



HIGH COURT OF AUSTRALIA

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Details of Filing

File Number: M43/2026
File Title: A.C.N. 652 661 955 Pty Ltd & Ors v. Valmorbida
Registry: Melbourne
Document filed: Form 27F - Appellants' Outline of oral argument
Filing party: Appellants
Date filed: 15 Oct 2026

Important Information

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

A.C.N. 652 661 955 PTY LTD (ACN 652 661 955)
AND OTHERS ACCORDING TO THE SCHEDULE

Appellants

and

DELMA ANNE VALMORBIDA

Respondent

APPELLANTS' OUTLINE OF ORAL SUBMISSIONS

PART I—CERTIFICATION

1. This outline is in a form suitable for publication on the internet.

PART II—OUTLINE OF ORAL SUBMISSIONS

A The first issue: General Law

2. As to the doctrinal basis of the law of prescriptive easements, this Court recognised over 120 years ago that the consent of the owner of the servient tenement is the substance of the matter (**AS [23]**).

Delohery v Permanent Trustee Co of New South Wales (1904) 1 CLR 283 at 297-9, 305-7 (**JBA vol 3 pt C tab 18 pp 484-485, 492-494**)

3. Where there has been a long period of uninterrupted user amounting to an assertion of right *and corresponding acquiescence by the owner of the servient tenement*, there is a presumption that the use was pursuant to the conferral of a lawful title.

Hampshire Automotive Centre Pty Ltd v Centre Com (Sunshine) Pty Ltd (2019) 60 VR 579 at 589 [52], 601 [107] (**CAB 109 [60]-[61]**)

4. Where there have been two successive owners of the servient tenement over the relevant 20 year period, there has not been acquiescence by *either* of them for the period of time that can be explained only by the user being as of right.
5. 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 (**AS [25]**).

6. If a landowner is bound by their predecessors' acquiescence, then a prescriptive easement may arise where the current servient owner had acquiesced in use for a period of less than 20 years. That period could be as short as one day (AS [28]).
7. The unfairness of binding a landowner to their predecessor's acquiescence becomes even clearer when it is considered that historical use may not be apparent from inspection of the land or otherwise be readily discoverable (AS [29]).
8. It is not necessary in this case to resolve any complexities with exactly what is meant by 'acquiescence' in the present context.

Dalton v Henry Angus & Co (1881) 6 App Cas 740 at 773 (JBA vol 4 pt D tab 23 p 618)

9. The authorities to which the Court of Appeal referred do not provide a reason to reject the analysis for which the appellants contend.

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

10. The effect of registration of an estate or interest under the *Transfer of Land Act* 1958 (Vic) is, by ss 42 and 43, to confer clear title by extinguishing all 'encumbrances' not recorded on the relevant folio of the Register unless the encumbrances fall within one of the exceptions to indefeasibility (AS [37]).

Leros Pty Ltd v Terara Pty Ltd (1992) 174 CLR 407 at 418 (JBA vol 3 pt C tab 19 p 513)

11. Inchoate prescriptive easements (ie where there has been less than 20 years of relevant use of the putative servient tenement) are not easements that have been 'acquired' or are 'subsisting', and thus do not fall within s 42(2)(d) (AS [31]).
12. The term 'encumbrance' is defined in s 4(1) of the Act extremely broadly (AS [39]).
13. The term should be construed as encompassing inchoate prescriptive easements, having regard to the text of the definition (AS [42]-[54]; Reply [11]).
14. The consequence of the respondent's approach is that an inchoate easement would have greater protection than an unregistered estate or interest.
15. The appellants' construction is also supported by the context and purpose of the Act (AS [36], [61], [71]).

Sale of Land Act 1962 (Vic) s 32C (JBA vol 2 pt C tab 12 pp 312-313)

16. It is not necessary for a thing to be an ‘encumbrance’ for it to be capable of being registered under the Act (see ss 37, 66(1), 72(2)).
17. The authorities to which the Court of Appeal referred do not stand against the approach for which the appellants contend (**CAB 119 [99]-[103]**).
18. The position concerning adverse possession, considerations of fairness and the historical rationale for prescriptive easements do not assist.
19. The ‘ambulatory operation’ of s 42(1) is not an objection to the appellants’ approach. (**Reply [13]**).

Bahr v Nicolay (No 2) (1988) 164 CLR 604 at 653 (JBA vol 3 pt C tab 15 p 653)

20. The legislative history of the Victorian Torrens statute supports the construction of ‘encumbrance’ contended for by the appellants. The change from a narrow definition of ‘encumbrance’ to a very broad and *inclusive* definition in 1866 supports the appellants’ contentions about the intended ambit of the term.
21. Shortly after the introduction of exceptions to indefeasibility in 1863, the Commissioner of Titles issued instructions as to the matters of which a purchaser of land being brought under the Act needed to satisfy themselves. Consistently with the spirit of the Act, those matters included ‘acquired’ easements but did not include inchoate easements based on less than 20 years’ use of the land (**AS [67]**).

‘Instructions as to Applications for a Title under the Real Property Act’
(undated) [1863] p 8 (**Supp JBA tab 4 p 19**)

Dated: 14 October 2026



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SCHEDULE

A.C.N. 652 661 679 PTY LTD (ACN 652 661 679)

Second Appellant

A.C.N. 652 661 651 PTY LTD (ACN 652 661 651)

Third Appellant

A.C.N. 652 661 795 PTY LTD (ACN 652 661 795)

Fourth Appellant