ACCESS TO LANDLOCKED LAND: A COMPARATIVE STUDY OF LEGAL SOLUTIONS

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1. Introduction

A recurring problem in the law of easements in all common law jurisdictions which have no relevant legislation governing the issue is the question of providing a legal means of access to landlocked land. The problem of landlocking arises most frequently on a sale of land under a subdivision where part of the newly-subdivided land does not adjoin a public highway. Where the land conveyed or retained does not adjoin a public highway, the conveyance or transfer normally contains an express grant or reservation of a right of way to the landlocked land over the adjoining land owned by the grantor or the grantee, but for a variety of possible reasons this may not occur: first, the right of way may be omitted because of an oversight by the parties to the subdivision; secondly, the owner of the landlocked land may not need the right of way because he has an alternative means of access through adjoining property of his own; thirdly, the owner of the landlocked land may be satisfied with the offer of a bare licence or contractual licence of a means of access made by one of the other adjoining landowners at the time of the subdivision; or finally, in light of the use to which he intends the land to be put, the owner of the landlocked land may have no wish for a means of access at the time of the subdivision. However, even though the owner of landlocked land may not consider a right of way to be essential at the time of the subdivision, such a right may become essential at a later stage. For example, in the above illustrations the owner of the landlocked land may sell his adjoining property through which he gained access to the landlocked property, the bare licence or contractual licence given by a neighbour may be withdrawn, or the owner may later wish to put the landlocked land to a different use.

Land may also become landlocked in a variety of other circumstances as well as on a sale of subdivided land: for example, if part of a block of land is acquired by adverse possession and the adverse possessor seeks a means of access over the other part of the block, or if a legal means of access to land is removed by the compulsory acquisition by a local council or public statutory authority of neighbouring property through which the right of way runs.

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In the context of the sale of subdivided land, it may be thought that the problem of access to landlocked land is of historical interest only in light of the strict town and country planning controls imposed by legislation throughout Australia.[1] While it is true that the modern legislation controlling the sealing of plans of subdivision effectively prevents new subdivisions creating landlocked land, it must be remembered that legislation of this nature is a mid-twentieth-century phenomenon. Modern litigation over access to landlocked land may be based on subdivisions which occurred well before the imposition of modern planning legislation, the dispute having been deferred for decades for a variety of possible reasons (for example, an informal agreement between the landowners as to access to the landlocked land which is later terminated).

Where the landlocking occurs as a result of a sale of subdivided land and the owner of the landlocked land is the grantee, a variety of legal doctrines exist under which the grantee may claim an implied right of way. First, an implied easement may arise under the rule in *Wheeldon* v. *Burrows*.[2] As stated by Thesiger, L.J.:

> On the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements (by which, of course, I mean quasi easements) or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owners of the entirety for the benefit of the part granted.[3]

Alternatively, an easement may arise by virtue of s. 67 of the Conveyancing Act 1919 (N.S.W.) or its equivalent in the other Australian States.[4] Section 67 states:

> (1) A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, watercourses, liberties, privileges, easements, rights and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or, at the time of conveyance, demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land or any part thereof. . . .

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[1] See Local Government Act 1958 (Vic), s. 569; Planning and Development Act 1966-1981 (S.A.), s. 40 ff; Local Government Act 1936-1980 (Qld), s. 34; Local Government Act 1919 (N.S.W.), s. 323 ff; Town Planning and Development Act 1928-1979 (W.A.), s. 20 ff.

[2] (1879) 12 Ch. D. 31 (C.A.).

[3] *Id.*, 49. This dictum was cited with approval in *Brown* v. *Alabaster* (1887) 37 Ch. D. 490 at 504, *per* Kay, J.; *Union Lighterage Co.* v. *London Graving Dock Co.* [1902] 2 Ch. 557 at 572, *per* Stirling, L.J.; *Aldridge* v. *Wright* [1929] 2 K.B. 117 at 129, *per* Greer, L.J.; *Liddiard* v. *Waldron* [1934] 1 K.B. 435 at 440, *per* Scrutton, L.J.; *Grigsby* v. *Melville* [1973] 2 All E.R. 1355 at 1360, *per* Brightman, J.; and *Ward* v. *Kirkland* [1967] 1 Ch. 194 at 224, *per* Ungoed-Thomas, J.

[4] See Property Law Act 1958 (Vic), s. 62; Law of Property Act 1936-1980 (S.A.), s. 36; Property Law Act 1969-1979 (W.A.), s. 41; Property Law Act 1974-1978 (Qld.), 239; Conveyancing and Law of Property Act 1884 (Tas.), s. 6. This legislation is based on the Law of Property Act 1925 (U.K.), s. 62.

(3) This section applies only if and as far as a contrary intention is not expressed in the conveyance, and has effect subject to the terms of the conveyance and to the provisions therein contained.

As further alternatives, a right of way may arise under the principle of non-derogation from grant[5] or by implication from the description of the land in the conveyance or contract of sale;[6] in the latter case, if land is described as "bounded by" or "abutting on" a road or street the grantor will be regarded as having impliedly agreed to grant to the grantee a right of way forming the road or street. With one exception,[7] these methods of creation of implied covenants are applicable throughout Australia in respect of both general law and Torrens system land.

For two reasons, these methods of creation will not be considered further in this article. As discussed in the textbooks on easements,[8] they are of general application to the law of easements and are not specifically aimed at the question of access to landlocked land. In addition, the operation of each of these methods is piecemeal and is circumscribed in various ways which prevent them from being a universal means of guaranteeing access to landlocked land.

The other method of creation of implied easements available to the grantee and the only method available to the grantor is the easement of necessity.[9] This method is the most effective means of guaranteeing access to landlocked land devised by the common law, and in fact was specifically devised in the seventeenth century for this very purpose.[10] In relation to access to landlocked land, it encompasses within its scope the other means of creating implied easements referred to in the preceding paragraph. This article will examine the scope of the easement of necessity with a view to showing its deficiencies as a universal remedy for the owners of landlocked

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[5] See, for example, *Broomfield* v. *Williams* [1897] 1 Ch. 602; *Ward* v. *Kirkland* [1967] 1 Ch. 194; *Woodhouse & Co. Ltd.* v. *Kirkland (Derby) Ltd.* [1970] 1 W.L.R. 1185.

[6] See, for example, *Roberts* v. *Karr* (1809) 1 Taunt. 495; 127 E.R. 926; *Mellor* v. *Walmesley* [1905] 2 Ch. 164; *Dabbs* v. *Seaman* (1925) 36 C.L.R. 538.

[7] In New South Wales, based on the wording of s. 46 of the Real Property Act 1900 and the N.S.W. Court of Appeal decision in *Australian Hi-Fi Publications Pty. Ltd.* v. *Gehl* [1979] 2 N.S.W.L.R. 618, these methods of creation are inapplicable in respect of Torrens system land (except for the implication of an easement from the description of the land). The equivalent legislation in the other States appears to recognize these methods of creation of easements in respect of Torrens land (*quaere* South Australia): see Transfer of Land Act 1958 (Vic.), s. 42(2)(d); Transfer of Land Act 1893-1978 (W.A.), s. 68; Land Titles Act 1980 (Tas.), s. 40(3)(e); Real Property Act 1861-1980 (Qld), s. 44; Real Property Act 1886-1980 (S.A.), s. 69IV. This issue is discussed in A. J. Bradbrook and M.A. Neave, *Easements and Restrictive Covenants in Australia,* Butterworths, Sydney, 1981, ch. 11.

[8] *Gale on Easements,* Sweet & Maxwell, London, 14th ed. 1972, 82-132; P. Jackson, *The Law of Easements and Profits,* Butterworths, London, 1978, 50-56, 72-107; A. J. Bradbrook and M. A. Neave, *Easements and Restrictive Covenants in Australia,* Butterworths, Sydney, 1981, paras. 410-460; K. J. Gray and P. D. Symes, *Real Property and Real People,* Butterworths, London, 1981, 592-598; R. E. Megarry and H. W. R. Wade, *The Law of Real Property,* Stevens, London, 4th ed. 1975, 830-841.

[9] Based on the wording of s. 46 of the Real Property Act 1900 (N.S.W.), it is uncertain whether the easement of necessity applies in respect of Torrens system land in New South Wales. Powell, J. stated *obiter* in *Kostos* v. *Devitt* [1979] A.C.L.D. 516 that it is doubtful whether easements of necessity can arise in these circumstances. If this dictum is correct, the problem of access to landlocked land is more acute in New South Wales than in the other Australian States.

[10] The first reported case on the easement of necessity is *Lord Darby* v. *Askwith* (1618) Hob. 234; 80 E.R. 380.

property and will compare critically the various statutory approaches adopted in both common law and civil law jurisdictions providing a means of access to landlocked land.

2. The Scope of the Easement of Necessity

For many years the conceptual basis of the easement of necessity was disputed. Authorities could be found both for the proposition that it is based on the actual or presumed intention[11] of the parties and for the alternative proposition that it is based on public policy.[12] If intention is the basis, it follows that in the case of a subdivision of land a right of access to the landlocked property will be denied if the grant expressly precludes the creation of a right of way or if it can be shown on the facts that there was no intention on the part of the owner of the landlocked land to obtain by grant or reservation a right of access. Based on the intention test, a right of access will also be denied if title to the landlocked land is obtained by adverse possession or if by compulsory acquisition of neighbouring land the owner of the landlocked land is deprived of his only means of access.[13] On the other hand, if public policy is the basis of the easement of necessity, a right of way to the landlocked property will be permitted in the case of a subdivision of land regardless of the existence of an intention by the parties to the grant. Based on public policy, such an easement would also arise in the case of acquisition of title to land by adverse possession. Thus, an easement of necessity would be a more comprehensive remedy if it is based on public policy than if it is based on intention.

In this light, it is considered unfortunate that the weight of recent decisions prefers intention as the basis of the easement of necessity. The matter has recently been considered by the English Court of Appeal in *Nickerson* v. *Barraclough.*[14] In this case, in 1973 the plaintiff had bought a field the only access to which was by a lane owned by the defendants running alongside one of the sides of the field and over a small bridge built across a ditch. Prior to 1906, the field and the defendant's land had been part of a large estate which was later sold in various blocks for building purposes. The subdivision in 1906 constituted at law a building scheme, the plan of which showed a proposed new road running alongside the plaintiff's field on the site of the lane. In the sale of the field to the plaintiff's predecessor-in-title, the conveyance stated: "The vendor did not undertake to make any of the proposed new roads . . . nor did he give any rights of way over the same until the same should (if ever) be made." After the plaintiff acquired the land from her predecessor-in-title she claimed a way of

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[11] See, for example, *Barry* v. *Hasseldine* [1952] 1 Ch. 835; *Davies* v. *Sear* (1869) L.R. 7 Eq. 427; *Bolton* v. *Clutterbuck* [1955] S.A.S.R. 253.

[12] See, for example, *Packer* v. *Welsted* (1658) 2 Sid. 39; 82 E.R. 1244; *Dutton* v. *Tayler* (1700) 2 Lut. 1487, 125 E.R. 819; *Brown* v. *Burdett* (1882) 21 Ch. D. 667.

[13] By virtue of the application of the intention test, it has been held that a way of necessity can never exist except in association with a grant of land (*Proctor* v. *Hodgson* (1855) 10 Exch. 824; *Wilkes* v. *Greenway* (1890) 6 T.L.R. 449; *Nickerson* v. *Barraclough* [1981] Ch. 426 at 440, *per* Brightman, L.J.).

[14] [1981] Ch. 426. Discussed in Crabb, "Necessity: The Mother of Intention" [1981] *Conveyancer* 442; Coldham, "Easements of Necessity: *Nickerson* v. *Barraclough* (1982) 132 *New L.J.* 224.

necessity to the nearby public highway over the bridge and along the lane despite the express term in the 1906 grant. This way of necessity was disputed by the defendants, who pulled down the bridge over the ditch. At first instance[15] the plaintiff succeeded. Megarry, V.-C. construed the 1906 conveyance as entitling the plaintiff's predecessor-in-title to a way of necessity for building purposes implied in the grant. His Honour based his judgment on the public policy consideration of construing transactions in such a way as to avoid making the use of land impossible by depriving it of a means of access. In his discussion of the role of public policy in this context, he stated:

> I do not think it can be said that, whatever the circumstances, a way of necessity will always be implied whenever a close of land is made landlocked. One can conceive of circumstances where there may be good reason why the land should be deprived of all access. The land may contain large quantities of highly toxic substances with a long life; or it may be desired to produce a bird sanctuary, that will as far as possible, be free from any disturbance; or there may be some other good reason, in no way contrary to the public interest, why it may be desired that the land should remain inaccessible. Accordingly, I would not go beyond saying that there is a rule of public policy that no transaction should, without good reason, be treated as being effectual to deprive any land of a suitable means of access. Alternatively, the point might be put as a matter of construction: any transaction which, without good reason, appears to deprive land of any suitable means of access should, if at all possible, be construed as not producing this result.[16]

On appeal the decision of Megarry V.-C. was reversed on the application of the intention test. The Court of Appeal held unanimously that considerations of public policy could not influence the construction of the 1906 conveyance. Brightman, L.J., with whom Buckley, L.J. concurred, stated emphatically:

> I cannot accept that public policy can play any part at all in the construction of an instrument; in construing a document the court is endeavouring to ascertain the expressed intention of the parties. Public policy may require the court to frustrate that intention where the contract is against public policy, but in my view public policy cannot help the court to ascertain what that intention was.[17]

The Court of Appeal decision in *Nickerson* v. *Barraclough* is consistent with the approach adopted in recent years by Australian courts. The major Australian authority on this issue is *North Sydney Printing Pty.*

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[15] [1979] 3 All E.R. 312; [1980] Ch. 325. Discussed in [1979] *Conveyancer* 446; (1980) 96 *L.Q.R.* 187; and (1979) 14 *Irish Jurist* 334.

[16] [1980] Ch. 325, at 334.

[17] [1981] Ch. 426, at 440-441. Eveleigh, L.J., although agreeing with Brightman, L. J., added (at 446-447) that he could see possibly a case where public policy could aid in the construction of an agreement. His Honour added, however, that it would be a rare case and gave no illustration of its operation. It would thus seem that Eveleigh L.J.'s exception is of little, if any, significance.

Ltd. v. *Sabemo Investment Corporation Pty. Ltd.*[48] In this case, the plaintiff company subdivided a large block of land in such a way as to render part of it landlocked. The plaintiff company retained the landlocked block, which was zoned for parking, and sold the remaining land to the defendant company. The facts showed that the plaintiff company had no intention to reserve a right of way for itself to the landlocked block as it intended to sell this land to the local council as an extension to its existing contiguous car park. However, after negotiations with the council for the sale of the land broke down the plaintiff company sought a declaration that it was entitled to a way of necessity on the basis of public policy. This application was dismissed by Hope, J. in Eq. on the ground that an easement of necessity is based on the actual or presumed intention of the parties rather than on public policy. This conclusion was based on an analysis of several earlier decisions,[19] particularly on *dicta* by Danckwerts, J. in *Barry* v. *Hasseldine*.[20] Hope J. in Eq. specifically rejected the proposition that the law inevitably makes provision for access over the land conveyed by the person in the position of the present plaintiff company, regardless of that person's intention and regardless of the other circumstances of the case.[21]

In summary, the reliance by the courts in recent years on intention rather than public policy as the basis for the easement of necessity has reduced the scope of the easement of necessity in providing for access to landlocked land and has increased the need for remedial legislation.

Certain other restrictions are imposed by common law on the scope and operation of the easement of necessity. These restrictions compound the problem of guaranteeing access to landlocked land. First, a way of necessity cannot be granted through the land of a third party, but only through the land of the grantor or grantee.[22] As stated by Stout, C.J. in *Riddiford* v. *Foreman*:

> No grant of right of way over the stranger's land can be presumed, and therefore no way of necessity over that land can be acquired; but a grant by the owner of one of the several portions to the other can be presumed, and therefore a way of necessity over his soil can be claimed.[23]

Thus, if the landlocked land is enclosed partly by the land of the grantor and partly by the land of one or more third parties, an easement of necessity cannot be claimed over the land of any of the third parties even if the means of access over their land would be shorter and more convenient. If an easement is to exist over land belonging to a third party, it can only come

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[18] [1971] 2 N.S.W.L.R. 150. Discussed in (1972) 46 *A.L.J.* 471. See also *Bolton* v. *Clutterbuck* [1955] S.A.S.R. 253; *Reid* v. *Zoanetti* [1943] S.A.S.R. 92.

[19] *Wilkes* v. *Greenway* (1890) 6 T.L.R. 449; *Proctor* v. *Hodgson* (1855) 10 Exch. 824; 156 E.R. 674; *Davies* v. *Sear* (1869) L.R. 7 Eq. 427; *Bolton* v. *Clutterbuck* [1955] S.A.S.R. 253; *In re Webb's Lease; Sandom* v. *Webb* [1951] 1 Ch. 808; *Pwllbach Colliery Co. Ltd.* v. *Woodman* [1915] A.C. 634.

[20] [1952] 1 Ch. 835.

[21] [1971] 2 N.S.W.L.R. 150, 161.

[22] See A. J. Bradbrook and M. A. Neave, *Easements and Restrictive Covenants in Australia,* Butterworths, Sydney, 1981, para. 416.

[23] (1910) 29 N.Z.L.R. 781 at 786.

into existence by express agreement between the parties. This is based on the conclusion that the easement of necessity is founded upon a presumed grant rather than public policy.

Secondly, an easement of necessity is limited to the purposes for which the landlocked land was being used at the time of the grant and does not entitle the grantee to use the way for any purposes connected with the landlocked land.[24] Thus, an easement of necessity will not take account of changing patterns of land use. Common law has held that if an easement was only designed for access by carts and pedestrians when the grant was made in the eighteenth or nineteenth centuries during a time when the land was used for agricultural purposes, the fact that at the present day the land is zoned for industrial or housing development does not justify increasing the scope of the easement to permit access for cars or trucks in connection with this changed land use.[25]

Thirdly, in contrast to the rule in *Wheeldon* v. *Burrows*[26] the test of necessity for an easement of necessity is strict. Numerous cases have held that a way of necessity will only arise if the way is absolutely essential for the use of the alleged dominant tenement. Mere inconvenience is insufficient.[27] Thus, an easement of necessity will never arise if an alternative means of access to the landlocked land exists, even if this alternative access is difficult and/or expensive or is unsuitable for traffic.[28] This restriction on the easement of necessity results in the denial of many claims for access routes and reduces the ability of the owner of the landlocked property to develop his land.

Finally, no compensation is payable to the servient owner if an easement of necessity is granted over his land. This is arguably unfair to the servient owner and may well have been partially responsible for the extremely narrow scope given by the common law courts to this type of easement. As will be shown,[29] in civil law jurisdictions where compensation is payable in these circumstances fewer restrictions are imposed on the scope of the right of access to landlocked property.[30]

The combined effect of these limitations on the scope of the easement of necessity means that there is no guaranteed legal means of access to landlocked land recognized at common law. This situation has occurred

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[24] See *Gale on Easements,* Sweet & Maxwell, London, 14th ed. 1972, 119-120; A. J. Bradbrook and M. A. Neave, *Easements and Restrictive Covenants in Australia,* Butterworths, Sydney, 1981, para. 418.

[25] *Corporation of London* v. *Riggs* (1880) 13 Ch. D. 798. See also *Gayford* v. *Moffatt* (1868) L.R. 4 Ch. App. 133.

[26] (1879) 12 Ch. D. 31.

[27] See, for example, *Midland Railway Co.* v. *Miles* (1886) 33 Ch. D. 632; *Ray* v. *Hazeldine* [1904] 2 Ch. 17; *Derry* v. *Sanders* [1919] 1 K.B. 223; *Bolton* v. *Clutterbuck* [1955] S.A.S.R. 253.

[28] *Titchmarsh* v. *Royston Water Co. Ltd.* (1900) 81 L.T. 673; *Marrs* v. *Ratliff* (1939) 278 Ky. 164; 128 S.W. 2d 604.

[29] See infra.

[30] Common law has adopted an "all or nothing" approach in relation to the payment to the owner of the servient land for a right of access across his land. If an easement of necessity is allowed, no payment is made at all. On the other hand, in circumstances where an easement of necessity is inapplicable a right of way will only be created on an express grant and the owner of the servient owner may insist on a substantial payment before making the grant.

because the development of the easement of necessity has proceeded on an *ad hoc* basis rather than as a result of a co-ordinated response to a social problem, and the courts have shown themselves to be more interested in maintaining the conceptual purity of the law of implied grants than in devising an effective means of resolving a practical problem. For these reasons, some common law jurisdictions (Queensland, Tasmania and New Zealand) have endeavoured to overcome the problem of access to landlocked land by statutory intervention. It is instructive to examine these enactments, together with equivalent legislation in certain civil law jurisdictions, to determine a possible suitable model for adoption by New South Wales and other common law jurisdictions.

3. Alternative Statutory Approaches

(a) *Queensland and Tasmania*

As an alternative to the easement of necessity, in Queensland and Tasmania a right of access to landlocked land may be obtained by legislation. The relevant legislation does not deal specifically with the issue of access to landlocked land, but deals more generally with the imposition of statutory rights of user in respect of land.

The relevant legislation in Queensland is the Property Law Act 1974-1978, s. 180,[31] which is based on recommendations made by the Queensland Law Reform Commission[32] and the English Law Commission.[33] Section 180 states in part:

> (1) Where it is reasonably necessary in the interests of effective use in any reasonable manner of any land (herein in this section referred to as "the dominant land") that such land, or the owner for the time being of such land, should in respect of any other land (herein in this section referred to as "the servient land") have a statutory right of user in respect of that other land, the court may, on the application of the owner of the dominant land but subject to the succeeding provisions of this section, impose upon the servient land, or upon the owner for the time being of such land, an obligation of user or an obligation to permit such user in accordance with that order.
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> (2) A statutory right of user imposed under sub-section (1) may take the form of an easement, licence or otherwise . . .
>
> (3) An order of the kind referred to in sub-section (1) shall not be made unless the Court is satisfied that —
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> (a) it is consistent with the public interest that the dominant land should be used in the manner proposed; and
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> (b) the owner of the servient land can be adequately recompensed in money for any loss or disadvantage which he may suffer from the imposition of the obligation; and either

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[31] This legislation is discussed in Tarlo, "Forcing the Creation of Easements — A Novel Law" (1979) 53 *A.L.J.* 254. See also A. J. Bradbrook and M. A. Neave, *op. cit.*, *supra* n. 7, paras. 308 ff.

[32] Queensland Law Reform Commission, *A Report on a Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property and Contract* (No. 16: 1973).

[33] Law Commission, Working Paper No. 36 (1971) on *Appurtenant Rights.*

(c) the owner of the servient land has refused to agree to accept the imposition of such obligation and his refusal is in all the circumstances unreasonable; or

(d) no person can be found who possesses the necessary capacity to agree to accept the imposition of such obligation.

(4) An order under this section (including an order under this subsection) —

(a) shall, except in special circumstances, include provision for payment by the applicant to such person or persons as may be specified in the order of such amount by way of compensation or consideration as in the circumstances appears to the Court to be just.

. . .

(d) may on the application of the owner of the servient tenement or of the dominant tenement be modified or extinguished by order of the Court where it is satisfied that —

(i) the statutory right of user, or some aspect of it, is no longer reasonably necessary in the interests of effective use of the dominant land; or

(ii) some material change in the circumstances has taken place since the order imposing the statutory right of user was made;

. . .

(7) In this section —

. . .

(b) "statutory right of user" includes any right of, or in the nature of, a right of way over, or of access to, or of entry upon land, and any right to carry and place any utility upon, over, across, through, under or into land;

. . .

(8) This section does not bind the Crown.

Similar, though not identical legislation exists in Tasmania in the Conveyancing and Law of Property Act 1884, s. 84J.[34] In addition, the Land Titles Act 1980 (Tas.), s. 110(4)-(12) empowers the Recorder of Titles to create easements over any property comprised in a plan of subdivision. Landowners affected by any proposed change are given a right of appeal to the Supreme Court.

An examination of the wording of this Queensland and Tasmanian legislation and the cases interpreting the meaning of the Queensland legislation[35] show that the legislation more effectively guarantees access to landlocked property than the easement of necessity.

In *Re Seaforth Land Sales Pty. Ltd.'s Land,*[36] Douglas, J. considered the meaning of "reasonably necessary" and "effective use in any reasonable

[34] This section was added by the Conveyancing and Law of Property Act (No. 2) 1978 (Tas.), s. 3.

[35] There are as yet no reported cases interpreting the Tasmanian legislation.

[36] [1976] Qd. R. 190. An appeal to the Full Court of the Supreme Court of Queensland was unanimously dismissed, except on the issue of compensation (*Re Seaforth Land Sales Pty. Ltd.'s Land (No. 2)* [1977] Qd. R. 317).

manner" in s. 180(1) of the Queensland Act and gave both phrases a broad interpretation. In this case, the owner of landlocked land claimed a right of way over neighbouring land under the legislation. The applicant had wrongly believed when buying the land that it already had the benefit of an easement over the alleged servient land. Prior to the alleged servient owner denying the applicant the means of access to its land, the applicant had constructed a factory on the land. On these facts, Douglas, J. had no hesitation in declaring that the "effective use in any reasonable manner" requirement was satisfied. He reasoned that "reasonable manner" is descriptive of the way any judge should act. On this basis, he stated that it was beyond dispute that an effective use of the dominant land would be as a factory, and it would also be a use in a reasonable manner.[37] The "reasonably necessary" requirement was also held to be satisfied despite the fact that the applicant could have gained access to its land by extending another easement over other land. His Honour stated that it would be difficult for the applicant to extend the alternative easement as a house on the neighbouring block occupied a substantial proportion of that block, and "having regard to the situation, and conformation of the dominant tenement, an easement of this nature would not be as effective in regard to the use of the dominant tenement as would be an easement over the servient land".[38] The wide interpretation thus given to "reasonably necessary" and "effective use in any reasonable manner" increases the usefulness of this form of legislation for guaranteeing access to landlocked land.

The aim of guaranteeing access to landlocked land is also assisted by the broad interpretation given to "consistent with the public interest" in s. 180(3)(a) by Andrews, J. in *Ex parte Edward Street Properties Pty. Ltd.*[39] His Honour held that "consistent with the public interest" does not mean "in the public interest", and stated that the applicant has to prove merely that the proposed use of the dominant tenement is not inconsistent with or contrary to the public interest. The applicant is not required to prove that the public interest would be advanced by the proposed use of the dominant tenement.[40] This interpretation is significantly more generous to the owners of landlocked land than the strict meaning given to public policy by those courts which, prior to *Nickerson* v. *Barraclough*,[41] held that public policy is the basis of the easement of necessity.

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[37] *Id.*, 193-194.

[38] *Id.*, 194. Douglas, J. appears to be giving the phrase "reasonably necessary" the same interpretation as has been given to the phrase "necessary to the reasonable enjoyment of the property granted" in the rule in *Wheeldon* v. *Burrows* (1879) 12 Ch. D. 31. See A. J. Bradbrook and M. A. Neave, *Easements and Restrictive Covenants in Australia*, Butterworths, Sydney, 1981, para. 431.

[39] [1977] Qd. R. 86.

[40] *Cf. Tipler* v. *Fraser* [1976] Qd. R. 272 at 276, *per* Matthews, J. Note that D. M. Campbell, J., one of the members of the Full Court of the Supreme Court of Queensland in *Re Seaforth Land Sales Pty. Ltd.'s Land (No. 2)* [1977] Qd. R. 317, adverted to the interpretation of sub-section 3(a). He stated (at 333) that the section did not require a need for the land to be used in the manner proposed to be proved before an easement could be created. He continued: "It has not to be shown that the proposed use of the land is in the public interest, it has only to be shown that the proposed use of the land is consistent with the public interest." As Tarlo has noted, however, this dictum is very ambiguous: see (1979) 53 *A.L.J.* 254 at 260.

[41] [1981] Ch. 426.

A further advantage of s. 180 over the common law rules regulating the easement of necessity is that except in exceptional circumstances compensation is always payable by the applicant for an order to the servient owner pursuant to s. 180(4)(a). The issue of the assessment of compensation was raised in *Re Seaforth Land Sales Pty. Ltd's Land.*[42] In this case, prior to the application under s. 180 an easement of way in favour of certain other land was already in existence over the servient land. Douglas, J., in making an order under s. 180(1), held that he should not consider the total deterioration in the value of the servient land because of the granting of the easement, but should assess the measure of compensation in light of the further reduction in value of the servient land caused by the greater user imposed on it by an order under s. 180(1).[43] As already mentioned, as well as being fairer than the common law, which made no provision for compensation, the compensation requirement in s. 180(4)(a) arguably makes it more likely that the court will impose by order under s. 180(1) an easement of access to landlocked land.

Two other advantages exist. First, unlike the common law which requires the necessity to be absolute before an easement is implied in favour of landlocked land,[44] s. 180(1) allows the court to impose such an easement where is "*reasonably* necessary". This form of wording enables the court to make an order for access under s. 180(1) even if another means of access already exists if the court considers that the other means is inadequate for the proper use of the land. In addition, the removal of the absolute necessity requirement again makes it more likely that an order will be made under s. 180 and that the full developmental potential of the landlocked land will be realized. The other advantage is that unlike at common law the court can use its power under s. 180 to grant a right of way over the land of strangers as an alternative to or in addition to a right of way over the grantor's land. This is because s. 180 is not based on a presumed grant. This last-mentioned point is especially significant as it circumvents one of the important restrictions on the scope of the easement of necessity and ensures that the court has a discretion in all cases to grant an easement of way in favour of landlocked land regardless of the circumstances under which the property became landlocked.

The only possible disadvantage which might be advanced with respect to creating means of access to landlocked land under s. 180 lies in the nature of the discretionary power vested in the courts. Where it applies, the easement of necessity can be demanded by the owner of landlocked land as of right. In contrast, under s. 180 an owner of landlocked land cannot claim a statutory right of user as of right but has to rely on the discretion of the court. This difference may result from the fact that an easement of necessity only arises in cases of absolute necessity, where no other means of access at all to the landlocked land is available.[45] In such cases it is arguably

[42] [1976] Qd. R. 190.

[43] Douglas, J. assessed the compensation at $3,000. This was increased by the Full Court of the Supreme Court of Queensland to $8,000, although the Court did not disagree with the principles of assessment used by the trial judge.

[44] See *supra* n. 27 and accompanying text.

[45] *Ibid.*

reasonable that the owner of the landlocked property should be able to demand access as of right. However, in Queensland and Tasmania, where the court has the power to grant access even if another means of access already exists, different considerations may apply. Thus, s. 180 does not guarantee access to landlocked land as the court may allow the land to remain landlocked by refusing to make an order. However, bearing in mind the fairly generous interpretation given to the scope of s. 180 by reported Queensland cases, it is unlikely that an application for an order under s. 180 granting a means of access to landlocked land would be denied except in exceptional circumstances. In addition, it can be argued that the discretionary power under s. 180 allows the court to achieve justice between the parties on the facts of each case. Thus, for example, if landlocked land was purchased at a greatly reduced price because of the lack of a means of access, a court might validly wish to refuse to make an order for access under s. 180. In short, it is submitted that far from being a disadvantage the courts' discretionary power is a positive advantage in the context of access to landlocked land.

(b) *New Zealand*

In 1975, the New Zealand legislature amended the Property Law Act 1952 by adding s. 129B.[46] This section reads in part:

> (1) For the purposes of this section —
>
> (a) A piece of land is landlocked if there is no reasonable access to it;
>
> . . .
>
> (c) "Reasonable access" means physical access of such nature and quality as may be reasonably necessary to enable the occupier for the time being of the landlocked land to use and enjoy that land for any purpose for which the land may be used in accordance with the provisions of any right, permission, authority, consent, approval, or dispensation enjoyed or granted under the provisions of the Town and Country Planning Act 1953.
>
> (2) The owner of any piece of land that is landlocked (in this section referred to as the landlocked land) may apply at any time to the Court for an order in accordance with this section.
>
> . . .
>
> (6) In considering an application under this section the Court shall have regard to —
>
> (a) The nature and quality of the access (if any) to the landlocked land that existed when the applicant purchased or otherwise acquired the land;
>
> (b) The circumstances in which the landlocked land became landlocked;
>
> (c) The conduct of the applicant and the other parties, including any attempts that they may have made to negotiate reasonable access to the landlocked land;

[46] This legislation is discussed in Thompson, "Landlocked Land" [1981] *N.Z.L.R.* 303.

(d) The hardship that would be caused to the applicant by the refusal to make an order in relation to the hardship that would be caused to any other person by the making of the order; and

(e) Such other matters as the Court considers relevant.

(7) If, after taking into consideration the matters specified in subsection (6) of this section, and all other matters that the Court considers relevant, the Court is of the opinion that the applicant should be granted reasonable access to the landlocked land, it may make an order for that purpose —

(a) Vesting in the owner of the legal estate in fee simple in the landlocked land the legal estate in fee simple in any other piece of land (whether or not that piece of land adjoins the landlocked land);

(b) Attaching and making appurtenant to the landlocked land an easement over any other piece of land (whether or not that piece of land adjoins the landlocked land).

(8) Any order under this section may be made upon such terms and subject to such conditions as the Court thinks fit in respect of —

(a) The payment of compensation by the applicant to any other person; and

(b) The exchange of any land by the applicant and any other person; and

. . .

Unlike the Queensland and Tasmanian legislation, s. 129B of the New Zealand Act is not of general application to the law of easements but is confined to the issue of access to landlocked land. The other major difference is that the possible remedies are couched more widely in the New Zealand Act. While the statutory right of user imposed in Queensland and Tasmania may take the form of "an easement, licence or otherwise",[47] s. 129B(7) of the New Zealand Act permits the court to vest in the owner of the landlocked land the legal estate in fee simple in any other piece of land (whether or not that piece of land adjoins the landlocked land) as an alternative to granting an easement of way to the landlocked property. This power is wide-reaching and goes further than any other comparable legislation elsewhere. To date, there are no reported cases where a fee simple estate has been granted under s. 129B or where the circumstances in which the option to grant a fee simple estate should be exercised have been explained.

The New Zealand legislation shares many of the advantages possessed by the Queensland and Tasmanian legislation over the common law easement of necessity. First, unlike the easement, s. 129B(1)(c) allows a right of access to be granted whenever it is "reasonably necessary". The application of this clause was considered in *Murray* v. *Devonport Borough* Council,[48] where Speight, J. held that the existence of a three-foot right of

[47] Property Law Act 1974-1978 (Qld.), s. 180(2); Conveyancing and Law of Property Act 1884 (Tas.), s. 84J(2).

[48] [1980] 2 N.Z.L.R. 572n.

way to a roadway was not a reasonable access to a residential property in today's vehicular context. This decision was followed by Jeffries, J. in *Wilson* v. *Rush*.[49] His Honour held that reasonable access for pedestrians will always be granted under s. 129B, and the court will not be deterred from making an order by the existence of a steep path and flight of steps leading to the property "suitable only for unencumbered, healthy bipeds". He further held that vehicular access should also normally be provided by order under s. 129B, although he refused to state that this is an absolute rule in light of the enormous variety of factual circumstances.[50]

Two other advantages of the New Zealand legislation are that compensation is payable in the discretion of the court under s. 129B(8) and that s. 129B is couched sufficiently widely to enable the court to grant a right of way over the land of strangers as an alternative to or in addition to a right of way over the grantor's land.

As in the case of the Queensland legislation, the New Zealand legislation suffers from the possible disadvantage that it does not guarantee access to landlocked land as the court may allow the land to remain landlocked by refusing the make an order for access.[51] However, as argued earlier, a discretionary power in the courts in this area is in fact a positive advantage and permits the courts to do justice to the parties on the facts of each case.

Section 129B(6) of the New Zealand Act specifies a variety of relevant factors for the court to consider when deciding whether to exercise its discretion to make an order for access to land under s. 129B(7). These factors are more broad-ranging than their counterparts in the Queensland legislation. Unlike the Queensland legislation,[52] which requires the court to consider the public interest, the question of compensation and the refusal by the owner of the servient land to agree to a right of way over his land, the factors in the New Zealand legislation look more to the activities of the parties leading to the landlocking and to the consequences to the parties if an order for access is made under s. 129B(7). The discretion given to the New Zealand judiciary is maximised by the inclusion of s. 129B(6)(e), "such other matters as the Court considers relevant".

(c) *West Germany*

The issue of access to landlocked property is dealt with in arts. 917 and 918 of the German Civil Code. These articles state:

> 917(1) If a piece of land lacks connection with a public road for its proper use, the owner may demand from the neighbors that they tolerate the use of their pieces of land to establish the necessary

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[49] [1980] 2 N.Z.L.R. 577.

[50] *Cf. Hutchison* v. *Milne* [1980] 2 N.Z.L.R. 568.

[51] Greig, J. held in *Mowat* v. *Federated Farmers of New Zealand (Waikato Provincial District) Inc.* [1980] 2 N.Z.L.R. 585 that owners with legal access which has been stopped or reduced by their own building should not have rights to obtain further access through their neighbour's land.

[52] Property Law Act 1974-1978 (Qld.), s. 180(3). The comparable Tasmanian legislation (Conveyancing and Law of Property Act 1884, s. 84J) only requires the court to consider the question of compensation.

connection until the lack is remedied. The direction of such right of way and the extent of the right of user shall be determined by judgment if necessary.

(2) The neighbors over whose lands the right of way extends, are to be compensated by the payment of rent. . . .

918(1) The obligation to tolerate the right of way does not arise, if the prior connection of the piece of land with the public road has been eliminated by an arbitrary act of the owner.

(2) If in consequence of the transfer of a part of the piece of land, the transferred or the retained part is cut off from its connection with the public road, the owner of the part over which the connection formerly ran, shall allow the right of way. The transfer of one part is equivalent to the transfer of several pieces of land belonging to the same owner.[53]

The approach adopted by the German Civil Code is significantly different in one respect from that imposed by statutory law in common law jurisdictions and by civil codes in other civil law jurisdictions. The German Code does not establish a legal easement or servitude of way in favour of the landlocked land, but reaches the same result by imposing a limitation on the ownership of an immovable which is situated between another immovable and a public road. The owner of the land so limited is bound to permit a right of access for the other immovable with the public road.[54]

By combining art. 917(1) and art. 918(2) it can be seen that the right of access to landlocked land is better safeguarded under the German Civil Code than under the common law easement of necessity. As already discussed, under the common law an easement of necessity can only be granted over the land of the grantor or grantee, never through private lands belonging to others.[55] In contrast, under German law the landowner responsible for creating the landlocking if the landlocking occurs as a result of the subdivision of land has the primary responsibility for providing a right of access across his land (art. 918(2)), but if the landlocking did not arise as a consequence of a sale of land, the owner of the landlocked land can demand a right of access to a public road across a stranger's land (art. 917(1)). Thus, the German Code provides a universal right of access to landlocked land, while the easement of necessity can only arise on a subdivision of land.

The major difficulty with the German Code provisions lies in the scope of the exception in art. 918(1) relating to cases where the prior connection of the landlocked land with the public road is eliminated by an arbitrary act of the owner. The meaning of "arbitrary act" is unclear. Under normal principles of statutory interpretation applicable in common law jurisdictions, this phrase is capable of more than one interpretation. A broad interpretation could mean that a right of access would be denied wherever the owner of the landlocked land or his predecessor-in-title is

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[53] *German Civil Code*, translated by I. S. Forrester, S. L. Goren and H. M. Ilgen, North-Holland Publishing Co., Oxford, 1975.

[54] See Yiannopoulos, "Enclosed Estates: Louisiana and Comparative Law" (1977) 23 *Loyola L. Rev.* 343 at 343.

[55] See *supra* n. 22 and accompanying text.

totally or partially responsible for creating the landlocking situation. Thus, it could be argued that the owner of the landlocked land is precluded by wording as in art. 918(1) from claiming a means of access in all cases where land is landlocked as a result of a subdivision because at the time of the grant he should have foreseen the need to include an express grant or reservation of a right of access in the conveyance or transfer of land. A more sensible interpretation, however, would be to limit the operation of art. 918(1) to situations where the owner of the landlocked land is more closely responsible for the landlocking situation (for example, where the owner of the landlocked land has built over his only means of access or has voluntarily abandoned a legal right of way).

Pursuant to art. 917(2), compensation is payable to a landowner subject to a right of way, but only in cases where the way extends over a stranger's land (art. 917(1)), not if it results from the grant or transfer of land (art. 918(2)). Where payable, compensation is by the payment of rent rather than a lump sum as provided for under the relevant Queensland, Tasmanian and New Zealand legislation.

(d) *France and Louisiana*

The French law relating to access to landlocked land is contained in arts. 682-684 of the Civil Code.[56] These articles state:

> 682. An owner whose estate is enclosed and who has no outlet to the public highway or only one which is insufficient for the agricultural or manufacturing working of his estate, or for the realization of operations of construction or subdivision development, can claim an outlet over the land of his neighbors, provided he pays an indemnity equivalent to the damage which he may occasion.
>
> 683. The outlet must generally be made on the side where the distance from the estate enclosed to the public highway is shortest.
>
> Nevertheless, it shall be fixed in the place which causes the least damage to the person over whose property it is allowed.
>
> 684. If an estate is enclosed because it has been divided in consequence of sale, exchange, division or any other agreement, the outlet can only be claimed over the lands forming part of these operations.
>
> Nevertheless, when a sufficient outlet cannot be made over lands thus divided, article 682 shall apply.

This legislation has been substantially copied in the Louisiana Civil Code (1870), where it appears as arts. 699-701.[57]

The right of passage granted under art. 682 of the French Code and art. 699 of the Louisiana Code has been interpreted flexibly and broadly by the courts and legal commenators. According to one writer:

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[56] *The French Civil Code,* translated by H. Cachard, Stevens, London, rev. ed. 1930, as amended by Statute dated 30 December 1967, [1968] Juris-Classeur Periodique III No. 33749, tit. III, ch. III.

[57] Note also art. 685, which states: "The position and mode of easement of a right of way in case an estate is enclosed, are established by continuous use during thirty years. A cause of action for indemnity in the case provided by article 682 can be outlawed and a right of way can be continued, although the cause of action for indemnity no longer lies." The Louisiana Civil Code (1870), art. 700 is to similar effect.

> . . . a forced passage may be granted not only for agricultural, but also for commercial, residential, and industrial uses of the enclosed estate. The owner of an enclosed estate is free to use it as he wishes and to make all the improvements and innovations that he considers useful. He may, for example, increase the scale of his industrial operations and demand a new passage if the original has become insufficient. He may also completely change the use of his estate; he may thus open a mine in a field or build a factory or an apartment complex on it. In such a case, he may claim a new passage to satisfy the new needs.[58]

The conceptual basis and interpretation of the right of access under the French and Louisiana codes differs fundamentally from that of the common law easement of necessity. Unlike the easement, it is settled law that the Code provisions are based on public policy rather than the presumed intention of the parties. As stated by Barham, J. in *Rockholt* v. *Keaty*:

> [P]ublic policy would dictate that [landlocked] land as is here involved, located in a desirable and strategic area, should not be taken out of use and commerce.
> While Article 699 has been generally accepted as designed to benefit the landowner so he could produce profit for himself and obtain full utility of his land, it must now be deemed also to offer protection of public interest. As land becomes less available, more necessary for public habitation, use, and support, it would run contrary to public policy to encourage landlocking of such a valuable asset and forever removing it from commerce and from public as well as private benefit.[59]

Numerous other differences exist between the scope of the Code provisions and the common law easement. First, unlike the common law requirement that an easement must be absolutely necessary before a right of way will be granted in favour of landlocked land, art. 682 of the French Code and art. 699 of the Louisiana Code can be invoked if the means of access is insufficient for the exploitation of the land. It may also be invoked even if there is a legal means of access through public lands, such as a park.

Secondly, the owner of the landlocked land who has the benefit of a servitude of passage under art. 682 of the French Code or art. 699 of the Louisiana Code may demand a modification to the type of user of the servitude if he can show that the conditions have changed. The only requirement is that the change is based on necessity; a change based on the convenience of the holder of the servitude will not be permitted.[60] This interpretation would, for example, permit the owner of the landlocked land to claim a servitude in respect of the passage of cars and trucks if land originally zoned for rural purposes is changed to industrial or residential

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[58] Yiannopoulos, *supra* n. 54 at 348.
[59] (1970) 256 La. 629, 237 So. 2d 663 at 668.
[60] See Yiannopoulos, *supra* n. 54 at 376.

purposes. As already discussed, this is not possible under the easement of necessity.[61]

Thirdly, like the German Code, the French Code guarantees a means of access to landlocked land in all cases. This guarantee is achieved by a combination of arts. 682 and 684. Like the common law easement of necessity, pursuant to art. 684 a right of way can only be claimed over the land of the grantor or grantee in the usual situation where property becomes landlocked as a consequence of a subdivision of land. However, where land becomes landlocked in other circumstances, pursuant to art. 682 the owner of the landlocked land can claim a means of access over the land of any of his neighbours. In contrast, as already discussed, an easement of necessity can never be claimed over the land of a stranger.

Finally, the rules as to compensation differ. In this respect, the French and German Codes adopt a similar approach in refusing compensation where the landlocking results from the grant or transfer of land. As in Germany, pursuant to art. 682 of the French Code compensation is only payable where the way extends over a stranger's land. In contrast, no compensation is payable in any circumstances in respect of the easement of necessity. The German and French Codes differ in that whereas in Germany the compensation is by way of annual rent, in France art. 682 gives the court the discretion to determine on the facts whether the compensation should consist of a lump sum or an annual charge.

4. Guaranteeing Access to Landlocked Land

It is submitted that all jurisdictions should develop a body of laws designed to ensure that its courts have the power to prevent land from remaining landlocked. The possibility of land remaining landlocked, as can occur in common law jurisdictions in the absence of legislation as a consequence of the limitations on the scope of the easement of necessity, is contrary to the basic tenet of real property law that land should be freely alienable. This tenet is supported by the rule against perpetuities and the rule against restraints on the alienation of land.[62] It would also seem to be clearly in the public interest that land should not lie unused and that its potential for development should be fully realized.

If this proposition is accepted, a guaranteed means of access to landlocked land could most easily be achieved in common law jurisdictions if the courts were to recognize public policy[63] as the basis of the easement of necessity.[64] This change would remove the limitations on the scope of the easement discussed earlier: for example, if it were based on public policy

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[61] See *supra* n. 25 and accompanying text.

[62] See, for example, *Re Rosher* (1884) 26 Ch. D. 801; *Corbett* v. *Corbett* (1888) 14 P.D. 7; *Re Dunstan* [1918] 2 Ch. 304; *Re Cockerill* [1929] 2 Ch. 131; *Re Brown* [1954] Ch. 39; *Hall* v. *Busst* (1960) 104 C.L.R. 206. See also R. E. Megarry and H. W. R. Wade, *Law of Real Property,* Stevens, London, 4th ed. 1975, 78 ff.; R. Sackville and M. A. Neave, *Property Law: Cases and Materials,* Butterworths, Sydney, 3rd ed. 1980, 559 ff.

[63] See generally Bodkin, "Easements of Necessity and Public Policy" (1973) 89 *L.Q.R.* 87.

[64] As referred to in n. 9, if s. 46 of the Real Property Act 1900 (N.S.W.) is held to preclude the application of easements of necessity, in New South Wales this type of easement, however modified, can never provide a guaranteed means of access to landlocked land in respect of Torrens system land.

rather than the intention of the parties it would not be restricted to cases where the landlocking arose on a subdivision, and in appropriate cases could be granted through private land belonging to third parties. While this change would run contrary to the recent Court of Appeal decision in *Nickerson* v. *Barraclough,*[65] it would not be revolutionary as the earliest reported cases on the easement of necessity appear to have accepted public policy rather than intention as the basis of the easement. For example, in *Packer* v. *Welsted,* Glyn, C.J. stated:

> But the jurors having found it to be a way of necessity, it seems to me that the way remains, for it is not only a private inconvenience, but it is also to the prejudice of the public weal, that land should lie fresh and unoccupied.[66]

The change to the present basis of intention did not occur until the nineteenth century and appears to have been due to the juristic tendency by the courts at that time to treat all legal transactions as if they were based on contracts. Thus, consistent with this approach, the easement of necessity was said to arise due to an implied agreement between the parties. As stated by one commentator:

> The nineteenth century judges who liked to think of all legal transactions in terms of contract turned "incident to a grant" into "an implied term of a grant" and began to say that it arose from the presumed intent of the parties. In fact, in their fervour to fit the creation of the way by necessity into a contractual pattern, they spoke of it as if it were within the actual intent of the parties and was therefore a term of the contract of conveyance implied-in-fact or truly contractual although not express.[67]

Another factor inhibiting the courts from adopting public policy as the basis of the easement of necessity has been the judicial reluctance in modern times to extend the notion of public policy. Public policy has been judicially described as "a vague and unsatisfactory term" which leads to the "greatest uncertainty and confusion"[68] and is "an unsafe and treacherous ground for legal decision".[69]

It remains to be seen whether the courts will be prepared to cure the deficiencies of the easement of necessity by adopting public policy as its basis. This is unlikely to occur if the following warning of Baron Parke in *Egerton* v. *Brownlow* is adhered to:

> It is the province of the statesman, and not the lawyer, to discuss, and of the Legislature to determine, what is best for the public good and to provide for it by proper enactments. It is the province of the judge to

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[65] [1981] Ch. 426.

[66] (1658) 2 Sid. 39, 111; 82 E.R. 1244, 1284.

[67] Comment, "Real Property: Basis for Implication of the Way of Necessity" (1946) 31 *Cornell L.Q.* 516 at 518. See also Simonton, "Ways by Necessity" (1925) 25 *Columbia L. Rev.* 571 at 576; Glenn, "Implied Easements in the North Carolina Courts: An Essay on the Meaning of 'Necessary'" (1980) 58 *N. Carolina L. Rev.* 223 at 228.

[68] *Egerton* v. *Brownlow* (1853) 4 H.L. Cas. 1, 123; 10 E.R. 359, 409.

[69] *Janson* v. *Driefontein Consolidated Mines* [1902] A.C. 484 at 500, *per* Lord Davey.

> expound the law only; . . . not to speculate upon what is the best, in his opinion, for the advantage of the community.[70]

On the other hand, the courts may be more willing to make this step in the present context in light of the fact that the easement of necessity was originally held to be based on public policy.[71] The courts may also be influenced by the fact that the easement of necessity shares the same rationale as the laws against the restraints on the alienation of land, which themselves are based on public policy.[72]

If the courts are unwilling to remove the limitations on the scope of the easement of necessity by judicial fiat, a guaranteed means of access to landlocked land will only be achieved by legislation. In this light, it is instructive to re-examine the Queensland, Tasmanian, New Zealand, West German and French alternative forms of legislation in order to determine a suitable model for the New South Wales and the other State legislatures to adopt.

At the outset, it is submitted that the West German system should be discarded as a suitable model. As discussed earlier, the phrase "arbitrary act" in art. 918(1) of the German Civil Code is inherently ambiguous and would undoubtedly provoke litigation if enacted in any common law jurisdiction.[73] In addition, it is submitted that the distinction between the law applicable to cases where the landlocking arises through the act of the claimant of the means of access and where the landlocking arises for other reasons is inappropriate and unnecessary. A further difficulty is that the conceptual approach of the German Code in imposing a limitation on the ownership of an immovable rather than establishing a legal servitude would be difficult to transpose into the common law classification of interests in land. Finally, consistent with other comparable situations in common law jurisdictions where compensation is payable pursuant to legislation where property rights are affected, it is submitted that the compensation paid to the servient owner should be a lump sum payment rather than rent, as under art. 917(2) of the German Civil Code.

Turning to the French, Queensland, Tasmanian and New Zealand legislation, the major difference between the French Civil Code, on the one hand, and the Queensland, Tasmanian and New Zealand legislation, on the other hand, is that under the French Code the owner of the landlocked land can insist on a right of access to his property, whereas the Queensland, Tasmanian and New Zealand legislation grants the court a discretion in this matter. The issue as to which system is better is ultimately a value judgment. It is submitted by the present writer that any new legislation should vest a discretionary power in the courts in this situation as such a

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[70] (1853) 4 H.L. Cas. 1, 123; 10 E.R. 359, 409. See also the warnings on judicial involvement in public policy considerations by Lord Atkin in *Fender* v. *St. John-Mildmay* [1938] A.C. 1 at 10-12.

[71] See *Packer* v. *Welsted* (1658) 2 Sid. 39; 82 E.R. 1244; *Dutton* v. *Tayler* (1700) 2 Lut. 1487; 125 E.R. 819.

[72] See *supra* n. 62 and accompanying text.

[73] See *supra*.

power enables the court to do justice on the facts of each case. As explained earlier,[74] in certain circumstances the court might validly conclude that an easement of way to landlocked land is not justified if, for example, the land was purchased at a greatly reduced price because of the lack of a means of access.

If the Queensland, Tasmanian and New Zealand system of judicial discretion is preferred, the next issue to determine is the various factors to be specified in the legislation which the court must take into account when exercising its discretion. This invites a comparison of the factors specified in the Property Law Act 1974-1978 (Qld.), s. 180(3) and the Property Law Act 1952 (N.Z.), s. 129B(6). If the court is to have a discretion, it is submitted that the discretion should be couched as widely as possible as there appears to be no justification for restricting its scope. This result would be most effectively achieved by adopting the five factors listed in the New Zealand legislation together with the first-mentioned factor in the Queensland legislation, namely that "it is consistent with the public interest that the dominant land should be used in the manner proposed".[75] In particular, the inclusion of the last-mentioned factor in the New Zealand legislation, "such other matters as the Court considers relevant",[76] is considered important. This suggested combination of factors would allow the court the maximum discretion to consider the effect on both the interests of the parties in making or refusing to make an order for access to the landlocked land and on the public interest in preventing land from remaining landlocked.

The final and most important issue to consider is whether any new legislation should be limited in its scope to providing a means of access to landlocked land (as in New Zealand) or whether it should enable the court to grant an easement over one person's land in favour of another person in all situations where an easement is considered to be reasonably necessary in the interests of the effective use in any reasonable manner of the land (as in Queensland and Tasmania). The answer to this issue depends on whether the failure of the common law to provide a guaranteed means of access to landlocked land should be viewed as a problem in itself or merely as one aspect of the wider problem of the inability of the courts to impose a statutory right of user over one person's land in favour of another person in order to encourage the effective use of land. In this respect, it is submitted that the Queensland and Tasmanian legislatures have shown greater foresight than their New Zealand counterpart. While access to landlocked land is the most obvious situation in which the court may need a discretionary power to impose an easement over private land in return for the payment of compensation, other situations exist where a similar power is arguably required. One illustration is the case of a landowner who wishes to develop his land to its full potential and who needs increased support for

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[74] *Supra.*
[75] Property Law Act 1974-1978 (Qld.), s. 180(3)(a).
[76] Property Law Act, 1952 (N.Z.) s. 129B(6)(e).

his land from his neighbour's land for the purpose of erecting buildings.[77] Under the present law the neighbour has an absolute right to refuse to grant an easement of support. Such an absolute right may retard or inhibit land development and is arguably contrary to the public interest. Another illustration is the case of a landowner who wishes to install a solar hot water service and for this purpose erects solar collector panels in the roof of his house. As solar collectors are unusable without direct access to the sun's rays, such a landowner is vulnerable to having his collectors shaded by trees, buildings or other obstructions on a neighbour's property.[78] In order to guarantee the effective operation of his solar hot water service, the solar user will need an easement of access to his collector panels of the direct rays of the sun. However, under the present law such an easement may be denied by a neighbour or only granted on the payment of an exorbitant price. The absence of a discretionary power in the courts to grant a statutory easement in favour of the solar user prevents the application of new technology and can be said to be contrary to the public interest in view of the current shortage of fossil fuels. Other illustrations doubtless exist.

While the existing Queensland, Tasmanian and New Zealand legislation is equally effective in solving the problem of access to landlocked land, it would be unfortunate if the wider problem of the present limitations on the court's powers illustrated above were overlooked. It is to be hoped that legislatures in New South Wales and other common law jurisdictions will follow the example of Queensland and Tasmania and will enact similar legislation designed to maximise land use and will neither shrink from the task entirely nor make the same mistake as the New Zealand legislature of dealing with the overall problem on an *ad hoc* basis.

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[77] The natural right of support at common law only extends to the support of adjoining land and does not include the support of buildings on adjoining land: see, for example, *Piper* v. *Walsh* (1874) 5 A.J.R. 13 at 14, *per* Barry J.; *Dalton* v. *Angus* (1881) 6 App. Cas. 740 at 792, *per* Lord Selbourne, L.C.; *Bognuda* v. *Upton & Shearer Ltd.* [1972] N.Z.L.R. 741 at 745, *per* North, P. This common law rule does not apply in Queensland, where the Property Law Act 1974-1978, s. 179, imposes liability for the withdrawal of support "from any building, structure or erection".

[78] For a general discussion of the problem of guaranteeing access to direct solar rays, see S. Kraemer, *Solar Law*, Shepard's Inc., Colorado, 1978; W. A. Thomas, A. S. Miller and R. L. Robbins, *Overcoming Legal Uncertainties About Use of Solar Energy Systems*, American Bar Foundation, Chicago, 1978; Eisenstadt and Utton, "Solar Rights and their Effect on Solar Heating and Cooling" (1976) 16 *Natural Resources J.* 363; and Gergacz, "Legal Aspects of Solar Energy: Easements for Sunlight and Individual Solar Energy Use" (1980) 18 *American Business L.J.* 414. See also Law Reform Committee of South Australia, *Report on Solar Energy and the Law in South Australia* (1978).