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Fiona Burns

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Implied Easements and the Integrity of the Torrens System

Abstract

Implied easements were initially created and then developed in eras when a Torrens or title-by-registration system did not operate. Like all traditional easements, implied easements were legal proprietary interests in favour of the dominant land which bound the successors in title of the servient land. Implied easements worked particularly well to accommodate the presumed intentions of parties, fill contractual gaps and provide a means of access to landlocked land. However, they operated and still operate outside title-by-registration.

Keywords

implied easements, torrens system

IMPLIED EASEMENTS AND THE INTEGRITY OF THE TORRENS SYSTEM

FIONA BURNS*

I Introduction

Implied easements were initially created and then developed in eras when a Torrens or title-by-registration system did not operate. Like all traditional easements, implied easements were legal proprietary interests in favour of the dominant land which bound the successors in title of the servient land.¹ Implied easements worked particularly well to accommodate the presumed intentions of parties, fill contractual gaps and provide a means of access to landlocked land. However, they operated and still operate outside title-by-registration.

This paper will consider: whether implied easements (albeit modified) continue to have a role in Australia's Torrens 'systems' or whether they simply impair the integrity of the register. To date, there have been three problems, which combined, have precluded an easy answer. First, there are a number of implied easements responding to a variety of situations. Second, the early framers of the various Torrens systems did not directly address problems which the ongoing recognition of implied easements could create. Third, Australian land law is neither controlled by one government, nor uniform in content. While an advantage is that such variation allows for diverse and creative responses, the disadvantage can be that there are no consistent or serious attempts to find the best response to a complex issue. States may be inclined to retain a preferred method demonstrating legislative autonomy, even in the face of ongoing difficulties.

This paper is divided into four parts. In Part 2, there is a brief description of the general law of implied easements and how it operates outside the Torrens system. In Part 3, the paper will consider how implied easements were received during the early implementation and operation of the Torrens system in Australia. In Part 4, the paper explores the different present approaches to implied easements in Australia. Finally, in Part 5 it is contended that there can be a difference between the integrity of the register and the integrity of the 'system'. The version of integrity which is chosen will

* Senior Lecturer, Sydney University Law School.

¹ E H Burn, *Cheshire and Burn's Modern Law of Real Property* (16th ed, 2000) 569.

determine whether implied easements will survive with or within the Torrens system. It is necessary to review the purpose and utility of implied easements and where appropriate, integrate them within title-by-registration.

II Implied Easements: A Brief Overview

A History and Early Policy Bases

By the 16th century two forms of implied easements had been recognized in England: easements of necessity and continuous and apparent easements.²

The rationales for easements of necessity were: either they were common or natural rights which did not cease upon unity of ownership, but revived if two parties owned each of the two tenements;³ or the public policy of annexing secondary rights to ensure that the land could be enjoyed.⁴

The rationale for continuous and apparent easements became clear in the 19th century. It was held that a person should not be able to derogate from his grant.⁵ Implying easements to support the actual or presumed intention of the contracting parties was not considered by judges as overstepping their authority.⁶

B Forms of Implied Easements

For the purposes of this paper, there are broadly three forms of implied easements presently existing in Australia.⁷

1 Implied Easements Supplementing a Formal Grant of Land

Several forms of implied easement supplement the terms of a formal grant of land where one or more of the parties have either not expressly considered the need for an easement or have assumed that it existed. Easements have been: inferred from the

² W S Holdsworth, *A History of English Law* (1937) vol 7, 334-335. Note also Adrian J Bradbrook and Marcia A Neave, *Easements and Restrictive Covenants in Australia* (2nd ed, Butterworths, 2000) para [4.25].

³ *Ibid*, 337.

⁴ *Ibid*, 337-338.

⁵ *Tenant v Goldwin* (1705) 2 Ld Raym 1093; 92 ER 222 (Holt CJ); *Suffield v Brown* (1864) 4 De GJ and S 185; 46 ER 888 (Lord Westbury); *Wheeldon v Burrows* (1879) 12 Ch D 31.

⁶ *Eg Pwllbach Colliery Co Ltd v Woodman* [1915] 634, 646-647.

⁷ For helpful discussions see Peter Butt, *Land Law* (5th ed, 2006) paras [1635]-[1662]; Adrian J Bradbrook, Susan V MacCallum and Anthony P Moore, *Australian Real Property Law* (4th ed, Lawbook Co, 2007) paras [18.195]-[18.230]; Bradbrook and Neave, above n 2, ch 4.

terms of the conveyance or lease;⁸ implied from the description of the land, so that the land adjoined a road owned by the grantor was subject to a right of way in favour of the grantee;⁹ implied when a particular use of the land was intended by the parties, but not specifically stated (or reserved) in the grant;¹⁰ and implied under the doctrine of non-derogation of the grant (such as in the rule in *Wheeldon v Burrows*¹¹ in which a grantee acquires all the quasi-easements (continuous and apparent) which were reasonably necessary and existed at the time of the severance.)¹²

2 Easements of Necessity

Easements of necessity¹³ are implied when the owner of the land disposes of land and retains land which is landlocked. Such easements arise under strict conditions: where there has been a severance¹⁴ and the easement is absolutely necessary for practical access.¹⁵ Such an easement arises from the actual or implied intention of the parties.¹⁶

3 Words Implied in Conveyance

At common law, it was possible to include 'general words' which expressly conveyed easements. This approach was enshrined in statute,¹⁷ having the potential to convert privileges or rights in respect to land (which were not easements prior to the

⁸ *Nickerson v Barraclough* [1981] Ch 426; Butt, above n7, para [1644].

⁹ See for example *Roberts v Karr* (1809) 1 Taunt 495; 127 ER 926; Jonathan Gaunt QC and Paul Morgan QC, *Gale of Easements* (17th, Sweet & Maxwell, 2002) paras 3-20-3-25; Butt, above n 7, para [1645]; Bradbrook, MacCallum and Moore, above n 7, paras [18.225]; Bradbrook and Neave, above n 2, paras [4.41]-[4.46].

¹⁰ See for example *Pwllbach Colliery Co v Woodman* [1915] AC 634, 646 (Lord Parker); Gaunt QC and QC, above n 9, paras 3-26-3-30; Butt, above n 7, para [1646]-[1647]; Bradbrook, MacCallum and Moore, above n 7, paras [18.205]; Bradbrook and Neave, above n 2, paras [4.18]-[4.22].

¹¹ (1879) 12 Ch D 31; Bradbrook and Neave, above n 2, paras [4.37]-[4.40].

¹² Butt, above n 7, paras [1652]-[1661]; Bradbrook, MacCallum and Moore, above n 7, paras [18.210]-[18.215]; Bradbrook and Neave, above n 2, paras [4.24]-[4.30].

¹³ Butt, above n 7, para [1648]-[1651]; Bradbrook, MacCallum and Moore, above n 7, paras [18.200]; Bradbrook and Neave, above n 2, paras [4.9]-[4.16].

¹⁴ *Corporation of London v Riggs* (1880) 12 Ch D 798; *Nickerson v Barraclough* [1981] Ch 426; Butt, above n 7, para [1648].

¹⁵ *Union Lighterage Co v London Graving Dock Co* [1902] 2 Ch 557; *Bolton v Clutterbuck* [1955] SASR 253; *North Sydney Printing Ltd v Sabemo Investment Co Pty Ltd* [1971] 2 NSWLR 150; Butt, above n 7, [1650].

¹⁶ *North Sydney Printing Ltd v Sabemo Investment Co Pty Ltd* [1971] 2 NSWLR 150; *Nickerson v Barraclough* [1981] Ch 426; Butt, above n 7, para [1651].

¹⁷ Eg *Conveyancing Act 1919* (NSW) s 67; Bradbrook, MacCallum and Moore, above n 7, paras [18.220]; Bradbrook and Neave, above n 2, paras [4.31]-[4.35].

conveyance) into easements.¹⁸ Some states enacted legislation which excluded such rights in the Torrens system,¹⁹ but then enacted a version of it in the Torrens legislation.²⁰ Some commentators have argued that such provisions in Torrens legislation ought to be restrictively construed.²¹

C *Comment*

Implied easements were developed in eras when there was neither a registration-of-title-system nor a title-by-registration system; and land ownership was the domain of a social and economic elite. Land dealings were decentralized. Complex webs of single transactions were connected to each other by a process of review and interdependence. In this way, rights were established, preserved and transferred to successors in title.²²

However, even carefully researched and negotiated transactions could contain flaws. One potential impediment was that the parties did not fully record their bargain or how the land would be utilized. Accordingly, like implied terms in a contract, implied easements gave effect to and ensured the smooth operation of the transaction.²³ Implied easements correlated with and gave legal recognition to assumptions or intentions about access or use. They also arose at the time of or after the transaction had been completed; and in response to omissions or errors in negotiations and/or documentation. Therefore, in a sense they were both proprietary and remedial. They resolved tensions about access or use by the imposition of a proprietary interest over the servient land in favour of the dominant land.

Such easements were not expressly stated. Instead, they stood behind the documentation, sometimes hinted in the description of the land, the terms of the conveyance or the intended use.²⁴ Nevertheless, they were essential not only to the efficient functioning of single transactions, but also for the ongoing use of the land well into the future and the integrity of the system of conveyancing as a whole.

¹⁸ Butt, above n 7, paras [1635]-[1639].

¹⁹ Eg *Conveyancing Act 1919* (NSW) s 67(5).

²⁰ Eg *Real Property Act 1900* (NSW) s 51.

²¹ Butt, above n 7, para [1641].

²² Alain Pottage, 'Evidencing Ownership' in Susan Bright and John Dewar (eds), *Land Law: Themes and Perspectives* (1998) 129, 136-142.

²³ *Bolton v Clutterbuck* [1955] SASR 253.

²⁴ Eg *RJ Finlayson Ltd v Smith & Company Ltd* [1936] SASR 209.

III Implied Easements and the Torrens System

A Early Torrens Title-By-Registration and Implied Easements

A title-by-registration system has operated in Australia for 150 years.²⁵ It has become so much part of the fabric of our legal system, that there is a danger that the reasons for implementing it can be forgotten.

For Sir Robert Torrens, the old (or common law) system was riddled with a number of flaws including complexity, unreliability and heavy legal costs.²⁶ Parties were faced with the dependency of title which could lead to uncertainty and financial loss so that the services of a skilled conveyancer were necessary.²⁷ Torrens instigated a title-by-registration system which relied on the centrality of the register as the guarantee of independent title, promising simplicity and certainty.²⁸

However, in regard to implied easements, four observations need to be made.

First, Torrens initiated a monumental shift in the administration of land transactions. His publications were aimed at convincing the public that title-by-registration was an inherently better system than the system in place at the time. Torrens faced stiff opposition.²⁹ Collateral or detailed issues, such as the role of implied easements, were not central to his proselytizing mission.

Second, to the extent that Torrens was interested in pre-existing modes for dealing with land, he was primarily concerned with purchases, leases and mortgages and how title-by-registration would improve their efficiency.³⁰ Implied easements were not discussed (although they were interests which could arise as a result of such transactions).

Third, while implied easements had long existed, some easements, such as *Wheeldon v Burrows* easements had still to be given formal legal endorsement.³¹ Therefore, there was an overlap between the implementation of the Torrens system and the maturation of implied easements.

²⁵ The first legislation, the *Real Property Act 1858* (SA) began operation on 1 July 1858.

²⁶ Robert R Torrens, *The South Australian System of Conveyancing by Registration of Title* (1859) 8. See generally, Butt, above n 7, paras [2001]-[2003].

²⁷ *Ibid*, 8-9.

²⁸ *Ibid*, 9-11.

²⁹ *Ibid*, 5-6; Butt, above n 7, para [2004].

³⁰ *Ibid*, ch 8.

³¹ Significantly *Wheeldon v Burrows* (1879) 12 Ch D 31 was not decided until almost two decades after the implementation of the Torrens System in South Australia.

Fourth, implied easements performed a facilitative function in the old system. They fulfilled intentions and unstated assumptions; and provided much needed access. It could not be said that implied easements had caused complexity or unreliability. Instead, it was strongly arguable that they successfully resolved problems. Therefore, they did not surface as major impediments to title-by-registration (although they arose outside the system).

Nevertheless, when drafting legislation for a title-by-registration system, it was necessary for Torrens to consider the place of easements. The earlier legislation allowed the express creation and registration of easements.³² It also recognized easements as exceptions to indefeasibility. The early South Australian legislation stated several exceptions including:

...the omission or misdescription of any right of way or other easement, created in, or existing upon, any land, under the operation of this Act...³³

This exception was wide enough to cover implied easements because the exception did not describe how the easement existed or was created. Other Australian states implemented similar exceptions.³⁴ In hindsight, the exception to indefeasibility was a helpful 'stop-gap' because much land was still to be transferred to the Torrens system; and a thorough investigation of the viability of implied easements was yet to be made.³⁵

³² *Real Property Act 1858* (SA) s 45.

³³ *Real Property Act 1858* (SA) s 39.

³⁴ Eg *Real Property Act 1862* (NSW) s 40.

³⁵ However, it ought not to be assumed that easements were uniformly considered necessary exceptions to indefeasibility in all jurisdictions contemplating title-by-registration. For example, several states in the United States contemplated implementing a title-by-registration system. For the purposes of this discussion, four matters stand out. First, the Torrens system of registration was the inspiration for these early systems. Second, it is clear that the advocates of title-by-registration did not spend much time (if any) considering the position of implied easements in the system. Third, the way that non-express easements were treated differed widely. One draft omitted easements as exceptions to indefeasibility altogether: *Draft American Uniform Land Registration Act*, presented to the 24th Annual Conference of Commissioners on Uniform State Laws, Washington DC October 14-19, 1914, s 11; others recognized any subsisting right of way or easement created within one year of the initial issue of the certificate of title: *Land Title Law*, s 34(3) in *Wild's Annotation of the Torrens Land Title Law of California* (1915); and yet others recognized any subsisting right of way or other easement, however created, upon, over or in respect of the land: *The Illinois Torrens Law 1897*, s 40(3) in William C Black, *The Torrens System: Its Cost and Complexity* (1903) 175-176. Fourth, the disparities indicated that not only were easements a minor

B Early Case Law

1 The High Court

The High Court did not necessarily consider that the Torrens system, as implemented in Australia, expunged or limited the operation of non-express and non-registered easements. For example, Griffith CJ who delivered judgment for the Court in *Delohery v Permanent Trustee of New South Wales*³⁶ observed in regard to prescriptive easements that indefeasibility provisions:

...expressly mention easements, and provide that as to them the register is not conclusive evidence of title. This is a plain recognition of the existence of a law under which interests can be created otherwise than by written instruments, since there could have been no difficulty in providing for the registration of grants for the creation of easements if it had been desired to do so.³⁷

However, in contrast in *Nelson v Walker*³⁸ Griffiths CJ stated in regard to the legislation governing the Torrens system in Victoria that:

... it must not be supposed that I assume that the doctrine of implied grant is at all applicable to land under the Act.³⁹

Dabbs v Seaman ('Dabbs')⁴⁰ raised the question of implied easements. Seaman had subdivided land and sold a block to Smith. In the transfer and certificate of title issued to Smith, the land was described by reference to the plan of subdivision showing a 20 foot strip with the words '20 foot lane.' Smith died and the land was sold by his executor to Dabbs. Seaman argued that he was entitled to have the words '20 foot lane' removed from his certificate of title, claiming that Dabbs was not entitled to a right of way. Dabbs argued that the principles of estoppel in pais and estoppel by deed applied in her favour; and that an implied right of way should be recognized over the lane described in the certificate of title.

At first instance⁴¹ Maughan AJ held that there was no evidence that Dabbs was induced to purchase the land on the basis of the existence of a right of way.⁴² He also

collateral issue, but that opinions were divided as to the extent to which a streamlined system was needed or achievable.

³⁶ 1904) 1 CLR 283.

³⁷ (1904) 1 CLR 283, 312.

³⁸ (1910) 10 CLR 560.

³⁹ *Ibid*, 573.

⁴⁰ (1925) 36 CLR 538.

⁴¹ *Seaman v Dabbs* (1924) 24 SR (NSW) 481.

⁴² *Ibid*, 490-493.

held that although the certificate of title was evidence of the proprietorship of the land, other particulars were merely inconclusive evidence.⁴³ Although the law of implied easements by description was raised briefly by counsel,⁴⁴ it appears that it was not explored. Neither the surrounding circumstances nor the material on the register were bases for an implied easement.

On appeal, a majority of the High Court held in favour of Dabbs. Isaacs J held that it was incongruous to amend Seaman's certificate of title, but not Dabbs' certificate of title.⁴⁵ He also considered, outlining earlier case law about easements implied by description,⁴⁶ that a right of way over the lane was an inherent characteristic of her land.⁴⁷ However, other principles influenced his decision, particularly estoppel.⁴⁸

Starke J pointed out that easements which were implied by description were justified by the principle of non-derogation from grant or estoppel.⁴⁹ He held that previous authorities had permitted implied easements to exist within the Torrens system⁵⁰ and that it was impossible to depart from them. Moreover, these principles applied to a transfer by Smith's administrator to Dabbs.⁵¹

In dissent, Higgins J held that no easement existed because it had not been created in a way envisaged under the relevant Act;⁵² the administrator of Smith's estate had not transferred an easement to Dabbs;⁵³ the words on the certificate of title would not have created an easement under the general law;⁵⁴ and Dabbs had always known that the lane would not be a means of access.⁵⁵

The outcome of the case was disappointing, not only for Seaman, but for subsequent generations of land lawyers. Viewed as an idiosyncratic case which ought to be

⁴³ *Ibid*, 493-494.

⁴⁴ *Ibid*, 486-487.

⁴⁵ (1925) 36 CLR 538, 545.

⁴⁶ *Ibid*, 536-548.

⁴⁷ *Ibid*, 546.

⁴⁸ *Ibid*, 548-552.

⁴⁹ *Ibid*, 573.

⁵⁰ *Ibid*.

⁵¹ *Ibid*, 575.

⁵² *Ibid*, 568-560

⁵³ *Ibid*, 560-561.

⁵⁴ *Ibid*, 561-564.

⁵⁵ *Ibid*, 566-568.

confined to its own special facts,⁵⁶ this High Court decision has not helpfully directed lower courts⁵⁷ and has been possibly overtaken by legislation in one state.⁵⁸

The judges who considered the matter were in sharp division. On the one hand, Isaacs J and Starke J acknowledged the principles governing easements implied by description, determining that there was sufficient description on the certificate of title to warrant a right of way.⁵⁹ However, neither Maughan JA nor Higgins J took this approach. For Maughan JA, the certificate of title was only conclusive of proprietorship, while for Higgins J an easement had not been appropriately created.

Moreover, it cannot be said that the decision was determinative on easements implied by description. Both Isaacs J and Starke J considered the doctrine of estoppel highly influential, while Maughan JA and Higgins J made their decisions on other bases.

Finally, the judges did not squarely tackle two issues: whether an easement by description ought to operate in a title-by-registration system and whether such an easement validly constituted an exception to indefeasibility. Perhaps it was not necessary to do so because the Courts considered material available from the register and certificate of title, so that it was arguable that the various decisions were reliant on an examination of central elements of the Torrens system. At best the decisions of

⁵⁶ *Jobson v Nankervis* (1943) 44 SR (NSW) 277; *Lamos Pty Ltd v Hutchison* (1984) NSW ConvR 55-183.

⁵⁷ According to one commentator, the majority of the High Court did not appear to treat the implied easement as omitted, but rather an inherent entitlement or characteristic of the dominant land: Butt, above n 7, para [2093]. Another has argued that no easement was created by estoppel: John Baalman, 'Easement by Estoppel' (1958) 31 ALJ 800. Bradbrook and Neave have suggested that basically a description of Torrens title land as abutting on a thoroughfare, creates a right of way. However, the precise basis for the decision is unclear; Bradbrook and Neave, above n 2, paras [4.45]. See also *Stevens v Allan* (1955) 58 WALR 1, 17.

⁵⁸ *Transfer of Land Act 1958* (Vic) s 96 (2); Bradbrook and Neave, above n 2, paras [4.46].

⁵⁹ Nevertheless, it is important to emphasize that the authority which Starke J relied on ought not to be considered a clear statement in favour of easements implied by description as exceptions to indefeasibility. In *Little v Dardier* (1891) 12 NSWLR (Eq) 319 the trustees of a will sought a declaration that they were entitled to a right of way over land. The main issue was determined by reference to the law of estoppel rather than principles governing implied easements. Moreover, the land over which the alleged right of way existed was never brought under the Torrens system and the Court held that the plaintiffs were seeking an equitable right (not a claim to a legal estate or interest in it). Even if the trustees were seeking an estate or interest, the registration of the will under the then Torrens legislation was considered sufficient.

Isaacs and Starke JJ gave meaning to the material, confirming the centrality of the register. At worst, Isaacs and Starke JJ were open to the criticism that they provided an imprecise analysis about whether implied easements were exceptions to indefeasibility. At the time, the indefeasibility provisions in NSW allowed omitted and misdescribed easements to constitute exceptions to indefeasibility.⁶⁰ It would have been helpful if not only Isaacs and Starke JJ, but all of the judges involved had considered the nature and effect of these provisions.

2 State Courts

Some early decisions of state courts considered whether an implied easement had been created over Torrens title land;⁶¹ and some addressed the role of implied easements in the Torrens system. However, there was no single sustained approach, but several strands became evident.

First, there were several cases where the courts assumed that implied easements could be integrated into the Torrens system without undermining the integrity of the register. Therefore, applying *Wheeldon v Burrows*, a party was not permitted to derogate from the terms of the grant;⁶² and a bona fide purchaser for value of a servient tenement remained subject to a pre-existing easement of necessity.⁶³ In *Pryce and Irving v McGuinness* ('Pryce'), Hanger J stated:

Easements of necessity have been for a long time registered interests in land. *The Real Property Acts* reveal no intention to interfere with the existence or creation of such rights. They have been described as conveyancing Acts. That such rights should not continue to exist and be valid and effective does not appear anywhere to have been in the mind of the legislature.⁶⁴

Therefore, it is arguable that these decisions were consistent with *Dabbs*, in the sense that if the implied easement constituted a right inherent in the land it could validly stand and operate outside the register.

Second, some courts recognized the existence of implied easements, but refused to allow them to exist when the new registered proprietor was a bona fide purchaser of the legal estate. This was due to the fact that legislation specifically protected such purchasers.⁶⁵ In *Billet v The Commonwealth Bank of Australasia Ltd*⁶⁶ the Court held that

⁶⁰ *Real Property Act 1900* (NSW) s 42 (b).

⁶¹ *Boulter v Jochheim* [1921] QSR 105.

⁶² *Taylor v Browning* (1885) 11 VLR 158; *Stevens v Allan* (1955) 58 WALR 1, 16-19.

⁶³ *Pryce and Irving v McGuinness* [1966] Qd R 591.

⁶⁴ *Ibid*, 606-607. He also added that easements arising by implication of law remained effective and valid, even though he did not classify them as omitted easements: at 607.

⁶⁵ *Real Property Act 1886* (SA) s 71.

an implied easement prevails both under old system and the Torrens system (notwithstanding its omission from the certificate of title of the servient tenement.) However, due to specific legislative protections it could not prevail against the plaintiff.⁶⁷ Therefore, the major difference between the first and second responses was the existence of legislation protecting bona fide purchasers. Both positions still contained the same 'default' assumption, namely that implied easements could operate without undermining the integrity of the register.

The third position was different. It was created by the ambivalent attitude of NSW courts to implied easements⁶⁸ and a strict interpretation of the indefeasibility provisions which, in turn, changed the 'default' position. In *Jobson v Nankervis* ('*Jobson*'),⁶⁹ a decision after *Dabbs*, the plaintiff argued, inter alia, that he was entitled to an implied easement based on an earlier plan and previously issued certificates of title. However, there was no reference to the right of way on the certificate of title issued to the plaintiff. The Court's decision on two matters ensured that it could not be assumed that implied easements existed unimpeded in NSW.

One was that unlike the Court in *Pryce*, the Court considered that such easements had to be evaluated within the confines of the Torrens legislation, particularly the indefeasibility exception for omitted and misdescribed easements.⁷⁰ Therefore, the Court had to decide whether an alleged easement which had been recognized in the general law of implied existed in the Torrens system because it was not registered. The Court held that omitted easements were limited to those which existed before the land was brought on to the register. Therefore, although an implied easement could have otherwise existed, it could not constitute a valid exception to indefeasibility if it did not exist before the land was brought onto the register.⁷¹ Although it was subsequently decided that omitted easements did include those easements which were expressly created and registered but subsequently omitted for whatever reason,⁷² implied easements which were not created by registration, had to satisfy the legislative criteria. The 'default' position had dramatically changed. The assumption was that implied easements were inherently dangerous because they arose outside the registration process. They were not recognized, unless they fell within the narrow

⁶⁶ [1906] SASR 193.

⁶⁷ *Ibid*, 206.

⁶⁸ *Seaman v Dabbs* (1924) 24 SR (NSW) 481.

⁶⁹ (1943) 44 SR (NSW) 277.

⁷⁰ *Real Property Act 1900* (NSW) s 42(b).

⁷¹ (1943) 44 SR (NSW) 277, 279-280.

⁷² *Dobbie v Davidson* (1991) 23 NSWLR 625.

exceptions to indefeasibility. In particular, it was not automatically assumed that they constituted 'omitted' easements.

The other was that the Court confined *Dabbs* to its own facts and curbed its potentiality, noting that it is limited to easements which arise by implication from the description on the certificate of title or on the basis of estoppel.⁷³ Neither the view of Isaacs J that the easement was inherent in the land nor the assumption of Starke J that the principles of the general law applied swayed it.⁷⁴ Having emasculated the potentiality of *Dabbs*,⁷⁵ implied easements increasingly became subject to a literal reading of the exceptions to indefeasibility in the quest to protect the integrity of the register.

Although the decision in *Jobson* strictly applied to NSW only, the approach was highly influential because throughout Australia, to the extent that implied easements are protected, it is more likely that they will prevail as exceptions to indefeasibility rather than as inherent and durable rights in the putative dominant tenement.

C Comment

Overall, the early treatment of implied easements was unhelpful. The decision in *Dabbs* could be interpreted in a variety of ways and did not provide solid guidance. It was the product of a fluid situation in which courts were still grappling with the effects of title-by-registration on well-established norms of property law.

The three strands of state authority outlined above differed in approach and outcome. Nevertheless, there was one important common thread. While each court referred back to the relevant legislation, the most important questions were not asked: do implied easements automatically and necessarily undermine the register: and even if they do affect the integrity of the register, do they still have an inherently important role to play in title-by-registration?

⁷³ (1943) 44 SR (NSW) 277, 280.

⁷⁴ *Ibid.*

⁷⁵ Cf *Stevens v Allan* (1955) 58 WALR 1, 17-18 where Wolff J held that *Jobson* was about a defective grant of an easement.

IV Implied Easements: The Present Situation

A *Implied Easements and the Torrens System*

Australia has not developed a uniform approach to implied easements in the Torrens system.⁷⁶ There are several reasons. One is that there was never any clear guide for dealing with implied easements in Torrens' blueprint or in subsequent court decisions. Another is that state legislatures and judiciary have interpreted the idea of the integrity of the Torrens system and the register differently.

1 *Easements Arising by Implication as a Specific Exception to Indefeasibility*

Tasmania is the only state which expressly protects 'easements arising by implication' as exceptions to indefeasibility, on condition that the easement would have constituted a legal easement if it had not arisen over land regulated by the Torrens system.⁷⁷ However easements implied by general words are expressly excluded.⁷⁸ Unfortunately, easements arising by implication are not defined in the legislation (except to the extent of exclusion) or in subsequent cases.⁷⁹ Traditionally, easements are legal in character, binding successors in title of the servient land⁸⁰ so this ought not to preclude implied easements constituting exceptions to indefeasibility. However, even if the easement were regarded as equitable, the legislation provides that it is an exception to indefeasibility except against a bona fide purchaser for value without notice of the easement who has lodged a transfer for registration.⁸¹ Presumably, equitable easements in most cases would be those which have been created by agreement between the parties in registrable form, but which have not proceeded to registration.

2 *Easements as General Exceptions to Indefeasibility*

In Victoria and WA, the legislation allows unregistered easements to constitute exceptions to indefeasibility.

⁷⁶ Bradbrook, MacCallum and Moore, above n 7, para [18.285]; Bradbrook and Neave, above n 2, paras [11.12]-[11.47].

⁷⁷ *Land Titles Act 1980* (Tas) s 40(3)(e)(i); Bradbrook and Neave, above n 2, paras [11.44].

⁷⁸ *Conveyancing and Law of Property Act 1884* (Tas) s 91 and Fourth Schedule.

⁷⁹ However, this provision did not include easements which were granted before the servient land was brought onto the register: *Parramore v Duggan* (1995) 183 CLR 633. Therefore, it was necessary to create a specific exception for this situation: *Land Titles Act 1980* (Tas) s 40(3)(e)(ia).

⁸⁰ Eg Burn, above n 1, 569.

⁸¹ *Land Titles Act 1980* (Tas) s 40(3)(e) (ii).

Land in the Victorian Torrens system is subject to 'any easements however acquired subsisting over or upon or affecting the land even though they are not specifically notified on the register.'⁸² In WA, land remains subject to 'any easements...subsisting over or upon or affecting the land.'⁸³

It appears that the current legislation in both states is sufficiently wide to encompass implied easements, even if the easement arose after the land was brought into the Torrens system.⁸⁴ The ACT legislation may also be wide enough to permit implied easements.⁸⁵

3 Abolition or an *In personam* Exception?

(a) NSW⁸⁶

In NSW, interests which could be created outside the Torrens registration process have been viewed with increasing suspicion.⁸⁷ Although the first Torrens legislation permitted implied easements as exceptions to indefeasibility, subsequent amendments have restricted their scope to do so.⁸⁸ The effect of the current provision

⁸² *Transfer of Land Act 1958* (Vic), s 42(2)(d); Bradbrook and Neave, above n 2, paras [11.30]; [11.34].

⁸³ *Transfer of Land Act 1893* (WA) a 68; Bradbrook and Neave, above n 2, paras [11.39].

⁸⁴ This is the approach in *Nelson v Hughes* [1947] VLR 227. It is important to emphasize that some of the early cases in which implied easements survived the Torrens system were decided in these states: *Taylor v Browning* (1885) 11 VLR 158; *Stevens v Allan* (1955) 58 WALR 1. However, it is interesting to note previous interpretations of the section. In *Fox Annotated Transfer of Land Act* (2nd ed, 1989) JJ Hockley acknowledged the breadth of the Victorian provision, but then appeared (at 46) to interpolate NSW decisions into his commentary. This does not appear to make sense as the Victorian exception to indefeasibility has been broader than various NSW versions for some time.

⁸⁵ Section 58(1)(b) of the *Land Titles Act 1925* (ACT) includes as exceptions to indefeasibility, 'any right of way or other easement created in or existing upon the same land which is not described, or is misdescribed in the relative certificate of title.' The reference to any easements created in or existing upon the land not described on the certificate of title appears sufficiently similar to the Victorian and WA legislation to allow implied easements as exceptions to indefeasibility.

⁸⁶ For a helpful discussion of some of the cases see: Marion McGuire, 'A New South Wales perspective on implied and prescriptive easements and the rights *in personam* exception to indefeasibility of title' (2006) 12 *Australian Property Law Journal* 228.

⁸⁷ It is interesting to compare and contrast the evaluation of implied easements in JG Beakingham and Lewis A Harris, *The Real Property Act NSW (as amended to the end of 1928)* (Sydney, 1929) 96-97; and RA Woodman and PJ Grimes, *Baalman: The Torrens System in New South Wales* (2nd ed, 1974) 186.

⁸⁸ *Real Property Act 1900* (NSW) s 42(1)(a1).

is that implied easements which arose before the land was brought onto the register will remain valid exceptions to indefeasibility because they constitute omitted easements.⁸⁹

However, it remains unclear whether implied easements under the general law which allegedly arose while the land was under the Torrens system fall within the exception. Several factors would tend to suggest that they do not. The legislation requires that the omitted or misdescribed easements were originally registered, but later omitted, whereas implied easements arise off-the-register. The Court of Appeal has held that prescriptive easements, which also arise off-the-register, are not valid omitted easements.⁹⁰ There have also been several first instance decisions where courts have held that implied easements do not constitute exceptions to indefeasibility,⁹¹ because such easements undermined the accuracy of the register and protections afforded to the purchaser.⁹²

However, there are several trends in the case law which suggest that implied easements may still exist over Torrens land. First, there is a general obiter dictum that rights which could arise under the general law were not simply ousted by the implementation of the Torrens system.⁹³ Second, it is arguable that s 51 of the *Real Property Act 1900* (NSW) passes to a transferee all existing easements, whether or not the easements are specifically referred to in the transfer,⁹⁴ so long as the easement exists.⁹⁵ Third, the Court of Appeal in *Wilcox v Richardson*⁹⁶ appeared to accept that implied easements could arise over Torrens title land. In that case, the Court held that on an assignment of a sub-lease, a *Wheeldon v Burrows* easement applied to enable the use of the sub-leased premises. The Court did not consider the effect that

⁸⁹ *Auerbach v Beck* (1986) 6 NSWLR 454; *Dobbie v Davidson* (1991) 23 NSWLR 625.

⁹⁰ *Williams v State Transit Authority of New South Wales* (2004) 60 NSWLR 286, 300 (Mason P). See also Butt, above n 7, para [2088].

⁹¹ *Tarrant v Zandstra* (1973) 1 BPR 9381; *Parish v Kelly* (1980) 1 BPR 9394; *Torrissi v Magame Pty Ltd* [1984] 1 NSWLR 14; *Kebewar Pty Ltd v Harkin* (1987) 9 NSWLR 738; *Goff v Albury Soldier, Sailors & Airmen's Club Ltd* (1995) 6 BPR 14,029.

⁹² *MCA Camilleri Building & Constructions Pty Ltd v HR Walters Pty Ltd* (1981) 2 BPR 9277. Note also in regard to prescriptive easements: *Dewhirst v Edwards* [1983] 1 NSWLR 34;

⁹³ *Hemmes Hermitage Pty Ltd v Abdurahman* (1991) 22 NSWLR 343, 345 (Kirby P); 354-356 (Priestley J). However, it must be emphasized that the right in question was an implied right to enter premises to repair a right of way which was registered under the Torrens system.

⁹⁴ *Vaneris v Kemeny* (1977) 1 BPR 9655; *Dresner v Scida* (2003) 12 BPR 22.

⁹⁵ However, it has been pointed out that a literal application of s 51 could undermine the integrity of the Torrens system: Butt, above n 7, para [1641].

⁹⁶ (1997) 43 NSWLR 4.

such an implied easement would have upon the registered lease, possibly because the sub-lease would have been relatively short-lived. It has been suggested that this case was an example of the operation of the *in personam* exception.⁹⁷

Fourth, some NSW decisions have preserved implied easements as equitable *in personam* interests. The High Court recognized very early that equitable interests had an important role to play in the Torrens system.⁹⁸ Thereafter, rights *in personam* or the personal equities 'exception' to indefeasibility permitted claims against the registered proprietor arising out of that proprietor's conduct.⁹⁹ As implied easements are not registered express grants, some courts have decided that they are mere equitable interests which are enforceable only against the original parties whose conduct would have created implied easements under traditional principles.¹⁰⁰ However, there are several difficulties with the analysis. One is that traditionally, implied easements have created legal rights enforceable against successors in title, rather than equitable interests enforceable against the original servient owners. Indeed, the right to enforce easements against successive owners of servient tenements has been one of their most useful features from a legal perspective. Another is that the *in personam* exception often applies when the registered proprietor has acted unconscionably, creating a legal or equitable cause of action. Sometimes it is arguable that implied easements are justified on conscience, for example that a person ought not be able to derogate from his grant or that the easement conforms to the parties' actual intention. However, courts have implied easements based on the description of an adjoining road when such a description was simply an aid to the location or dimension of the putative dominant land in pre-Torrens eras. The point is that there has been a too easy elision from the law of implied easements to equitable *in personam* rights.

Nevertheless, in a recent decision, the Court of Appeal re-affirmed that unregistered implied easements were equitable easements which were enforceable only against the original servient owner.¹⁰¹ The Court also acknowledged that there was merit in the argument that implied easements, like prescriptive easements, ought no longer be afforded even limited protection as *in personam* rights. However, as no implied

⁹⁷ Janice Gray, Brendan Edgeworth, Neil Foster and Scott Grattan, *Property Law in New South Wales* (2007) para [12.50]-[12.51].

⁹⁸ *Barry v Heider* (1914) 19 CLR 197.

⁹⁹ *Frazer v Walker* [1967] 1 AC 569; *Breskvar v Wall* (1971) 126 CLR 376.

¹⁰⁰ *Australian Hi-Fi Publications Pty Ltd v Gehl* [1979] 2 NSWLR 618; *Lamos Pty Ltd v Hutchison* (1984) NSW ConvR 55-183; *Kebewar Pty Ltd v Harkin* (1987) 9 NSWLR 738; cf *Stevens Allan* (1955) 58 WALR 1; *Pryce and Irving v McGuinness* [1966] Qd R 591; *Rock v Todeschino* [1983] Qd R 356; *Hutchinson v Lemon* [1983] Qd R 369.

¹⁰¹ *McGrath v Campbell* (2006) 68 NSWLR 229, 252-253 (Tobias JA).

easement had arisen, it was unnecessary to determine the matter.¹⁰² Interestingly, the Court did not provide even an obiter dictum signpost as to how it would deal with implied easements as *in personam* interests in the future.¹⁰³ Whether the Court of Appeal's decision not to automatically apply its approach to prescriptive easements to implied easements represents a significant 'sea change' remains unclear.

(b) *Queensland*

The Queensland legislation¹⁰⁴ is broadly similar to that in NSW. Omitted and misdescribed easements will be exceptions to indefeasibility when: they existed before the burdened lot was first registered but were never recorded;¹⁰⁵ or were registered but the register no longer contains the particulars.¹⁰⁶ However, unlike NSW, an easement constituting an exception to indefeasibility may arise when the instrument providing for it was lodged for registration, but was never registered.¹⁰⁷

Although implied easements were recognized under earlier legislation,¹⁰⁸ the present legislation does not specifically protect them as exceptions to indefeasibility. Commentators suggest that implied easements will probably not survive in the Torrens system or will be at most *in personam* rights.¹⁰⁹

(c) *South Australia*

The South Australian legislation allows omitted and misdescribed easements to constitute exceptions to indefeasibility.¹¹⁰ This is subject to some exceptions including that registered proprietors are deemed to hold the land subject only to such rights of

¹⁰² *Ibid*, 251.

¹⁰³ *Ibid*, 252-253.

¹⁰⁴ *Land Title Act 1994* (Qld) s 185.

¹⁰⁵ *Land Title Act 1994* (Qld) s 185(3)(a).

¹⁰⁶ *Land Title Act 1994* (Qld) s 185(3)(b). This exception does not apply to easements which have been extinguished in regard to the lot.

¹⁰⁷ *Land Title Act 1994* (Qld) s 185(3)(c).

¹⁰⁸ *Pryce and Irving v McGuinness* [1966] Qd R 591; *Rock v Todeschino* [1983] Qd R 356; *Hutchison v Lemon* [1983] Qd R 369.

¹⁰⁹ Carmel MacDonald, Les McCrimmon, Anne Wallace, Michael Weir and Sally Sheldon, *Real Property Law in Queensland* (2nd ed, Lawbook Co, 2005) paras [15.149] and [15.210]. Consider eg *Stuy v BC Ronalds Pty Ltd* [1984] 2 Qd R 578.

¹¹⁰ *Real Property Act 1886* (SA) s 69(d). This exception is permitted when the easement has not been barred or avoided by the *Rights-of-Way Act 1881* (SA) or the *Real Property Act 1886* (SA).

way which are stated in the certificate of title.¹¹¹ However, it remains possible that the *in personam* exception applies.¹¹²

(d) *The Northern Territory*

In the Northern Territory, omitted and misdescribed easements are exceptions to indefeasibility.¹¹³ Omitted easements are those which existed before the land was brought into the Torrens system or were registered and then later omitted by the error of the Registrar-General.¹¹⁴ There is no case law on implied easements and the Torrens system and it is unclear whether they would survive as *in personam* rights.

B *Suggestions for Reform*

Unfortunately, implied easements have not attracted the same degree of interest from reformers as prescriptive easements.¹¹⁵ Perhaps, they have not been considered as controversial or it has been automatically assumed that they are antithetical to title-by-registration.

The latter thinking appears to have influenced the report of the Law Reform Commission of Victoria.¹¹⁶ The Commission argued that modern title-by-registration and land management practices rendered easements created by implied grant and reservation unnecessary and recommended their abolition. Instead, the Registrar would have the power to grant an easement which was necessary for the reasonable enjoyment of the land, subject to the payment of adequate compensation.¹¹⁷ However, the review was limited because the Commission considered land-locked land only and assumed that it was appropriate for an administrator to impose easements. The recommendations lacked the comprehensive review and re-evaluation necessary.

¹¹¹ *Real Property Act 1886* (SA) s 83.

¹¹² It was relied upon to protect a prescriptive easement: *Golding v Tanner* (1991) SASR 482. See also Bradbrook, MacCallum and Moore, above n 7, paras [18.285]; Bradbrook and Neave, above n 2, paras [11.18]-[11.23].

¹¹³ *Land Title Act 2000* (NT) s 189(1)(c); cf Bradbrook and Neave, above n 2, paras [11.18]-[11.23].

¹¹⁴ *Land Title Act 2000* (NT) s 189(3).

¹¹⁵ Note Law Reform Committee of South Australia, *Prescription and Limitation of Actions*, Report 76 (1987); Law Reform Commission of Tasmania, *Report and Recommendation for Reform of Fifteen Conveyancing Matters*, Report No 36 (1984).

¹¹⁶ Law Reform Commission of Victoria, *Easements and Covenants, Discussion Paper No 15* (1989). At the time of writing the anticipated report from the Tasmanian Law Reform Institute dealing with easements and other analogous rights had not been published.

¹¹⁷ *Ibid*, paras [12]-[13].

C Comment

Some states and territories have retained implied easements as exceptions to indefeasibility of title, implicitly indicating that such easements do not impugn the integrity of the register.

On the other hand, some state legislatures have limited the kinds of easements which may constitute exceptions to indefeasibility. In most cases, the status of these easements is not determined by reference to the general law. Instead, the connection of the alleged easement to registration will be determinative. For example, a question may be whether the easement was registered, but later omitted; or whether the easement was ever lodged for registration. However, even in these jurisdictions, implied easements not been completely jettisoned. First, *Dabbs* may have been confined to its facts, but it has not been overruled.¹¹⁸ Second, implied easements may exist outside the statutory exceptions to indefeasibility provisions as *in personam* rights. The question is: why have these complex accommodations of implied easements occurred?

The answer is that even in those jurisdictions where the integrity of the register means optimally, a flawless accuracy (so that generally, implied easements are not automatic exceptions to indefeasibility), the utility of implied easements even as *in personam* interests is recognized. This may explain procrastination of the Court of Appeal in NSW.¹¹⁹ Although the integrity of the register is of great significance, there is another integrity at issue – the integrity of the Torrens system as a complete land dealing system.

As highlighted earlier, it was never the intention of the framers of the Torrens system to exclude completely doctrines which had been developed in the pre-Torrens era. Their goal was the incontestable verification of land ownership and the efficacy of certain common land transactions.

The developments in NSW display the conflict between the two notions of integrity. If the integrity of the register is central to judicial and administrative thinking, the protection of the bona fide purchaser for value without notice is paramount. Such a person is best protected by a flawless register because she must be protected before acquisition and registration takes place. Accordingly, it is assumed that all unregistered easements, whatever their rationale, undermine the integrity of the

¹¹⁸ *Jennings v Sylvania Waters Pty Ltd* [1972] 2 NSWLR 4.

¹¹⁹ *McGrath v Campbell* (2006) 68 NSWLR 229, 250-253.

register.¹²⁰ The fear is that a purchaser will be burdened by an easement of which she was not aware. In short, the integrity of the register is the measure of the integrity of the Torrens system. This view is ably expressed by Butt:

...the integrity of the Torrens system is undermined if rights are allowed to be created by implication only – especially in the case of easements, where the Act sets up a procedure for formal creation and registration.¹²¹

However, some judges have considered that implied easements continue to have utility. The protection of the bona fide purchaser has not been narrowly defined by an accurate register. Instead, implied easements have been recognized as reflecting the intentions of the parties (particularly the bona fide purchaser before registration) or as a suitable means to provide practical access to the land. The easements may enhance the proprietorship of the former bona fide purchaser for value without notice. Therefore, for example, a newly registered proprietor may rely on a *Wheeldon v Burrows* easement where she had purchased the putative dominant tenement in a subdivision.¹²²

However, the rights of such a purchaser are not interminable. They remain effective against the original servient owner. It is expected that the parties will create an express easement or the easement would expire on sale of the servient tenement. Otherwise, future owners of the servient tenement could be burdened by easements undisclosed on the register. However, this may be an unsatisfactory compromise. A change in the ownership of the servient tenement could mean that the dominant tenement was inaccessible or unable to be used for the purpose for which it was intended. This does not bode well for the stability of dominant owner's proprietary interests or the integrity of the Torrens system, although the limited *in personam* approach protects the integrity of the register.

¹²⁰ Eg *Tarrant v Zandstra* (1973) 1 BPR 9381; *Parish v Kelly* (1980) 1 BPR 9394; *Torrisi v Magame Pty Ltd* [1984] 1 NSWLR 15. See also the comments of Butt, above n 7, para [2088] conflating prescriptive and implied easements.

¹²¹ Butt, above n 7, para [1641].

¹²² Consider *Australian Hi-Fi Publications Pty Ltd v Gehl* [1979] NSWLR 618, 623-624 (Mahoney JA) although the case turned ultimately on the definition of 'omission' in the legislation. Note also *Kebewar Pty Ltd v Harkin* (1987) 9 NSWLR 738; *Lamos Pty Ltd v Hutchinson* (1984) NSW ConvR 55-183; *McGrath v Campbell* (2006) 68 NSWLR 229. It is arguable that similar assumptions were made in *Wilcox v Richardson* (1997) 43 NSWLR 4.

V Ways Forward

A *The Problem of a 'One-dimensional' Analysis*

The central question for the future is whether implied easements can be better integrated into the Torrens system, so that not only is the integrity of the register protected, but the Torrens system effectively operates to reflect the intentions and expectations of owners of land.

Previously, the question has been one dimensional: whether implied easements should exist as exceptions to indefeasibility. While this is an important issue, it does not recognize two matters: the law governing implied easements has developed over the centuries 'in a piecemeal, uncoordinated fashion'¹²³ and the considerable utility of implied easements in the past, despite their *ad hoc* development. Before permitting or abolishing an interest as an exception to indefeasibility, it is surely necessary to examine: what was the original rationale for the interest; when did such an interest arise; how the interest is currently created; and whether such an interest is still necessary and appropriate in modern land law.

The one-dimensional analysis has had a peculiar effect. Tasmania simply relies on the policy of the general law (legislatively modified) to determine whether or not an easement ought to be implied. The legislation in Victoria, Western Australia and the ACT similarly does so.

The three narrower approaches demonstrated in NSW (and generally Queensland and the Northern Territory) law are arguably no better. When an implied easement arises before land is transferred to the Torrens system, then the easement is considered to be an omitted easement, determined by reference solely to the general law without any analysis of whether such an easement is relevant to modern conditions.

In personam rights are also based on the general law without an evaluation of its ongoing relevance and efficacy. Then, the application of that law is truncated once the servient land passes to a newly registered proprietor.

Implied easements are effectively abolished when the land was always under the Torrens system or the alleged easement arose when the land was under that system. The problem here is that this is again one-dimensional – except that this time a whole area of land law is simply jettisoned because the easements are created outside title-by-registration.

¹²³ Law Commission, *Easements, Covenants and Profits à Prendre, A Consultation Paper* (Consultation Paper No 186, 2008) para [4.99].

B *Important Issues*

In the event that legislatures wish to depart from the one-dimensional approach, some important issues need to be confronted.

First, implied easements require thorough re-evaluation. The English Law Commission has argued that the underlying rationale/s of these easements needs urgent review as a first step towards their possible integration into a title-by-registration system. This is not an easy task as the Commission has identified a number of potential rationales which are broadly defensible and apposite in regard to some (if not all) implied easements.¹²⁴ However, this also serves to highlight that the term 'implied easement' covers a wide gamut of circumstances which result in the creation of an easement. In Australia, the range and scope of implied easements would have to be determined in the light of any jurisdictional differences between the states and territories.

Such a review would also raise the relevance of certain kinds of implied easements today, for example:

Why should a description of land as adjoining a road by words or a diagram in a certificate of title or a registered lease lead to an implied right of way? The description may simply be for identification or location purposes. To infer an implied right of way may not accord with the intention of the parties or serve a practical purpose or protect the integrity of the register.

Why should easements of necessity arise only from the actual or presumed intention of the parties and where there is a severance? Such requirements have ensured that such easements do not arise 'at large',¹²⁵ but they are probably illogical because the land became inaccessible because the parties had not considered a means of access to and from the putative dominant tenement.¹²⁶

Second, courts have considered that rights *in personam* exist if there is a pre-existing cause of action¹²⁷ and the proprietor's conscience is vitiated.¹²⁸ However, a more specific issue is whether the intentions, assumptions or actions of one or both of the parties ought to be able to create an easement off-the-register? At present this could occur in two ways. One is that an easement could be created by reference to a legal or

¹²⁴ Ibid [4.108]-[4.145].

¹²⁵ Butt, above n 7, para [1651].

¹²⁶ Consider the facts in *North Sydney Printing Pty Ltd v Sabemo Investment Co Pty Ltd* [1971] 2 NSWLR 150.

¹²⁷ *Frazer v Walker* [1967] 1 AC 569; *Breskvar v Wall* (1971) 126 CLR 376.

¹²⁸ Butt, above n 7, para [20104].

equitable cause of action unrelated to the general law of easements.¹²⁹ The other is that the easement could be created on the basis of the general law of easements including implied easements.

It is arguable that the integrity of the register would be better safeguarded if easements were not and could not be created off-the-register. The problem is that parties would be unable to obtain redress in those post-transactional disputes presently covered and resolved by *in personam* rights or the general law of easements, particularly implied easements. The integrity of the system would be called into question, although it would be arguable that from the perspective of title-by-registration, the register accurately stated the rights of the parties.

Third, assuming that the categories of implied easements are rationalized and that the creation of unregistered implied easements is abjured, the question is how to take into account those situations of ongoing relevance which the law of implied easements presently addresses. The answer lies in the express statutory integration into the Torrens system of easements which have been traditionally implied. Possibilities avenues for integration include:

- Expansion of the exceptions to indefeasibility. The provisions governing indefeasibility could be amended to allow specific exceptions to indefeasibility for certain situations which are presently covered by implied easements. For example, where there had been a subdivision of land and access to the subdivided part/s had been via a quasi-easement, all subdivided parts would be entitled to use that right of way as an easement right. The advantage of specific provisions is that they would protect common and defensible assumptions made by newly registered proprietors without incurring substantial costs. Moreover, in some jurisdictions easement rights are statutorily implied in regard to subdivisions,¹³⁰ or other specific easement characteristics are mandated¹³¹ so that these kinds of provisions are not unprecedented.

¹²⁹ For example, a vendor could be estopped from denying express misrepresentations as to the existence of an easement. However, it is difficult to say whether this would afford a putative dominant owner with something more than damages or equitable compensation eg worthwhile practical access over the servient land. The putative servient owner, as an innocent third party, may simply be able to deny the existence of the easement. It is unlikely that a court would impose a remedy adversely affecting the interests of the servient owner: see *Giumelli v Giumelli* (1999) 196 CLR 101.

¹³⁰ Eg *Transfer of Land Act 1958* (Vic) s 98; *Subdivision Act 1988* (Vic) ss 12(2) & 3(B); Bradbrook and Neave, above n 2 para [4.50].

¹³¹ Eg *Conveyancing Act 1919* (NSW) s 88(1).

- Statutory easements with 'sunset' clauses. A provision could be added to the Torrens legislation which allowed certain situations to create limited statutory rights of access or use, particularly in favour of a newly registered proprietor. For example a set period could be prescribed after registration or the statutory right could be limited to the duration of the putative dominant and servient owner's proprietorship. The parties would be placed on notice that thereafter the statutory right would expire. The advantage would be that new proprietors would be protected, while at the same time they would be compelled to take action to have an easement expressly created and registered, hopefully at minimal expense.
- Reliance on court imposed easements. Some states have introduced court imposed easements under which a party makes an application to court for the imposition of an easement.¹³² If the application is successful, an easement is registered on the titles of the servient and dominant land – thereby preserving the integrity of the register. Court imposed easements are very useful when, for example, pre-existing owners of land cannot agree about access. However, a newly registered putative dominant owner would be in a difficult position. She would have no immediate rights in the servient tenement; and she would have to initiate costly and lengthy litigation to acquire an easement, without guaranteed success. Moreover, the statutory criteria which must be fulfilled are significantly different from those applicable to implied easements. The court does not consider 'subjective' issues such as the terms of the transfer to the putative dominant owner or the intended use of the land. Instead, the court is legislatively bound to examine 'objective' criteria, such as whether: the easement is reasonably necessary for the effective use and development of the land; the proposed use is not inconsistent with the public interest; and the imposition of the easement is compensatable. Although, there would be occasions when a putative dominant owner would be successful under both the general law of implied easements and statutory rights of user or even successful only under the criteria for statutory rights of user,¹³³ it is questionable whether statutory rights of user could always be an effective substitute for implied easements. Certainly, some courts have been reluctant to impose easements except in the most deserving circumstances. Court imposed easements are not necessarily a panacea for a failure by a purchaser to

¹³² Eg *Conveyancing Act 1919* (NSW) s 88K; *Property Law Act 1974* (Qld) s 180(1); *Land and Environment Court Act 1979* (NSW) s 40.

¹³³ There may be instances when the criteria for court imposed easements are wider than those for implied easements. For example, while easements of necessity are strictly interpreted to apply when the easements is absolutely necessary for the use of the land, the statutory criteria states that the proposed easement must be 'reasonably necessary' - giving broader discretion to the court to impose the easement.

investigate access which later results in limited or incomplete access after settlement and registration.¹³⁴

VI Conclusion

The framers of the Torrens system spent their energies proselytizing the benefits of title-by-registration. Implied easements were at most an afterthought. However, the Torrens system has now been implemented in Australia for 150 years and the remaining land governed by the old system has significantly diminished.

To date, there has been a singular 'laziness' of thought in regard to implied easements. Although there have been significantly different approaches to implied easements in the various states and territories, a predominant issue has been whether they ought to operate outside the registration system as exceptions to indefeasibility. However, this is only one of several vital matters.

If the operation of the Torrens system in Australia is to be improved and, if possible, made more uniform in the next 150 years, it will be necessary to review in fine detail the extent to which some forms of implied easements still have a role to play. This will involve the re-evaluation of the rationales for implied easements and the circumstances in which they arise throughout the country. In particular, it requires the recognition that the Torrens system operates not only to protect prospective bona fide purchasers, but also newly registered proprietors. Unfortunately, notions of the integrity of the Torrens system have been restricted to the integrity or flawless accuracy of the register. In the future, the integrity of the Torrens system will not only require the accuracy of the register, but also a broader utility – a responsiveness to those situations in which parties inadvertently and innocently fail to protect their interests.

¹³⁴ See eg *Bloom v Lepre* [2008] NSWSC 79.