NSW Law Reform Commission

REPORT 71 (1994) - RIGHT OF ACCESS TO NEIGHBOURING LAND

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Terms of Reference and Participants

To the Honourable John P Hannaford, MLC
Attorney General for New South Wales

Right of Access to Neighbouring Land

Dear Attorney General

We make this Final Report pursuant to the reference to this Commission dated 23 December 1987.

Hon Gordon J Samuels AC QC

(Chairman)

Professor David Weisbrot

(Commissioner)

Hon Jerrold S Cripps

(Commissioner)

Terms of Reference

On 23 December 1987, the Attorney General, the Hon Ron Mulock, required the Commission to inquire into and report on the following matters:

1. The laws which define and regulate relationships between people who live on neighbouring land, with particular reference to:

    (i) The laws which define and regulate relationships between people who live on neighbouring land with particular reference to:

        (a) access to neighbouring land for the purposes of maintaining fixtures and services required by an adjoining property;

        (b) easements for joint services, including joint connections for sewerage and drainage;

        (c) problems caused by trees;

        (d) noise control as it affects neighbours.

2. Any related matters.

Participants

The Law Reform Commission is constituted by the *Law Reform Commission Act* 1967. For the purpose of this reference, the Chairman, in accordance with the Act, created a Division comprising the following members of the Commission:

The Hon R M Hope AC CMG QC (until 2 April 1993)

The Hon G J Samuels AC QC (from 3 April 1993)

Professor David Weisbrot

The Hon J Cripps

Ms Jane Stackpool (until 31 December 1993)

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Executive Summary

The law of real property has not kept pace with modern living conditions which often necessitates access to or over another person's property. Generally, the common law does not permit such access, except where an easement or other formal right of access exists. The Commission recommends statutory reform in this area of the law to allow a person to apply to the court for access over an adjoining or adjacent property in certain circumstances. The main features of the Commission's recommendations are as follows:
A person should have the right to apply to a Local Court for an order for access to or over adjoining or adjacent land in two situations.

> **Neighbouring land access order**: This order is sought by a person requiring access in order to carry out work (for example, repair or demolition work) on his or her own land.

> **Utility service access order**: This order is sought by a person requiring access to carry out work on a utility service (for example, a sewerage service) situated on neighbouring land, where the applicant is entitled to the use (solely or jointly) of that service.

The applicant for an order must give at least 21 days notice of the lodging of the application to persons who may be affected by the order.

An order for access does not create a permanent right. It expires on the date specified in the order unless revoked earlier by the court. If the property subject to the access order is transferred during the time the order is in force, the order binds successors in title.

The court, in granting the order, may impose terms and conditions on the access order. These terms and conditions should assist in avoiding or minimising loss, damage, injury, inconvenience or loss of privacy caused by the order.

The Local Court is the preferred forum for the resolution of routine "neighbour disputes". It is, therefore, appropriate for the Local Court to have jurisdiction to make access orders. If a dispute involves compensation or damages exceeding the jurisdiction of the Local Court, the magistrate must transfer proceedings to the Land and Environment Court. Questions of law may also be transferred to the Land and Environment Court. An appeal from a decision of a Local Court is made to the Land and Environment Court, on a question of law only, within 30 days after a decision to grant or not to grant an access order.

The court has a discretion to determine the payment of the costs of the application. In making a determination, the court has a discretion to take into account any attempts made by the parties to reach agreement before the proceedings, whether the refusal to allow access was reasonable in the circumstances, and any other matters it considers relevant.

1. Introduction

THE REFERENCE

1.1 The proposal to seek a reference on neighbour and neighbour relations originated from a conference convened by the Commission in 1983 at which representatives from the Chamber Magistrates group, Community Justice Centres (hereafter referred to as CJCs), the Public Solicitor's Office and four community legal centres identified matters suitable for inclusion in the Commission's Community Law Reform Program.

1.2 During December 1986 and January 1987, the Commission distributed a Community Law Reform Program pamphlet designed to encourage members of the community and interest groups to articulate their views on aspects of the law which they thought required modification. Specifically, the distribution of pamphlets was meant to produce suggestions which would give direction to the choice of references made in the Community Law Reform Program. Many of the suggestions received involved problems associated with dividing fences, joint use of services available to adjoining properties, and problems created by large trees and noise.

1.3 The response to the pamphlet caused the Commission to seek one reference on dividing fences and another on neighbour and neighbour issues. A Report on *Dividing Fences* was published in 1988.[1] A Discussion Paper entitled *Neighbour and Neighbour Relations*[2] was released in April 1991. As a result of the response to this Discussion Paper (hereafter referred to as DP 22), and further work undertaken by the Commission, it was decided to publish two reports. This Report considers the existing law relating to:

private rights of access to neighbouring land to maintain and repair fixtures on one's own property; and

private rights of access to neighbouring land to carry out work on utility services on that neighbouring land.

The second Report will focus on disputes relating to noise and trees.

WIDER CONCEPT OF "NEIGHBOUR"

1.4 DP 22 focussed primarily on relationships between residential neighbours. The Commission has given this distinction further consideration and has decided that there is no reason in principle, why the concept of "neighbour" for the purposes of this reference should not include commercial or industrial neighbours. Over-sailing cranes on city building sites were raised as a particular problem affecting commercial neighbours, where in the absence of permission from the neighbouring landowner for the crane to enter that neighbouring airspace, a trespass occurs. If such permission cannot be obtained, the construction may be indefinitely delayed, resulting in considerable cost to the developer. The recommendations in this Report thus extend to all neighbours, not only residential neighbours.

CONSULTATION AND SUBMISSIONS

1.5 The Commission sought submissions from both the general public and specific interest groups. Departments and organisations including the Land Titles Office, the Law Society of New South Wales, the Board of Surveyors and the Council for Community Justice Centres responded to the Discussion Paper. Although the Commission did not receive many submissions overall, the responses received supported legislative reform of the area of law under consideration.

1.6 As part of its consultation process on the reference, the Commission also conducted a "phone-in" on 18 October 1991. The Commission received over 300 calls on the day and the number of follow-up calls and submissions was overwhelming. The "phone-in" was given extensive media coverage on Sydney radio stations and newspapers. The results of the "phone-in" provided the Commission with valuable information concerning the

range of problems occurring within the community and the varied experience of those seeking resolutions of these problems both inside and outside the legal system.

ISSUES COVERED IN THIS REPORT

1.7 People buy houses and land for privacy and security. Many believe that they should have the right to deny entry to their property to anyone they choose. Modern living conditions, the desire of property owners and that of the public generally, to keep properties maintained or developed, and the need to rectify problems that have arisen where utility services pass through a neighbouring property, are among reasons why property related rights need to be reassessed. Inroads into this area of law have already taken place. There are, for example, statutory rights of entry allowing the Crown and its agents to enter private property without the consent of the owner. Further, recent court decisions have permitted a "trespass" subject to payment.[3]

1.8 In practical terms, the number of occasions on which the lack of access to a neighbouring property actually causes problems may not be great. Neighbours may be able to negotiate a solution themselves, perhaps involving the payment of money by the landowner seeking access. Unfortunately, this spirit of compromise will not exist between all neighbours and a refusal of access may not only lead to a deterioration of the relationship between the neighbours, but also of the property, which in turn may risk the health and safety of those neighbours.

1.9 This Report considers the question of access to neighbouring land for two main reasons.

> The first is where the access is sought for the purpose of doing something to a person's land *from* neighbouring land. Some examples of this include the repair or maintenance of existing property, such as eaves, or the undertaking of new building work on that property, but only as a result of being able to enter and work from the neighbouring land.
>
> The second issue is where access is sought to do work *on* neighbouring property, for the benefit of one's own land. The particular instance referred to in the Discussion Paper and this Report is where a person solely or jointly uses a utility service pipe that is not directly connected to the main, but traverses neighbouring property before reaching the main, and that service is in need of repair, but can only be repaired by working on the service on the neighbouring property. In a number of cases an easement may exist allowing access to that service, in favour of the property or properties being served. There are cases however, where there is no such right, and the neighbour's permission to enter the land may not be forthcoming.

1.10 Various reform measures have been introduced in other jurisdictions. The *Access to Neighbouring Land Act* 1992 (Tas) and the *Access to Neighbouring Land Act* 1992 (England and Wales), enable persons who wish to carry out work on their land, to obtain access to neighbouring land to do so. Section 180 of the *Property Law Act* 1974 (Qld) empowers the court to grant a landowner a "statutory right of user" (a right in the nature of an easement) to do such work in certain circumstances.

NON-COURT BASED AND COURT BASED RESOLUTION OF ACCESS DISPUTES

1.11 The reforms proposed in this Report should be regarded as remedies of last resort. Finding a mutually acceptable solution with the neighbouring landowner is the first step, and mediation of any consequent problems should be attempted prior to litigating them. As pointed out by the Law Society in its submission,[4] the most appropriate forum for any neighbour dispute is the one most able to provide a suitable remedy quickly and inexpensively. Since the establishment of CJCs in 1980, mediation with the guidance of trained mediators has proved to be the quick and inexpensive means of resolving many "backyard" disputes. Such resolution is conducted on an informal basis, without the procedures and expense associated with a court-based resolution. Most importantly, any settlement that is reached has been determined and accepted by the neighbours themselves.

1.12 Unlike parties to other forms of disputes, neighbours live in close proximity to each other and have a continuing relationship; they cannot simply walk away from each other after a dispute has been resolved. Often, intractable disputes will arise between them that cannot be resolved outside the court process. The recommendations made in this Report are designed to assist the individual and the court where litigation appears to be the only solution. It is not just the intractable nature of some disputes that makes them unsuitable for mediation; the issues themselves maybe beyond the scope of the services offered by a mediator.

1.13 Complex issues concerning property law may be involved, which require analysis of legal principles, and in the case of some utility services, the enforceable apportionment of costs in respect of maintenance or relocation. The trained personnel at a CJC may not have the relevant expertise in property law, with the result that mediation of such disputes may not be a practical solution in some cases.[5]

1.14 Traditionally where persons have sought a court based resolution, the determination of property rights has been within the jurisdiction of the Supreme Court. DP 22 raised for consideration whether other more accessible and less expensive forums to resolve disputes between neighbours over access should be available. These included the Land and Environment Court, the District Court, the Local Court and a new tribunal which would only deal with neighbour disputes.[6]

1.15 The concept of a specialised “Neighbour Tribunal” was not supported in the submissions to the Commission on the ground that it would merely duplicate the service already provided by the Local Court. The proposal to make the Land and Environment Court the relevant jurisdiction for handling these disputes was also not generally supported; in particular, the Land and Environment Court[7] did not want its jurisdiction increased to accommodate these types of disputes. The Local Court system was considered the most appropriate forum for resolving such access disputes between neighbours. The draft legislation attached to this Report recommends that given the Land and Environment Court’s powers, and the nature of the disputes that it regularly adjudicates, it should at least be a court of appellate jurisdiction.

OUTLINE OF THIS REPORT

1.16 Chapter Two of this Report examines the general history and current problems surrounding access to neighbouring land and looks at changing judicial attitudes which are enabling a more pragmatic approach to be taken in this area. Chapter Three considers the particular problems raised in DP 22 in respect of utility services. Chapter Four looks at the reform that has taken place in other jurisdictions to enable a person to gain access over neighbouring land. Chapter Five discusses the Commission’s recommendations for reform.

FOOTNOTES

1. New South Wales. Law Reform Commission *Dividing Fences* (Report 59, 1988). The Commission’s recommendations in that Report form the basis of the *Dividing Fences Act* 1991, which was assented to on 17 December 1991 and commenced in February 1992. A media release by the Minister for Local Government, Mr Peacocke, dated 24 September 1991 stated that “the Act is intended to give a clearer way of identifying the need for and type of fence required between properties and the contribution required by neighbours to the cost”.

2. New South Wales. Law Reform Commission *Neighbour and Neighbour Relations* (Discussion Paper 22, 1991).

3. See *Dupen & Anor v K W Semken Pty Limited & Ors* (unreported) Supreme Court, NSW, 21 May 1986, Bryson J, ED 5126/86; *LJP Investments Pty Ltd v Howard Chia Investments Pty Ltd*, (1991) 24 NSWLR 490; *Bendal Pty Ltd v Mirvac Projects Pty Ltd*, (1990) 23 NSWLR 464; and *Meriton Apartments Ltd v Baulderstone Hornibrook Pty Ltd* (unreported) Supreme Court, NSW, 9 March 1992, Young J ED 4940/91. See also *Fritz Schroder & Anor v Eventang Pty Limited & Ors* (unreported) Supreme Court, NSW, 4 March 1994, Windeyer J ED 1212/94.

4. The Law Society of New South Wales, *Submission and Comments*, (hereafter Law Society Submission) (November 1991) at 11.

5. This is recognised by Community Justice Centres, see Community Justice Centres Council, *Submission*, (9 July 1991) at 3.

6. Only five submissions received by the Commission gave specific comments on the resolution of access disputes between neighbours, namely the Law Society of New South Wales, the Council of Community Justice Centres, the Australian Dispute Resolution Association, the Board of Surveyors, and the Land and Environment Court.

7. Land and Environment Court, *Submission*, (26 September 1991).

2. The Current Law Governing Access to Neighbouring Land

INTRODUCTION

2.1 In the absence of the permission of the owner, the civil and criminal law in New South Wales both prohibit a general right of entry by a person onto neighbouring property, regardless of the purpose of the entry.[1] However, in modern crowded cities and suburban areas encroachment or entry onto a neighbour's land is sometimes necessary and difficult to avoid. Unless a specific right to enter the adjoining land exists at law or has been created, for instance by easement or licence, entry will constitute trespass. A further result where entry is refused may be the deterioration of the property with consequential financial loss for the owner. It could also be argued that such deterioration is contrary to the public interest of having residential and commercial premises properly maintained.[2]

TRESPASS

Civil

2.2 A trespass will occur whenever there is interference with another's exclusive possession of property, regardless of whether any damage has been done. As Fleming observes,[3] trespass originated as a remedy for forcible breach of the King's peace, aimed against acts of intentional aggression. The proprietary aspect of this tort became more dominant when it was later used for the purpose of settling boundary disputes, and preventing the acquisition of easements by prescriptive use. Consequently civil trespass came to be associated with preserving the rights and privileges of private property owners.[4]

2.3 The principles associated with trespass have been recently reaffirmed by the High Court in Australia in *Plenty v Dillon*.[5] The High Court has held that without the consent of the person in possession, or entitled to possession of land, and without any implied leave or licence, the common law does not entitle anyone to go onto another person's land.

2.4 Remedies are available when a trespass occurs. These remedies include injunctions to prevent actual or threatened encroachment on the property, and damages. Damages will be awarded in vindication of a landowner's right to exclude a trespasser from the property, regardless of whether any loss has been suffered by the owner (or occupier).[6] Compensation will also be awarded where the trespass has caused actual damage to the land itself and/or buildings on the land.

Criminal

2.5 Where there was no evidence that a person accused of trespass had any felonious intent, the criminal law was not traditionally concerned with trespass to land. The eviction of trespassers was generally left to civil remedies, civil trespass being actionable without the need for the plaintiff to establish actual damage.[7] Now however, all Australian jurisdictions have laws creating a number of trespass offences.

2.6 Previously in New South Wales, the *Summary Offences Act* 1970 contained a basic trespass offence, punishable by a fine of up to $200, or three months imprisonment.[8] After the repeal of the *Summary Offences Act* 1970 in 1979, this basic trespass offence was essentially incorporated into the *Inclosed Lands Protection Act* 1901. "Inclosed land" is defined by s 3 as:

> any lands, either public or private, inclosed or surrounded with any fence, wall or other erection, or partly by a fence, wall or other erection and partly by a canal or by some natural feature such as a river or cliff by which its boundaries may be known or recognised, including the whole or part of any building or structure and any land occupied or used in connection with the whole or part of any building or structure.

2.7 Section 4 of the Act contains the offence provision and provides as follows:

> (1) Any person who, without lawful excuse, enters into the inclosed lands of any other person, without the consent of the owner or occupier thereof, or the person apparently in charge of the same or remains upon the inclosed lands of another person after being requested by the owner or occupier or person apparently in charge of those lands to leave those lands, shall be liable to a penalty not exceeding $100, and the proof of such lawful excuse shall be upon the defendant in any such case.

2.8 An important difference between this legislation and the *Summary Offences Act* 1970, is that the *Inclosed Lands Protection Act* requires a defence of "lawful excuse", whereas previously a defence of "reasonable cause" was the test.[9] The *Inclosed Lands Protection Act* 1901 seeks to provide a fairly comprehensive statement of the criminal law of trespass.

2.9 To avoid the problems associated with civil or criminal trespass, various methods of legitimising access exist. Often an informal means of access will arise through cooperation between neighbours. However, such cooperation is not always forthcoming and permission is only personal, not attaching to the land or binding successive purchasers of the property.

EASEMENTS AND LICENCES

Express rights

2.10 A landowner may grant an adjacent landowner an express right of entry onto his or her property in the form of an easement. Such an easement would "run with the land" and bind successors in title of both parties. If there is a valid easement allowing access, the law not only recognises that right, but the ancillary rights that are necessarily implied in such an easement. In *Jones v Pritchard* Parker J said:

> The grant of an easement is prima facie also the grant of such ancillary rights as are reasonably necessary to its exercise or enjoyment. Thus the grantee of an easement for a watercourse through his neighbour's land may, when reasonably necessary, enter his neighbour's land for the purpose of repairing, and may repair, such watercourse.[10]

This principle has been recently upheld by the New South Wales Court of Appeal in *Hemmes Hermitage Pty Ltd v Abdurahman*,[11] where it was held that at common law, rights of deviation or repair of an easement including a right of footway were implied in order to make the grant of easement effective.

2.11 In New South Wales an easement may be expressly granted or reserved pursuant to s 46-47 of the *Real Property Act* 1900 (NSW) (hereafter referred to as the *RPA*) and s 88 of the *Conveyancing Act* 1919 (NSW). In some cases, although there may have been a failure to record the easement on the Certificate of Title, the courts have held that such an omission will not necessarily extinguish the easement,[12] on the basis that it constitutes an exception under s 42(b) of the *RPA*.[13]

2.12 An express right of access to neighbouring land may also arise by way of licence or contract. A recent example of such a licence is found in *Meriton Apartments Pty Ltd v Baulderstone Hornibrook Pty Ltd*,[14] where the plaintiff landowner allowed the defendant landowner to encroach onto its property for the purpose of constructing a building. The authority was revoked when the relationship between the parties deteriorated, causing problems for the defendant landowner who claimed that the construction of the building could only be completed (without incurring unreasonable additional expense) by entering on the plaintiff landowner's property.

2.13 This case illustrates the nature of the differences between a licence and an easement. A licence is merely a right to occupy land, conferring no interest in that land to the occupier, generally arising in a "one-off situation" and not "running with the land" or binding successors in title.[15] Further, whereas an easement has to be formally created,[16] a licence can be created without legal formalities (for instance, by way of letter). There is no doubt that the granting of a licence to a landowner to enter upon land will facilitate entry; however, the licensee

landowner should be aware of the limitations of such permission, and seek to obtain a more binding arrangement in appropriate cases.

Implied rights

2.14 Easements can also arise by implication. For example, an easement of necessity, is an implied reservation in favour of the land retained by the grantor over the land conveyed, where such easements that are "necessary" for the use of the land are retained.[17] One instance is when land becomes "landlocked" following the sale of surrounding property. If an easement of access over the surrounding properties did not exist, the land could not be used at all.

STATUTORY RIGHTS OF ACCESS

2.15 DP 22 only considered the problems surrounding access to neighbouring land from the perspective of a private individual. The Crown, and statutory authorities such as the Electricity Commission and the Water Board are authorised pursuant to their respective Acts to enter any land for the purpose of carrying out their functions.[18] In some cases this entry may be without notice and by force.[19]

A CHANGE OF DIRECTION

2.16 Recent court decisions in New South Wales have expressed dissatisfaction with the existing law relating to access to an adjoining property. Such decisions, whilst careful to avoid giving permission to use the land of another simply because it does not cause any significant damage, have suggested that temporary encroachment subject to the payment of compensation may provide a solution to the problem in certain circumstances.[20] Hodgson J in *LJP Investments Pty Ltd v Howard Chia Investments Pty Ltd*[21] has even stated that where an offer of a sum of money is made by the landowner seeking to build, which sum bears a relationship to the saving the landowner will make by using the adjoining land, and the adjoining landowner refuses that offer, there may be circumstances in which a court might find that the conduct of the adjoining landowner is unreasonable and refuse to grant an injunction preventing further access.

2.17 This change in judicial attitude to conflicting private property rights has also occurred in the United Kingdom. The following comments by Scott J[22] reveal a frustration with the constraints of the existing common law, and the acknowledgment of benefits in giving the court power to allow, in certain circumstances, use to be made by developers of the land of neighbours.

> It would in many respects be convenient if the court had power, in order to enable property developments to be expeditiously and economically completed, to allow, on proper commercial terms, some use to be made by the developers of the land of neighbours... There is a sense in which the grant of an injunction against trespass enables a landowner to behave like a dog in a manger... It would be possible for the law to be that the court should not grant an injunction to restrain a trifling trespass if it were shown to be reasonable and sensible that the trespass be allowed to continue for a limited period upon payment of substantial and proper damages.

2.18 This decision and others,[23] recognise that there is merit in allowing temporary access to a neighbouring property without attracting penalties for trespass. A scheme of compulsory licences allowing encroachment at a proper fee is a further suggestion recently proposed in New South Wales to minimise the problems that are occurring.[24]

2.19 By favouring and protecting the right of a landowner to deny entry, even in the most unreasonable circumstances, the law would seem to operate against the public interest, where those who wish to develop sites in city[25] and suburban areas are prevented from doing so. Where landowners cannot arrive at some arrangement between themselves, the law should be able to provide a remedy for the landowner seeking access, but at the same time balancing this with the interests and rights of the landowner over whose land access is

sought. The judicial attitudes referred to here reflect a growing trend away from maintaining the inflexible rights previously associated with land ownership, a trend that the Commission believes should be supported by legislation.

FOOTNOTES

1. Some cases such as *Darcey v Pre-Term Foundation Clinic* [1983] 2 NSWLR 497 and *R v Bacon* [1977] 2 NSWLR 507, discuss the possibility that in certain circumstances necessity may be a lawful excuse to trespass.

2. An illustration of the concerns of the Commission is found in *John Trenberth Ltd v National Westminster Bank Ltd*, (1979) 39 P & CR at 104.

3. J G. Fleming *The Law of Torts* (8th ed, The Law Book Company Ltd, Sydney, 1992) at 39.

4. An example of the nature of this tort is found in the judgement of Lord Camden L.C.J in *Entick v Carrington* (1765) 95 ER 807 at 817.

5. (1991) 171 CLR 635.

6. *Plenty v Dillon* (1991) 171 CLR 635.

7. D Brown, D Farrier, D Neal and D Weisbrot *Criminal Laws: Materials and Commentary on Criminal Law and Process in New South Wales* (The Federation Press, Sydney, 1990) at 1049.

8. *Summary Offences Act* 1970 (NSW) s 50(1).

9. *Summary Offences Act* 1970 (NSW) s 50. For a discussion of “lawful excuse” see *Darcey v Pre-Term Foundation*, and for “reasonable excuse” see *Petersen v Ford* [1975] 1 NSWLR 455.

10. (1908) 1 Ch 630 at 638.

11. (1991) 22 NSWLR 343 at 355-356 per Priestley J.

12. *Auerbach v Beck* (1985) 6 NSWLR 424 at 446; *Margil Pty Ltd v Stegul Pastoral Pty Ltd* (1984) 2 NSWLR 1 at 11.

13. Until recently, the meaning of “omission” was “something which was not there because something that should have been done, was not done”. See *Auerbach v Beck* (1985) 6 NSWLR 424 at 446 and *Margil Pty Ltd v Stegul Pastoral Pty Ltd* (1984) 2 NSWLR 1 at 11. The Court of Appeal decision in *Dobbie v Davidson* (1991) 23 NSWLR 625, has chosen not to follow this definition and has held that “omission” for the purposes of s 42(b) of the RPA simply means “something not there”.

14. (unreported) Supreme Court, NSW, 9 March 1992, Young J, ED 4940/91.

15. In a variety of circumstances a licence may, by the application of equitable principles, become irrevocable either indefinitely or for some specific period, and may even, for some purposes at least, give rise to an interest in land: see *Plimmer v Mayor, Councillors, and Citizens of the City of Wellington* (1884) LR 9 AC 609.

16. See paragraph 2.14.

17. P Butt *Land Law* (2nd ed, The Law Book Company Ltd, Sydney, 1988) para 1628.

18. See s 30-40 of the *Sydney Electricity Act* 1990 (NSW) and s 15-16 of the *Water Board Act* 1987 (NSW).

19. *Water Board Act* 1987 (NSW) s 16(4). The Commission is unaware of any reason why the Crown and its agents, where they are not specifically given a statutory right of entry, or where they are the owners or in possession of the land over which access is sought, should not also be bound by the legislation.

20. See *Dupen & Anor v K W Semken Pty Limited & Ors* (unreported) Supreme Court, NSW, 21 May 1986, Bryson J, ED 5126/86; *LJP Investments Pty Ltd v Howard Chia Investments Pty Ltd*, (1991) 24 NSWLR 490; *Bendal Pty Ltd v Mirvac Projects Pty Ltd* (1991) 23 NSWLR 464; and *Meriton Apartments Pty Ltd v Baulderstone Hornibrook Pty Ltd* (unreported) Supreme Court, NSW, 9 March 1992, Young J, ED 4940/91.

21. (1991) 24 NSWLR 497.

22. *Anchor Brewhouse Developments Limited & Ors v Berkley House (Docklands Developments) Limited* (1987) 38 BLR at 87.

23. For example, see *LJP Investments Pty Ltd v Howard Chia Investments Pty Ltd* (unreported) Supreme Court, NSW, 18 July 1989, Hodgson J, ED 0003/89 at 15-16.

24. *Meriton Apartments Pty Ltd v Baulderstone Hornibrook Pty Ltd*, transcript at 13.

25. *Meriton Apartments Pty Ltd v Baulderstone Hornibrook Pty Ltd* (unreported) Supreme Court, NSW, 9 March 1992, Young J, ED 4940/91, transcript at 13.

3. Particular Issues Concerning Utility Services

GENERAL

3.1 In most cases, persons using utility services that pass through several properties benefit by the existence of an easement of access over that service, entitling the user to enter the property on which the service is located in order to attend to the service.[1] However, in the absence of such an easement, the user of the service is not allowed to interfere with the service, even where that interference is for the purpose of maintenance, repair, or relocation of the service.

3.2 One explanation of why there may not be an easement is that the properties through which the service runs were once commonly owned. When the common ownership ceased, new owners may have failed to ensure that easements over water pipes or sewer lines existed for the particular part of the property they were purchasing. The problem may have arisen due to an assumption that such a right was simply transferred with the purchased property, or by an omission on the part of the conveyancer. Whatever the reason, the failure to create and register an easement has given rise to a number of lasting problems. These difficulties have been compounded by the general reluctance of the Water Board to impose on new purchasers a requirement to install costly separate connections. Many properties today do not have a viable means of creating a separate connection at reasonable cost.

3.3 A user of a service may attempt to disconnect the joint service and force other users of the service to bear the cost of a direct connection to the main service. Such action will however, be illegal unless conducted in accordance with the *Water Board Act 1987 (Water Board (Plumbing and Drainage) Regulation 1989)*,[2] or a court order declaring that the common user of the service has a right to discontinue the service.[3]

3.4 The creation of permanent rights of access is seen as a means of avoiding problems of access in respect of utility services, and applications have been made to the courts over the years to have access to and over utilities such as water pipes and sewers recognised as easements of necessity. The courts have, however, gone to considerable lengths to hold that although such an easement may be considered by a landowner to be essential for the reasonable enjoyment of property, it is not an easement of necessity,[4] because at law easements over such services are not considered necessary to the land itself.[5]

3.5 Although DP 22 raised the possibility of statutory recognition of these “trespassing” services as a means of rectifying the problem, the Board of Surveyors pointed out in their submission[6] that few authorities know with any exactitude the location of their service lines. Consequently, the Board of Surveyors opposes the creation of statutory easements over them until such time as they are properly defined on title. The Commission agrees that such a step may be expensive and premature at this stage. It would seem desirable however, that steps are taken in the long term by the relevant authorities to locate such services, properly record them and establish the appropriate rights over them.

LIABILITY FOR COSTS

Role of the Water Board

3.6 An important and related issue that was raised in DP 22, in respect of utility services, is establishing liability for the repair and maintenance costs of common service pipes for individual users. The problem only really exists in respect of joint sewer services, because the Water Board will absorb the costs of repair and maintenance of water services (joint or single) within the areas of its operation.[7] In those cases where the Board does not assume responsibility, it can still do the repair work itself and then issue notices for payment to the users of the service. The *Water Board Act* 1987 (NSW) does not contain any guidelines in respect of apportioning the costs of the work carried out.

3.7 The Water Board does not assume the same level of responsibility in respect of sewage services. A liability policy similar to the water supply policy (as discussed above) was considered for sewage services, but was rejected as too expensive. Where the Water Board is aware that work needs to be done on a joint sewer service, the Board will issue a defect notice requiring the users to repair the service within a certain period of time. Sometimes repair is ordered to take place within 24 hours, if the damaged service is deemed to be a health risk. It may also be the case that the users of that service realise that the service is in need of repair and attend to the repairs prior to receiving a notice from the Board.

Existing guidelines for apportioning costs

3.8 There are no guidelines to assist the owners in dividing the cost of repairs, although DP 22 argued that Regulation 9 of the *Plumbing and Drainage Regulation* (September 1989) could be interpreted as making owners jointly responsible for the maintenance of their water service pipe, sewer or storm water drain.[8] Some users may argue that they were not responsible for any damage to the service and thus refuse to pay anything; other users may argue that the cost of repair should be divided equally, regardless of which users were directly affected, on the basis that the service is jointly owned; and others may consider the amount charged to be excessive and only wish to pay an amount they consider appropriate. Although a recommended rate may be obtained from the Master Plumbers Association, this rate is not a standard or enforceable rate and the final figure charged may be higher or lower depending on the circumstances.

3.9 In practice, one user (usually the person most affected by overflow from the blockage) often pays for the repairs and is then forced to seek contribution from the other users, and when payment is not forthcoming, he or she may be forced to litigate for the recovery of the money. Whilst a user may wish to claim equally against each of the other users of the service, it is difficult to prove what their contribution should be. A plumber may be retained to give expert advice about who or what caused the damage to the service. This lack of legislative direction stands in sharp contrast to the specific contributions that unit owners of a Strata Titles plan are required to provide by way of levy where maintenance and repair of the common property is necessary.[9]

PROPOSALS FOR REFORM RAISED BY DP 22

3.10 DP 22 raised several options for reform in this area. One suggestion put forward in the Discussion Paper was a scheme for the apportionment of costs for the repair or maintenance of a joint service similar to that which exists for dividing fences and which is contained in the *Dividing Fences Act* 1951 (NSW). This Act has now been repealed and replaced by the *Dividing Fences Act* 1991.[10] The relevant provision in the 1991 Act that apportions costs in respect of a dividing fence is section 7.[11]

3.11 The other alternative the Commission suggested in DP 22 was the introduction of legislation modelled on s 22 of the *Building Act* 1984 (UK). This section allows a local authority, when determining that buildings should be drained either separately or in combination, to decide the proportions in which the expenses of constructing or maintaining and repairing the sewer are to be borne by the owners concerned. In some cases the authority may bear a proportion of the costs itself.

3.12 The submissions received by the Commission did not support either of these proposals in particular, but supported the general proposal that some method of apportionment should exist. The Law Society submitted that the apportionment of costs in such cases should be at the discretion of the court, and that costs should be apportioned in proportion to the benefits which are anticipated to accrue from the rights conferred.[12] The Council for Community Justice Centres did not consider that there was any role for mediation, given the costs involved in re-organising such services.[13]

RECOMMENDATIONS

3.13 Because each user of a utility service has the use and enjoyment of that service as a whole, **the Commission recommends that the maintenance and repair of that service should be the responsibility of all the users. Each user should contribute in equal proportions to the repair and maintenance of that service.** An amendment to this effect, inserted in the *Plumbing and Drainage Regulation (September 1989)* would ensure that this recommendation is reflected at law, avoiding any of the current confusion.

FOOTNOTES

1. In January 1992, the Water Board estimated that within its area of operation there were approximately 3,000 properties affected by a joint water service and 32, 000 affected by joint sewer services.

2. Section 23.

3. As was the case in *Industrial Non Woven v Weider* (unreported) Supreme Court, NSW, Bryson J, ED 4968/87.

4. *Union Lighterage Co v London Graving Dock Co* [1902] 2 Ch 557 at 572; *Ray v Hazeldine* [1904] 2 Ch 17 at 20-21.

5. *Pryce and Irving v McGuinness* [1906] Qd R 591 at 608.

6. Board of Surveyors of New South Wales *Submission* (5 September 1991)

7. This policy came into effect during the 1980s, extending to copper service domestic water supplies between main and meter. Although nearly all services within the area of the Board's operation are copper, there are still some galvanised iron services, which the Commission understands are gradually being phased out. In those cases, the Board will not intervene and liability for repair remains with the users of the service. There is an exception to the Board's policy when, regardless of the type of service, it will not assume liability for the costs of repair where the damage to the service has been the result of direct interference.

8. Regulation 9 provides:

The owner of land connected to a water main, sewer or stormwater drain of the board must:

(a) install and provide, as prescribed by or under the Act, and

(b) at all times keep in good order and condition and free from defects the water service, sewerage service or stormwater service on the land from the water main, sewer or stormwater drain to the property.

9. *Strata Titles Act* 1973 (NSW), ss 59, 68.

10. *Dividing Fences Act* 1991 (NSW) s 7.

11. Further, section 15 of the *Dividing Fences Act* provides that once an agreement is reached by or among the adjoining landowners, or an order made by a local court, or land board, an adjoining owner has three months in which to perform his or her part of the agreement, after which the other owner may carry out the work as agreed upon and recover from the defaulting owner the amount agreed to be paid by that defaulting owner. Similar legislative intervention may assist users of joint utility services where they need to be repaired or maintained. However, a shorter compliance period may be appropriate, say seven days, given the inconvenience of not having water or sewage services disrupted.

12. Law Society Submission at 10.

13. CJC submission at 3.

4. Rights of Access to Neighbouring Land in Other Jurisdictions

NATURE OF REFORM IN OTHER JURISDICTIONS

4.1 Developments in other jurisdictions reveals that a reappraisal of property related rights is taking place. In both the United Kingdom and Tasmania, specific legislation exists which permits access to neighbouring land in certain circumstances.[1] In New Zealand the *Property Law Act* 1952[2] allows the District Court to authorise a landowner to enter on adjoining land for the purpose of erecting, repairing, adding to or painting a building, wall, fence or other structure on an applicant landowner's land. In the Canadian provinces of British Columbia and Manitoba[3] the courts have the discretion to permit an owner to enter adjoining property to carry out repair work and the like.

4.2 The legislative reform recommended by the Commission in this Report is closely modelled on the Tasmanian legislation, which is similar to the English legislation. The following paragraphs examine these pieces of legislation. Both pieces of legislation arose from recommendations made by the Law Reform Commissions in those respective jurisdictions.[4]

Class of applicant and respondent

4.3 The Tasmanian and English legislation does not restrict the class of person able to apply for an order for access, and nor does it restrict the class of persons against whom an order for access may be made. It is in the applicant's interest to seek that the access order be made against all those persons who are likely to be affected by the order, regardless of whether those persons have legal title to the affected property or not. The English legislation specifically provides for those cases where the applicant does not know or cannot reasonably ascertain the name of any person whom he or she wishes to make a respondent to the application for access.[5]

Type of work authorised by the order

4.4 The Tasmanian and English schemes differ in what type of work can be authorised pursuant to an order for access. Following the recommendations of the Law Commission,[6] the English Act only allows access for the purpose of *preservation work* where such work *cannot be carried out*, or would be *substantially more difficult* to carry out, without access to the neighbouring land (s 1 (2(a)-(b)). The Act's definition of preservation work excludes work to be done for its own sake;[7] however, there is some discretion for the court to allow work incidentally involving improvement work to the land.[8] The requirement that the work to be done, is to be substantially more difficult to carry out without access, implies that the court may refuse an application for access where it is simply more convenient to carry the work out via a neighbouring property. Although the Law Commission accepted that there was a case for allowing access for work involving no element of preserving existing property (ie improvements and alterations done for their own sake or land development generally)[9] it was reluctant to take this further step.[10]

4.5 In formulating it's recommendations, the Tasmanian Commission considered that this approach was too restrictive and the English Commission had provided insufficient reasons why new building work should be excluded. The Tasmanian Commission recommended that the kind of work that an access order could authorise should be left in the hands of the tribunal determining the matter, which could take into account all of the relevant circumstances and considerations and impose any restriction that was necessary. The resultant legislation does not limit the type of work for which access may be sought although it attempts to provide an exhaustive list[11] of the work for which access may be sought, including the repair and renewal of buildings, ascertaining the course of drains, sewers or pipes and repairing or clearing them, and replacing any tree or shrub.

Discretionary scheme

4.6 Both the English and Tasmanian legislation reflect recommendations made by the respective Law Reform Commissions that a discretionary scheme accommodating private rights of access was a more satisfactory and reasonable solution for those affected than an automatic right of access. The Tasmanian Commission[12] felt that there were too many difficulties involved in defining the work an automatic right of entry would cover, when a discretionary scheme would be sufficiently wide enough to cover all possibilities. The English Law Commission[13] favoured a discretionary scheme over an automatic or limited automatic right because of its flexibility and safeguards, and believed that there would be misgivings over the creation of a general right of access. Both pieces of legislation allow the court to impose conditions[14] on access orders, in order to provide safeguards for those affected by the order. The legislation also allows the court the discretion to refuse to make an order for access where the court considers that entry would cause unreasonable hardship to any person affected by the proposed order.[15]

4.7 Both Commissions believed that the right of access should be a "one-off" right, as a permanent right of access would essentially amount to an easement, which would be inconsistent with the discretionary scheme that was proposed.[16] The Tasmanian Commission did suggest that there may be circumstances where a permanent right of access might be justified. For instance, where the applicant landowner's property needs periodic attention to maintain it in a safe condition, it may be unreasonable to require a fresh application for access each time. The Commission did acknowledge that such a right would be restricted to exceptional circumstances.[17] The legislation that was enacted in these jurisdictions has made the right of access a singular right.

Compensation

4.8 One condition that can be attached to an order for access (for which both the Tasmanian and English legislation provide) is the requirement that some form of compensation be payable to the person over whose property access is granted.

4.9 Section 2 of the English legislation defines what terms and conditions may be imposed on the access order, and includes compensation for "any substantial loss of privacy or other substantial inconvenience"; and such payment for the privilege of entering the neighbouring land, as appears fair and reasonable in all the circumstances, having regard to the likely financial advantage of the order to the applicant,[18] and the degree of inconvenience likely to be caused to the landowner. This section raises some difficult questions of causation, and does not apply to residential land. It is not apparent from a reading of the Act what type of orders will be made under this section. The annotations to the Act comment that because the commercial purpose of the applicant is irrelevant, estate owners will be able to take advantage of the section.[19] Further, those owners of properties which are zoned both residential and commercial may argue in some instances that repairs are residential and will therefore not attract any payment of compensation. The example given in the annotations is where a property consists of shops with flats above them, and the landlord needs access to adjoining land to repair the roof, which he or she argues is "residential". On that basis a landlord may escape payment.

4.10 The legislation departs in a number of respects from final recommendations made by the Law Commission. The Commission recommended that compensation should not be available for inconvenience on the basis that any compensation should reflect only actual loss and damage suffered as a result of the access, and further, there was no accurate means by which the court could be assisted to determine a figure payable.[20] The Commission was of the view that a measure of inconvenience is something that simply must be endured as a fact of modern life, and in those situations where that inconvenience is considered to be intolerable, an access order would probably not be granted by a court. The Report recommended that compensation be payable for financial loss caused by the exercise of the right of access, but compensation for financial damage stemming from the doing of the work should not be recoverable as part of the same claim, but rather should be enforceable at general law if it amounted to a nuisance.[21]

4.11 The Commission also recommended that there should be no compensation available for any financial advantage gained by the applicant, essentially because of the difficulties that lie in assessing what that value would be, and the fact that the scheme was designed to prevent the respondent to an access order from

sustaining loss caused by the access, not to reduce the benefit to the applicant of being able to repair his or her property.[22]

4.12 The Tasmanian Commission recommended that there be no restriction on the heads of compensation awarded by a tribunal, as it may be appropriate to order compensation for personal injury; nuisance and inconvenience; physical damage to personal property or for financial loss. The English proposals restricted the heads of compensation to loss, damage or injury which the neighbour suffers as a result of the access. The Tasmanian recommendations were made on the basis that occasions may arise where it may be appropriate to award compensation outside those heads.[23] The Tasmanian Act however, excludes compensation for any loss of privacy or for any inconvenience that the owner of the land subject to the access order may suffer solely as a result of the entry authorised by the order, or solely by reason of making the order.[24] The Act does provide for compensation to be payable to the owner of land over which access is sought, for loss, damage or injury, including damage to personal property, financial loss and personal injury.[25]

Jurisdiction

4.13 The Tasmanian legislation allows authorisation of the access order to be made by a magistrate or the Small Claims Division of the Magistrates Court. The English scheme permits an application for access to be made to a county court.

OTHER TYPES OF REFORM

4.14 As well as the reform discussed in the preceding paragraphs, other legislation exists in those jurisdictions which could assist a person to gain access over another's property. Such reform concentrates on allowing the creation of permanent rights of access, in the form of easements, or the like, over neighbouring land. The Commission does not believe that this type of right needs to be created where access to a neighbouring property is sought.

4.15 In Queensland and Tasmania, a "statutory right of user" in the form of an easement, licence or other right can be conferred on one landowner at the expense of another, for the purpose of the first owner using the latter's property.[26] In the United Kingdom,[27] recommendations have been made that an "appurtenant right" should be obtainable by a landowner against another landowner, thereby enabling the former either to do something on the other's land, or require the latter to do or refrain from doing something on his or her land, or to pay or contribute to the cost of works which would benefit his or her own land. In New Zealand, in the case of "landlocked" land, a benefit of an easement over surrounding land can be granted to the "landlocked" landowner.[28]

4.16 Such rights can only be granted if specific conditions are met,[29] including whether the proposed use for the affected land is consistent with the public interest (the English proposals require the use of the land to be in the public interest); whether the owner of the affected land can be adequately compensated (New Zealand only provides for compensation at the court's discretion); and whether the landowner has been unreasonable in refusing to accept the obligation sought by the other landowner. Despite these conditions, the court or tribunal to which the application is made, appears to retain a wide discretion in respect of the purpose for which a "statutory right of user" or "appurtenant right" can be granted. For instance, the Queensland legislation allows the right to be in the nature of a right of way, access to land, and the right to place any utility service across, through or under land.

SUMMARY

4.17 The need for occasional access over adjoining land is a major problem affecting neighbours, and a number of jurisdictions have enacted or recommended reform to overcome the situation where such access is not otherwise available.

4.18 The Commission favours the reform which allows a discretionary scheme of access such as exists in Tasmania and England and Wales. In particular, the flexible scheme which exists in Tasmania, which does not restrict the type of work that can be permitted by an access order, but leaves it to the discretion of the court to determine what is an appropriate application in the circumstances.

4.19 The Commission does not support the English step of allowing compensation for any loss of privacy or inconvenience that an access order may give rise. In the Commission's view there is no accurate means by which a court could assess an appropriate figure. Although some infringement of privacy will always be present whenever an order for access is made, the Commission does not believe this should prevent an order from being made. A measure of inconvenience is an inevitable consequence of modern social and physical proximity.

4.20 The Commission also believes in the importance of attempting to reach an arrangement with the affected neighbour prior to making an application to the court for access. This premise is supported in the legislative reforms discussed in this chapter. The Tasmanian legislation makes an attempt to reach an agreement with the neighbouring landowner, (and failing this, at least providing that neighbour with notice of an intention to apply to the court for access) a condition precedent to the court making an order for access. Whilst the English legislation does not have as specific a requirement, the legislation implies that some discussion with the affected neighbour should have taken place, since an application for access is made by a person who does not have the consent of some other person to that entry.

FOOTNOTES

1. See *Access to Neighbouring Land Act* 1992 (England & Wales); and *Access to Neighbouring Land Act* 1992 (Tas).

2. Section 128.

3. For British Columbia see *Property Law Act*, RSBC 1979, c.340 s 30: and for Manitoba see *Law of Property Act*, RSM 1987, c.L90 s 39(2).

4. See England and Wales. The Law Commission *Rights of Access to Neighbouring Land* (Report 151 1985); and Tasmania. Law Reform Commission *On Private Rights of Access to Neighbouring Land* (Report 42 1985).

5. *Access to Neighbouring Land* Act 1992, s 4(3).

6 Reasons given by the Commission for limiting an access order to only allow this type of work included; that the actual complaints about lack of access which had given rise to the reference only related to preservation work; that an order for access for the purpose of preservation work would be more readily accepted by neighbours than an order permitting access for other types of work; and that the proposed access scheme depended on the relevant work being "reasonably necessary". The degree of necessity in the case of preservation work would generally be greater than where the work was for the purpose of improving the property, thereby enhancing its value. See LCR 151 at para 4.4.

7. Section 1(4) states:

(4) Where a court is satisfied on an application under this section that it is reasonably necessary to carry out any basic preservation works to the dominant land, those works shall be taken for the purposes of this Act to be reasonably necessary for the preservation of the land; and in this subsection "basic preservation works" means any of the following, that is to say-

(a) the maintenance, repair or renewal of any part of a building or other structure comprised in, or situate on, the dominant land;

(b) the clearance, repair or renewal of any drain, sewer, pipe or cable so comprised or situate;

(c) the treatment, cutting back, felling, removal or replacement of any hedge, tree, shrub or other growing thing which is so comprised and which is, or is in danger of becoming, damaged, diseased, dangerous, insecurely rooted or dead;

(d) the filling in, or clearance, of any ditch so comprised;

but this subsection is without prejudice to the generality of the works which may, apart from it, be regarded by the court as reasonably necessary for the preservation of any land.

8. Section 1(5).

9. LCR 151 at para 4.4.

10. LCR 151 at para 3.28.

11. S 5(3)(a)-(h).

12. Tas LRC 42 at 12.

13. LCR 151 at para 3.35 and 3.42.

14. See *Access To Neighbouring Land Act* 1992 (Tas), s 6; and *Access To Neighbouring Land Act* 1992 (E&W), s 2.

15. See *Access To Neighbouring Land Act* 1992 (Tas), s 5(2); and *Access To Neighbouring Land Act* 1992 (E&W), s 1(3).

16. LCR 151 at para 4.63.

17. Tas LRC 42 at 14.

18. A complex formula for ascertaining what that financial advantage may be is contained in s 2(6).

19. Chapter 23 Current Law Statutes Annotated at 23-7.

20. LCR 151 at para 4.52-4.54.

21. LCR 151 at para 4.51.

22. LCR 151 at para 4.58.

23. Tas LRC 42 at 14.

24. Section 6(3).

25. Section 6(2)(g).

26. See *Property Law Act* 1974 (Qld) s 180 and the *Conveyancing and Law of Property Act* 1884 (Tas), s 84J (1)-(7).

27. England and Wales. The Law Commission *Appurtenant Rights* (Working Paper No 36 1971).

28. *Property Law Act* 1952 (NZ), s 129B.

29. See *Property Law Act* 1974(Qld) s 180(3); *Conveyancing and Law of Property Act* 1884(Tas) s 84J; and WP 36 at para 118.

5. Recommendations and Proposals for Reform

CONCLUSIONS

5.1 As discussed in this Report, the absence of a general right of access by private persons to an adjoining property gives rise to some potentially serious problems. The Commission acknowledges the premise that the privacy and security of property owners should not be unreasonably eroded. However, in some cases the law should intervene and assist a person seeking to gain access to a neighbouring property, where that neighbour's consent is not forthcoming. Such a step should be exercised with caution, because in the Commission's view the grant of a right of access should not be automatic. Rather, it is something to be determined in each case, giving careful consideration to balance the interests of the affected landowners.

5.2 Following from DP 22, this Report has focused on the practical difficulties that arise between landowners who desire access to property neighbouring their own. In the absence of an easement creating a right of access, or a specific agreement between the neighbours allowing access, the law protects a landowner from incursions onto his or her property (regardless of the necessity of such entry), through the law of trespass. Although some may view any change in this position as simply legitimising trespass, the Commission believes the law should provide access rights in appropriate circumstances.

5.3 While the precise need for and nature of the access will differ in each case, as will the effect on and level of interference to the neighbouring property, the issue is ultimately one of access. The reforms discussed in this Report highlight the different approaches that various jurisdictions have taken. Although the type of right granted may range from a licence to an easement, and the conditions precedent to the granting of the right may not be identical, all the reforms or proposed reforms considered in this Report are designed for the same purpose - to allow one landowner to use a neighbouring landowner's land for a purpose that will benefit the first landowner.

5.4 This Report recommends that legislation similar to the Tasmanian *Access to Neighbouring Land Act* 1992 be enacted in New South Wales and a draft Bill modelled on the Tasmanian Act is annexed to this Report. The legislation provides the court with sufficient discretion to address the rights of competing landowners. Although the Bill contains guidelines in relation to the type of work for which access can be sought, it does not limit the type of work for which access can be sought, so different and varying situations can be accommodated. Generally speaking, the Commission sees no need to limit the type of work for which access is sought, if the court subjects such access to reasonable and appropriate conditions and safeguards.

5.5 In those cases where easements or other rights of access do not exist, problems with access may be minimised or may not even occur, if neighbouring landowners are able to reach agreement about the terms of access between themselves. The necessity for legislative intervention arises where such agreement is not possible. The *Access to Neighbouring Land Bill* offers court redress to a person who fails to obtain the neighbouring landowner's consent, but only after personal attempts to reach an arrangement have been made.

RECOMMENDATION 1

In the absence of an easement, agreement for an easement, or any other agreement providing access over adjoining or adjacent land, a landowner should have a right to apply to a court for access to that land. Land should be defined to include air space and subsoil.

A right of access to another person's land should be available in two specific instances. The first is where a person wishes to carry out work on the person's own land, and the second is for the purpose of carrying out work on a utility service on neighbouring land where the applicant being entitled to the use of that service. An access order should not only permit the owner of the land, or the user of the utility service to enter the land which is the subject of the access order, but also the employees and agents of the applicant who are required to carry out the work specified in the order.

An access order should be single and specific. It should not burden the property indefinitely, but be of limited duration, providing a reasonable period of time for carrying out the work specified in the access order. Because of the temporary nature of the order, it would not be necessary to register the order on the title of the affected property. However, if the property changed ownership during the time in which the order was in effect, the order would bind the successor in title.

Neighbouring land is defined for the purposes of this Report as land that adjoins or is adjacent to an applicant's land. It includes the air space and subsoil of that adjoining property. Where access is sought over a utility service that traverses through land other than the applicant's, neighbouring land is defined as including any land which accommodates that utility service.

RECOMMENDATION 2

The court should have a discretionary power to make an order for access. In exercising its discretion the court should take into account:

a) the type of work for which access is sought;

b) whether the work cannot be carried out, or would be substantially more difficult or expensive to carry out, without entry onto the adjoining land; and

c) whether the entry would cause unreasonable hardship to any person affected by the access order.

The Commission agrees with the reasons put forward by the English and Tasmanian Law Reform Commissions that a discretionary scheme is preferable to a scheme allowing an automatic right of access in certain circumstances. The Commission believes that whilst general guidelines for granting access can be established, it would be impossible for legislation to define every conceivable circumstance for which access may be required, whereas a discretionary scheme has the flexibility of addressing each case on its merits.

In the Commission's view, an alternative means of access should not automatically exclude the right to access under consideration in this Report. If an alternative means does exist, the court should take into consideration the convenience and expense involved in taking it. Obviously an order allowing access will have some effect on the landowner over whose land access is granted. In exercising its discretion, the court needs to balance the competing interests of landowners, and if one of them is to suffer unreasonable or unnecessary hardship as a result of an order for access, then the court must consider whether such an order should be made.

RECOMMENDATION 3

There should be no statutory restriction on the type of work for which access to neighbouring land is sought.

Whether access is required to facilitate work on a person's own property, or to facilitate work on a utility service on neighbouring property, the Commission does not believe the type of work for which the access is sought should be limited by legislation. In both cases, guidelines should exist to assist the court, but not to limit the nature of the work.

RECOMMENDATION 4

In making an order for access, the court must be satisfied that:

a) the applicant has made a reasonable effort to reach agreement with the person/s affected by the order regarding the work to be carried out; and

b) the person seeking access must first have served on the person whose agreement to the entry is required, a notice describing the work intended to be performed.

A central theme to the Commission's recommendations in this Report is the importance of neighbours taking steps to resolve any dispute over access between themselves, prior to making application to the court for access. Such a step not only encourages neighbours to build a better relationship, but it also prevents the court from being deluged with a flood of applications for court ordered access.

"Reasonable effort to reach agreement" does not mean that a third party has to be involved in any mediation of the problem prior to making application to the court. It is entirely a matter for the parties themselves. The Commission's emphasis is that *some* attempt to resolve the matter has been made.

A further prerequisite to making a court application for access is that the applicant has to serve a notice of his or her intention to make application to the court for access at least 21 days before making such application. This puts the neighbour on notice and could stimulate an agreement without having to involve the court.

RECOMMENDATION 5

The court must have the power to impose such terms and conditions on an access order as appear reasonably necessary in the circumstances. Such terms and conditions should include but are not limited to the following:

a) conditions imposed to avoid and/or minimise any loss, damage or injury caused by reason of the order authorising access;

b) conditions imposed to avoid and/or minimise any inconvenience and loss of privacy;

c) any necessary precautions and safeguards, including the taking out of any appropriate public liability insurance.

The order must also specify the land to which it permits access, the work and the times during which work is to be carried out, and the date of the commencement and cessation of the access order.

Each application for access will differ. If the neighbours have had to approach the court to determine the issue then they are unlikely to be able to resolve the conditions of the access themselves. As a safeguard to the landowner over whose land access is sought, the court needs to be able to specify the conditions of the access, so as not to inconvenience that landowner any more than necessary. At the same time the court has to be reasonable in the conditions it imposes on the applicant.

RECOMMENDATION 6

A court may order that compensation be paid for any loss, damage or injury, including damage to personal property, financial loss and personal injury, to the owner or person in occupation of the subject land.

The landowner seeking access has to be responsible for his or her actions on the neighbouring property. The applicant must bear in mind that he or she is only on the neighbour's property at the discretion of the court, and must take care not to harm the neighbour's property or person. The person benefitting from the access order should be liable for any loss or damage that ensues from that order. Consequently, it may be appropriate for public liability insurance to be taken out by the applicant. Compensation for inconvenience is not recommended

by the Commission. Although a degree of inconvenience and loss of privacy may follow as a result of an access order, on balance, the Commission believes that generally this should not prevent an access order from being made, nor should it be a ground for compensation. Recommendation 2 of this Report (and clause 13(b) of the draft Bill) provide that if the access order would cause unreasonable hardship to a person affected by the order, then the order should not be made. Issues of inconvenience and loss of privacy would undoubtedly be taken into account by the court in determining whether the order should be made.

In order to prevent an applicant remaining liable for compensation indefinitely, the Commission suggests that an action for compensation may not be brought three years or more after the last date on which access occurred under the access order.

RECOMMENDATION 7

The costs of an application for an order for access are payable at the Court's discretion.

Given that the circumstances of each application will be different, it is not appropriate that the applicant automatically assume responsibility for the costs of the application. In determining the issue of costs, the court should take into account the attempts to reach agreement between the parties prior to coming to court, and whether the neighbour's refusal to grant access has been unreasonable in the circumstances. If for instance, the access is only for a very short period of time and will cause no real inconvenience, but the neighbour has refused to allow access except for payment of large sums of money, then consideration should be given to apportioning the costs of the application.

RECOMMENDATION 8

Persons entitled to apply for a neighbouring land access order should include the owner of the land on which work is to carried out, and a person who has the consent of that owner. In the case of a utility service access order, the class of applicant should include a person who is entitled to the use of the service, either solely or jointly, but who is not the owner of the whole or part of the land on which that service is located.

In the case of a neighbouring land access order, the class of applicant should be wide enough to include a person who is not the owner of the land, for example, a tenant. Although in such a case the consent of the owner should be obtained, provision should be made for situations where that consent is unobtainable. In the case of a utility service access order, an application for access should be able to be made by the user of the service, in the capacity of sole or joint user, where that user is not the owner of the whole or part of the land on which the service is located.

RECOMMENDATION 9

Persons against whom the application is to be made should include anyone likely to be affected by the terms and conditions of the order. Such persons would usually include the owner and the occupier of the land over which access is sought. In the case of utility services this includes any owners of the land on which the utility service is located and any other users of that service. Provision should also be made for substituted service of the application in cases where persons likely to be affected by the order cannot be located. In addition the Court should have the power to direct service on any person.

Because the owner will not be the occupier in every case the applicant should seek to join the person in occupation of the subject property as well. An applicant should exercise caution and include anyone likely to be affected by the access order. In those cases where the relevant parties cannot be located to be served with an application for an order for access, the applicant should be able to apply for substituted service.

RECOMMENDATION 10

The Local Court is the most appropriate jurisdiction to hear applications for access, at first instance. In cases where the compensation or damages to be awarded is beyond the jurisdiction of the Local Court, the matter must be transferred to the Land and Environment Court. The Local Court may also refer questions of law to the Land and Environment Court. An appeal from a decision of the Local Court on a question of law only, may be made to the Land and Environment Court, within 30 days after the decision to grant, or not to grant an access order has been made.

Although most real property issues are currently dealt with by the Supreme Court, the Commission believes that the Local Court is the more appropriate jurisdiction to deal routinely with the type of order proposed in this Report. There is no reason why a magistrate cannot deal with these applications provided comprehensive legislative guidelines exist. This recommendation is made as part of the Commission's general proposal that issues affecting "neighbours" should be able to be resolved in more accessible and less expensive forums. A magistrate should have the discretion to refer matters to higher courts in appropriate circumstances, for example, where the possible amount of compensation involved would exceed the jurisdiction of the Local Court. Given that the Land and Environment Court constantly deals with building and development applications, planning, land valuations and environmental matters, the Commission believes that this jurisdiction is the most suitable to refer questions of law, and matters on appeal arising from questions of law. The Commission does not consider this recommendation as burdensome on the Land and Environment Court, it makes sensible use of an existing jurisdiction to determine access disputes without having to create a unique tribunal to deal with such matters.

RECOMMENDATION 11

The scheme should bind the Crown.

The Commission believes that for the purposes of the reforms recommended in this Report, the Crown should generally be treated in the same manner as any other person, and be bound by the requirements of any new or amending legislation. There may, of course, be some exception to this rule, for instance, where the Crown already has a statutory right of access.

RECOMMENDATION 12

Joint users of a utility service should contribute in equal proportions to the repair and maintenance of such services, except in cases where the need for repair or maintenance is caused by the deliberate or wilful act of one of the users. In the latter case, total liability rests with the user at fault without any prejudice to the right to claim damages.

Each user of a utility service has the use and enjoyment of that service, and as a consequence, the Commission believes that the maintenance and repair of that service is the responsibility of *all* users. Although this position is not currently reflected at law, the Commission recommends that the position can be simply rectified by amendment to the *Plumbing and Drainage Regulation* (September 1989). The Regulation should state that costs are to be apportioned for the repair and maintenance of the service, rather than leaving one user to pay and then seek whatever contribution he or she can from the other users of the service. An exception to joint liability should exist where the repair or maintenance is required as a result of a deliberate act, and, in that case the person responsible should be solely liable.

Appendix A: Access to Neighbouring Land Bill 1994

ACCESS TO NEIGHBOURING LAND BILL 1994

NEW SOUTH WALES

[STATE ARMS]

EXPLANATORY NOTE

The object of this Bill is to enable a person to gain access to another person's land to carry out work on the person's own land or to carry out work on a utility service situated on that other person's land. The person will be able to apply to a Local Court for a neighbouring land access order or a utility service access order. At present, unless consent is obtained from the owner of the land, or there is some other legal right to access, access cannot be gained for these purposes.

The orders are to be subject to statutory conditions, including an obligation, so far as is practicable, to restore the land, and are to be of limited duration.

PART 1—PRELIMINARY

This Part contains the introductory, commencement and interpretative provisions of the proposed Act (clauses 1–3). It sets out the short title of the proposed Act and provides that it is to commence on a day or days to be proclaimed (clauses 1 and 2). Definitions are contained in clause 3. The Part also provides that the proposed Act will bind the Crown (clause 4).

PART 2—ACCESS ORDERS

Division 1—Applications for access orders and making of orders

The Division sets out who may apply for the access orders and confers jurisdiction on the Local Court to make the orders. A person who requires access to land adjoining or adjacent to the person's land to carry out work on the person's land may apply for a neighbouring land access order (clause 5).

A person who requires access to land to carry out work on a utility service (for example, a sewerage service) which the person is entitled to use but which is situated on land that the person does not own may apply for a utility service access order (clause 6). Both kinds of orders may be applied for by the user of the utility service or the owner of the land on which work is to be carried out. A neighbouring land access order may be applied for by some other person with the consent of the owner. A person who requires both kinds of order may apply for both orders at the same time (clause 7).

Notice of applications must be given to affected persons (clause 8).

The Local Court may grant an access order if it is satisfied that access is required for the specified purpose and that it is appropriate in the circumstances of the case (clauses 9 and 11). However, orders may not be made unless the Court is satisfied that a reasonable effort has been made to reach agreement by the relevant parties and that the required notice of the application has been given.

The types of work for which each kind of access order may be made are set out in the Division (clauses 10 and 12). The Court must consider the purpose and type of work proposed, whether the work cannot be carried out, or would be substantially more difficult or expensive to carry out, without the access and whether the access would cause unreasonable hardship to a person affected by the order (clause 13). Conditions may be imposed on an access order, including conditions relating to minimising inconvenience or loss of privacy and requiring the applicant to take out insurance (clause 14).

Matters to be included in access orders, such as the work to be carried out and the duration of the order are also specified (clause 15).

Division 2—Effect of access orders

This Division sets out the activities authorised by orders and the obligations of persons who obtain orders as well as those of the owners and occupiers of land subject to access orders. A neighbouring land access order authorises, for the purpose of carrying out work on land, a person to have access to and to remain on adjoining or adjacent land to that land, in accordance with the order (clause 16). A utility service access order authorises a person to have access to and to remain on land to carry out work on a utility service on that land in accordance with the order (clause 17).

Both kinds of order authorise the applicant to move materials, remove waste from the land and also authorise such persons as are reasonably necessary to carry out the work to have access to the land (clause 18). In turn the applicant is required to restore the land, as far as practicable, to the condition it was in before the access and to indemnify the owner against damage to the property arising from the access (clause 19). The owner must give access in accordance with the order (clause 20).

The orders do not bind anyone who was not a party to the proceedings for the order except a successor in title to an owner bound by an order (clause 21).

Division 3—Other provisions relating to access orders

The Division provides that an access order may be varied or discharged by a Local Court (clause 22) and that an order ceases to have effect on a date specified or if earlier discharged (clause 23).

An order for compensation for loss, damage or injury arising from access may be made by the Court when an order is made or at a later time (even if the order is no longer in force) (clause 24). The costs of an application are payable at the Court's discretion (clause 25).

It will be an offence carrying a penalty of up to 5 penalty units (currently $500) to fail to comply with an access order and an additional remedy of damages will be available on failure to comply with an order (clause 26).

PART 3—TRANSFER OF PROCEEDINGS TO OTHER COURTS AND APPEALS

The Part provides for the transfer of proceedings from the Local Court to the Land and Environment Court if the amount of any compensation or damages is likely to exceed the Local Court's civil jurisdiction and for the transfer of proceedings by the Land and Environment Court (clause 27).

The Part enables a Local Court to refer a question of law arising in proceedings for an access order to the Land and Environment Court (clause 28).

The Part also provides for a right of appeal in proceedings for an access order from a Local Court to the Land and Environment Court (clause 29).

PART 4—MISCELLANEOUS PROVISIONS

The Part contains miscellaneous provisions.

Contracting out of the proposed Act is to be prohibited (clause 30).

Notices under the proposed Act are to be given personally or by post addressed to the last known place of residence or business of the person (clause 31).

Proceedings under the Act are to be dealt with summarily before a Local Court constituted by a Magistrate sitting alone (clause 32).

A power to make regulations for the purposes of the proposed Act is included (clause 33).

The Land and Environment Court Act 1979 is amended to confer jurisdiction on it in relation to transferred proceedings and appeals (clause 34 and Schedule 1).

The proposed Act is to be reviewed as soon as possible after the period of 5 years from the date of assent to the proposed Act (clause 35).

ACCESS TO NEIGHBOURING LAND BILL 1994

NEW SOUTH WALES

[STATE ARMS]

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SCHEDULE 1—AMENDMENT OF LAND AND ENVIRONMENT COURT ACT 1979

ACCESS TO NEIGHBOURING LAND BILL 1994

NEW SOUTH WALES

[STATE ARMS]

No.   , 1994

A BILL FOR

An Act to enable courts to make orders permitting access to land by persons not otherwise entitled to that access for the purpose of carrying out work on their own land or carrying out work on utility services on that land; and for other purposes.

The Legislature of New South Wales enacts:

PART 1—PRELIMINARY

Short title

1. This Act may be cited as the Access to Neighbouring Land Act 1994.

Commencement

2. This Act commences on a day or days to be appointed by proclamation.

Definitions

3. In this Act:

"access order" means a neighbouring land access order or a utility service access order;

"exercise" of a function includes the performance of a duty;

"function" includes a power, authority or duty;

"land" includes a stratum of air or a stratum of soil below the surface of the earth;

"neighbouring land access order" means an order made under this Act authorising access to adjoining or adjacent land;

"owner" includes a joint owner and an occupier;

"utility service" means a sewerage, drainage, water, gas, electricity or telephone service or other service prescribed by the regulations for the purpose of this definition;

"utility service access order" means an order made under this Act authorising access to land to carry out work on a utility service.

Act binds Crown

4. This Act binds the Crown in right of New South Wales and also, in so far as the legislative power of Parliament permits, the Crown in all its other capacities.

PART 2—ACCESS ORDERS

Division 1—Applications for access orders and making of orders

Persons who may apply for a neighbouring land access order

5. **(1)** A person who, for the purpose of carrying out work on the person's land, requires access to adjoining or adjacent land may apply to a Local Court for a neighbouring land access order.

(2) A person who is not the owner of the land on which work is to be carried out may apply for a neighbouring land access order with the consent of the person on whose behalf the work is to be carried out.

(3) The Local Court may waive the requirement for consent under subsection (2) if it thinks it appropriate to do so in the circumstances.

Persons who may apply for a utility service access order

6. (1) A person who, either solely or jointly, is entitled to the use of a utility service but who is not the owner of the whole or part of the land on which it is located and who requires access to that land for the purpose of carrying out work on the utility service may apply to a Local Court for a utility service access order.

(2) A person may apply for a utility service access order even if there is an easement or other right of access to the land concerned to carry out the work.

Person may apply for both orders

7. A person who requires access for both purposes referred to in sections 5 and 6 may apply to a Local Court for both a neighbouring land access order and a utility service access order.

Notice of application for access order to be given to owners of affected land or services

8. (1) An applicant for an access order must give at least 21 days' notice of the lodging of the application and the terms of any order sought:

(a) to the owner of the land to which access is sought under the application; and

(b) to any other person entitled to the use of any utility service on which work is proposed to be carried out; and

(c) to any other person the applicant has reason to believe will be affected by the order.

(2) The Local Court may direct that notice of an application be given to a person or that notice be given in a specified manner.

(3) The Local Court may waive or vary the period of notice under this section if it thinks it appropriate to do so in the circumstances.

Jurisdiction to make neighbouring land access orders

9. (1) A Local Court may make a neighbouring land access order if it is satisfied that, for the purpose of carrying out work on land, access to adjoining or adjacent land is required and it is satisfied that it is appropriate to do so in the circumstances of the case.

(2) The Court must not make a neighbouring land access order unless it is satisfied:

(a) that the applicant has made a reasonable effort to reach agreement with every person whose consent to access is required as to the access and carrying out of the work; and

(b) that the applicant has given notice of the application in accordance with section 8.

Types of work for which neighbouring land access orders may be made

10.(1) A neighbouring land access order may be made for one or more of the following purposes in connection with the other land:

(a) carrying out work of repair, maintenance, improvement, decoration, alteration, adjustment, renewal or demolition of buildings and other structures;

(b) inspections for the purpose of ascertaining whether any such work is required;

(c) making plans in connection with such work;

(d) ascertaining the course of drains, sewers, pipes or cables and renewing, repairing or clearing them;

(e) ascertaining whether any hedge, tree or shrub is dangerous, dead, diseased, damaged or insecurely rooted;

(f) replacing any hedge, tree or shrub;

(g) removing, felling, cutting back or treating any hedge, tree or shrub;

(h) clearing or filling in ditches;

(i) carrying out any work that is necessary for, or incidental to, anything referred to in paragraphs (a)–(h).

(2) This section does not limit the kinds of work with respect to land for which a neighbouring land access order may be made.

Jurisdiction to make utility service access orders

11.(1) A Local Court may make a utility service access order if it is satisfied that access to land is required for the purpose of carrying out work on a utility service situated on the land and it is satisfied that it is appropriate to do so in the circumstances of the case.

(2) The Court must not make a utility service access order unless it is satisfied:

(a) that the applicant has made a reasonable effort to reach agreement with every person whose consent to access is required as to the access and carrying out of the work; and

(b) that the applicant has given notice of the application in accordance with section 8.

Types of work for which utility service access orders may be made

12.(1) A utility service access order may be made for one or more of the following purposes:

(a) carrying out work of repair, maintenance, improvement, adjustment or renewal of the utility service;

(b) connecting or disconnecting the service;

(c) inspections for the purpose of ascertaining whether any such work is required;

(d) making plans in connection with any such work;

(e) carrying out any work that is necessary for, or incidental to, anything referred to in paragraphs (a)–(d).

(2) This section does not limit the kinds of work with respect to a utility service for which a utility service access order may be made.

Matters to be considered by Court

13. Before determining an application for an access order the Local Court is to consider the following matters:

(a) whether the work cannot be carried out or would be substantially more difficult or expensive to carry out without access to the land the subject of the application;

(b) whether the access would cause unreasonable hardship to a person affected by the order.

Conditions of access orders

14.(1) The Local Court may specify such conditions in an access order as, in its opinion, are reasonably necessary in the circumstances.

(2) Without limiting subsection (1), the conditions may include the following kinds of conditions:

(a) conditions imposed for the purpose of avoiding or minimising loss, damage or injury to the owner of the land to which access is granted or to any other person or to any other land or other property;

(b) conditions imposed for the purpose of avoiding or minimising inconvenience or loss of privacy caused to the owner of the land to which access is granted or to any other person;

(c) specified precautions and safeguards;

(d) the taking out of insurance cover by the applicant against such risks, if any, as may be specified;

(e) a condition varying or dispensing with any or all of the provisions of Division 2.

(3) The Court may impose a condition providing for the reimbursement by the applicant of any expenses reasonably incurred by the owner of the land to which access is granted that are not recoverable as costs under section 25.

Form of access orders

15. An access order is to specify:

(a) the land to which it permits access; and

(b) the work which may be carried out; and

(c) the date on or from which access is permitted and the date when access ceases to be permitted and, if appropriate, the times during which access is permitted; and

(d) any conditions specified by the Local Court; and

(e) the provisions of Division 2, as applying to the order.

Division 2—Effect of access orders

General effect of neighbouring land access order

16.(1) A neighbouring land access order authorises, for the purpose of carrying out work on land, a person to have access to adjoining or adjacent land in accordance with the order.

(2) Unless the Local Court varies or dispenses with any or all of the authorities and obligations set out in sections 18–21, a neighbouring land access order also authorises the actions, and imposes the obligations, set out in those provisions.

General effect of utility service access order

17.(1) A utility service access order authorises a person to have access to land to carry out work on a utility service on the land concerned in accordance with the order.

(2) Unless the Local Court varies or dispenses with any or all of the authorities and obligations set out in sections 18–21, a utility service access order also authorises the actions, and imposes the obligations, set out in those provisions.

Authority to carry out ancillary activities

18. An access order authorises:

(a) the access to and the remaining on the land concerned of such persons authorised by the applicant as are reasonably necessary to carry out the work; and

(b) the applicant to bring on, leave on and remove from the land such materials, plant and equipment as are reasonably necessary for carrying out the work; and

(c) the applicant to remove from the land any waste that may arise from carrying out the work.

Restoration of land and indemnity for damage

19. The applicant must:

(a) restore the land concerned to the same condition it was in before the access, so far as is reasonably practicable, before the date specified in the order for that purpose; and

(b) indemnify the owner of the land to which access is granted against damage to the land or personal property arising from the access.

Owner's obligations

20. The owner of the land to which access is granted must permit access to the land in accordance with the order and this Act.

Persons bound by access order

21.(1) A person who is not a party to the proceedings for an access order, or expressly bound by the order, is not bound by the access order.

(2) However, a successor in title to an owner of land to which access is granted is bound by that order in the same way as that owner.

Division 3—Other provisions relating to access orders

Variation and revocation of access orders

22. A Local Court may vary or revoke an access order on application by the applicant for the order or by any other person affected by the order.

When access orders cease to be in force

23.(1) An access order ceases to have effect on the date specified in the order or on revocation under section 22.

(2) The cessation or revocation of an order does not affect the previous operation of the order.

(3) The cessation or revocation of an order does not prevent the enforcement by the owner of the land to which access is granted of any conditions of the order or obligations of the applicant imposed by this Act.

Compensation

24.(1) A Local Court may order that a person to whom an access order is granted pay compensation to the owner of the land to which access is granted for loss, damage or injury, including damage to personal property, financial loss and personal injury arising from the access.

(2) Compensation is not payable under this section for loss of privacy or inconvenience suffered by the owner solely as a result of access authorised by the access order or solely because of the making of the order.

(3) An order for compensation may be made at any time and may be made whether or not the order is in force.

(4) An action for an order for compensation may not be brought 3 years or more after the last date on which access occurred under the order.

(5) Any such order is enforceable as if it were a judgment for that amount by a Local Court exercising jurisdiction under the Local Courts (Civil Claims) Act 1970.

Costs

25.(1) The costs of an application for an access order are payable at the Local Court's discretion.

(2) In determining whether the whole or part of the costs of an application for an access order are payable by a party, the Court may consider the following matters:

(a) any attempts by the parties to reach agreement before the proceedings;

(b) whether the refusal to consent to access was unreasonable in the circumstances;

(c) any other matter it thinks fit.

Failure to comply with access order

26.(1) A person must not fail to comply with a requirement of an access order that is applicable to the person.

Maximum penalty: 5 penalty units.

(2) It is a defence to an offence under this section if the other party to the order affected by the breach consented to the breach of the order.

(3) In addition to any other remedy, a Local Court may make an order for payment of damages by a party to the proceedings who fails to comply with a requirement of an access order or of Division 2 as applied to that order.

(4) Any such order is enforceable as if it were a judgment for that amount by a Local Court exercising jurisdiction under the Local Courts (Civil Claims) Act 1970.

PART 3—TRANSFER OF PROCEEDINGS TO OTHER COURTS AND APPEALS

Transfer of matters to other courts

27.(1) A Local Court must order the transfer of the whole or any part of the proceedings to the Land and Environment Court, if the amount of any compensation or damages involved is likely to exceed the amount of the Local Court's jurisdiction in an action for the recovery of a debt under the Local Courts (Civil Claims) Act 1970.

(2) The Land and Environment Court may at any stage of proceedings transferred under subsection (1) order the transfer of the whole or any part of the proceedings back to the Local Court.

(3) A transfer of proceedings under this section may be made on the Court's own motion or on the application of a party to the proceedings.

(4) The Land and Environment Court has, in respect of proceedings transferred under this section and in addition to any other jurisdiction and functions it has, the same jurisdiction and functions as are conferred on a Local Court by or under this Act (other than section 28 and 29).

Referral of questions of law by Local Courts

28.(1) If, in proceedings before it under this Act, a question of law arises, a Local Court may decide the question or refer it to the Land and Environment Court for decision.

(2) If a question of law is referred to the Land and Environment Court by a Local Court, the Local Court must not make an order or a decision to which the question is relevant until the Land and Environment Court has decided the question.

(3) On deciding the question, the Land and Environment Court must remit its decision to the Local Court and that Court must not proceed in a manner, or make an order or a decision, that is inconsistent with the decision of the Land and Environment Court.

(4) A reference under this section is to be made in accordance with rules of the Land and Environment Court.

Appeals from decisions of Local Courts

29.(1) A party to proceedings before a Local Court for an access order may appeal to the Land and Environment Court, on a question of law, against a decision to grant or not to grant an access order.

(2) The appeal must be made within 30 days after the decision to grant or not to grant an access order is made.

(3) If a party to proceedings before a Local Court appeals to the Land and Environment Court under this section, either the Local Court or the Land and Environment Court, may suspend, until the appeal is determined, the operation of any order or decision made in the proceedings.

(4) The Local Court may terminate a suspension of the operation of an order or a decision suspended by it. The Land and Environment Court may terminate a suspension of the operation of an order or a decision suspended by it or by a Local Court.

PART 4—MISCELLANEOUS PROVISIONS

Contracting out of Act prohibited

30. Any agreement, whether made before or after the commencement of this section, which would have the effect of preventing or restricting a person from applying for an access order is void to the extent that it would have that effect.

How notices may be served

31.A notice under this Act may be given to a person personally or by post addressed to the last known place of residence or business of the person to whom the notice is addressed.

Proceedings for applications or offences

32. Proceedings for applications or an offence against this Act are to be dealt with summarily before a Local Court constituted by a Magistrate sitting alone.

Regulations

33.(1) The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

(2) In particular, the regulations may make provision for or with respect to service of notices or orders where the owner of land or any other person cannot be found.

(3) The Governor may make rules for or with respect to regulating the practice and procedures of Local Courts in proceedings under this Act.

Amendment of Land and Environment Court Act 1979

34. The Land and Environment Court Act 1979 is amended as set out in Schedule 1.

Review of Act

35.(1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.

(2) The review is to be undertaken as soon as possible after the period of 5 years from the date of assent to this Act.

(3) A report of the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.

SCHEDULE 1—AMENDMENT OF LAND AND ENVIRONMENT COURT ACT 1979

(Sec. 34)

(1) Section 19 (**Class 3—land tenure, valuation, rating and compensation matters**):

After section 19 (e), insert:

(e1) proceedings under sections 27, 28 and 29 of the Access to Neighbouring Land Act 1994;

(2) Section 36 (**Delegation to assessors**):

(a) In section 36 (1) (a), after “paragraph (b)”, insert “or subsection (1B)”.

(b) After section 36 (1A), insert:

(1B) The Chief Judge may not direct under this section that proceedings under section 27, 28 or 29 of the Access to Neighbouring Land Act 1994 are to be heard and disposed of by one or more assessors.

(3) Section 39 **(Powers of court on appeals)**:

After section 39 (7), insert:

(8) This section does not apply to proceedings under section 28 or 29 of the Access to Neighbouring Land Act 1994.

Appendix B: Submissions

Australian Dispute Resolution Association, Inc, 28 November 1991.
Ayres D & T, 21 October 1991.

Board of Surveyors of New South Wales, 5 September 1991.

Buttfield A H, 31 October 1991.

Byrnes Mr & Mrs A J, 20 October 1991.

Community Justice Centres, 9 July 1991.

Dunlop Robert A, 20 October 1991.

Home Unit Owners Association of New South Wales, 30 August 1991.

Land and Environment Court of New South Wales, 26 September 1991.

Land Titles Office, NSW, 19 June 1991.

Law Society of New South Wales, November 1991.

Reid Y, 22 October 1991.