 years.
16. As to the second issue, the appellants contend that s 42 of the Act has the effect that a registered proprietor of land holds the land free from any inchoate prescriptive easement based on less than 20 years of use prior to registration of the registered proprietor’s
30 estate or interest. The effect of registration of an estate or interest is to extinguish any ‘encumbrance’ not recorded on the relevant folio of the Register unless it falls within one of the exceptions in s 42(2). An inchoate prescriptive easement has not been

‘acquired’ and is not ‘subsisting’, and therefore does not fall within the exception in s 42(2)(d). The term ‘encumbrance’ is defined in the Act extremely broadly, and should be construed as encompassing inchoate prescriptive easements, with the result that they are extinguished upon registration of the registered proprietor’s estate or interest. Such a construction of the Act is supported by the relevant statutory context and the Act’s underlying purpose, including the ‘first principle’ of the Torrens system that the need for retrospective investigations is dispensed with. It is therefore not possible for a prescriptive easement to be formed where there have been multiple successive registered proprietors of the putative servient tenement during the 20 year period.

10 **B The first issue: General law**

(a) *Introduction*

17. The whole law of prescription rests upon acquiescence¹ — that is, the acquiescence of the owner of the servient tenement. Such a landowner should not be bound or affected by the acquiescence of their predecessors in title, of which acquiescence they may know nothing. The consequence of this is that it is not possible to aggregate periods of acquiescence by successive owners for the purpose of establishing a prescriptive easement. Accordingly, a prescriptive easement cannot arise at general law based on 20 years of use if that period spans multiple successive owners of the servient land. The Court of Appeal was wrong to hold otherwise (CA [67]).

20 (b) *The Court of Appeal’s reasoning*

18. In considering the issue of ‘tacking’² at general law, the Court of Appeal began by noting that, in *Laming v Jennings*,³ the Court had identified that in a future case consideration would need to be given to case law to the effect that the owner of a putative servient tenement is bound by the acquiescence of their predecessors (CA [53], [62]). The Court of Appeal stated that that question was squarely raised for consideration and determination in this case (CA [62]).

19. The Court of Appeal then referred to cases in which it had been held or stated in *obiter* that, for the purposes of the law of prescription, a landowner is bound by the

¹ *Dalton v Henry Angus & Co* (1881) 6 App Cas 740 at 773.

² ‘Tacking’ in this context means aggregating periods across multiple successive owners of land for the purpose of establishing a prescriptive easement (CA [49]).

³ [2018] VSCA 335 at [195].

acquiescence of their predecessors (CA [63]–[64]). The first such case was *Auckran v The Pakuranga Hunt Club*.⁴ While a decision of ‘the Supreme Court of New Zealand’, the decision was not of the appellate body bearing that title today. It was a 1904 first instance decision of a single judge of what is now known as the High Court of New Zealand. His Honour stated:⁵

The theory of the presumption of a lost grant, in the case of the enjoyment of an easement for twenty years, is that the grant has been made prior to the commencement of the enjoyment: Per Lord Blackburn, in *Angus v Dalton*, commenting upon the case of *Campbell v Wilson*. It follows that the owner of the dominant tenement may take advantage of the enjoyment of his predecessor, and that the owner of the servient tenement is bound by the acquiescence of those who have preceded him.

The Court of Appeal suggested (CA [64]) that that statement had been followed in two first instance decisions of the Supreme Court of Western Australia, *Pekel v Humich*⁶ and *Wayella Nominees Pty Ltd v Cowden Ltd*.⁷ In fact, although the statement in *Auckran* was referred to in both of those decisions, *Pekel* did not involve multiple successive owners of the servient land during the relevant 20 year period,⁸ and therefore the statement in *Auckran* did not form part of the *ratio* of that decision.

20. The Court of Appeal accepted that none of *Auckran*, *Pekel* or *Wayella Nominees* provided an analysis of the doctrinal basis for the principle postulated in *Auckran* (CA [64]). However, it suggested that that analysis had been provided in three decisions (CA [65]).⁹ The Court of Appeal sought to identify and describe that analysis by noting that ‘[t]he law of prescription provides a certain legal basis for what would otherwise be an inexplicable state of affairs’, and that ‘[it] does so by implying the grant of an easement to explain the fact that, for 20 years or more, the owners of the servient tenement have acquiesced in the open, as-of-right use of their land by the owners of the dominant tenement’ (CA [65]). It stated that that analysis does not require 20 years of

⁴ (1904) 24 NZLR 235.

⁵ Ibid 240–1, citing *Dalton v Henry Angus & Co* (1881) 6 App Cas 740 at 798 and *Campbell v Wilson* (1803) 3 East 294; 102 ER 610.

⁶ (1999) 21 WAR 24 at 38 [135].

⁷ [2003] WASC 210 at [230].

⁸ In *Pekel* (1999) 21 WAR 24 at 36 [114], 39 [140], 42 [172], the Court found that a prescriptive easement had arisen on the basis of use that had commenced in 1942. Therefore, the easement was formed in 1962. There was only one owner of the servient land from 1933 to 1969: at 28 [38]. Despite this, the Court of Appeal in this case stated (at CA [99]): ‘While there is no Victorian or High Court authority on the precise issue that has arisen in this case, there is a decision of the Supreme Court of Western Australia [*Pekel*] in which an easement was found to have arisen over a servient tenement as a result of 20 years of uninterrupted use, *despite changes in the registered proprietor of the servient tenement during that period* [emphasis added].’

⁹ Citing *Delohery v Permanent Trustee Co of New South Wales* (1904) 1 CLR 283, *Dobbie v Davidson* (1991) 23 NSWLR 625 and *Hampshire Automotive Centre Pty Ltd v Centre Com (Sunshine) Pty Ltd* (2019) 60 VR 579.

acquiescence without any change in the ownership of the servient tenement. On that basis, the Court of Appeal concluded that an easement can arise at general law based on 20 or more years of use, despite changes in ownership of the relevant land during that period (CA [67]).

21. The Court of Appeal’s reasoning does not in fact identify any principled justification as to why, for the purposes of establishing a prescriptive easement based on 20 years of use, the owner of a putative servient tenement should be bound by the acquiescence of their predecessors in title.
22. While it may be accepted that the law of prescription provides a legal basis for explaining what is otherwise unexplained by implying the grant of an easement,¹⁰ that does not supply any justification for binding a landowner to the acquiescence of previous owners of the putative servient land. Nor does the fiction of a lost modern grant, which is that a grant of an easement was made prior to the period of use, necessitate a conclusion that a landowner is bound by their predecessors’ acquiescence.¹¹ To state that a doctrinal analysis of the law of prescription ‘does not require 20 years of acquiescence without any change in the ownership of the servient tenement’ (CA [65]) does not answer the relevant inquiry, which is whether a landowner should be bound by the acquiescence of their predecessors.

(c) *The doctrinal basis of the law of prescription*

- 20 23. Over 120 years ago, in *Delohery v Permanent Trustee Co of NSW*,¹² this Court recognised that the ‘the doctrine of lost grant was never regarded as anything more than an artificial and subsidiary rule designed for the purpose of giving effect to a substantial right’. Since at least *Dalton v Henry Angus & Co*,¹³ it has been accepted that ‘the whole law of prescription and the whole law which governs the presumption or inference of a grant or covenant rest upon acquiescence’. Or, as it was put by this Court in *Delohery*,

¹⁰ See *Hampshire Automotive Centre Pty Ltd v Centre Com (Sunshine) Pty Ltd* (2019) 60 VR 579 at 601 [107]; *Hamilton v Joyce* (1984) 3 NSWLR 279 at 287.

¹¹ Cf *Auckran* (1904) 24 NZLR 235 at 240. In *Delohery* (1904) 1 CLR 283 at 313–314, this Court stated that the foundation for a prescriptive easement is ‘a grant or agreement on the part of the owner of the adjoining land, using those terms in the sense, not of an actual document which has been lost, but in the sense of a contractual obligation which is implied by law from proved or admitted facts’.

¹² (1904) 1 CLR 283 at 309.

¹³ (1881) 6 App Cas 740 at 773.

by reference to even earlier authority, ‘the consent of the owner of the servient tenement [is] the substance of the matter’.¹⁴

24. These references to ‘acquiescence’ or ‘consent’ are to the conduct of the owner of the servient land. This focus on the acquiescence or consent of the servient tenement owner — as opposed to, say, the expectations of the user — may be understood when it is recognised that the effect of a prescriptive easement is to impair the existing legal rights of a landowner by conferring new legal rights on a person who had hitherto been a trespasser.
25. Properly understood, the doctrinal basis of the law of prescriptive easements is that it is just to impose a prescriptive easement upon a landowner who has acquiesced in the use of their land, without force, secrecy or permission,¹⁵ for a period of 20 years. It is that landowner, and not their predecessors in title, whose legal rights are impaired by the formation of a prescriptive easement. Such a landowner should not be bound or affected by the acquiescence of their predecessors, whose rights are not affected by the formation of a prescriptive easement and of whose acquiescence the landowner may be ignorant.
26. By holding that it is possible to aggregate periods of acquiescence across multiple successive owners of the servient land, the Court of Appeal’s reasoning inverts the foundational statement of principle in *Dalton* by giving primacy to the position of the user. According to the Court of Appeal’s analysis, it matters not whether the landowner whose legal rights will be impaired by the formation of an easement has acquiesced for only one day, so long as the user can establish an aggregated period of acquiescence by multiple successive owners amounting to 20 years. Such an approach is not consonant with the principle that the law of prescription rests upon the acquiescence of the servient landowner. Rather, it suggests that the law of prescription rests upon the expectations of the user, and that the position of a landowner who may have no knowledge of use that occurred prior to their ownership is secondary to the position of an unauthorised user of the land. That is not a sound doctrinal basis for the law of prescription.
- (d) *Should a landowner be bound by the acquiescence of their predecessors?*
27. It is otherwise impossible, as a matter of principle, to justify the proposition that the owner of a putative servient tenement should be bound by the acquiescence of their

¹⁴ (1904) 1 CLR 283 at 307.

¹⁵ *Nec vis, nec clam, nec precario.*

predecessors in title. An owner of land is not bound by the contractual or other *in personam* obligations of their predecessors. In the context of prescriptive easements, the current owner of a servient tenement would not be affected by a consent or permission to use the land given by their predecessor (such as to constitute use *precario*), unless that consent or permission had been adopted or renewed by the current owner. In these circumstances, why should a landowner be bound by a predecessor's acquiescence, which by its nature falls short of consent or permission?

28. Consistently with the doctrinal analysis developed above, and starting from the premise that 20 years is the period the law has fixed for the establishment of a prescriptive easement, one may readily justify imposing a prescriptive easement on a servient tenement owner where the owner has acquiesced in use for a period of 20 years during the period of their ownership. That includes where there have been multiple successive owners of the dominant tenement during that period.¹⁶ However, that justification is impossible where the current servient tenement owner has acquiesced in use for a period of less than 20 years. That shorter period could be one year (in this case it was 18 months), or it could be one month, one week, or even one day. The principled justification for a prescriptive easement is lacking.
29. The potential absurdity and unfairness of such a result becomes even starker when it is considered that the use of land by the owner of the putative dominant tenement necessary to establish a prescriptive easement will not, by definition, involve possession. Historical use may not be apparent from inspection of the land or otherwise be readily discoverable by the landowner — whether through disclosure in a vendor's statement¹⁷ or otherwise.
30. For these reasons, the Court of Appeal erred in holding that a prescriptive easement may arise at general law on the basis of 20 years of use despite a change in ownership of the putative servient tenement during that period.

C The second issue: The *Transfer of Land Act*

(a) Introduction

31. The effect of registration of an estate or interest under the *Transfer of Land Act* is, by s 42, to extinguish all 'encumbrances' not recorded on the relevant folio of the Register

¹⁶ See *Sunshine Retail Investments Pty Ltd v Wulff* [1999] VSC 415 at [145], citing *Auckran*.

¹⁷ See *Sale of Land Act 1962* (Vic), s 32C(a), discussed below.

unless the encumbrance falls within one of the specified exceptions to indefeasibility of title. In other words, a registered proprietor takes completely clear title, subject to the exceptions to indefeasibility. Inchoate prescriptive easements are not easements that have been ‘acquired’ or are ‘subsisting’, and therefore do not fall within the exception in s 42(2)(d) of the Act. The term ‘encumbrance’ is defined in the Act extremely broadly. For the reasons discussed below, that term should be construed as encompassing inchoate prescriptive easements, with the result that they are extinguished upon registration of a registered proprietor’s estate or interest.

10 32. A registered proprietor of land under the Act therefore holds the land free from any inchoate prescriptive easement based on less than 20 years of use prior to registration of the proprietor’s estate or interest. It is thus not possible for a prescriptive easement to arise where there have been multiple successive registered proprietors of the putative servient land during the relevant 20 year period. The Court of Appeal erred in holding otherwise (CA [132]–[133]).

(b) *Section 42 of the Transfer of Land Act*

33. Section 42(1) of the Act, which provides for indefeasibility of title, is in the following terms:¹⁸

20 Notwithstanding the existence in any other person of any estate or interest (whether derived by grant from Her Majesty or otherwise) which but for this Act might be held to be paramount or to have priority, the registered proprietor of land shall, except in case of fraud, hold such land subject to such encumbrances as are recorded on the relevant folio of the Register but absolutely free from all other encumbrances whatsoever, except ...

34. Section 42(2) relevantly provides:

Notwithstanding anything in the foregoing the land which is included in any folio of the Register or registered instrument shall be subject to—

...

(d) any easements howsoever acquired subsisting over or upon or affecting the land;

...

30 notwithstanding the same respectively are not specially recorded as encumbrances on the relevant folio of the Register.

35. It may be accepted that a prescriptive easement which has arisen by 20 years of use against the owner of a servient tenement is one that has been ‘acquired’ and is hence ‘subsisting’ over the land. But inchoate prescriptive easements, ie those involving use for a period of less than 20 years, do not fall within the exception in s 42(2)(d), as they

¹⁸ Version 174 of the Act, which was in force at the time of registration of the estate in fee simple of Les Denny Pty Ltd (ACN 156 618 825) (now named A.C.N. 156 618 825 Pty Ltd (in liq)) on 10 April 2015.

are not easements that have been ‘acquired’ or are ‘subsisting’. So much was accepted by the Court of Appeal (CA [102]). The Court of Appeal’s conclusion rested not on the application of s 42(2)(d) but on the proposition that s 42(1) did not free the title of a new registered proprietor of the inchoate prescriptive easement because it was not an ‘encumbrance’.

(c) *The effect of registration*

36. In *Leros Pty Ltd v Terara Pty Ltd*,¹⁹ Mason CJ, Dawson and McHugh JJ noted that Sir Robert Torrens had, in a passage quoted by Windeyer J in *Breskvar v Wall*,²⁰ described the operation of the legislation as ‘cutting off the retrospective or derivative character of the title upon each transfer or transmission, so as that each freeholder is in the same position as a grantee direct from the Crown’.²¹ Their Honours stated:²²

This passage supports the view that the effect of the registration of a subsequent dealing bringing about the registration of an estate or interest in land is to extinguish all prior unregistered estates or interests which, but for that registration, would have conflicted with the proprietor’s estate or interest or encumbered that estate or interest, unless the prior unregistered estate or interest falls within the exceptions to indefeasibility of title of s 68 [of the *Transfer of Land Act 1893* (WA)].

37. In other words, the effect of s 42(1) is to extinguish any ‘encumbrances’ (being the language used in the provision) that are not recorded on the relevant folio of the Register unless they fall within one of the exceptions to indefeasibility.

20 38. Whether that proposition extends not only to unregistered estates or interests, but also to inchoate prescriptive easements, depends in part on the proper meaning to be given to the definition of the term ‘encumbrance’. If an inchoate prescriptive easement constitutes an ‘encumbrance’ within the meaning of the Act, then it is clear that an inchoate prescriptive easement is — like an unregistered estate or interest — extinguished upon registration of a registered proprietor’s estate or interest.

(d) *The definition of ‘encumbrance’*

39. The term ‘encumbrance’ is defined in s 4(1) of the Act extremely broadly:

encumbrance in respect of any land includes any estate interest mortgage charge right claim or demand which is or may be had made or set up in to upon or in respect of the land ...

¹⁹ (1992) 174 CLR 407 at 418.

²⁰ (1971) 126 CLR 376 at 400.

²¹ Robert Torrens, *A Handy Book on the Real Property Act of South Australia* (1862) p 11.

²² (1992) 174 CLR 407 at 418. See also *Bahr v Nicolay (No 2)* (1988) 164 CLR 604 at 619; *Peldan v Anderson* (2006) 227 CLR 471 at 480 [20].

40. In considering whether an immature prescriptive easement falls within this broad definition, the Court of Appeal began its analysis by stating that ‘[t]he applicants’ contention that an emerging easement is an “encumbrance” for the purposes of the *Transfer of Land Act* finds no support in general law’ (CA [85]).²³ The Court of Appeal observed that an inchoate prescriptive easement does not confer any legal interest in land at general law (CA [85]–[87]), and on that basis concluded that an inchoate prescriptive easement does not fall within the statutory definition (CA [91]).
41. It is uncontroversial that an inchoate prescriptive easement does not confer any interest in land. By focusing on that fact, the Court of Appeal gave inadequate attention to the definition of the term ‘encumbrance’ under the Act. The appellants make four observations in relation to the text of that definition.
42. *First*, the definition is expressed to be inclusive, which immediately indicates its intended breadth. The immediate impression is of a definition that seeks to capture as broadly as possible any conceivable burden upon the land, listing every word the drafter could think of to describe such a burden and then, for good measure, making the definition non-exhaustive.
43. *Secondly*, the breadth of a deliberately expansive definition is borne out by the legislative history, which reveals that the current definition of the word ‘encumbrance’ replaced a far narrower definition.
- 20 44. Since the enactment of the *Transfer of Land Statute 1866* (Vic), the indefeasibility provision (now s 42) has relevantly provided that a proprietor of land under the Act shall hold the land subject to such ‘encumbrances’ as are notified on the folio, ‘but absolutely free from all other encumbrances whatsoever’.²⁴
45. The 1866 statute introduced a definition of the term ‘encumbrances’ which was in very similar terms to the current definition of ‘encumbrance’:

The word “encumbrances” shall include all prior estates interests rights claims and demands which can or may be had made or set up in to upon or in respect of the land[.]²⁵

²³ At CA [83], the Court of Appeal incorrectly stated that the appellants had referred to *Leros* (1992) 174 CLR 407 in support of their contention that the definition of ‘encumbrance’ was broad enough to encompass an inchoate prescriptive easement. See also CA [[89], [90]. In fact, the appellants did not rely on *Leros* in support of their contention about the proper construction of the term ‘encumbrance’.

²⁴ *Transfer of Land Statute 1866* (Vic) s 49; *Transfer of Land Act 1890* (Vic) s 74; *Transfer of Land Act 1915* (Vic) s 72; *Transfer of Land Act 1928* (Vic) s 72; *Transfer of Land Act 1954* (Vic) s 42(1); *Transfer of Land Act 1958* (Vic) s 42(1).

²⁵ *Transfer of Land Statute 1866* (Vic) s 3.

In 1874, the original Western Australian Torrens statute adopted the Victorian definition with minor variations.²⁶ Subsequent enactments in Victoria, in 1890,²⁷ 1915,²⁸ 1928,²⁹ 1954³⁰ and 1958,³¹ replicated the 1866 definition, also with minor variations. The precise wording of the current definition was introduced by the 1954 Act.

46. The *Real Property Act 1862* (Vic), which was the original Torrens statute in Victoria, and followed the South Australian enactment by only four years,³² had contained a far narrower definition of the word ‘encumbrance’ than the definition in the 1866 Act:

“Encumbrance” shall mean any charge on land created for the purpose of securing the payment of an annuity or sum of money other than a debt[.]³³

- 10 The indefeasibility provision in the 1862 Act provided that a registered proprietor of land shall

hold the same subject to such encumbrances liens estates or interests as may be notified on the folium of the register book constituted by the grant or certificate of title of such land but absolutely free from all other encumbrances liens estates or interests whatsoever ...³⁴

47. That is, four years after the original Victorian enactment, Parliament decided to enact a much wider definition of ‘encumbrance’ than had been included in the 1862 Act. A consequence of the more expansive definition was that, pursuant to the indefeasibility provision, the registration of an estate or interest no longer simply extinguished any ‘encumbrance’ (defined in the 1862 statute as a charge created for the purpose of securing the payment of an annuity or sum of money other than a debt), lien, estate or
- 20

²⁶ *Transfer of Land Act 1874* (WA) s 3: ‘The word “encumbrances” shall include all estates, interests, rights, claims, and demands which can or may be had, made, or set up in, to, upon, or in respect of the land, adversely and preferentially to the title of the proprietor.’ Section 4(1) of the *Transfer of Land Act 1893* (WA) now provides: ‘**encumbrances** includes all prior estates interests rights claims and demands which can or may be had made or set up in to upon or in respect of the land, and a dealing that is registered under this Act’. One of the exceptions to indefeasibility under s 68(1A) of the *Transfer of Land Act 1893* (WA) is ‘any easements acquired by enjoyment or user or subsisting over or upon or affecting such land’.

²⁷ *Transfer of Land Act 1890* (Vic) s 4: ““Encumbrances” shall include all prior estates interests rights claims and demands which can or may be had made or set up in to upon or in respect of the land’. The word ‘prior’ was introduced.

²⁸ *Transfer of Land Act 1915* (Vic) s 4. The 1915 Act reverted to the wording of the definition in the 1866 Act.

²⁹ *Transfer of Land Act 1928* (Vic) s 4: ““Encumbrances” includes all prior estates interests rights claims and demands which can or may be had made or set up in to upon or in respect of the land’. The word ‘prior’ was reintroduced.

³⁰ *Transfer of Land Act 1954* (Vic) s 4(1). The words ‘mortgage’ and ‘charge’ were introduced.

³¹ *Transfer of Land Act 1958* (Vic) s 4(1).

³² Section 3 of the *Real Property Act 1858* (SA) contained a completely different definition of the term ‘encumbrance’ from the *Real Property Act 1862* (Vic).

³³ *Real Property Act 1862* (Vic) s 3.

³⁴ *Real Property Act 1862* (Vic) s 39.

interest which was not notified on the folio. After the enactment of the 1866 statute, the registration of an estate or interest extinguished any ‘encumbrances’ not notified on the folio, with the term ‘encumbrances’ defined, in very broad fashion, as encompassing ‘all prior estates interests rights claims and demands which can or may be had made or set up in to upon or in respect of the land’. The new, all-encompassing definition of ‘encumbrances’ now included estates or interests but also any rights, claims or demands. Further, the definition was now expressed to be inclusive.

48. This history demonstrates that the definition that was introduced in 1866, and has remained essentially unchanged in Victoria’s Torrens legislation since that time, was cast in deliberately broad terms.
49. *Thirdly*, the term ‘encumbrance’ is defined as including, in addition to any ‘estate interest mortgage charge [or] right’, any ‘claim or demand’. The Court of Appeal’s analysis erroneously assumes that, because an inchoate prescriptive easement does not confer any estate or interest in land (or indeed any right in respect of land), an inchoate easement cannot constitute a ‘claim or demand’ in respect of the land. So much is clear from the Court of Appeal’s conclusion that, because an inchoate easement does not have ‘any legal existence’ (CA [87]),³⁵ the respondent ‘had no “claim or demand which is or may be had made or set up in to upon or in respect of the land”’ (CA [88]).
50. However, if there may only be a ‘claim or demand’ in respect of land where there is also an estate or interest in the land, then the words ‘claim or demand’ in the definition of ‘encumbrance’ have no work to do. In construing the definition of ‘encumbrance’, it should be presumed that the words ‘claim or demand’ were intended to have some operative effect, and therefore that there may indeed be a ‘claim or demand’ in respect of land even where there is no estate or interest.
51. *Fourthly*, the definition of ‘encumbrance’ includes, among other things, any ‘claim or demand’ which is or may be had, made or set up in, to, upon or in respect of the land. This expansive language — the term’s ‘extended meaning’³⁶ under the Act — further indicates the intended breadth of the definition. Again, the impression is of the drafter

³⁵ Citing *Greenhalgh v Brindley* [1901] 2 Ch 324 at 328.

³⁶ Dr Stanley Robinson, *Transfer of Land in Victoria* (1979) p 190. See also *Talacko v Talacko* [2008] VSC 128: ‘Section 4 of the Victorian *Transfer of Land Act 1958* gives “encumbrance” an extended meaning embracing competing interests, claims and demands. This is not, however, its ordinary meaning ...’

searching for every conceivable way to describe the way in which a burden may be asserted against the title of the registered proprietor.

52. Where land has been used for less than 20 years, such as to give rise only to an immature easement rather than an easement that is fully formed and ‘acquired’, the prospective dominant tenement holder may indeed have a claim that ‘is or may be had made or set up’ in respect of the land. Such a person may be said to have a claim that may be had or made in the event that 20 years of use is reached.³⁷ Further, a person who has used land for a period of less than 20 years may set up a claim in respect of that use (that is, once the period of use exceeds 20 years) by recording or obtaining evidence of that use. Such a user is also in a position to put the landowner on notice of the nature and period of their use, and in that sense may be said to have a claim (being a claim to an inchoate easement) that is or may be had, made or set up in, to, upon or in respect of the land.
53. It is thus clear from the definition of ‘encumbrance’ in s 4(1) of the Act that the term was intended to have an extremely wide meaning. According to that definition, ‘encumbrances’ include not only estates or interests in land, but also claims or demands that may be had, made or set up in respect of the land. Further, as noted above, the definition is expressed to be inclusive, and so the breadth of the term may go beyond what is stated in the definition. In its ordinary meaning, an ‘encumbrance’ is simply ‘a burden’.³⁸ Land is affected and burdened by an inchoate easement in the sense that the owner of the land must either end or permit the use in order to avoid an easement arising.
54. In these circumstances, the term ‘encumbrance’ should be construed as encompassing inchoate prescriptive easements. If the position is otherwise, it would have this perverse consequence. The registration of an estate or interest would have the effect of extinguishing all unregistered estates or interests that do not fall within an exception to indefeasibility. But there would be left untouched an inchoate prescriptive easement, which does not confer any legal interest, cannot be registered, and does not fall within any exception to indefeasibility. An unauthorised user of land, who does not have the benefit of an exception to indefeasibility, would thus be in a better position than, say,

³⁷ Cf *Mayfield Development Corporation Pty Ltd v NSW Port Operations Hold Co Pty Ltd* [2026] HCA 12 at [49]–[51], where a release in respect of ‘Claims’ that a party ‘had or may have had’ were intended to, and did, foreclose the possibility of future claims against the party with the benefit of the release.

³⁸ *The Oxford English Dictionary*, 2nd ed, 1989 rep 1991, vol V, p 218.

an unregistered mortgagee or an unregistered lessee who is not in possession of the land. That cannot have been the intention of the Act.

(e) *Statutory context*

55. The context in which the definition of ‘encumbrance’ is to be construed also favours a conclusion that the term encompasses an inchoate prescriptive easement.

56. Section 43 of the Act relevantly provides:

10 Except in the case of fraud no person contracting or dealing with or taking or proposing to take a transfer from the registered proprietor of any land shall be required or in any manner concerned to inquire or ascertain the circumstances under or the consideration for which such proprietor or any previous proprietor thereof was registered ...

57. The stipulation that a person contracting or dealing with a registered proprietor does not need to inquire as to the circumstances in which the proprietor, or a previous proprietor, was registered supports the appellants’ contention that the term ‘encumbrance’ is wide enough to include an inchoate prescriptive easement. A person dealing with land under the Act should not be required to make inquiries in relation to use of the land that preceded registration of the current registered proprietor’s estate or interest, including in order to ascertain whether a third party may have inchoate rights to a prescriptive easement.

20 58. The statutory context of s 42 of the Act and the definition of the term ‘encumbrance’ in s 4(1) of the Act also includes s 32C(a) of the *Sale of Land Act 1962* (Vic). Whilst that provision is contained in a separate statute that applies to the sale of both general law land and land brought under the *Transfer of Land Act*, the two Acts are both part of a scheme of legislation in Victoria dealing with land transactions. They should be read harmoniously together.³⁹ Section 32C(a) of the *Sale of Land Act* requires a vendor under a contract for the sale of land to give to a purchaser a statement that contains a description of any registered or unregistered easement affecting the land. However, that requirement only applies in respect of easements that have been formed.

30 59. Consequently, a vendor must notify a purchaser of any prescriptive easement that has arisen prior to entry into the contract of sale, with the result that a purchaser should not be required to undertake historical investigations to ascertain whether any prescriptive easements affecting the land have been formed by that time. On the other hand, a vendor

³⁹ *Sweeney v Fitzhardinge* (1906) 4 CLR 716 at 726; *JC v DPP (NSW)* (2014) 87 NSWLR 320 at 329 [36]; *Will v Brighton* (2020) 104 NSWLR 170 at 182 [46]–[48].

is not required to notify a purchaser of any inchoate prescriptive easement affecting the land (that is, where there has been less than 20 years of use of the land). The fact that the *Sale of Land Act* requires notification of prescriptive easements that have been formed, but does not require notification of immature prescriptive easements, supports a conclusion that the term ‘encumbrance’ as used in the *Transfer of Land Act* encompasses inchoate prescriptive easements, such that they are extinguished upon registration of the registered proprietor’s estate or interest. Such a construction involves a harmonious reading of the two statutes. Otherwise, a purchaser of land under the Act is vulnerable to being affected by an inchoate prescriptive easement of which they may have no knowledge, including because there is no statutory requirement for a purchaser to be notified of such an inchoate easement. It is implausible that that was the legislative intention.

(f) *The purpose of the Torrens system*

60. A construction of the *Transfer of Land Act* whereby the registration of a registered proprietor’s estate or interest extinguishes any inchoate prescriptive easement based on less than 20 years of use is also strongly supported by the purpose of the Act.

61. As is well known, the purpose of the Torrens system is to establish a system of title by registration rather than one of registration of title.⁴⁰ Sir Robert Torrens identified ‘[a]s a first principle’ that the system creates ‘independent titles’ and that ‘retrospective investigation is cut off’.⁴¹ He further stated that ‘abstracts and costly retrospective investigations are effectually and in perpetuity got rid of, and a purchaser or mortgagee can see at a glance the precise state of the title, without having to search a register or call in professional aid’.⁴² In general, a person dealing with a registered proprietor of land need look no further than the registered title and the interests notified on it in order to ensure that their dealing does not miscarry.⁴³

62. Whereas the construction of s 42 contended for by the appellants gives effect to that purpose, the conclusion reached by the Court of Appeal tends to undermine it.⁴⁴

⁴⁰ *Breskvar v Wall* (1971) 126 CLR 376 at 385; *Deguisa v Lynn* (2020) 268 CLR 638 at 645 [4].

⁴¹ Robert Torrens, *The South Australian System of Conveyancing by Registration of Title* (1858) p 9.

⁴² *Ibid*, p 34.

⁴³ *Deguisa v Lynn* (2020) 268 CLR 638 at 644 [2]. See also *Westfield Management Ltd v Perpetual Trustee Co Ltd* (2007) 233 CLR 528 at 531 [5].

⁴⁴ See similarly, albeit in relation to the differently expressed South Australian provisions, *Golding v Tanner* (1991) 56 SASR 482 at 492.

63. A registered proprietor of land may readily be assumed to have knowledge of any use of the land that may be sufficient to give rise to a prescriptive easement *while they are the registered proprietor*. Conversely, a registered proprietor may have no knowledge — or even means of obtaining such knowledge — of any use that occurred prior to the registration of their interest. One of the reasons for this is that the use grounding, and permitted by, an easement does not involve possession.
64. When viewed in this way, it can be seen that most of the other exceptions to indefeasibility in s 42(2) of the Act are paramount interests of which the registered proprietor may be assumed to have actual knowledge or, at the least, ready means of obtaining such knowledge:
- 10
- (a) the reservations exceptions conditions and powers (if any) contained in the Crown grant of the land;
 - (b) any rights subsisting under any adverse possession of the land;
 - (c) any public rights of way;
 - ...
 - (e) the interest (but excluding any option to purchase) of a tenant in possession of the land;
 - (f) any unpaid land tax, and also any unpaid rates and other charges which can be discovered from a certificate issued under section three hundred and eighty-seven of the **Local Government Act 1958**, section 158 of the **Water Act 1989** or any other enactment specified for the purposes of this paragraph by proclamation of the Governor in Council published in the Government Gazette ...⁴⁵
- 20
65. Notably, a registered proprietor will have knowledge of the paramount interests referred to in s 42(2)(b) ('any rights subsisting under any adverse possession of the land') and (e) ('the interest (but excluding any option to purchase) of a tenant in possession of the land') because they involve possession of the land. Critically, none of these paramount interests requires 'retrospective investigation' on the part of the incoming registered proprietor or another person dealing with the land.
- 30 66. However, by concluding that inchoate prescriptive easements survive registration of a registered proprietor's estate or interest, the Court of Appeal's decision will require 'retrospective investigation' of use of the land that occurred prior to such registration, to ensure that a person dealing with Torrens land understands the true state of the title. This will likely involve inquiries as to what, if any, use of the land has been made by third parties; the identity of those third parties; the nature of the use (for example,

⁴⁵ Version 174 of the Act, which was in force at the time of registration of the estate in fee simple of Les Denny Pty Ltd (ACN 156 618 825) (now named A.C.N. 156 618 825 Pty Ltd (in liq)) on 10 April 2015. Section 42(1)(f) now refers to s 121 of the *Local Government Act 2020* (Vic).

whether it occurred continuously and without force, secrecy or permission); and the length of the use. To require such historical investigation is contrary to the purpose of the Act identified above.

67. Consistently with the spirit of the Torrens legislation, in 1866 the Commissioner of Titles, who had drafted the Bill for the *Transfer of Land Statute 1866* (Vic)⁴⁶ (which introduced the expansive definition of ‘encumbrance’), gave the following advice on the matters which a purchaser of land being brought under the statute should satisfy themselves of:

10 Every purchaser taking a receipt for his purchase-money, with a description of the land bought or otherwise coming in under any direction, should satisfy himself that there are no unpaid rates against the property ... ; also that there are no rights subsisting under any adverse possession of any part of the land; also that there are no rights of road, rights to light, or other easements *acquired* by enjoyment or user, or subsisting over or upon or affecting the land applied to be brought under the Statute; and where the possession is not adverse the interest of any tenant of the land should be ascertained.⁴⁷

The *only* matters referred to in that advice were the exceptions to indefeasibility contained in s 49 of the 1866 Act, which included ‘any easements *acquired* by enjoyment or user or subsisting over or upon or affecting [the] land’. The matters that a purchaser should satisfy themselves of did not include any inchoate rights to a prescriptive easement. The Commissioner of Titles’ advice thus supports the appellants’
20 contentions that inchoate prescriptive easements are extinguished upon registration of an estate or interest, such that an incoming registered proprietor does not need to undertake investigations as to the existence of such inchoate easements.

68. The Court of Appeal acknowledged the underlying purpose of the Act (CA [109]). However, after doing so, it raised two matters in support of its ultimate conclusion (CA [110]). *First*, it stated that ‘s 42(2) creates a number of exceptions to indefeasibility in respect of several “paramount interests”, including unregistered easements “howsoever acquired”’. *Secondly*, it stated that s 3(1) of the Act ‘preserves the operation of the general law in relation to land under the *Transfer of Land Act* so far as it is not
30 inconsistent with the Act’. Neither of those matters is sufficient to support the conclusion of the Court of Appeal.

⁴⁶ Victoria, *Parliamentary Debates*, Legislative Council, 22 May 1866, p 458 (Henry Miller).

⁴⁷ John Carter (Commissioner of Titles), ‘Advice by the Commissioner of Titles’ (1866) [34] (emphasis added), appended to Thomas a’Beckett, *Introduction and Notes to the Transfer of Land Statute of Victoria* (1867) pp 137–148.

69. The appellants accept that the exception in s 42(2)(d) of the Act includes prescriptive easements acquired by long use.⁴⁸ The legislative history recited in the Court of Appeal’s reasons (CA [112]–[125]) (none of which touched on the issue of ‘tacking’) makes plain that that is so. The appellants do not dispute that a prescriptive easement may arise over land registered under the Act based on 20 years of use during the period of ownership of a single registered proprietor. However, the fact that one of the exceptions to indefeasibility is ‘any easements howsoever acquired [...]’ does not answer the question whether a registered proprietor of land holds the land free from any inchoate prescriptive easement based on *less than* 20 years of use prior to registration of their interest. As noted above, s 42(2)(d) only refers to easements that have been acquired and so does not include inchoate easements. If the effect of registration of a proprietor’s estate or interest would otherwise be to extinguish any inchoate prescriptive easements, then they are not saved by the exception in s 42(2)(d). Indeed, the fact that s 42(2)(d) is limited to prescriptive easements that have already been acquired tends *against* the Court of Appeal’s view that inchoate prescriptive easements are effectively also exempted from the operation of s 42(1).
70. The Court of Appeal’s reliance on s 3(1) of the Act is misplaced. Section 3(1) relevantly provides that no rule of law, so far as inconsistent with the Act, shall apply to land which is under the operation of the Act, but otherwise shall apply to land under the Act. Whether or not a rule of law continues to apply depends on whether it is inconsistent with the Act. Observing that s 3(1) preserves general law principles that are not inconsistent with the Act does not assist with construing provisions of the Act to determine whether they *are* inconsistent with the Act. As to whether the general law⁴⁹ is inconsistent with the Act, the Court of Appeal concluded that it was not on the basis that ‘the existence of an easement “howsoever acquired” is accommodated by the exception in s 42(2)(d)’ (CA [96]). However, that analysis neglects the fact that inchoate easements have not been ‘acquired’, and therefore are not saved by the exception if they would otherwise be extinguished upon registration of a proprietor’s estate or interest.
71. The Court of Appeal appears to have overlooked the effect of registration by focusing on what the trial judge had described as the ‘ambulatory’ operation of s 42 of the Act.

⁴⁸ *Nelson v Hughes* [1947] VLR 227.

⁴⁹ As discussed above in relation to the first issue, the Court of Appeal held that at general law a prescriptive easement can arise based on 20 years of use of the putative servient tenement despite a change in ownership of that land during the 20 year period.

The Court of Appeal stated that s 42 ‘describes the estate of the registered proprietor of land from time to time, not only at the point of registration’ (CA [132]). It may be accepted that s 42 (which is contained in a section of the Act headed ‘Effect of registration’) does indeed apply at any point in time. However, as noted above, the effect of registration is to place the registered proprietor ‘in the same position as a grantee direct from the Crown’.⁵⁰ Such a position necessarily involves a registered proprietor holding land free from inchoate prescriptive easements based on use that preceded registration of their interest. If they thereafter acquiesce in 20 years of use of their land by the owner of the dominant tenement, the prescriptive easement which thus arises will be protected by s 42(2)(d). The ‘ambulatory’ operation of s 42(1) does not free the registered proprietor from the ‘day by day’ consequences of their own acquiescence any more than it would free them from any other *in personam* claim.⁵¹ But that is radically different from subjecting a subsequent registered proprietor to a claim unrelated to the requisite period of acquiescence *by them*.

72. For these reasons, the Court of Appeal erred in holding that a registered proprietor of land under the *Transfer of Land Act* holds the land subject to any inchoate prescriptive easement based on less than 20 years of use prior to registration of their estate or interest.

PART VII—ORDERS SOUGHT

73. The appellants seek the orders in their notice of appeal (CAB 140).

20 PART VIII—TIME ESTIMATE

74. The appellants estimate that they require 2 hours and 15 minutes for the presentation of their oral argument, including reply.

Dated: 27 May 2026



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⁵⁰ Robert Torrens, *A Handy Book on the Real Property Act of South Australia* (1862) p 11, cited in *Breskvar v Wall* (1971) 126 CLR 376 at 400 (Windeyer J) and *Leros* (1992) 174 CLR 407 at 418 (Mason CJ, Dawson and McHugh JJ).

⁵¹ *Golding v Tanner* (1991) 56 SASR 482 at 484–486, 488–489, 495.

SCHEDULE

EVIE PITARD PTY LTD (ACN 652 661 679)

Second Appellant

CHLOE PITARD PTY LTD (ACN 652 661 651)

Third Appellant

HUNTER PITARD PTY LTD (ACN 652 661 795)

Fourth Appellant

ANNEXURE TO APPELLANTS' SUBMISSIONS

No	Description	Version	Provisions	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
1	<i>Transfer of Land Act 1958</i> (Vic)	Version 174 (15 October 2014 to 30 June 2015)	Ss 4(1), 42	Act in force at the time of registration of the estate in fee simple of Les Denny Pty Ltd (ACN 156 618 825) (now named A.C.N. 156 618 825 Pty Ltd (in liq))	10 April 2015: date of registration of the estate in fee simple of Les Denny Pty Ltd (ACN 156 618 825) (now named A.C.N. 156 618 825 Pty Ltd (in liq))