

Easement

Step 1: Is there an easement?

1. State - **Substance v Criteria – 4 Elements/Characteristics** must be present for a valid easement to exist; without any one these, it remains an 'easement in gross' or a mere license:

Re Ellenborough Park [1956] Ch 131 at 159-64 (Evershed MR)

Owner of park granted full enjoyment to tenants on sale – application on for recognition as an easement – easement recognised.

(1) Use of the park is a benefit: *jus spandi* (a 'privilege of wandering at will overall and every part of another's field or park').

affirmed in **Riley v Penla [1974] VR 457 at 557 (Gillard J)**

Plan of subdivision – allotments surrounding a common area – enjoyment of the garden or park expressly granted – defendants purchased the common area – claimants entitled to declaratory relief – *jus spandi*.

1. There must be a Dominant and Servient Tenement
 - a. There must be a parcel of land burdened by it (the 'servient tenement') and
 - b. A parcel of land, in the vicinity of or annexed to the burdened land which is benefited by it (the dominant tenement)

Commissioner for Main Roads v North Shore Gas Co Ltd (1967) 120 CLR 118 at 113-4

(1) The right or interest conferred must attach to the dominant tenement (land); otherwise, the right granted will be a mere personal or contractual right and not proprietary.

Exception: Easements 'in gross' – Law of Property Act 1936 (SA) s 41A

2. The Dominant and Servient Tenements are Different People

Real Property Act 1886 (SA) s 90C—Easement and servient land may be vested in same person

- (1) Subject to this section, a person may be the proprietor of an easement and the servient land that is subject to the easement and accordingly a person may grant an easement to himself or herself.
- (2) Subject to this section, if an easement and the servient land are vested in the same person by transfer or conveyance the easement will not merge with the servient land unless the transfer or conveyance expresses the intention that it should do so.