Guide to removal of easements for non-use or abandonment under the *Transfer of Land Act 1958*





Contents

[1. Removal of easements in the Register of land (Register) 2](#_Toc143266668)

[2. Abandonment or extinguishment of easements under sections 73 or 73A of the TLA 2](#_Toc143266669)

[2.1 Abandonment 2](#_Toc143266670)

[2.2 Extinguishment (applies to sections 15, 60 and 73 of the TLA) 3](#_Toc143266671)

[2.3 Common issues 3](#_Toc143266672)

[3. Removal of easements in an adverse possession application under section 60 of the TLA 3](#_Toc143266673)

[3.1 Documents required to lodge an application under section 60 of the TLA 4](#_Toc143266674)

[3.2 Common issues 4](#_Toc143266675)

[4. Specific easement types 4](#_Toc143266676)

[4.1 Drainage easements 4](#_Toc143266677)

[4.2 Easements of right of way and carriageway 4](#_Toc143266678)

[5. Section 12(2) of the Subdivision Act 1988 – implied easements and rights 5](#_Toc143266679)

This guide sets out the requirements to remove easements in an application under section 73 or section 60 of the *Transfer Land Act 1958* (TLA)

1. Removal of easements in the Register of land (Register)

An easement that is registered or recorded in the Register may be removed by a number of different applications under the TLA. An easement may also be removed under the *Subdivision Act 1988*. The appropriate application to be lodged will depend on the circumstances under which the easement was created and the circumstances under which it ceases to have effect.

This guide provides information about the removal of easements that have been abandoned or extinguished under the TLA and sets out the lodging requirements for the administrative removal of such easements from the Register.

This guide does not cover the surrender of an easement under section 45 of the TLA.

1. Abandonment or extinguishment of easements under sections 73 or 73A of the TLA

For both sections 73 and 73A of the TLA, an application under section 73 of the TLA must be lodged electronically. See the [Guide to residual documents](https://www.land.vic.gov.au/__data/assets/word_doc/0022/505435/220505-Guide-to-Residual-Documents-part-land-final.docx) for further information about electronic lodgment.

### 2.1 Abandonment

1. Deed of abandonment (only applies to section 73 of the TLA)

Deeds of abandonment are the preferred form of evidence for an application claiming abandonment. A deed is a written document which usually refers to itself as a deed, setting out what is agreed to with the execution clause usually referring to it as having been signed sealed and delivered.

Applications to remove an easement created by a plan of subdivision that has been certified by the council must be supported by the written consent of council.

**Standard easement**

A deed of abandonment must:

1. clearly state that any and all rights, title or interest in the easement are abandoned;
2. have all the current registered proprietor(s) of the servient land and all the current registered proprietor(s) of the dominant land and any mortgagee(s), chargee(s) or lessee(s) of the dominant land as parties to the deed; and
3. if signed on behalf of registered proprietor(s), set out the capacity of the signer (for example, if signed by an attorney, the execution must state this and the power of attorney must be provided or if executed on behalf of an authority/council, the authorisation of the person signing).

**Easement in gross**

A deed of abandonment must:

1. clearly state that any and all rights, title or interest in the easement are abandoned;
2. be signed by all the current registered proprietor(s) of the servient land and the current authority/council entitled to the benefit of the easement;
3. if signed on behalf of registered proprietor(s), set out the capacity of the signer (for example, if signed by an attorney, the power of attorney must be provided or if executed on behalf of an authority/council, the authorisation of the person signing); and
4. if the benefit is held by an authority/council that was not the original grantee of the easement, set out the basis on which the right, title or interest in the easement has vested in the authority/council.

For easements created in a plan of subdivision certified by the council, the application must be supported by the written consent of council.

1. Evidence of non-use (applies to sections 15, 60, 73 and 73A of the TLA)

If a deed of abandonment cannot be obtained or is not applicable, unequivocal evidence of non-use for a continuous period of 30 years is required. Generally, evidence must be in the form of statutory declarations by:

1. the applicant(s) being the registered proprietor(s) of the servient land or a mortgagee in possession of the servient land;
2. if the applicant(s) has not been in possession for 30 years, any prior possessor(s); and
3. if the land has been subject to a tenancy, statutory declarations from the tenant(s)
4. in limited circumstances, evidence in the form of statutory declaration(s) from disinterested witness(es) may be required. Disinterested witness(es) must have sufficient knowledge.

For easements created in a plan of subdivision certified by the council, the application must be supported by the written consent of council.

The nature of the evidence will depend on the nature of the easement. For specific evidence required for different easement types see [Specific easement types](#_Specific_easement_types).

### 2.2 Extinguishment (applies to sections 15, 60 and 73 of the TLA)

1. Extinguishment by merger

When the registered proprietor(s) of the dominant land is the same legal person/entity as the registered proprietor(s) of the servient land, any easement(s) over the servient land may be extinguished. An application made on this basis must be supported by a statutory declaration by the applicant(s) being the registered proprietor(s) of the servient land or a mortgagee in possession of the servient land stating that the same legal person/entity is the registered proprietor(s) of the servient land and the dominant land and the easement has been extinguished.

1. Extinguishment by operation of law

Reference to specific legislation or case law must be set out in the application. The application must also be supported by a statutory declaration by the applicant(s) being the registered proprietor(s) of the servient land or a mortgagee in possession of the servient land detailing how the legislation or case law applies.

### 2.3 Common issues

1. Non-use - insufficient evidence in the form of a statutory declaration by the applicant(s), any prior possessor(s) and disinterested witnesses (if required) that the land subject to the easement has not been used as an easement for at least 30 continuous years.
2. Evidence is not provided in the form of a statutory declaration that complies with the *Oaths and Affirmations Act 2018*.
3. Lodgment of an application under section 73 of the TLA when a planning permit has been issued by council for the removal of the easement(s). In this case, an application must be made under section 23 of the *Subdivision Act 1988* or other appropriate section of that Act.
4. Removal of easements in an adverse possession application under section 60 of the TLA

The removal of easements in an adverse possession application relies on the standard of proof for non-use required by section 73 or section 73A of the TLA respectively.

Removal of easements relating to general law land may also be applied for in an application under section 15 of the TLA. If you have a query about such a removal, please seek advice from a property law expert before lodging.

### 3.1 Documents required to lodge an application under section 60 of the TLA

Refer to the [Guide to Adverse Possession](https://www.land.vic.gov.au/__data/assets/word_doc/0029/469451/Guide-to-adverse-possession.docx) for general lodging requirements. See [Abandonment or extinguishment of easements under sections 73 or 73A of the TLA](#_Abandonment_or_extinguishment) for specific requirements.

### 3.2 Common issues

1. Insufficient evidence in the form of a statutory declaration by the applicant(s), any prior possessor(s) and disinterested witness(es) that the land subject to the easement has not been used as an easement for at least 30 years.
2. Removing reserve/road status without addressing underlying implied easements under section 98 of the TLA.
3. The application does not clearly outline whether the claimed land is to be vested subject to or free of each easement encumbering the claimed land.
4. Specific easement types

In addition to the evidence required above, further evidence is required for particular easement types as follows:

### 4.1 Drainage easements

1. Deed of abandonment

Applications to remove drainage easements created by a plan of subdivision that has been certified by the council must be supported by the written consent of council.

1. Evidence of non-use
2. The consent of the relevant drainage authority/council to remove the drainage easement must be obtained and supplied.
3. If the drainage easement is being removed due to non-use, the evidence must show that:

* the land subject to the easement (including underground) has not been used as a drainage easement for at least 30 years;
* the use of the land subject to the easement is inconsistent with a drainage easement; and
* if it relates to a surface drain from the appearance of the ground or surface it would not be known that the land subject to the easement is or has been used as a drainage easement for at least 30 years.

### 4.2 Easements of right of way and carriageway

1. Deed of abandonment
2. Written confirmation from the relevant council that the easement is not a road within the meaning of the *Road Management Act 2004*.
3. Written consent of council to the surrender of the right of way or carriageway.
4. A statutory declaration stating that no rights of the public exist in relation to the subject land.

If such confirmation and statutory declaration is provided, any road status will be removed on registration of the application.

(b) Evidence of non-use

1. Written confirmation from the relevant council that the easement is not a road within the meaning of the *Road Management Act 2004*.
2. Written consent of council to the surrender of the right of way or carriageway.
3. A statutory declaration(s) stating that:

* the land subject to the easement has not been used as a road or right of way by foot or vehicular traffic for at least 30 years;
* the use of the land subject to the easement is inconsistent with an easement of right of way; and
* from the appearance of the ground or surface it would not be known that the land subject to the easement is or has been used as a road or right of way for at least 30 years.

If such confirmation is provided, any road status will be removed on registration of the application.

1. Section 12(2) of the Subdivision Act 1988 – implied easements and rights

Removal of section 12(2) easements is complex and difficult to prove. If you have a query about such a removal, please seek advice from a property law expert before lodging.