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

DELMA ANNE VALMORBIDA
Respondent

RESPONDENT'S SUBMISSIONS

PART I—CERTIFICATION

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

PART II—STATEMENT OF ISSUES

2. In Victoria, an unregistered easement is one of the exceptions to the principle of "indefeasibility" of Torrens land: *Transfer of Land Act* 1958 (Vic), s 42(2)(d). And, in Victoria, unlike most Australian jurisdictions, an easement can arise by prescription, that is, based on 20 years' use of the servient land.

3. For more than 20 years, the respondent used—in a way the law recognises as giving rise to a prescriptive easement—a strip of the land that neighbours hers. During that period, the neighbouring land was sold. Although the new owner knew (or should have known) of the respondent's use of the land, it protested only after the 20-year period had ended. Three years later, the neighbouring land was sold again, to the appellants.

4. The primary judge held that the respondent's use of the neighbouring land gave rise to a prescriptive easement. The Court of Appeal of Victoria dismissed the appellant's appeal.

5. Against that background, the issues in this case are:
   (a) Under the general law, can a prescriptive easement arise if there is a change in the ownership of the relevant land (the putative subservient tenement) during the 20-year period?
   (b) Where such a change in ownership occurs (that is, before the end of the 20-year period), what is the effect of s 42(1) of the *Transfer of Land Act 1958*?

PART III—SECTION 78B NOTICE

6. The respondent has considered whether any notice should be given in compliance with section 78B of the *Judiciary Act 1903* and has concluded it is not necessary.

PART IV—STATEMENT OF FACTS

7. In dealing with the history of the relevant land, the narrative in the appellants' submissions ((**AS**) [9] and [10]) omits several facts, as follows:

   (a) Since at least the time the house on the respondent's property at 33 Ivanhoe Street was built, its inhabitants and visitors used Stevens Court to access the property. "That would have been obvious to anyone who cared to look" (PJ [39]; CA [20(b)]).

   (b) The appellants are associated with members of Simon Pitard's family (PJ [2]; CA [12]). Mr Pitard controlled the appellants' predecessor in title, ACN 156 618 825 Pty Ltd (referred to below as "**Les Denny (Old)**") (PJ [8]; CA [13]). He was involved in the negotiations in 2014 about the purchase of the land (PJ [68]–[69]; CA [20(l)]). He signed the contract of sale that included an acknowledgement the land was purchased "subject to registered and implied easements, 'including without limitation any implied easement of way that may exist in favour of adjoining owners of land'" (PJ [68]; CA [20(l)]). "At least by the time of the sale, Mr Pitard was or should have been aware that the occupiers of… 33 Ivanhoe Street may well have an easement over Stevens Court obtained from their long use" (PJ [69(c)]; CA [20(l)]).

   (c) Mr Pitard did not give the respondent's family permission to use Stevens Court in a way that would break the 20-year period of their use as of right (PJ [72]; CA [20(l)]). "It was not until 2018, after the 20-year period had elapsed, that Mr Pitard took any steps to interfere with the Valmorbidas' use of Stevens Court" (PJ [74]; CA [20(l)]).

8. It is correct that, at the trial, the respondent relied only on her own use of Stevens Court since October 1996 to establish a prescriptive easement (PJ [84]; CA [23]). But, by the same token, not until the appeal to the Court of Appeal did the appellants raise the first issue in this appeal, whether "common law principles did not permit the claimant to 'tack' periods of use of land across a change of ownership of the burdened tenement" (CA [50]). Thus, Mrs Valmorbida has had been denied the opportunity to lead evidence of the use made of Stevens Court prior to hers (CA [51]).

9. **Paragraph 13** does not accurately summarise the Court of Appeal's reasoning about s 42 of the *Transfer of Land Act 1958*. Because that reasoning relates to the second issue in this appeal, it is detailed in that context (see paragraphs 47–48 below).

PART V—ARGUMENT

Overview

10. Unlike most cases involving a registered proprietor of Torrens land, this one is unusual because the appellants do not rest their arguments on their own status as registered proprietors but on that of their predecessor in title to the land. They are driven to that

position because, by reason of their predecessor's acquiescence—after it became the registered proprietor in April 2015—to the respondent's ongoing use of the land (which dated from October 1996), the 20-year period necessary to give rise to an easement by prescription expired in October 2016, before the appellants became the land's registered proprietors in October 2021. Hence, they fasten on the only thing that changed during the 20-year period—their predecessor's registration as the proprietor of the land and their arguments that the 20-year use must arise "during the period of ownership of a single registered proprietor".[1]

11. The appellants' submissions are structured around the two issues in this case. It is convenient to adopt the same structure and to commence by outlining some relevant principles about easements, prescriptive easements in particular.

Relevant principles about easements

(a) Easements generally

12. An easement "may be defined to be a privilege without profit, which the owner of one neighbouring tenement hath of another, existing in respect of their several tenements, by which the servient owner is obliged to suffer or not to do something on his own land, for the advantage of the dominant owner".[2] There is no such thing in the common law as an "easement in gross", that is, an easement that is not appurtenant to or connected with a dominant tenement.[3]

13. An easement is "no mere personal right" but "is attached to the dominant land for the benefit of that land".[4] Nor is an easement an estate in land; rather, a "privilege without profit" that "relates only to user of land and confers neither seisin nor possession" of the servient land.[5]

(b) Prescriptive easements

14. An easement can arise by prescription. In *Delohery v Permanent Trustee Company of NSW,*[6] this Court considered the origin and operation of title by prescription, explaining that "is a very ancient branch of the real property law of England… as it was a well-known branch of the Roman law from which the English law on the subject was… derived".[7] It

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1 AS [69].

2 *Municipal District of Concord v Coles* (1905) 3 CLR 96, 110 (Barton J), citing *Gale on Easements* 7th ed (1899), p 6.

3 *Rangeley v Midland Railway Co* (1868) 3 Ch App 306, 311 (Lord Cairns LJ), cited by Giffith CJ in *Municipal District of Concord v Coles* (1905) 3 CLR 96, 104–105; *Commissioner of Main Roads v North Shore Gas Co Ltd* (1967) 120 CLR 118, 134 (Windeyer J). Easements in gross may be created by statute.

4 *Gallagher v Rainbow* (1994) 179 CLR 624, 633 (Brennan, Dawson and Toohey JJ) and cases there cited.

5 *Parramore v Duggan* (1995) 183 CLR 633, 642 (Toohey J).

6 (1904) 1 CLR 283 (Griffth CJ, Barton and O'Connor JJ).

7 *Id*, 300.

explained the relevant Roman law doctrine— "*usucapio*"—was defined as "the acquisition of a right of property by the continuance of possession for a time prescribed by law"[8] and that the common law adopted prescription, as had Roman law,[9] "on grounds of public policy, in order that the right of property in these things might not be forever uncertain".[10] It quoted Coke's statement that, in the common law, "two things are incidents inseparable, viz., possession or usage, and time" and that "[p]ossession has three qualities, it must be long, continual, and peaceable", and pointed out that it cited a passage from Bracton that included the phrase "*Longus usus, viper vim, nec clam, nec precario"*— "without force, without secrecy, without permission".[11]

15. After surveying the authorities, the Court explained how the principles apply to easements, saying: "The law of prescription says that a right of property in certain things may be acquired by long, continual, and peaceable possession."[12] But the law assumed that the origin of the title it recognised was lawful and, because an easement over the land of another could only be lawfully created by the landowner's consent, the law "implied that that consent had been given. This was the substance of the law. The mode of giving the consent was an accident."[13]

16. Further, although "no one pretended to believe in the actual existence of such a grant", a practice had emerged of pleading a "lost grant" and, once the issue of the grant was raised, it was left to the jury "but with a direction to the effect that if the facts proved showed 20 years' continuous possession, unexplained, the law inferred a lawful origin for the possession".[14] Thus, said the Court, 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".[15]

17. A series of cases demonstrates that English law remains consistent with the analysis and conclusions expressed in *Delohery*.[16] In *R v Oxfordshire County Council, Ex p Sunningwell Parish Council,* for example, Lord Hoffmann explained how the law of prescription had developed, including the shift to the quality of the 20-year user as the basis for recognising

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8 Citing the *Digest* (Lib. 41, tit. 3, *De usurpationibus et usucapionibus*, Art. 3)

9 (1904) 1 CLR 283, 300, "In Art. 1 of the same book and title the reason is given…"

10 *Id*, 308.

11 *Id*, 300-301.

12 *Id*, 308. See also *Commonwealth v Registrar of Titles (Vic)* (1918) 24 CLR 348, 353 (Griffith CJ)

13 *Ibid*.

14 *Ibid*.

15 (1904) 1 CLR 283, 309.

16 *R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335; *R (Beresford) v Sunderland City Council* [2004] 1 AC 889; *Blakewell Management Ltd v Brandwood* [2004] 2 AC 519; *R (Lewis) v Redcar and Cleveland Borough Council (No 2)* [2010] 2 AC 70; *Lawrence v Fen Tigers Ltd* [2014] AC 822; *Loose v Lynn Shell Fish Ltd* [2017] AC 599.

a prescriptive right: "It became established that such user had to be, in the Latin phrase, *nec vi, nec clam, nec precario*: not by force, nor stealth, nor the licence of the owner".[17] His Lordship also said: [18]

> The unifying element in these three vitiating circumstances was that each constituted a reason why it would not have been reasonable to expect the owner to resist the exercise of the right—in the first case, because rights should not be acquired by the use of force, in the second, because the owner would not have known of the user and in the third, because he had consented to the user, but for a limited period.

18. It is necessary to say a little more about the *nec clam* ("without stealth") element. The cases establish a prescriptive right cannot be acquired from activity of which the owner has no knowledge,[19] actual or constructive—where constructive knowledge means the knowledge that a reasonably diligent owner would have obtained exercising reasonable care in protecting its own rights and interests.[20]

Issue 1: Prescriptive easements under the general law

(a) Introduction

19. The appellants contend the "whole law of prescription rests upon acquiescence – that is, the acquiescence of the owner of the servient tenement" and a landowner should not be bound or affected by the acquiescence of predecessors in title, of which they may know nothing.[21] Thus, they argue, it is impermissible to "aggregate periods of acquiescence by successive owners" to establish a prescriptive easement.

20. These contentions cannot be sustained. They misapprehend how the law of prescription operates, overstate the proper role of acquiescence in it, are conjectural ("**may** know nothing"), and overlook that if the owner of the subservient tenement "knows nothing", there will be no acquiescence.

(b) The Court of Appeal's reasoning

21. The appellants' submissions do not fairly or accurately describe the Court of Appeal's reasoning about the general law governing prescriptive easements.[22] That reasoning commenced (CA [55]) with *Delohery* and this Court's acceptance that the prescription was part of the law received into New South Wales,[23] deprecation of "the fiction of the lost

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17 [2000] 1 AC 335, 350H (Lords Browne-Wilkinson, Steyn, Hobhouse and Millett agreeing).

18 *Id*, 350H–351A.

19 See e.g. *Laming v Jennings* [2018] VSCA 335, [29]. "It is a reflex of the requirement that the acts not occur by stealth and a precondition for acquiescence that the servient owner have knowledge of the acts that constitute the claimed assertion of title and the power to stop them."

20 *Laming v Jennings* [2018] VSCA 335, [90]–[91] and the cases there cited.

21 AS [17] (emphasis added

22 AS [18]-[22].

23 CA [55], citing *Delohery* (1904) 1 CLR 283, 311.

grant" and acceptance that "prescriptive rights over the land of another could be acquired by long, continual, and peaceable use or possession for a period of 20 years or more".[24] It explained:

> Since an easement over the land of another could only be created by consent, the law implied that consent had been given. This was the substance of the law, as distinct from the pleading practice developed in conjunction with it. [25]

22. Next, the Court referred to ***Dobbie v Davidson***,[26] a case in which the New South Wales Court of Appeal held that a prescriptive easement had arisen over an access road. It set out (CA [57] and [58]), Kirby P's statements about (a) the purpose of the rule by which the law upholds a prescriptive right and (b) the *indicia* of a "claim as of right".

23. Then, the Court referred (CA [59]–[60]) to Victorian cases in which easements acquired by long use have been found to exist, setting out the following statement of principle from ***Hampshire Automotive*** *Centre Pty Ltd v Centre Com (Sunshine) Pty Ltd*, where it (differently constituted) had stated the law of prescriptive easements in Victoria:[27]

> In Victoria, it has been established that an easement by prescription can arise where there has been an open and uninterrupted enjoyment of land for at least 20 years that is not explained by an express grant of an easement or permission to use the land…
>
> The underlying premise is that, where there has been a long period of uninterrupted user amounting to an assertion of right and a corresponding acquiescence by the owner of the servient tenement in a position to prevent that user, there is a presumption that the use was pursuant to the conferral of a lawful title, thus the fiction of lost modern grant. The legal fiction is that the paper owner of the servient tenement has conferred a right by grant but the grant has been lost.

24. It is to be observed that the appellants make no criticism of *Delohery*, *Dobbie v Davidson*, or *Hampshire Automotive* or the statements of principle in those cases. Nor do they criticise the Court of Appeal's treatment of the cases or its identification of the principles they establish.

25. After that, the Court of Appeal—having pointed out (CA [62]) that one of its own decisions (*Laming v Jennings*[28]) observed that a future case would need to consider "case law to the effect that an owner of the servient tenement is bound by the acquiescence of previous owners"—reviewed that case law. The review commenced (CA [63]) with the New

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[24] *Ibid*, citing *Delohery* (1904) 1 CLR 283, 299.

[25] *Ibid*, citing *Delohery* (1904) 1 CLR 283, 308–9 and 313–314. See also CA [56], where the Court explained that, because *Delohery* had "distinguished the substantive law of prescription, which implies the grant of an easement to explain 20 or more years of use", from the practice of pleading a lost modern grant, it would refer to "the law of prescription".

[26] (1991) 32 NSWLR 625.

[27] (2019) 60 VR 579, [51]–[52] (Tate, Niall and Emerton JJA). The other cases were *Nelson v Hughes* [1947] VLR 227 (cited in AS [69]) and *Sunshine Retail Investments Pty Ltd v Wulff* [1999] VSC 415: CA [59].

[28] [2018] VSCA 335 (Kyrou, McLeish and Niall JJA), see esp. [186] and [188]–[198].

Zealand decision in ***Auckran*** *v Pakuranga Hunt Club,*[29] identifying a passage (extracted at AS [63]) it described as a "statement of principle" (CA [64]) that had been applied in two decisions of the Supreme Court of Western Australia—***Pekel*** *v Humich* and *Wayella Nominees Pty Ltd v Cowden Ltd*. It also identified a Victorian decision, *Sunshine Retail Investments Pty Ltd v Wulff*,[30] that applied *Auckran* "to hold that 'the owner of the dominant tenement may add to his own period of use any period of use by a predecessor in title'".

26. Of those decisions, the appellants address only *Pekel*, contending the statement from *Auckran* was not part of its ratio.[31] Otherwise, the appellants' omission to deal with the decisions is presumably because (as they observe[32]) the Court said the decisions do not provide "an analysis of the doctrinal basis for the principle that was applied" (CA [64]). They say the Court "suggested" [33] the analysis was provided in three decisions—*Delohery*, *Dobbie v Davidson*, and *Hampshire Automotive* (discussed above). What "suggested" is intended to mean is not clear. That, and the appellants' criticism of the Court's reasoning, make it necessary to set out the relevant paragraph of its reasons (CA [65]):

> That analysis was provided by the High Court in *Delohery*, by Kirby P of the New South Wales Court of Appeal in *Dobbie v Davidson*, and by this Court in *Hampshire Automotive*. The law of prescription provides a certain legal basis for what would otherwise be an inexplicable state of affairs. 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. This does not require 20 years of acquiescence without any change in the ownership of the servient tenement. Rather, it requires a pattern of prolonged use with the acquiescence of the owners from time to time of the servient tenement, as though an easement had been granted before the use began.

27. Referring to aspects of the paragraph, the appellants describe the Court of Appeal as seeking "to identify and describe" an analysis of the "doctrinal basis" of the statement in *Auckran*.[34] That description is difficult to understand. In the paragraph, the Court explained, by reference to principles set out in uncontroversial decisions of this Court and two Australian intermediate appellate courts (discussed earlier in its reasons), why and how the common law recognises a prescriptive easement and why those principles do not

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[29] (1904) 24 NZLR 235.

[30] [1999] VSC 415.

[31] The appellants contend *Auckran* was not part of the ratio in *Pekel* because the latter "did not involve multiple successive owners of the servient land during the relevant 20 year period": AS [19]. But *Pekel* did not involve determination of when the easement (a right of way over a strip of the defendant's land) had been formed but whether it existed, and, if so, whether a (then) owner of the dominant land should be taken to have acquiesced in its closure and thereby abandoned any claim: see (1999) 21 WAR 24, 25–26; [1]–[2].

[32] AS [20].

[33] *Ibid*, emphasis added. The appellants identify the decisions in a footnote– AS [fn 9].

[34] AS [20].

require 20 years of acquiescence by a single owner, but “a pattern of prolonged use with the acquiescence of the owners from time to time of the servient tenement”.

28. The appellants do not cavil at the Court’s statement of the principles. As already observed, they make no criticism of the cases on which the Court relied. Yet, despite the paragraph’s clear identification and explanation of the principles and their application, they criticise the Court’s reasoning for failing to identify “any principled justification” why the owner of a servient tenement “should be bound by the acquiescence of its predecessors”.[35] In fact, they go further and—despite accepting the law of prescription “provides a legal basis for explaining what is otherwise unexplained by applying the grant of easement”[36]—contend it “does not supply **any justification** for binding a landowner to the acquiescence of previous owners of the putative servient land”.[37] In doing so, they expound what they say is the (true) “doctrinal basis of the law of prescription”[38] and how it applies to prescriptive easements.

29. The appellants’ contentions should not be accepted. The Court of Appeal reached its conclusion by applying undisputed principles, established by uncontroversial authorities, consistent with orthodox doctrine. It is the appellants’ attempt to redraw the “doctrinal basis” of prescriptive easements that is unsupported, misconceives the purpose and operation of the law of prescription—in particular, the function of “acquiescence”—and is inconsistent with aspects of the law that have existed for centuries.

(c) The doctrinal basis of prescriptive easements

30. The applicants contend 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, for a period of 20 years”.[39] But, they contend, 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”.[40]

31. Pausing there, the appellants’ argument already runs into difficulty. Assume a parcel of land is held by a single landowner for 20 years, during which time a prescriptive easement arises. The landowner sells the land to a purchaser ignorant of both the easement and the landowner’s acquiescence. On the appellants’ argument, the purchaser—who did not (and

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[35] AS [21]–[22].
[36] AS [22].
[37] AS [22].
[38] AS [23]–[26].
[39] AS [25].
[40] *Ibid*.

necessarily could not) acquiesce to the use—should not be "bound or affected" by the easement.[41] But, like all easements, a prescriptive easement binds a successor in title of the servient tenement.[42] Thus, its "doctrinal basis" must involve something more than "acquiescence" of the landowner.

32. That is illustrated by the two cases the appellants cite in their exposition of the "doctrinal basis".[43] That exposition commences with the statement in *Delohery* that 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".[44] Then, without identifying either the "substantial right" or how or why the law recognises it, it moves to the statement of Fry J (as he then was) in *Dalton v Henry Angus & Co*[45] that "the whole law of prescription and the whole law which governs the presumption or inference of a grant or covenant rest upon acquiescence", and then back to a statement in *Delohery* about "the consent of the owner of the servient tenement [being] the substance of the matter".

33. Closer analysis of the cases reveals the appellants have cherry-picked the statements, overlooking the explanations in the cases of how and why the law recognises prescriptive easements and the role of "acquiescence" in that recognition.

34. The statement in *Delohery* about "consent [being] the substance of the matter" came as part of the Court's consideration of *Moore v Rawson,*[46] and Littledale J's explanation of the "material difference" between the acquisition of rights of way and rights to light and air, and what was necessary to create a right of way by prescription.[47] It set out a lengthy passage in which Littledale J explained that a party using the way without consent would be a wrongdoer "but when such a user, without interruption, has continued for twenty years, the consent of the owner is not only implied during that period, but a grant of the easement is presumed to have taken place before the user commenced". The importance of the passage, the High Court said, was "that it is apparent that that very learned Judge regarded the consent of the owner of the servient tenement as the substance of the matter, **and the**

[41] The rights of the landowner/vendor would also be "affected by the formation of [the] prescriptive easement" (cf AS [25]). But that does not explain why, if the test were only acquiescence of the present owner, the purchaser would also be "affected".

[42] "Under the general law, apart from registration, the right of the owner of the easement will prevail over that of the purchaser": *Barba v Gas & Fuel Corporation (Vic)* (1976) 136 CLR 120, 141 (Gibbs J; Stephen and Jacobs JJ agreeing).

[43] AS, [23]–[26].

[44] AS [23], citing *Delohery* (1904) 1 CLR 283, 311.

[45] (1881) 6 App Cas 740.

[46] (1824) 3 B & C 332; 107 ER 756.

[47] "[A right to light and air] is acquired by mere occupancy; [a right of way] can only be acquired by user, accompanied with the consent of the owner of the land; for a way over the lands of another can only be lawfully used, in the first instance, with the consent, express or implied, of the owner": 3 B & C 332, 333 (extracted in *Delohery* (1904) 1 CLR 283, 305-306).

means by which it is to be presumed to have been given as a mere question of form" (emphasis added).[48] The appellants' submissions omit the emphasised text and, with it, the explanations that (a) the relevant consent is presumed and (b) the means by which it is presumed is "a mere question of form". The Court made these points later in its judgment, when explaining how the law of prescription operates in relation to easements: [49]

> And, since an easement over the land of another could only be lawfully created by his consent, the law, as pointed out by Littledale, J., implied that that consent had been given. This was the substance of the law. The mode of giving the consent was an accident. But, as the usual mode of creating an easement was by grant, it was not a great step to take to say, when the conditions which conferred the right were proved to exist, "Here is an incorporeal hereditament in lawful existence and of lawful origin. There must therefore at one time have been a grant."

35. The same difficulty infects the appellants' reliance on Fry J's statement about "resting upon acquiescence". Here, they overlook what his Lordship said—before and after that statement—about the role of acquiescence and how it will be constituted.

36. Early in his reasons, Fry J said that, absent express stipulation, the rights at issue (rights of support to a building) could arise from either of two sources: "as incidents attached to property by nature herself, or as incidents attached to property by the force of long continued user under circumstances importing acquiescence in such user".[50] Later, he said that, absent an express contract, it was "essential to inquire on what principle, in what time, and under what circumstances" the right might be acquired. "Mere lapse of time [could not] on any intelligible principle, confer a right not previously possessed, **though lapse of time accompanied by inaction, where action ought to be taken**, may well have such a result."[51] It was in this context that he made the statement about the law "resting upon acquiescence". And, as his next sentence makes clear, acquiescence explains why rights of prescription are upheld:

> Courts and the Judges have had recourse to various expedients for quieting the possession of persons in the exercise of rights which have not been resisted by the persons against whom they are exercised, but in all cases it appears to me that acquiescence and nothing else is the principle upon which these expedients rest.

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48 *Delohery* (1904) 1 CLR 283, 307.

49 *Delohery* (1904) 1 CLR 283, 308.

50 (1881) 6 App Cas 740, 772.

51 *Id*, 773.

37. It is therefore unsurprising that Fry J emphasised—in the sentence that followed—that "[i]t becomes of the highest importance to consider of what ingredients acquiescence consists", and set them out.[52] After that, he made the following statement, which is illuminating: [53]

> As regards the reason of the case, it is plain good sense to hold that a man who can stop an asserted right, or a continued user, and does not do so for a long time, may be told that he has lost his right by his delay and his negligence, and every presumption should therefore be made to quiet a possession thus acquired and enjoyed by the tacit consent of the sufferer…

38. Or as Professor Butt put it earlier this century (emphasis added): [54]

> The crucial issue is whether the use was sufficiently open that servient owners – whoever they are – reasonably careful of their interests, would have known about the use and so could have put a stop to it had they wished. **When it is said that 'acquiescence' lies at the root of prescription, what is meant is that the servient owners – whoever they are – have the means of knowing of the use being exercised but do not interrupt it**.

39. In short, prescriptive rights arise from long use or possession and "acquiescence" is the label used to describe the factual basis for the law's recognition of the rights arising from that use. Accordingly, the appellants' contention that the Court of Appeal's reasoning "inverts the foundational statement of principle in *Dalton* by giving primacy to the position of the user" cannot be sustained. It mischaracterises the reasoning in *Dalton v Angus* and *Delohery* and misconceives the rationale for the law's recognition of prescriptive rights.

40. There is no reason in principle why the acquiescence of the successor in title to the servient tenement should not be "tacked" to the period necessary to create a prescriptive easement. The successor is in as good a position as the predecessor to "stop [the] asserted right, or [the] continued user" and, provided that "right or user" is *nec clam* , the successor's failure to stop is as much "acquiescence" as its predecessor's.

Issue 2: The effect of the Transfer of Land Act

(a) Introduction

41. The appellants contend the effect of s 42 of the Act (more precisely, s 42(1)) is that a registered proprietor will hold the land free from any "inchoate prescriptive easement based on less than 20 years of use prior to registration"[55] because (a) the effect of registration is

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[52] "In many cases, as, for instance, in the case of that acquiescence which creates a right of way, it will be found to involve, 1st, the doing of some act by one man upon the land of another; 2ndly, the absence of right to do that act in the person doing it; 3rdly, the knowledge of the person affected by it that the act is done; 4thly, the power of the person affected by the act to prevent such act either by act on his part or by action in the Courts; and lastly, the abstinence by him from any such interference for such a length of time as renders it reasonable for the Courts to say that he shall not afterwards interfere to stop the act being done." *id*, 774.

[53] *Ibid*.

[54] P. Butt, "Use 'as of Right'" (2004) 78 *Australian Law Journal* 162, 166. See also White JA's discussion in *Arcidiacono v The Owners – Strata Plan No 17719* [2020] NSWCA 269, [107]–[146].

[55] AS [16].

to extinguish any "encumbrance" not recorded on the Register unless it falls within one of the exceptions in s 42(2); (b) an "inchoate prescriptive easement" has not been "acquired" and is not "subsisting", so does not fall within the exception in s 42(2)(d), further, is an "encumbrance" for the purposes of s 42(1); and (c) that construction of "encumbrance" is supported by the statutory context, the Act's history, and the "purpose of the Torrens system".

42. At the outset, it should be observed that, while the appellants refer to an "inchoate prescriptive easement",[56] they do not unpack that term or explain its content or meaning. These submissions will return to the significance of that.

43. That aside, the appellants' contentions should not be accepted. An inchoate prescriptive easement is not an "encumbrance" for the purposes of the Act. Their construction of "encumbrance" is not supported by the statutory context, the Act's text, its history, or the "purpose of the Torrens system". Accordingly, an inchoate prescriptive easement is not extinguished upon the registration of a new proprietor.

(b) The statutory text

44. Sub-section 42(1) of the Act relevantly provides that "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…".

45. Sub-section 42(2) identifies what are known as the "paramount exceptions", relevantly providing:

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

46. Section 4(1) provides "**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".

(c) The Court of Appeal's reasoning

47. The appellants raised the argument during their oral submissions in the Court of Appeal (CA [83]). However, the Court did not accept an "emerging easement" could be an encumbrance, pointing to cases that establish, before the end of the 20-year period, the user

[56] The appellants also refer variously to "an immature prescriptive easement": AS [40] and [52].

of another's land has "no rights at all"[57] and "the so-called potentiality of the acquisition of an easement within less than twenty years is not an interest in land".[58] Applying these, it held that before Mrs Valmorbida accrued 20 years' use of Stevens Court, she had no relevant "claim or demand". It also pointed out that, upon becoming registered proprietor, Les Denny (Old) could have asserted its ownership, which would give her "no rights at all" (CA [88]). The Court concluded: "Her potential easement over Stevens Court had no legal existence at that time and was not an encumbrance that could be extinguished by the registration of a new proprietor" (CA [91]).

48. By October 2021, when the appellants became the registered proprietors, Mrs Valmorbida's use had matured into an easement—the 20–year period having expired in October 2016. Because their interest would be subject to the easement if it came within s 42(2)(d), it was necessary for the Court to consider whether it did. It began with s 3(1) of the Act, which addresses the application of other laws to land under the Act. After considering the sub-section's history and the extrinsic materials for the legislation that introduced its current form in 1954 (CA [93] and [94]), the Court concluded that s 3(1) "supports the understanding that the Torrens system under the Act 'assumes the existence of general law principles' regarding land and does not work a fundamental change to those principles" (CA [95]). The Court said that, far from being inconsistent with the Act, the existence of an easement "howsoever acquired" was accommodated by the exception in s 42(2)(d), pointing to authorities that reached the same conclusion (CA [96]). Finally, after a comprehensive review (CA [97]–[131])—including of authority, statutory context, policy, legislative history, matters of fairness, and historical rationale—it concluded Mrs Valmorbida acquired an easement over Stevens Court in 2016, which had subsisted since then despite not being recorded on the Register (CA [132]).

(d) The appellants' arguments

49. The appellants contend 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 prescriptive easement because it was not an 'encumbrance'".[59] The correctness of that contention depends on what it means by "new registered proprietor". If it means <u>Les Denny (Old)</u>, the Court's conclusion rested on s 42(1) and the meaning of "encumbrance"; but if it means the <u>appellants</u>, the conclusion rested on s 42(2)(d).

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[57] *Bonner v Great Western Railway Company* (1883) 24 Ch D 1, 8 (Baggallay LJ; Lindley and Fry LLJ agreeing).

[58] *Greenhalgh v Brindley* [1901] 2 Ch 324, 328 (Farwell J). His Lordship explained "There is either an easement… or there is not. If there is not, there is no intermediate stage which has any legal existence…"

[59] AS [35].

The effect of registration

50. Mrs Valmorbida agrees that the effect of s 42(1) is to extinguish any "encumbrance" that is not recorded in the relevant folio in the Register, unless it falls within one of the exceptions in s 42(2).[60]

51. She also accepts that whether s 42(1) extinguishes "something" (to use a neutral term) depends on whether it is an "encumbrance" capable of being recorded on the folio.[61]

The meaning of "encumbrance"

52. The appellants' statement that 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])"[62] does not fairly or accurately describe the Court's conclusion or its reasoning—outlined above. The Court did not even use the phrase "inchoate prescriptive easement".

53. That aside, while the appellants accept that an inchoate prescriptive easement does not confer an interest in land,[63] it is not clear whether they accept the Court's conclusion that it gave Mrs Valmorbida "no rights at all". More importantly, if they contend that, by the inchoate prescriptive easement, she did have rights to Stevens Court, they do not identify what those rights were, whence they were derived, what their character or content was, or how she could have asserted, protected or vindicated them. Accordingly, it is impossible to discern what they say was the "encumbrance" that s 42 extinguished.

54. Despite all that, the appellants criticise the Court of Appeal for giving "inadequate attention" to the definition of "encumbrance".[64] They make four observations to support their contention that term encompasses an inchoate prescriptive easement.

55. The *first* is that the definition is inclusive and has the "impression" of "[seeking] to capture as broadly as possible any conceivable burden upon the land".[65] However, even accepting the definition's breadth, the observation provides little assistance—aside perhaps from confirming that, as the appellants see things, what s 42(1) extinguished was appurtenant to the land (hence, "burden upon the land"), rather than a personal right.

56. *Second*, they observe the definition's breadth is "borne out by [its] legislative history" and that it replaced an earlier, narrower definition.[66] Boiled down, that amounts to no more

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[60] AS [38].
[61] AS [38].
[62] AS [40].
[63] AS [41].
[64] *Ibid*.
[65] AS [42].
[66] AS [43]–[48].

than, in 1866, the current definition of "encumbrance" was introduced, replacing a narrower definition contained in Victoria's first Torrens statute—the *Real Property Act 1862* (Vic). The appellants identify nothing else in the history to support the construction for which they contend, including any authority—whether from Victoria or Western Australia (which, they point out, "adopted the Victorian definition with minor variations" in 1874)—decided in the 160 years since the definition was introduced.

57. The *third* observation focuses on the words "claim or demand" in the definition. The appellants criticise the Court of Appeal for "erroneously assuming" that, because an inchoate prescriptive easement "does not confer any estate or interest in land (or indeed any right in respect of the land)", it cannot constitute a "claim or demand".[67] It is unclear whether the parenthetical reference to "any right in respect of the land" expresses the appellants' acceptance that an inchoate prescriptive easement does not confer any rights or their criticism of the Court for "erroneously assuming" the same. And despite referring to the Court's conclusion that an inchoate easement does not have "any legal existence", they do not say whether that conclusion is correct.[68] Instead, they make the unremarkable point that, as a matter of construction, the words "claim or demand" must be given effect and there may be a "claim or demand", even where there is no estate or interest. But, as observed already, they do not descend to identify the "claim or demand" that, on their case, made the definition operative (see paragraph 53 above). Nor do they identify any authority to have considered the meaning of "claim or demand".

58. The *fourth* observation[69] is similar to the third but focuses on the words "is or may be made or set up" in the definition of "encumbrance" Here, the appellants contend that, where land has been used for less than 20 years "such as to give rise only to an immature easement", the user "may indeed have a claim". The equivocation in "may indeed" only underscores that the relevant "claim" has not been identified, while the authority cited provides no assistance at all.[70]

59. Based on these observations, the appellants contend, "[i]n its ordinary meaning, an 'encumbrance' is simply 'a burden'" and land is "affected and burdened" by an inchoate

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[67] AS, [99].

[68] AS [50]

[69] AS [51]–[52].

[70] AS [53], [fn 37], citing three paragraphs from *Mayfield Development Corporation Pty Ltd v NSW Port Operations Hold Co Pty Ltd* [2026] HCA 12 explaining a release, contained in a deed of release that was expressed to apply to "Claims" that one party "had or may have had" against another in relation to a dispute between them. "Claims" was defined as including "'action, suit, cause of action ...' etc": [2026] HCA 12, [50]. The Court held the release did not extend to the relevant "Claims". The result aside, the appellants do not explain how the wording of a private agreement between contracting parties informs the proper construction of a public Act.

easement "in the sense that the owner of the land must either end or permit to use in order to avoid an easement arising".[71] Those contentions should not be accepted. Given the definition of "encumbrance" and the emphasis the appellants give to its breadth, their appeal to "ordinary meaning" is difficult to understand. And if "encumbrance" means no more than "burden", it is difficult to understand why the Act would need to define it at all. The fact that time has commenced under a period of prescription does not mean the land is "burdened" since, as the Court of Appeal held, an inchoate easement does not have "any legal existence".

60. For much the same reason, the appellants' contentions about the "intention of the Act" and the "perverse consequence" if "encumbrance" is not construed as they contend, are also unsustainable. If anything, their explanation of that consequence—registration of an estate or interest would "[leave] untouched" an inchoate prescriptive easement that "does not confer any legal interest, cannot be registered, and does not fall within any exception to indefeasibility"[72]—illustrates why an inchoate prescriptive easement cannot "burden" the land, let alone be an "encumbrance" within the statutory definition. Their concession that it "cannot be registered" is particularly telling.

61. The appellants argue that s 42(1)'s effect is to extinguish any "encumbrances" not recorded on the Register, unless they fall within one of the exceptions to infeasibility.[73] A necessary concomitant of that argument is that whatever s 42 extinguishes must be capable of registration because, were it otherwise, the Act would effect extinguishment without affording protection by registration. If an inchoate prescriptive easement cannot be registered, it follows that it cannot be an "encumbrance" and so cannot be extinguished.

62. The appellants' submissions do not consider whether an inchoate prescriptive easement can be registered. Accordingly, it is necessary to consider the relevant provisions of the Act.

63. Section 72 deals with the notification of easements on the register: "A folio on the Registrar may contain a recording to the effect that the land therein described is subject to or has appurtenant thereto an easement": s 72(1). Two points can be made about the provision: first, it does not provide that an easement must be registered (which is consistent with the exception in s 42(2)(d)); second, as the appellants' submissions emphasise, an inchoate prescriptive easement is not an "easement", so cannot be registered under s 72(1). Section 89 provides for caveats: "[a]ny person claiming any estate or interest in land" may lodge a

71 AS [54].
72 AS [54].
73 AS [37].

caveat. But, as the appellants also accept, an inchoate prescriptive easement does not confer an estate or interest in land. Accordingly, it cannot be protected by a caveat either.

Statutory context

64. The appellants' contentions about statutory context do not support their construction of "encumbrance". They rely on two provisions to provide the context.

65. The first is s 43 of the Act—the "notice" provision[74]—on which the appellants rely to contend that a person dealing with land under the Act should not be required to make inquiries about use of the land that preceded the registration of the current registered proprietor, "including to ascertain whether a third party may have inchoate rights to a prescriptive easement".[75] However, their written submissions extract the part of s 43 concerned with inquiries about "the circumstances or consideration under which" the registered proprietor or any previous proprietor became registered. It is difficult to see how a use that might found a prescriptive easement could be relevant to how a registered proprietor became registered. Perhaps they meant to refer to that part of s 43 as provides that a person contracting or dealing with the registered proprietor shall not be "affected by notice actual or constructive of any trust or unregistered interest". If so, the argument faces at least two difficulties: first, an inchoate prescriptive easement is not a trust and does not give rise to an interest in land (as they accept); second, courts have consistently held that the protection s 43 that confers operates only upon registration[76] and in this case the undisputed finding was, at least by the time of the sale, Les Denny (Old) was aware or ought to have been aware that there may well be an easement over Stevens Court obtained from long use: see paragraph 7(c) above.

66. The second provision—s 32C(a) of the *Sale of Land Act 1962* (Vic)[77]—does not assist the appellants either. It relevantly provides that the "s 32 statement" a vendor must give a purchaser before the purchaser signs a contract for the sale of land must include, "in relation to the use of the land… a description of any easement… affecting the land (whether registered or unregistered)". It is difficult, however, to understand how a statutory obligation to describe an interest falling within an express exception to infeasibility can support a construction of "encumbrance" that would have the effect of extinguishing the basis of that very same interest. The existence of s 32C illustrates that the appellants' appeal to a potential vendor's ignorance is conjectural. Finally, s 32C illustrates that, if the "legislative intention" were for "encumbrance" to mean what the appellants contend, it

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[74] AS [57]–[58].

[75] AS [56].

[76] *Templeton v Leviathan Pty Ltd* (1921) 30 CLR 34, 54, 55; *Lapin v Abigail* (1930) 44 CLR 166, 182, 188, 196, 203; *IAC (Finance) Pty Ltd v Courtenay* (1963) 110 CLR 550, 572.

[77] AS [58]–[59].

could be achieved by the simple expedient of including a reference to "use" in the definition: see the chapeau to s 32C.

The purpose of the Torrens system

67. Finally, the appellants point to the "purpose of the Torrens system" as supporting the construction of "encumbrance" for which they contend.

68. In several cases, this Court has pointed out the limitations of "statutory purpose" as an aid in interpreting legislation.[78] Those limitations are compounded in a case like this, where the appellants call in aid the "purpose of the Torrens system"—a system enacted in each State and Territory by legislation that is not uniform but reflects, in each instance, the outcome of different policy choices, including about balancing competing interests, and the means by which to implement those choices. That is particularly so in relation to easements, where the Act, unlike the Torrens statutes in most other Australian States and Territories, provides not only that easements but also unregistered easements are an exception to indefeasibility. Further, several aspects of the Act's operation that the appellants identify have formed the basis of recommendations for its amendment.[79] However, the Victorian Parliament has not implemented those recommendations.

69. In considering the same arguments the appellants make now, the Court of Appeal was alive to the "purpose of the Torrens system", the policy that the register "should provide 'the information necessary to comprehend the extent or state of the registered title to the land in question'" and the role of indefeasibility of title in achieving that policy" (CA [109]). It also recognised that s 42(2) creates a number of exceptions to indefeasibility, including unregistered easements "howsoever acquired", that s 3(1) preserves operation of the general law so far as it is not inconsistent with the Act, and the "obvious tension between the policy of certainty of registered title and the express preservation of certain unregistered interests in land" (CA [111]). After careful and thorough consideration of the authorities and text, context, policy, legislative history and fairness, it concluded (CA [128]:

> Unless and until Parliament amends the *Transfer of Land Act* to limit or remove the exception for unregistered easements in s 42(2)(d), the Court must give effect to the exception, despite the potential for it to operate unfairly. In this case, the 20-year period expired in 2016, well before the applicants became the registered proprietors of 31 Ivanhoe Street, and so questions of unfairness do not arise. The easement had been acquired by Mrs Valmorbida and subsisted when the transfer to the applicants was registered in October 2021.

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[78] See e.g. *Carr v Western Australia* (2007) 232 CLR 138, [5] (Gleeson CJ); *Alcan (NT)Alumina Pty Ltd v Commissioner of Territory Revenue* (NT) (2009) 239 CLR 27, 27, [51] (Hayne, Heydon, Crennan and Keifel JJ), [5] (French CJ); *Construction Forestry Mining and Energy Union v Mammoet Australia Pty Ltd* (2013) 248 CLR 619, [40]–[41].

[79] See CA [124] and the reports of the Law Reform Commission of Victoria cited there. See also *Reform Commission of Victoria, Easements and Covenants*, Discussion Paper No 15 (1989).

70. The foregoing observations are sufficient to dispose of the appellants' contention that the Court of Appeal's conclusion "tends to undermine" the purpose of the Torrens system.[80] That said, it is also necessary to deal with some of their other arguments.

71. The appellants advance several contentions about the knowledge registered proprietor has or might have of the use of the land.[81] They accept a registered proprietor will have knowledge of use "while they are the registered proprietor",[82] which leaves their arguments about a registered proprietor's knowledge before registration. Those are answered, on the facts, by the findings about the state of its knowledge at the time of the sale of the land and by the disclosure required under s 32C(a) of the *Sale of Land Act*.[83]

72. The appellants identify—by reference to the exceptions in s 42(2)—instances where the registered proprietor "may be assumed to have actual knowledge or, at the least, ready means of obtaining such knowledge", including s 42(2)(b) (adverse possession) and (e) (interest of a tenant in possession).[84] It is difficult to understand why the use of land sufficient to found a prescriptive easement should not fall into that category too—after all, the function of the "*nec clam*" element is to ensure that the landowner has knowledge. Likewise, "retrospective investigation"[85] will be required as much for a claim for adverse possession as a prescriptive easement—if not more, given the requirements of s 32C(a) of the *Sale of Land Act*.

73. Rather than support the appellants' contentions, the advice from the Commissioner of Titles, published in 1866, undermines them.[86] That the advice was published at all confirms that, under the Victorian "Torrens system", purchasers should undertake investigations and not rely solely on the register. Second, rather than confirming the appellants' contentions, the fact that the advice does not refer to "inchoate prescriptive easements" confirms they are not "encumbrances" for the purposes of the Act. In that regard, it should be recalled that the present definition of "encumbrance" was introduced by the 1866 legislation, which was drafted by the same Commissioner who published the advice.

74. The appellants' arguments criticising the Court of Appeal's consideration of s 42(2)(d) and s 3(1) lack merit.[87] Section 42(2)(d) expressly provides that an easement, even if unregistered, is an exception to indefeasibility. It is difficult to see how or why the Act—

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[80] AS [62].
[81] AS [63]–[65].
[82] AS [63].
[83] *Ibid*.
[84] AS [65].
[85] AS [66].
[86] AS [67].
[87] AS [68]–[70].

which preserves a prescriptive easement at maturity—would strangle it in infancy. The appellants mischaracterise the role of s 3(1) in the Court's reasoning, which was simply (CA [93]–[96]) that it applied the general law's recognition of an easement acquired through long use—which, earlier in its reasons, the Court had concluded could arise despite changes in ownership of the relevant land during the period of use—to land under the Act.

75. The Court did not overlook the effect of registration.[88] The whole point of its consideration of the Act's operation was to determine whether s 42(1) extinguished (using the neutral expression from before) such "something" as Mrs Valmorbida had in Stevens Court. Mr Torrens' reference to freeholders as being "in the same position as a grantee direct from the Crown" explains that a registered proprietor's title does not derive from its predecessor. But it says nothing about the "paramount interests"[89] in s 42(2) of the Act and is no substitute for an analysis of the statutory text to determine what, in any particular case, s 42(1) does—or does not—extinguish.

76. By the time the appellants became registered in October 2021, Mrs Valmorbida's use of Stevens Court had matured into an easement. The Court below rejected their arguments to the contrary, which are not the subject of this appeal. The Court of Appeal concluded that, at the time their predecessor—Les Denny (Old)—became registered, Mrs Valmorbida's "potential easement" had "no legal existence" and was not an "encumbrance" that could be extinguished by the registration. For the reasons given above, the appellants' contentions provide no basis for impugning that conclusion. They do not even identify what they say s 42(1) extinguished.

PART VI—ESTIMATE OF TIME TO PRESENT ORAL ARGUMENT

77. The respondent estimates that two hours will be required for her oral argument.

DATED 24 June 2026

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[88] AS, [71].

[89] L. Spagnolo, "A Conceptual Framework: What the Forgotten History of Victorian Torrens Legislation Tells Us About Priority Disputes Involving Paramount Interests" (2022) *Sydney Law Review* 261, 269–271.

SCHEDULE

EVIE PITARD PTY LTD (ACN 652 661679)

Second Appellant

CHLOE PITARD PTY LTD (ACN 652 661 651)

Third Appellant

HUNTER PITARD PTY LTD (ACN 652 661 795)

Fourth Appellant

ANNEXURE TO RESPONDENT'S SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date
1	*Transfer of Land Act 1958* (Vic)	Version 174 (15 October to 20 June 2015)	ss 3(1), 4(1), 42, 43, 72, 89	Act in force at the date of registration of Les Denny Pty Ltd (ACN 156 618 825) (now named ACN 156 618 825 Pty Ltd) (**"Les Denny (Old)"**) as the proprietor of the estate in fee simple	10 April 2015 (date of registration of "Les Denny (Old)" as the proprietor of the estate in fee simple
2	*Sale of Land Act 1962* (Vic)	Version 154 (1 October 2014 to 22 April 2015)	ss 32, 32C	As above	As above