

Our Ref: JM:20190493

10 September 2019

Mr W Weisse
183 Coopers Lane West
MAIN ARM NSW 2482

Dear Wayne

Right of Carriageway – Lot 3 DP 558858

1. Thank you for your instructions in this matter.
2. You and a substantial number of other property owners/occupiers use a formed driveway access from Coopers West Lane across Lot 3 DP 558858 (**Access**), being the property owned by a multiple occupancy community, Karu Kali Pty Ltd (**Burdened Land**).
3. Your land and other properties to the north and south of your land is benefitted by a right of carriageway (**ROC**) over the Burdened Land.
4. The terms of the ROC are not specified in the relevant dealings and accordingly, the standard wording of the *Conveyancing Act* 1919 (**Act**).
5. As is common in rural land, the Access has not been constructed in the same alignment as the ROC shown on the relevant plan/s.

Options for the ROC

6. There are a number of options for rectifying the misalignment of the ROC:
 - a. **Forming the Access in line with the ROC**
 - i. Without limitation, the terms of the ROC provide all ancillary rights necessary to use the ROC. Accordingly, you and any other benefited party are entitled to use machinery to form a new access within the ROC alignment. The permission of Karu Kali is not required prior to carrying out this work.

b. Creation of new easement by consent

- i. Obtaining the consent of Karu Kali to the creation of a new easement (easement over track in use) will be the simplest and quickest option. This will involve a plan of easement and easement terms being prepared, signing by all parties and lodgement of the plan with NSW Land and Registry Services.

c. Court ordered easement

- i. Section 88K of the *Conveyancing Act* 1919 allows the Court to create an easement by order without the consent of the servient tenement (the party with the burden of the easement). Whilst I would need to consider the issue in more depth, my preliminary view is that there are good prospects of you obtaining an easement under section 88K, having regard to the current use of the Access, history and properties reliant on the access.

d. Prescriptive Easement

- i. Subject to detailed investigation, it may be that there is evidence of use and an arrangement granted before the land became Torrens title. If this was proven, then the easement would be recognised and registered on title.

e. Equitable Easement

- i. The law recognises an "equitable easement" created by acquiescence or estoppel. That is, in circumstances where a party has intentionally granted an easement or induced another party to think that an easement had been granted and then relied to its detriment on that easement, then the Court may enforce (in equity) that easement.

7. As you can see from the above, there are number of options open to you and the other owners to rectify the alignment of the Access.

I am happy to discuss this advice with you, once you have had an opportunity to review and process it.

Yours faithfully



Jonathan Marquet
Solicitor/Director
Direct Line: 6683 5592
jonathan@my-lawyers.com.au