

Easements created by prescription

Where there has been long continued use or exercise of a right over another persons land that has the characteristics of an easement, in theory the Court will presume the grant of an easement. There is no statutory recognition of easements arising purely from long continued use in NSW.

The legal recognition of this kind of right depends ultimately upon the acquiescence of the servient owner. There must be proof that the servient owner knew of the exercise of the right, was under no legal disability to make a grant of the right and did not take steps to prevent or limit the acts of the user.

The Courts have considered a variety of prescriptive easements:

- **Rights to take water from a spring or pump**
- **Rights of Grazing**
- **Rights to drain sewage**
- **Rights to discharge water onto or over adjoining land**
- **Rights to Air**
- **Rights to Light**
- **Rights of Support**
- **Rights of Way**

A prescriptive easement cannot be created over Torrens title land. Any prescriptive easement which is in existence when the servient tenement is converted to Torrens title will remain effective even though not recorded on the title.

In order to have a subsisting prescriptive easement recorded on the Register it is necessary to obtain an instrument or Court Order confirming the existence, nature and extent of the easement. The instrument would take the form of a transfer or conveyance depending on the title system of the servient tenement. Where the dominant or servient tenement is Old System, a primary application may be lodged to have the instrument evidencing the easement recorded in the Torrens system.

The easement would be recorded through the lodgment of the Court Order together with:

- **a Request where both tenements are Torrens title or where the dominant and servient tenements are Torrens and Old System title respectively.**
- **a Primary Application where both tenements are Old System title or the dominant and servient tenements are Old System and Torrens title respectively.**

For further information on prescriptive easements see Hallmann (paragraph 8.51).