

A PROBLEM WITH AN OLD RIGHT OF WAY: A CASE STUDY FROM THE VICTORIAN SURVEYORS' CONFERENCE, APRIL 2011.

The Place: This is the title to a very old department store in Benalla, the brick building of which fills the entire parcel. There is a narrow lane at the rear and, although this is not shown on the title, it is mentioned in a transfer document of the same land, dated May, 1902. Despite the lane being only 3.05m wide, there are three downpipes at the rear of the building, overhanging eaves and doorways from adjoining buildings. The storm water downpipes consist of one which is recessed into the wall, one covered in a solid steel sleeve, and a third that is plastic – next to the steel sleeve but otherwise not protected. (See figure 1)

The Problem: The pavement of the lane is extremely rough, with uneven, broken concrete at its entrance. Large vans deliver goods once or twice a week to the shop next door to the department store. As the vans back into the narrow lane, they hit the rough concrete and tip so far that they hit either the wall or the storm water downpipes. The plastic downpipe has been broken, thus causing expense, inconvenience and distress to the owner of the store.

The Question: The store owner wants the laneway fixed up. Who owns and should therefore maintain it? The other shopkeepers along the lane claim that they do not own it but have rights of way over it. None want to maintain it. Where does the store owner go for redress?

The first action: The owner comes to her local surveyor in the first instance. He says he could obtain title searches (at a cost) and possibly find an owner. [Shock, horror! We do not want to pay for advice.] Not wanting to incur expenses, the owner then goes to the City council. They say that they have no record of council ownership - and she should go and see the local surveyor!

The second action: The surveyor then goes and discusses the matter with officers of the council engineering department and also the rates officer. The rates man is able to produce titles to several of the adjoining properties and it is easy to see that they all have right of way over the offending lane. One title includes a substantial length of the lane, but not the end where the problem is occurring. All adjoining titles show "Road" on the right of way.

The third action: It occurs to the surveyor that he has seen something similar before. Some very old subdivisions elsewhere in Benalla had made provision for the "night cart" by the creation of laneways at the rear of the properties. In those days, any roads on subdivisions were left as residual land on the original title, rather than being vested in the local government authority as happens today. Perhaps this could be a similar situation. Indeed, a final title search produces such a result. There is a title to the first 20.12m of the offending lane – in the name of one Michael Giblin, together with a right of carriageway over a further 3.05m (only). The most recent transaction with the title was February, 1879. What is more, there is an undischarged mortgage to the Land Credit bank of Australasia Ltd. (see figure 2)

Back to the problem: Who is going to fix up the lane entrance so that vehicles do not keep wrecking the downpipe? Obviously it is no good the store owner trying to get the owner to fix up the lane entrance. The other users of the lane are probably not going to cooperate.

Solution? Well, at this stage, there is no solution. It would probably be best for the city council to take over ownership and maintenance of the lane. However, like so many local government bodies there is no spare money and the council is extremely reluctant to take on

anything that is going to use up precious funds. The local surveyor is as interested as anybody to find out the final outcome for this little dilemma.

Alan Monger

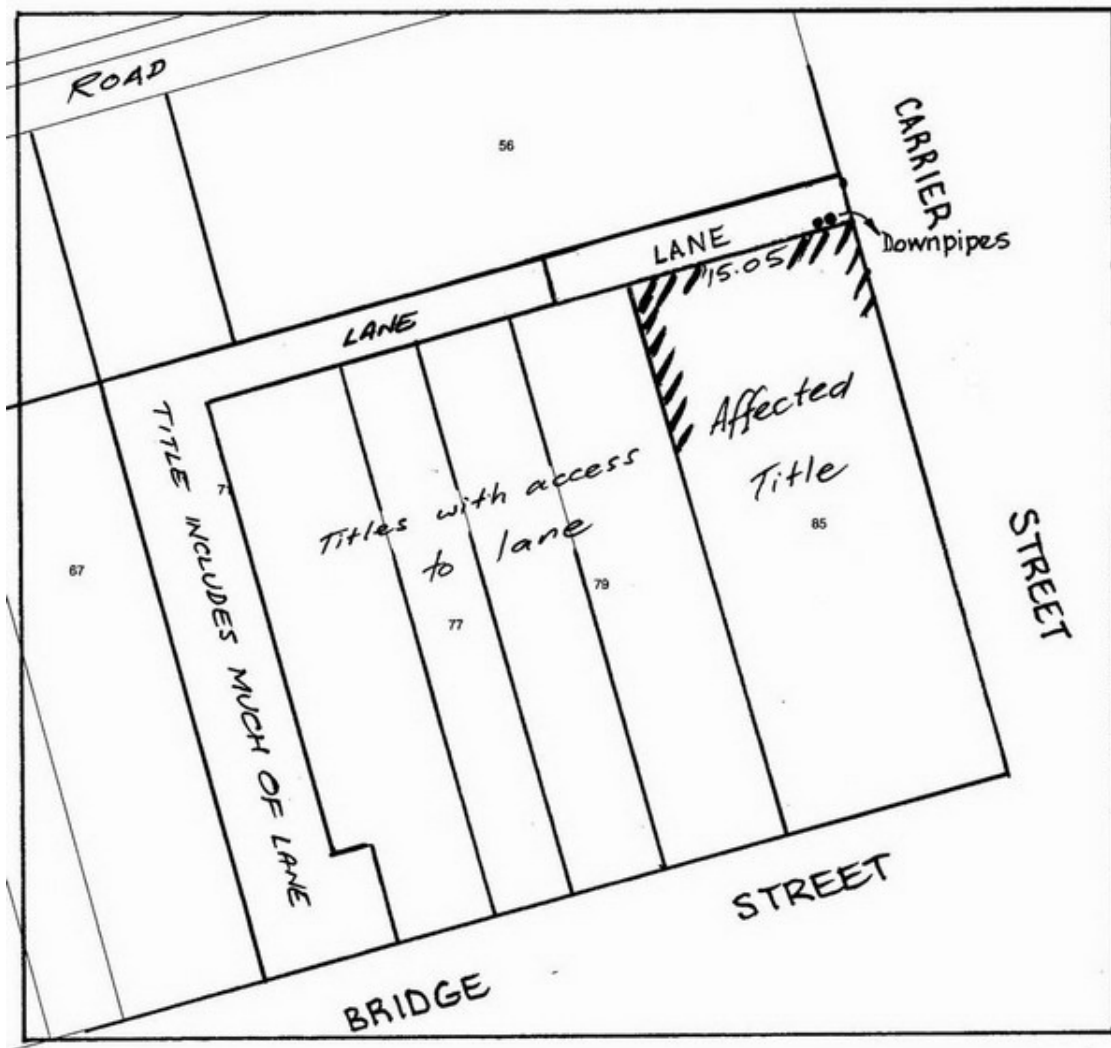


Figure 1: Overall site plan

REGISTER SEARCH STATEMENT (Title Search) Transfer of Land Act 1958

VOLUME 01090 FOLIO 878

Security no : 124037235105N
Produced 28/03/2011 09:41 am

LAND DESCRIPTION

Lot 1 on Title Plan 939128Y (formerly known as part of Crown Allotment 9
Section D Township of Benalla Parish of Benalla).

PARENT TITLES :

Volume 00951 Folio 141 Volume 01032 Folio 359
Created by instrument 0076551 15/02/1879

REGISTERED PROPRIETOR

Estate Fee Simple

Sole Proprietor

MICHAEL GIBLIN of BENALLA
0076551 15/02/1879

ENCUMBRANCES, CAVEATS AND NOTICES

MORTGAGE 0029193 15/02/1879

THE LAND CREDIT BANK OF AUSTRALASIA LTD

Any encumbrances created by Section 98 Transfer of Land Act 1958 or Section
24 Subdivision Act 1988 and any other encumbrances shown or entered on the
plan set out under DIAGRAM LOCATION below.

DIAGRAM LOCATION

SEE TP939128Y FOR FURTHER DETAILS AND BOUNDARIES

ACTIVITY IN THE LAST 125 DAYS

NIL

DOCUMENT END

Figure 2: face sheet – title to the east end of the Lane

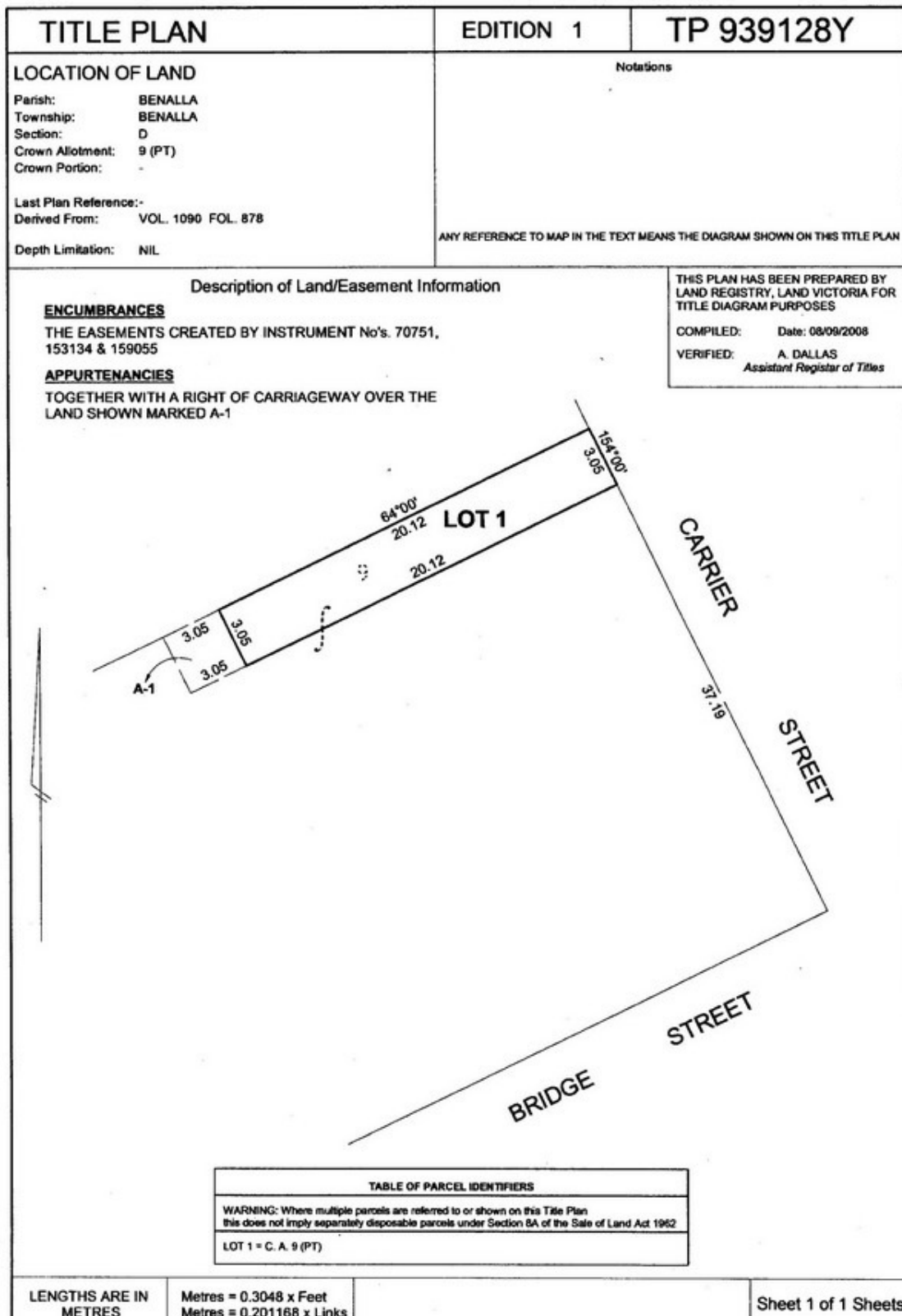


Figure 3: TP for the title to east end of the lane