

# How to help your clients navigate a private road dispute in NSW

Resources for community lawyers on the disaster frontline

Oct 2023



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**SECTION 1:**  
**What is this resource?**

# 1. What is this resource?

This resource is for legal workers supporting people dealing with a private roads dispute in disaster affected areas in New South Wales (NSW). This information is relevant for people who:

- ▶ own land which has a private road passing through it used by other people to access their own properties (**acting for the landowner**);
- ▶ use a private road owned by someone else to access their own properties (**acting for a road user**); or
- ▶ have a legal agreement (registered easement) that grants them the right to use a private road owned by someone else (**acting for a road user**).

This resource will assist in identifying whether a client or someone else you are helping is dealing with a legal problem relating to private access roads and if so, what their options are.

Disputes often arise in relation to roads on private properties in rural areas as access to properties can be poor and the repair of a damaged road can be very labour intensive and expensive.



Disasters can exacerbate existing issues with private access roads and create new damage.

Private roads often have several parties with competing registered interests, making the determination of responsibility difficult.

## 1.1. Purpose of this document

Justice Connect is coordinating the delivery of pro bono legal help to disaster-affected communities across Australia. We're working closely with other organisations like legal aid commissions, community legal centres and law societies to ensure that people can access legal help as quickly and seamlessly as possible.

We've seen first-hand how legal need shifts during disasters and crises. In the wake of disasters and extreme weather events, people, small business owners, and not-for-profit organisations can face unexpected legal problems. If left unresolved these legal problems



can have serious consequences for people's financial stability, relationships, health, and wellbeing. In these times of crises, people need ready access to legal support.

That's why we're creating resources to support community legal workers deliver place-based services to disaster affected communities. Through our Disaster Legal Support Resource Hub community lawyers can find high-quality legal information quickly, take steps to resolve their client's legal problems, and refer their clients for pro bono legal support before their problems escalate.

If you have a client that you'd like to refer for pro bono legal support, visit our website.



### Refer someone to Justice Connect

If you're a professional working with communities affected by disasters, and you'd like to connect your client with pro bono legal help or seek assistance for your own organisation, please make a referral to Justice Connect.

[Make a referral to Justice Connect](#)

## 1.2. Disclaimers and scope of this document

This resource was last updated on 31 October 2023. This resource is designed and intended to provide general information only and does not constitute legal advice.

This resource is intended for use by legal professionals.

Please view our full disclaimer for more information.

## 1.3. How to navigate a private road dispute

- 
1. Establish the category of road (private, public or Crown)
  2. Establish ownership and responsibility of the road
  3. Consider options for neighbours and private road users
  4. Determine whether there is a registered easement
  5. Resolve the matter through Alternative Dispute Resolution
  6. Commence a claim in the relevant court
-



## 1.4. Executive summary

This resource will step you through each stage of managing a private roads dispute for your client or someone you are helping. You can navigate through the resource as appropriate for your client's circumstances.

### Section 2

In section 2 we provide guidance on how to establish the category of road, road boundaries and road ownership, including how to find and use online search and mapping tools.

### Section 3

In section 3 we provide guidance on how to advise and act for your client if they are the landowner of a damaged private road. This section includes a landowner's duty of care to invitees and trespassers on a damaged road, whether they should repair the damaged road, costs disputes with interested parties to the damaged road, and the risk of exposure to civil litigation. It also contains downloadable template letters to assist you help your client.

### Section 4

In section 4 we provide guidance on how to advise and act for your client if they are a user of someone else's private road. This section includes a landowner's duty of care to invitees and trespassers on a damaged road, whether a road user can compel a road owner to repair a damaged road, a road user's rights to access private roads and personal injury claims. It also contains downloadable template letters to assist you help your

### Section 5

In section 5 we provide guidance on methods of alternative dispute resolution that could be available to your client to resolve their dispute. This section will explain the merits of different types of alternative dispute resolution and your role as a legal representative.

### Section 6

In section 6 we provide guidance on the relevant jurisdictions and types of claims available to your client dealing with a private roads dispute.

### Section 7

In section 7 we annex template letters that you can complete to assist your client in managing a private roads dispute.



## 2. Private road dispute background

### 2.1. Legislative background

Roads in NSW are predominately governed by the *Roads Act 1993* (NSW)<sup>1</sup> (the Roads Act). Under the Roads Act, roads are broadly defined as public or private.

A **public road** is defined under the Roads Act as:

*'(a) any road that is opened or dedicated as a public road, whether under this or any other Act or law, and*

*(b) any road that is declared to be a public road for the purposes of this Act'*

A **private road** is defined under the Roads Act as 'any road that is not a public road'. Most commonly, a private road is a road that passes through or over a person's land.

In addition to the Roads Act, a private road is defined as:

- A road on or over land owned by a person other than the Crown or a local authority. Usually, the land is owned by the owner of the land which is serviced by the road.
- A road restricted to use by a limited class of person (i.e., not all members of the public) or to a limited period of time.\*

It is important to establish that the road in question is a private road before investigating the liabilities and requirements of a landowner.

There are several categories of public road defined under the Roads Act, including but not limited to:

- ▶ A **Crown road** - a *'public road declared to be a crown road.'* These roads are often called 'paper roads' and are land corridors set aside for access<sup>2</sup>; and
- ▶ A **classified road**- for example, a main road; highway or tourist road.

### 2.2. Right to access

At section 5(1) of the Roads Act, it is established that members of the public have the right to *'pass along a public road (whether on foot, in vehicle or otherwise) and to drive stock or other animals along the public road.'*

\* Encyclopaedic Australian Legal Dictionary.

<sup>1</sup> <https://legislation.nsw.gov.au/view/html/inforce/current/act-1993-03>

<sup>2</sup> <https://www.crownland.nsw.gov.au/sites/default/files/2023-04/Crown-roads-what-you-need-to-know.pdf>





This same right is **not** awarded in respect of private roads. Access to private roads is restricted. Members of the public **do not** have the right to access a private road without an appropriate easement or agreement.

To establish a right to access and/or use a private road an easement **must** be established.

## 2.3. Disputes arising

Disaster events in NSW have caused extensive damage to roads used by people to access their property or maintain their business. People often require access to private roads to access their own property, for stock movement and for safe evacuation. After a road has been damaged by a disaster road users can find themselves in disputes as to whose responsibility it is to bear the cost and labour of repairing the private roads, and whether or not a road user has a continued right to use a damaged private road.

A landowner has a duty of care to repair a private road where it has been damaged by a disaster where it is reasonably foreseeable for harm to occur to an invitee or trespasser. This precedent is set out in the *Civil Liability Act 2002* (NSW) and case law.

If there is a registered easement to access the private road by neighbours, the landowner's liability is not diminished. The costs of maintenance and repair in respect of an easement that gives a right of vehicular access or personal access are to be borne by the persons concerned in the proportions specified in the easement or in equal proportions if unspecified.<sup>3</sup>

### 2.3.1. Taking action

- ▶ For disputes as to determining private road liability, claims may be brought in the Supreme Court of NSW.
- ▶ For disputes regarding a breach of liability resulting in personal injury, claims may be brought in the competent jurisdiction dependent on the monetary amount claimed. A claim for any breach of liability resulting in personal injury is to be brought within 3 years from the date the negligence occurred as required by the *Limitation Act 1969* (NSW).



## 3. Establishing the category of road

**The first step in a potential private road matter is confirming that the category of road is a private road. By confirming that the category of road is a private road, you will also confirm and/or identify the relevant parties to the dispute. This resource assists legal workers in determining whether the road in dispute is a private road.**

If a road that is used to access property or is situated on private property is damaged following a disaster, you must first establish the category of road. This distinction is important as the responsibility for repairing the road is dependent on the classification and the owner. The ownership of the private road must also be determined.

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This section details the steps involved in establishing the category of road, which are as follows:

1. Establishing the road boundaries and ownership
2. Ruling out public roads and Crown roads

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### 3.1. Establish the road boundaries and ownership

Identifying the relevant parties to a potential private road dispute is crucial. You can find this information on the Certificate of Title and deposited plan relevant to the property over which the road passes.

The Certificate of Title and deposited plan will also help you determine whether the damage to the private road is within the applicable lot boundaries.

#### 3.1.1. Title search

A title search is a current copy of the Certificate of Title which will show the current owner(s) of a property, the land description and any registered interests or dealings associated with the property that owners need to be aware of.

The title search will be useful to determine ownership of a road, if it is private, and whether any relevant easements are registered.

#### 3.1.2. Deposited plan

The deposited plan will define the legal boundaries of the relevant land and its legal identity. These plans often show road corridors within or adjacent to the property and may show if a road passing through the relevant land is *not* a private road.

Reviewing the deposited plan is important to confirm ownership and location of the private road.



**Copies of the relevant Certificate of Title and deposited plan may be requested from the client (if acting for the landowner) or through an Information Broker.**

For more information on Brokers in NSW see:

[https://www.nswlrs.com.au/Titles-Dealings/Title-Information-\(1\)/Information-Brokers](https://www.nswlrs.com.au/Titles-Dealings/Title-Information-(1)/Information-Brokers)

## 3.2. Rule out public roads and Crown roads

As private roads are defined under the Roads Act as ‘any road that is not a public road’, the first step you should take is to confirm the road is not a public or Crown road.

### 3.2.1. Contact the relevant council authority

An enquiry to the local council authority requesting confirmation of the classification of the road may be the simplest route to determining the road status as public, Crown or private. An enquiry may be sent to the contact email address for the relevant council, found on the council’s website.

If the council is unable to determine the category of road or does not respond promptly/within a reasonable time, you can complete a Transport for NSW – NSW Road Network Classification and Spatial Viewer online search. If these are indeterminate you can purchase a road status search from the relevant public authority. We explain how to do this below.

### 3.2.2. Public Roads: Transport for NSW – NSW Road Network Classification

First, review the Transport for NSW online NSW Road Network Classification Map available at the following link:



<https://roads-waterways.transport.nsw.gov.au/classification/map/>

This tool assists in determining whether a Road is a:

1. State Road;
2. Regional Road; or
3. Local Road.

The classification map can be used to demonstrate that the relevant road is not a public road. If the road **is** listed as either a State Road, Regional Road, or Local Road then it **is a public road** and it is not the landowner’s responsibility to repair or maintain damage incurred. The damage should instead be referred to the relevant council or road authority.

If the road is **not** listed as either a State Road, Regional Road, or Local Road, then you should confirm that the road is not a Crown road as outlined in the next section).

If it is unclear from the classification map whether the road is public or private, then enquiries regarding the classification of individual roads can be directed to the relevant Transport for NSW Regional Office.

### 3.2.3. NSW Planning Portal Spatial Planner

Second, review the NSW Planning Portal Spatial Viewer available to access at the following link:

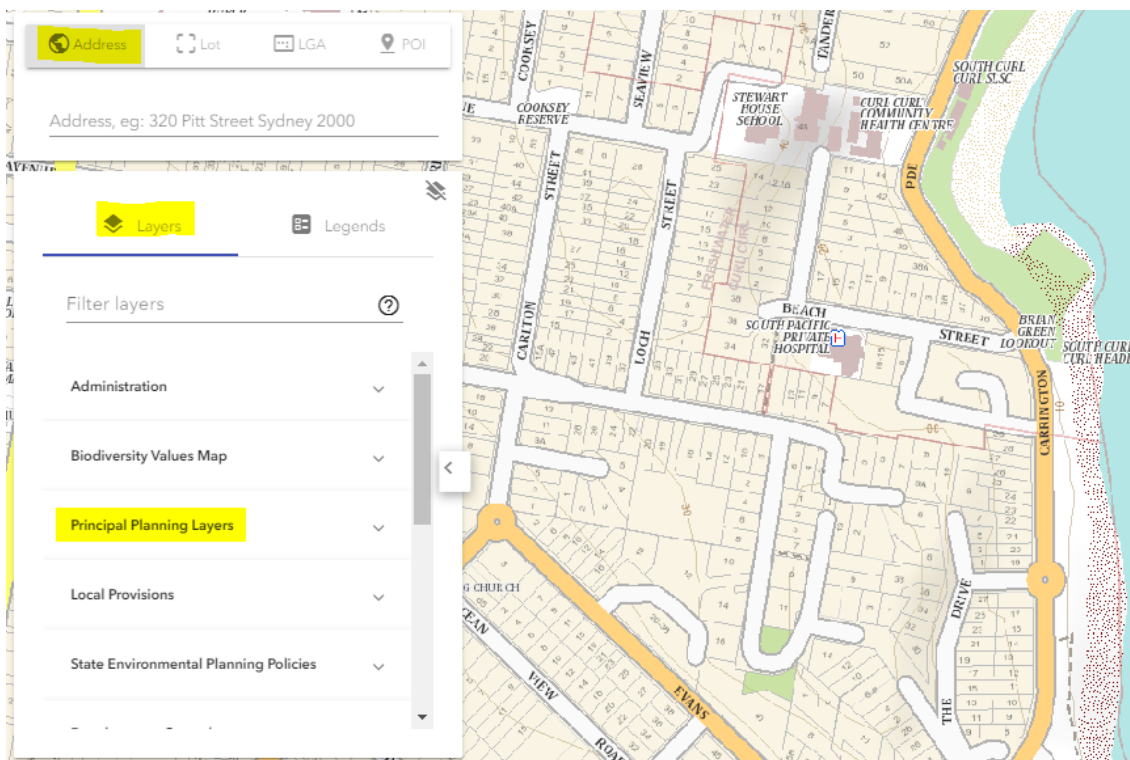


<https://www.planningportal.nsw.gov.au/spatialviewer/#/find-a-property/address>

This tool assists in determining whether a Road is a:

#### 1. Crown Road.

Once you have entered the Planning Portal, enter/search for the address of the property. Then on the left a 'Layers' list should be on screen. Under subheading 'Principal Planning Layers' then subheading 'Land Zoning Map' turn the option 'Land Zoning Map' on. Under subheading 'Crown Land' turn option 'Crown Land' on. The diagram below shows where you can enter and select the relevant conditions:

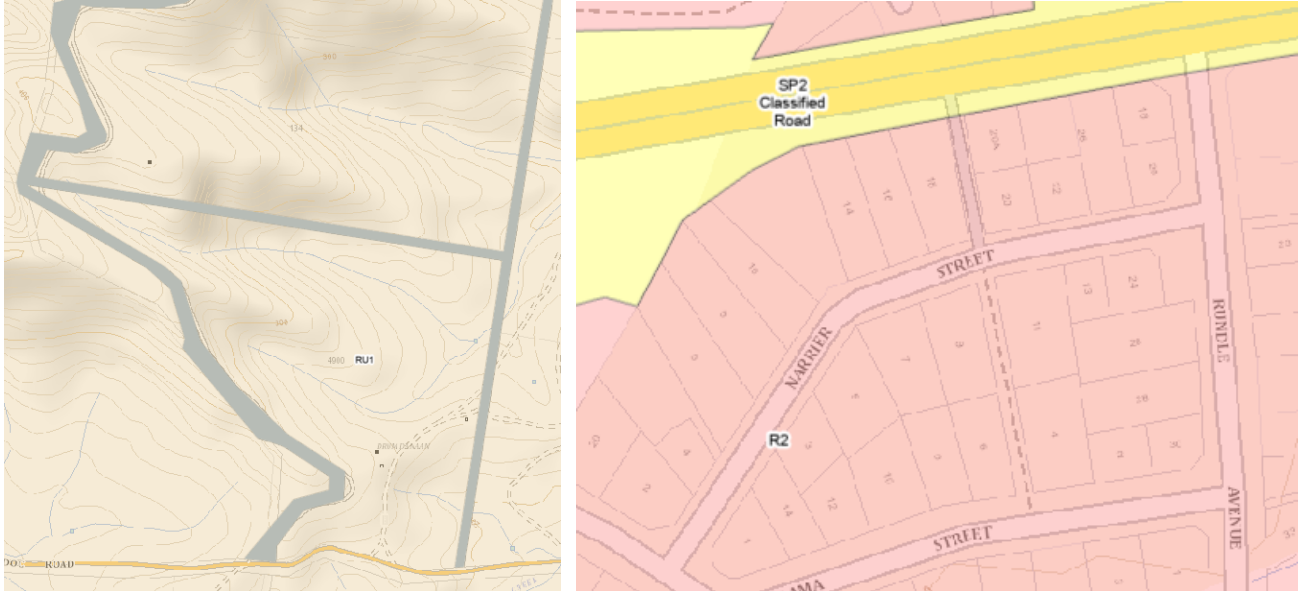


Once these options are selected, the map should show if the road is a classified road or whether the road is on Crown land.

Sometimes, the spatial viewer does not distinguish Crown roads from Crown land; both are shown in grey. However, in this instance, Crown roads can often be distinguished due

to their long thin shape and the grey colour of the road (this matches the colour shown in the Legend tab for Crown Land).<sup>4</sup>

The images show examples of Crown roads as represented on the spatial viewer:



### 3.2.4. Crown road status searches

If you are unable to determine if the road is a Crown road using the spatial viewer, an application for a Crown land status search may be conducted to confirm whether the road is a Crown road, **for a fee**.

Before you apply for a search on the status of Crown Land, you should use the free ePlanning Spatial Viewer.

There are two types of searches available:

**1. Current road status - \$127.00 per road.**<sup>5</sup>

This search is limited to defining the authority responsible for the road.

**2. Historical road status - \$464.00 for up to 5 hours of search time (+\$86 per hour of additional search time).**<sup>6</sup>



**Searches may be conducted online at:**

<https://www.crownland.nsw.gov.au/resources/order-search-status-crown-land/order-search-status-crown-land-online>

<sup>4</sup> <https://www.crownland.nsw.gov.au/sites/default/files/2023-04/Crown-roads-what-you-need-to-know.pdf>

<sup>5</sup> Fees accurate as of September 2023.

<sup>6</sup> Fees accurate as of September 2023.



**SECTION 4:**  
**Are you acting for the landowner  
or the private road user?**

## 4. Are you acting for the landowner or private road user?

### Private road disputes are complex.

Once you have established the category and ownership of the road, determine whether you are acting for the landowner or the private road user.

The required steps to manage a private roads dispute referred to in Section 1 for landowners and private road users are set out respectively at:

- **Acting for the landowner** – Section 3
- **Acting for a road user** – Section 4

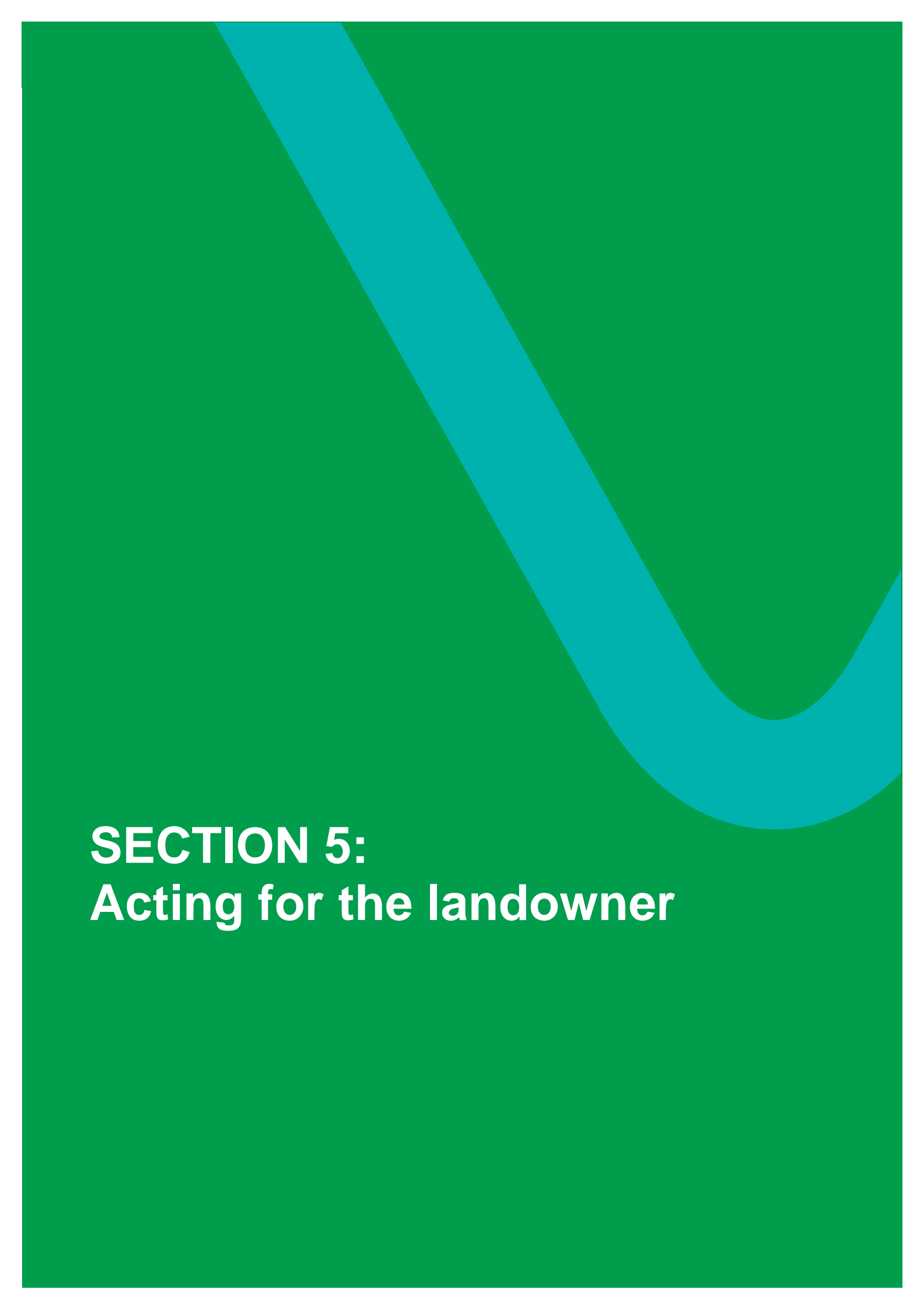
Flowcharts are included in both sections to assist in providing advice for private road disputes regarding damage sustained following a disaster and are relevant only to the party to the dispute that you are acting for.



**This resource provides legal information for private road disputes only.**

If you have determined that the road is a public or Crown road, then this resource will no longer be able to assist.

Your client may be eligible for pro bono legal support from Justice Connect. To refer your client, visit our website: [I need to refer someone – Refer to Justice Connect](#).



**SECTION 5:**  
**Acting for the landowner**





## 5. Acting for the landowner

**This section will assist in identifying whether your client is dealing with a legal problem in relation to their ownership of a private road that has sustained damage following a disaster and which is used by other people.**

**It will also explain what their rights and obligations are when dealing with it.**

A landowner has a duty of care to repair a private road where it has been damaged by a disaster where it is reasonably foreseeable for harm to occur to an invitee or trespasser.

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This resource includes:

- ▶ A flowchart
  - ▶ Determining whether there is an easement and reviewing easement terms
  - ▶ Advising your client on duty of care owed by landowner to invitees or trespassers
  - ▶ Costs disputes
  - ▶ Explanations of when to use template letters (which are annexed in Section 9)
-



## Is there an easement?

**An easement is an arrangement that gives someone the right to access and use land for a specific purpose, while the legal title or ownership of the land remains with the owner.**

You will need to determine whether there is a registered easement relating to the road.

To do this, review the title search you obtained when establishing road ownership. In addition to current owner(s) of the property and the land description, it will show any registered interests, including easements, relating to the land and their terms.

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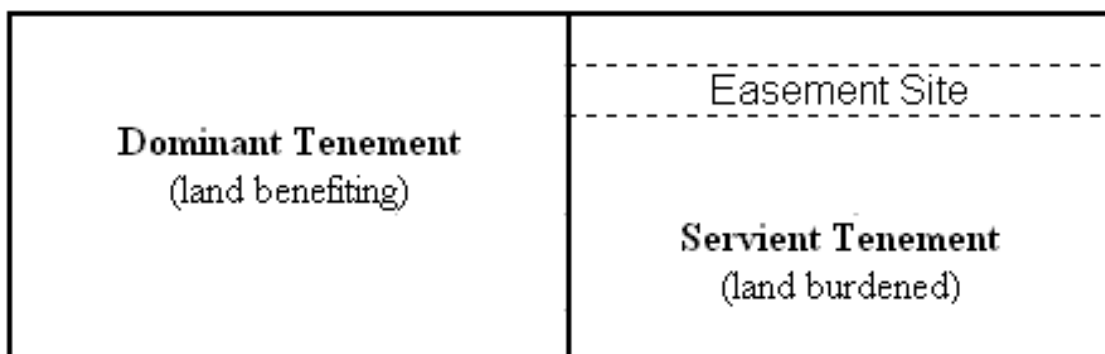
This section includes:

- ▶ Common types of easements relevant to private road disputes
- ▶ Reviewing easement terms
- ▶ Notifying interested easement parties
- ▶ What if there is no easement?

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### 5.1. Common easements

To have a valid easement there must be a benefited parcel and a burdened parcel of land, referred to as the dominant and servient tenements respectively. This is shown in the diagram below:



There are various types of easements that may be relevant to private roads. The most common, and discussed for the purposes of this resource, is an easement for the right of carriageway and an easement of necessity.



### 5.1.1. Right of carriageway

A right of carriageway is also known as a right of way. A right of carriageway is a particular type of easement which provides one party the right to travel over the land of another.

Schedule 8, Part 1 of the *Conveyancing Act 1919* (NSW) provides for the standard construction of expression for a right of carriageway:

*“Full and free right for every person who is at any time entitled to an estate or interest in possession in the land herein indicated as the dominant tenement or any part thereof with which the right shall be capable of enjoyment, and every person authorised by that person, to go, pass and repass at all times and for all purposes with or without animals or vehicles or both to and from the said dominant tenement or any part thereof”*

### 5.1.2. Easement of necessity

An easement of necessity arises when land is ‘landlocked’, meaning to access the land you must travel over someone else’s land. An easement of necessity does not arise when there are other options to access the site.

An easement of necessity is an easement created by implied grant or reservation and without which the dominant tenement could not be used. No easement of necessity is implied where alternative rights exist, for example, if an alternative access exists, even though that access may be indirect or inconvenient. An easement of necessity ceases if the necessity ceases. An easement of necessity may only be used for purposes appropriate to the use of the land at the time the easement arose.

There are strict prerequisites for an easement of necessity, and they are only available in circumstances where absolutely required.

## 5.2. Reviewing easement terms

If there is an easement, it is crucial to review the relevant easement terms to confirm the repair and maintenance requirements and who is responsible as well as the proportion the costs are to be shared.

If there is a registered easement to access the private road by neighbours, as per Schedule 8B(7) of the *Conveyancing Act 1919* (NSW), the costs of maintenance and repair in respect of an easement that gives a right of vehicular access or personal access are to be borne by the persons concerned in the proportions specified in the easement or in equal proportions if unspecified.

It is important to review the terms of the registered easement **prior** to requesting an interested easement party contributes to the costs of repairing the road. It is also important to advise the landowner that they keep all receipts or invoices in relation to the maintenance or repair of the road.

If there is no reference to cost proportions in the easement, costs are to be paid in accordance with Schedule 8B, section 7 of the *Conveyancing Act 1919* (NSW), it is to be in equal proportions.



### 5.3. Notifying interested easement parties

Following damage to a private road where an easement is registered on title, it is recommended that the landowner provide a written notice of the damage and proposed costs to be shared to repair the damage to the easement holder(s).

A draft letter is provided in Appendix 1 to be completed with the relevant details.

Following the provision of the above letter, the subsequent courses of action are:

#### 1. Costs agreed

If the costs are agreed, the landowner may undertake the required repairs for the road in accordance with any easement terms and provide an invoice to the other easement holder(s) to make the payment.

#### 2. Costs not agreed

If the relevant easement parties do not contribute to the costs of repair, the landowner may demand payment of the amount they owe in writing. A template Letter of Demand can be found at Appendix 2 to be completed with the relevant details.

Discussion/negotiations may commence between relevant parties regarding the liability for the costs of maintenance and repair of the roads and who is responsible for completing the repairs. It is highly recommended and preferred the parties engage in alternative dispute resolution methods prior to commencing a court claim.

Alternative dispute resolution (**ADR**) options are set out in Section 5.

If alternative dispute resolution is unsuccessful in resolving the costs dispute, the landowner may bring a court claim in the relevant jurisdiction to recover costs owed. More information regarding court claims is provided in Section 6.

### 5.4. What if there is no easement?

Section 5(1) of the *Roads Act 1992* (NSW) establishes that members of the public have the right to '*pass along a public road (whether on foot, in a vehicle or otherwise) and to drive stock or other animals along the public road*'.

The same right is **not** awarded in respect to private roads. As such, a neighbour of someone with a private road cannot use that private road without an appropriate easement or agreement. To establish a right to access and/or use a private road, an easement must be established.

If there is no other way to access their land other than the damaged road, an easement of necessity may apply. However, if there is another way to access the property the neighbouring landowner (your client) is not required to agree to establishing an easement.

Where there is no easement applicable to the private road dispute, the landowner of the private road may **prohibit access to and use of the private road by means such as erecting gates or locking existing gates**.

If the road is damaged due to a disaster, even without an easement, the landowner still owes a duty of care to invitees and trespassers that may use the road, if it is reasonably foreseeable for harm to occur to them. In the section below, we provide guidance on advising the landowner on their duty of care and how to mitigate risk of liability for a breach of their duty of care.



# Landowner duty of care

**Landowner duty of care extends to usage of private roads. A landowner owes a duty of care to invitees and trespassers to avoid/reduce reasonable harm. Therefore, a landowner of a private road will owe a duty of care requiring repair of a road which has sustained damage following a disaster if it is reasonably foreseeable to the landowner that harm may occur to an invitee or trespasser if they use a damaged private road.**

**It is unlikely that damage occurring from a disaster mitigates the landowner's liability and responsibility.**

Landowners should be advised as to their duty of care, the law's application to their specific circumstances, and what consequences they may face if they are found to be in breach.

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This section includes:

- ▶ Personal injury claims
- ▶ Relevant law and regulation, including:
  - a) *Civil Liability Act 2002* (NSW)
  - b) Duty of care owed to invitees and trespassers
  - c) Duty of care owed to neighbours
  - d) Delegation of duty of care
- ▶ Facing litigation and how to make a referral for pro bono legal assistance

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## 5.5. Personal Injury claim

A private road owner may be required to pay damages to a harmed person where the owner is determined to be responsible for the respective harm resulting from use of the road.

If a private road owner is determined to be responsible for harm by a court as a result of not taking action to repair the private road following a disaster, when the owner knew or should have known it was damaged, the owner may be required to pay compensation, known as damages, to the harmed person. Not knowing that the road is damaged may not be enough to escape responsibility.

This is established in the *Civil Liability Act 2002* (NSW) and case law.

If there is an easement over the private road, **the owner (not the holder of the registered easement) is still responsible for any harm caused to someone using the road if it is damaged following a disaster and is still responsible for repairing the road.**



## 5.6. Relevant law and regulation

### 5.6.1. Civil Liability Act 2002 (NSW)

According to the *Civil Liability Act 2002* (NSW), which establishes a landowner's duty of care:

#### *Section 5B*

*(1) A person is not negligent in failing to take precautions against a risk of harm unless –*

- a. The risk was foreseeable (that is, it is a risk of which the person knew or ought to have known), and*
- b. The risk was not insignificant, and*
- c. In the circumstances, a reasonable person in the person's position would have taken those precautions.*

*(2) In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things) –*

- a. The probability that the harm would occur if care were not taken,*
- b. The likely seriousness of the harm,*
- c. The burden of taking precautions to avoid the risk of harm,*
- d. The social utilities of the activity that creates the risk of harm.*



### 5.6.2. Duty of care owed to invitees and trespassers

One of the leading statements on the extent of the duty of care owed by a landowner was made by Justice Deane in the High Court in *Hacksaw v Shaw* (1984) 155 CLR. In this case, Justice Deane stated:

*“Where the visitor is **lawfully upon the land**, the mere relationship between the occupier on the one hand and the invitee or licensee on the other will of itself suffice to give rise to a duty on the part of the occupier to take reasonable care to avoid a foreseeable risk of injury to her or him.*

*When the visitor **is on the land as a trespasser**, the mere relationship of the occupier and the trespasser in which the trespasser has imposed upon the occupier will not satisfy the requirement of proximity. Something more will be required. The additional factor or combination of factors which may ... supply the (required) degree of proximity or give rise to a reasonably foreseeable risk of relevant injury are incapable of being exhaustively defined or identified. **At the least they will include either knowledge of the actual or likely presence of a trespasser or reasonable foreseeability of a real risk of such presence**”*

A private road landowner will be liable for harm or damage caused to a trespasser or invitee if there is a reasonably foreseeable risk of harm or damage occurring (*Hacksaw v Shaw*).

### 5.6.3. Duty of care owed to neighbours

In *Burnie Port Authority v General Jones Pty Ltd* (1994) (High Court) the appellant was found liable for damages caused by the negligence of its independent contractor. The contractor was carrying out unguarded welding operations which resulted in a fire spreading to adjoining cold rooms occupied by the respondent and ruining the respondent's frozen vegetables.

In *Weber v Greater Hume Shire Council* (2019) (NSWCA), Greater Hume Shire Council operated a waste disposal site. A fire ignited in the tip and quickly spread, reaching Gegorery where it destroyed homes and personal possessions of several residents including the appellant. It was held:

1. The most likely cause of the fire was spontaneous combustion, however it was not necessary for the Court of Appeal to be satisfied on the balance of probabilities that spontaneous combustion was the cause. The only other likely causes were the lensing effect of glass and arcing of a vehicle battery. As such, the Court of Appeal considered it was more probably than not that one of these was the cause of the fire.





2. The Council failed to take a number of precautions to avoid the risk of fire igniting and spreading from the tip. Within the tip, these precautions included reducing dried vegetation in the tip and slashing the grass between the piles of waste and between the waste and boundary fence. Other precautions which the Court of Appeal accepted should have been taken by the Council included compacting and covering the waste and maintaining a fire break around the tip.

3. It was still necessary to consider whether the limited resources available to Council meant that those precautions were beyond those which should have been reasonably undertaken. For that purpose, this required considering the burden of adopting those precautions only at waste disposal facilities operated by the Council, and not on other land owned or occupied by the Council. In this respect, while the evidence showed that the tip operated at a loss (as expected), there was evidence that the Council received unallocated grants and maintained a waste management fund, for which the actual expenditure prior to the fire was less than the budgeted expenditure.

This indicated that there had been 'ample funds' available to the Council to take all the identified precautions. Consequently, the Court of Appeal concluded there was no evidence that the Council was reasonably precluded from taking those precautions.

In *McInnes v Wardle* (1931) (High Court) a contractor was engaged by the defendant to fumigate rabbits. The normal practice was to clear the bracken fern by burning. The contractor lit a fire which escaped to the plaintiff's neighbouring property and caused damage. Judgement was awarded to the plaintiff and it was determined the landowner was negligent. The court pointed out that:

1. Grass and scrub are usually very dry during the Australian summer and that fires spread with great rapidity. It was observed that the statutory prohibitions against lighting fires during summer months demonstrated that the defendant should have foreseen and guarded against the danger of burning ferns and undergrowth as a means of controlling rabbits.

#### 5.6.4. Delegation of duty of care

In *Yeung v Santosa Realty* (2020) (Victorian Supreme Court) it was held the duty to inspect, detect and report on obvious hazards had been delegated by the owner to the real estate agent. This decision confirms the legal proposition that the duty of a landlord to take reasonable precautions (by routine inspection of rental premises) to avoid foreseeable risk of injury can be delegated by engaging a competent contractor (managing real estate agent).

### 5.7. Facing litigation

A private road owner may be required to pay damages to a harmed person where the owner is determined to be responsible for the respective harm resulting from the use of the road.

If they sustained harm as a result of using the landowner's damaged private road, a road user may initiate Alternative Dispute Resolution or make a claim in court.

Any disputes in regard to private road liability may be brought in the Supreme Court of NSW and any claims made for a breach of liability may be brought by application in the competent jurisdiction dependent on the monetary amount claimed.

A claim for any breach resulting in personal injury is to be brought within 3 years from the date the negligence occurred as required by the *Limitation Act 1969* (NSW).

How to advise and act for your client if a claim is brought against them for harm or damage caused to a road user is outside the scope of this resource. See the following section on how to make a referral to Justice Connect for pro bono legal assistance.

#### 5.7.1. How to make a referral for pro bono legal assistance

Justice Connect connects eligible individuals, small business owners and primary producers and community organisations affected by disasters like floods, bushfires, cyclones, and other extreme weather events, with free legal help.

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**SECTION 6:**  
**Acting for a road user**



## 6. Acting for a road user

**This section will assist in identifying whether your client is dealing with a legal problem in relation to their use of a private road that has sustained damage following a disaster which is owned by someone else.**

**It will also explain what their options are for dealing with it.**

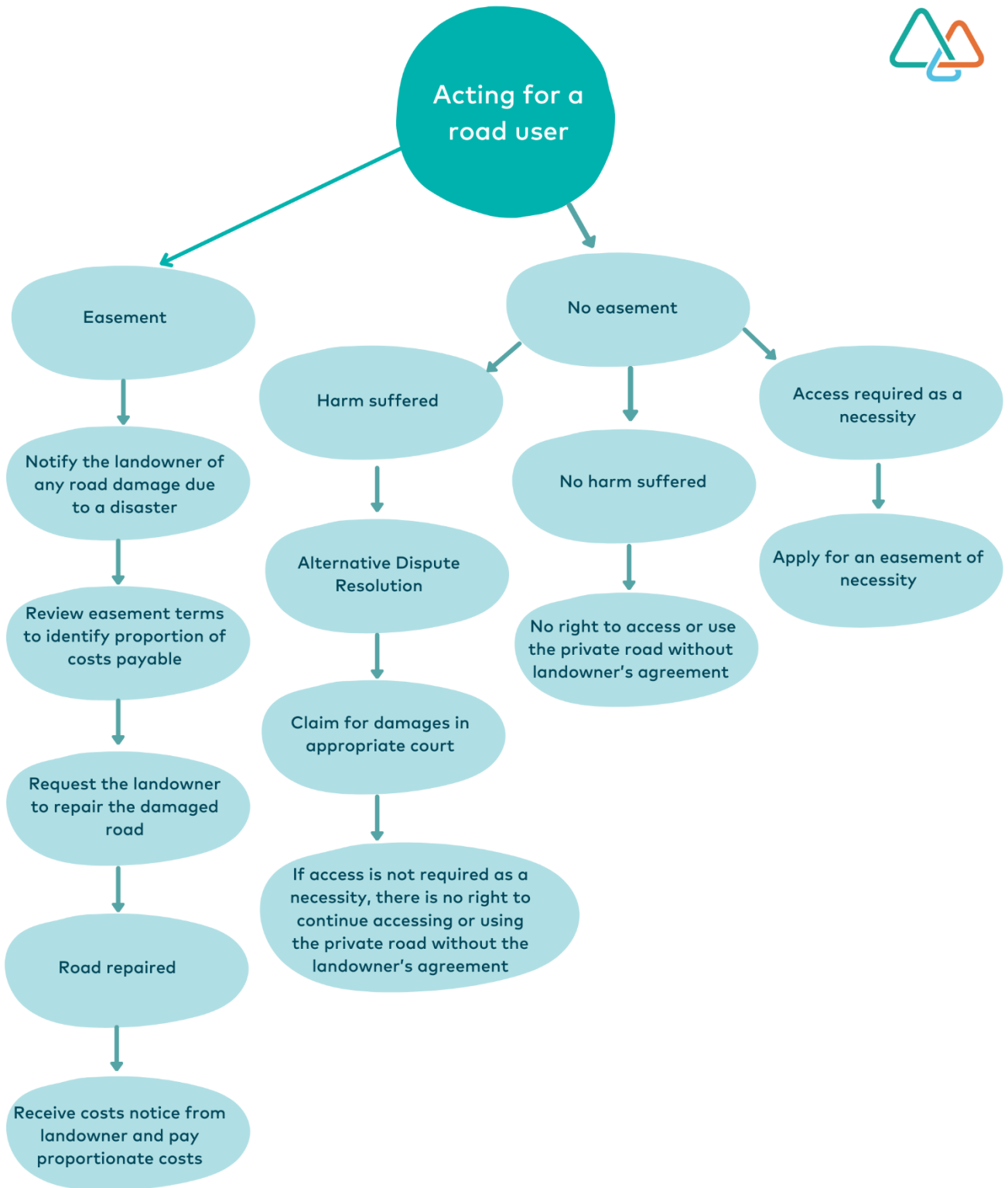
A road user does not have the right to access their neighbour's private roads without an appropriate easement or agreement. To establish a right of access and/or use of a private road, an easement must be established.

A road user is owed a duty of care by the landowner, even if they are not a registered easement holder. The road user may consider alternatives to going to court in order to recover damages due to personal injury incurred by a landowner's breach of their duty of care to repair the damaged private road.

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This resource includes:

- ▶ A flowchart
  - ▶ Determining whether there is an easement and reviewing easement terms
  - ▶ Landowner's duty of care and personal injury claims
  - ▶ Explanations of when to use template letters (which are annexed in Section 9)
-



# Is there an easement?

**An easement is an arrangement that gives someone the right to access and use land for a specific purpose, while the legal title or ownership of the land remains with the owner.**

You will need to determine whether the road user holds a registered easement relating to the road.

To do this, review the title search you obtained when establishing road ownership. In addition to current owner(s) of the property and the land description, it will show any registered interests, including easements, relating to the land and their terms.

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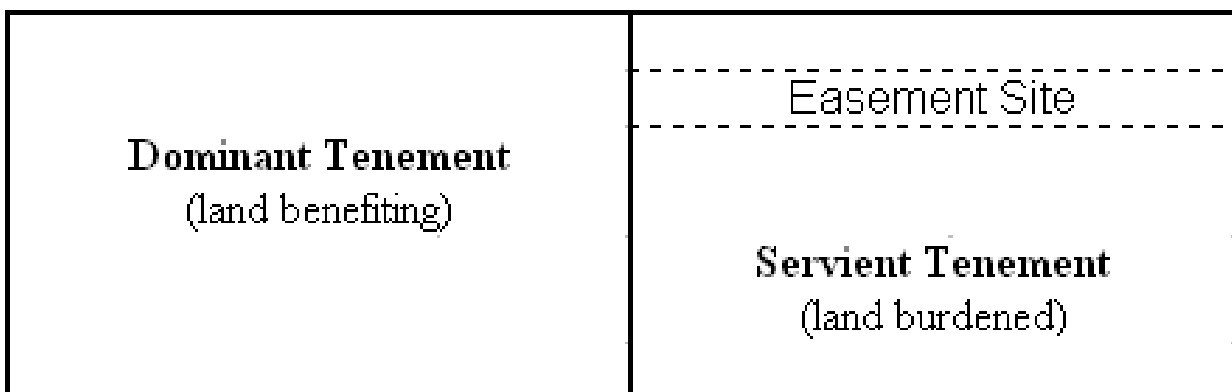
This section includes:

- ▶ Common types of easements relevant to private road disputes
- ▶ Reviewing easement terms
- ▶ Notifying interested easement parties
- ▶ What if there is no easement?

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## 6.1. Common easements

To have a valid easement there must be a benefited parcel and a burdened parcel of land, referred to as the dominant and servient tenements respectively. This is shown in the diagram below:



There are various types of easements that may be relevant to private roads. The most common, and discussed for the purposes of this resource, is an easement for the right of carriageway and an easement of necessity.



### 6.1.1. Right of carriageway

A right of carriageway is also known as a right of way. A right of carriageway is a particular type of easement which provides one party the right to travel over the land of another.

Schedule 8, Part 1 of the *Conveyancing Act 1919* (NSW) provides this standard construction of expression for a right of carriageway:

*“Full and free right for every person who is at any time entitled to an estate or interest in possession in the land herein indicated as the dominant tenement or any part thereof with which the right shall be capable of enjoyment, and every person authorised by that person, to go, pass and repass at all times and for all purposes with or without animals or vehicles or both to and from the said dominant tenement or any part thereof”*

### 6.1.2. Easement of necessity

An easement of necessity arises when land is ‘landlocked’, meaning to access the land you must travel over someone else’s land. An easement of necessity does not arise when there are other options to access the site.

An easement of necessity is an easement created by implied grant or reservation and without which the dominant tenement could not be used. No easement of necessity is implied where alternative rights exist, for example, if an alternative access exists, even though that access may be indirect or inconvenient. An easement of necessity ceases if the necessity ceases. An easement of necessity may only be used for purposes appropriate to the use of the land at the time the easement arose.

There are strict prerequisites for an easement of necessity, and they are only available in circumstances where absolutely required.

## 6.2. Reviewing easement terms

If there is an easement, it is crucial to review the relevant easement terms to confirm the repair and maintenance requirements and who is responsible, as well as the proportion the costs are to be shared.

If there is a registered easement to access the private road by neighbours, as per Schedule 8B(7) of the *Conveyancing Act 1919* (NSW), the costs of maintenance and repair in respect of an easement that gives a right of vehicular access or personal access are to be borne by the persons concerned in the proportions specified in the easement or in equal proportions if unspecified.

It is important to review the terms of the registered easement **prior** to requesting the landowner repairs the road and determining the proportional costs to be paid by the road user who is also a registered easement holder.

If there is no reference to cost proportions, in accordance with Schedule 8B, section 7 of the *Conveyancing Act 1919* (NSW), it is to be in equal proportions.



### 6.3. Notifying interested easement parties

Following damage to a private road where an easement is registered on title, a road user who is an interested easement party can:

1. Inform the owner of the private road that it has been damaged. A draft letter is provided at Appendix 3 to be completed with the relevant details.
2. If the landowner does not take action to repair the road after the road user (who is an interested easement party) has given them a reasonable opportunity to do so, the road user (who is an interested easement party) can initiate Alternative Dispute Resolution or make a claim in court.

Following the repair, the subsequent courses of action are:

#### 1. Costs agreed

If the costs are agreed, the landowner may undertake the required repairs for the road in accordance with any easement terms and provide an invoice to the other easement holder(s) to make the payment.

#### 2. Costs not agreed

If the relevant easement parties are not agreeable with costs required for repair, the landowner may serve a letter of demand on the relevant easement parties.

If the parties continue to disagree on the costs of repair and amounts payable by the easement parties, discussions/negotiations may commence between relevant parties regarding the liability for the costs of maintenance and repair of the roads and who is responsible for completing the repairs. **It is highly recommended and preferred the parties engage in Alternative Dispute Resolution methods prior to commencing a court claim.**

Alternative Dispute Resolution options are set out in Section 7.

If Alternative Dispute Resolution is unsuccessful in resolving the costs dispute, the road user and/or relevant easement parties may bring a court claim in the relevant jurisdiction to determine costs owed. More information regarding court claims is provided in Section 6.

### 6.4. What if there is no easement?

Section 5(1) of the *Roads Act 1992* (NSW) establishes that members of the public have the right to '*pass along a public road (whether on foot, in a vehicle or otherwise) and to drive stock or other animals along the public road*'.

The same right is **not** awarded in respect to private roads. As such, a neighbour of someone with a private road cannot use that private road without an appropriate easement or agreement. If the road user does not have a right to access their neighbour's private road, and they have not suffered personal injury in using the road then they do not have standing to bring a claim regarding the landowner's liability. To establish a right to access and/or use a private road, an easement must be established.

Where there is no easement applicable to the private road dispute, the road users' access may be prohibited by the landowner by means such as erecting gates or locking existing gates.





You should advise a client early in the process that they do not have the ability to commence a claim in situations where they have no legal right to access the road and do not qualify for an easement of necessity.

#### 6.4.1. Applying for an easement of necessity

If the road user must use the road to access their property as there is no alternative way to access their property, the road user should first approach the landowner and request that they grant an easement.

If the landowner is not agreeable to creating an easement, the road user may apply to the court for an easement of necessity. The process to apply for an easement of necessity is granted under section 88K of the *Conveyancing Act 1919* (NSW) which sets out the following:

*(1) The Court may make an order imposing an easement over land if the easement is reasonably necessary for the effective use or development of other land that will have the benefit of the easement.*

*(2) Such an order may be made only if the Court is satisfied that –*

- a. Use of the land having the benefit of the easement will not be inconsistent with the public interest;*
- b. The owner of the land to be burdened by the easement and each other person having an estate or interest in that land that is evidenced by an instrument registered in the General Register of Deeds or the Register kept under the Real Property Act 1900 can be adequately compensated for any loss or other disadvantage that will arise from the imposition of the easement; and*
- c. All reasonable attempts have been made by the applicant for the order to obtain the easement or an easement having the same effect but have been unsuccessful.*

*(3) The Court is to specify in the order the nature and terms of the easement and such of the particulars referred to in section 88(1)(a)-(d) as are appropriate and is to identify its site by reference to a plan that is, or is capable of being, registered or recorded under Division 3 of Part 23. The terms may limit the times at which the easement applies.*

The process for an application for an easement of necessity is outside the scope of this resource. See the following section on how to make a referral to Justice Connect for pro bono legal assistance.

#### 6.4.2. How to make a referral for pro bono legal assistance

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# Personal Injury claim

A road user is owed a duty of care by the landowner, even if they are not a registered easement holder. If the road user sustains personal injury because the landowner breached their duty of care, in failing to repair the private road when they knew or should have known that the road was damaged, the landowner may be required to pay damages to the harmed road user.

A road user may consider alternatives to going to court to recover damages.

---

This section includes:

- ▶ Personal injury claims
- ▶ Relevant law and regulation, including:
  - a) *Civil Liability Act 2002* (NSW)
  - b) Duty of care owed to invitees and trespassers
  - c) Duty of care owed to neighbours
  - d) Delegation of duty of care
- ▶ Initiating a dispute

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## 6.5. Personal Injury Claim

Landowner duty of care extends to usage of private roads.

A landowner owes a duty of care to invitees or trespassers to avoid or reduce reasonable harm. Therefore, a landowner of a private road will owe a duty of care requiring repair of a disaster damaged road if it is reasonably foreseeable to the landowner that harm may occur to an invitee or trespasser if they use a damaged private road.

It is unlikely that damage occurring from a weather event mitigates the landowner's liability and responsibility.

If a private road owner is determined to be responsible for harm by a court as a result of not taking action to repair the private road following a disaster, when the owner knew or should have known it was damaged, the owner may be required to pay damages to the harmed person.

Not knowing that the road is damaged may not be enough to escape responsibility.

This is established in the *Civil Liability Act 2002* (NSW) and case law.

If there is an easement over the private road, **the owner (not the holder of the registered easement) is still responsible for any harm caused to someone using the**



road if it is damaged following a disaster and is still responsible for repairing the road.

## 6.6. Relevant law and regulation

### 6.6.1. *Civil Liability Act 2002 (NSW)*

According to the *Civil Liability Act 2002 (NSW)*, which establishes a landowner's duty of care:

#### *Section 5B*

*(3) A person is not negligent in failing to take precautions against a risk of harm unless –*

- a. The risk was foreseeable (that is, it is a risk of which the person knew or ought to have known), and*
- b. The risk was not insignificant, and*
- c. In the circumstances, a reasonable person in the person's position would have taken those precautions.*

*(4) In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things) –*

- a. The probability that the harm would occur if care were not taken,*
- b. The likely seriousness of the harm,*
- c. The burden of taking precautions to avoid the risk of harm,*
- d. The social utilities of the activity that creates the risk of harm.*

### 6.6.2. Duty of care owed to invitees and trespassers

One of the leading statements on the extent of the duty of care owed by a landowner was made by Justice Deane in the High Court in *Hacksaw v Shaw* (1984) 155 CLR. In this case, Justice Deane stated:



*“Where the visitor is **lawfully upon the land**, the mere relationship between the occupier on the one hand and the invitee or licensee on the other will of itself suffice to give rise to a duty on the part of the occupier to take reasonable care to avoid a foreseeable risk of injury to her or him.*

*When the visitor **is on the land as a trespasser**, the mere relationship of the occupier and the trespasser in which the trespasser has imposed upon the occupier will not satisfy the requirement of proximity. Something more will be required. The additional factor or combination of factors which may ... supply the (required) degree of proximity or give rise to a reasonably foreseeable risk of relevant injury are incapable of being exhaustively defined or identified. **At the least they will include either knowledge of the actual or likely presence of a trespasser or reasonable foreseeability of a real risk of such presence**”*

A private road landowner will be liable for harm or damage caused to a trespasser or invitee if there is a reasonably foreseeable risk of harm or damage occurring (*Hacksaw v Shaw*).

### 6.6.3. Duty of care owed to neighbours

In *Burnie Port Authority v General Jones Pty Ltd* (1994) (High Court) the appellant was found liable for damages caused by the negligence of its independent contractor. The contractor was carrying out unguarded welding operations which resulted in a fire spreading to adjoining cold rooms occupied by the respondent and ruining the respondent's frozen vegetables.

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1. The most likely cause of the fire was spontaneous combustion, however it was not necessary for the Court of Appeal to be satisfied on the balance of probabilities that spontaneous combustion was the cause. The only other likely causes were the lensing effect of glass and arcing of a vehicle battery. As such, the Court of Appeal considered it was more probably than not that one of these was the cause of the fire.



2. The Council failed to take a number of precautions to avoid the risk of fire igniting and spreading from the tip. Within the tip, these precautions included reducing dried vegetation in the tip and slashing the grass between the piles of waste and between the waste and boundary fence. Other precautions which the Court of Appeal accepted should have been taken by the Council included compacting and covering the waste and maintaining a fire break around the tip.

3. It was still necessary to consider whether the limited resources available to Council meant that those precautions were beyond those which should have been reasonably undertaken. For that purpose, this required considering the burden of adopting those precautions only at waste disposal facilities operated by the Council, and not on other land owned or occupied by the Council. In this respect, while the evidence showed that the tip operated at a loss (as expected), there was evidence that the Council received unallocated grants and maintained a waste management fund, for which the actual expenditure prior to the fire was less than the budgeted expenditure.

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1. Grass and scrub are usually very dry during the Australian summer and that fires spread with great rapidity. It was observed that the statutory prohibitions against lighting fires during summer months demonstrated that the defendant should have foreseen and guarded against the danger of burning ferns and undergrowth as a means of controlling rabbits.

#### 6.6.4. Delegation of duty of care

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This decision confirms the legal proposition that the duty of a landlord to take reasonable precautions (by routine inspection of rental premises) to avoid foreseeable risk of injury can be delegated by engaging a competent contractor (managing real estate agent).

## 6.7. Initiating a dispute

A private road owner may be required to pay damages to a harmed person where the owner is determined to be responsible for the respective harm resulting from the use of the road.

The road user may consider alternatives to going to court in order to recover damages due to personal injury incurred by the landowners' breach of their duty of care to repair the private road. Alternative dispute resolution options are set out in Section 7

Where the parties are unwilling to resolve any relevant disputes through alternative dispute resolution processes, legal action through a court may be initiated.



### Limitation Date

A claim for any breach of liability resulting in personal injury is to be brought within 3 years from the date the negligence occurred, as required by the *Limitation Act 1969 (NSW)*.

Any disputes regarding private road liability may be brought in the Supreme Court of NSW and any claims made for a breach of liability may be brought by application in the competent jurisdiction dependant on the monetary amount claimed.

How to commence a court claim is set out in Section 8.

How to advise and act for your client when bringing a claim against a landowner to recover damages is outside the scope of this resource. See the following section on how to make a referral to Justice Connect for pro bono legal assistance.

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**SECTION 7:**  
**Alternative Dispute Resolution**

## 7. Alternative Dispute Resolution

**Alternative dispute resolution (ADR) describes a range of processes for resolving a matter outside of Court.**

**This resource will assist in identifying what alternative dispute resolution (ADR) processes may be appropriate for resolving a matter outside of Court and your role as a legal representative.**

It is most time and cost effective to attempt resolution via ADR before commencing proceedings. However, ADR can be used at any time during the dispute, including before you start a legal case, while a case is going on or even after a court or tribunal has made a decision.

There are different types of ADR. This resource explains the most commonly used types: negotiation, mediation, conciliation and arbitration.

---

This resource includes:

- ▶ Negotiation
- ▶ Mediation
- ▶ Conciliation
- ▶ Arbitration



### **ADR service providers**

ADR service providers can be located through the NSW Communities and Justice page at the following link: <https://courts.nsw.gov.au/alternative-dispute-resolution/alternative-dispute-resolution-service-providers.html>.



## 7.1. Negotiation

Negotiation is a process where each party sets out what they want or want to achieve and attempt to reach an agreement with the other side.

Negotiation can happen informally between parties or formally with parties' legal representatives present or between legal representatives entirely.

To prepare for negotiation we recommend a legal representative:

- ▶ Familiarises themselves with the facts, issues and interests of each party
- ▶ Speak with their client about their expectations and what they are prepared to negotiate and compromise on. Ensure that you have clear instructions on what the client is and isn't prepared to agree to.
- ▶ Questions to ask your client ahead of a formal negotiation include:
  - a) What is your most preferred outcome?
  - b) Can you compromise on that?
  - c) Can you accept something less than your most preferred outcome as a back-up?
  - d) Do you have a bottom line or less preferred outcome that you could accept?
  - e) Does it matter to you how long it takes to get to the outcome?

All discussions and offers should be made without prejudice to ensure the client is protected should the matter go to Court at a later date.

It is important that you take detailed notes of the negotiation. If an agreement is made it is essential that a written record is made and that a binding agreement is made as soon as practicable following the negotiation.

If an agreement is not made your client may wish to attempt another form of ADR, as described below, or proceed to filing in a relevant Court.

## 7.2. Mediation

Mediation is where an independent third party, the mediator, assists the people in dispute to identify the disputed issues, develop options, consider alternatives and try to reach an agreement.

Prior to entering a mediation process, you should provide legal advice on the client's rights and responsibilities and what alternatives are available if you do not negotiate an agreement.

Mediation is the appropriate ADR where the parties:

- ▶ Feel comfortable and safe having a conversation with the others involved
- ▶ Want a third person to assist the discussion
- ▶ Want to make the decision themselves
- ▶ Want to maintain the best possible ongoing relationship with the other participants
- ▶ Want to control the outcome, rather than asking someone else to decide the outcome
- ▶ Want to keep discussions confidential
- ▶ Want to find innovative solutions to a problem



The role of lawyers in mediation will usually depend on the type of case. For example, in disputes between individuals such as neighbours, there will be many types of issues to resolve that are not just about legal rights. In these types of cases, mediation generally works better when it is an informal process between the parties and the mediator, without the lawyer attending or, if they do attend, just listening but not taking an active role.

For large or complicated disputes that involve mainly legal issues, it is more common to have lawyers present and involved in the mediation process, although the focus remains on the people in dispute communicating about the issues and working towards a resolution.

### 7.3. Conciliation

Conciliation is where an independent third party, the conciliator, helps people in a dispute to identify the disputed issues, develop options, consider alternatives and try to reach an agreement.

Conciliation may be voluntary, court ordered or required as part of a contract. It is often part of a court or government agency process.

The role of conciliators is similar to that of mediators except that the conciliator may also:

- ▶ Have specialist knowledge and give the participants some legal information
- ▶ Suggest or give the participants expert advice on the possible options for sorting out the issues in their dispute
- ▶ Actively encourage the participants to reach an agreement.

Conciliation is likely suitable for your client if they:

- ▶ Want to reach an agreement on technical or legal issues
- ▶ Want assistance with the process
- ▶ Want to make the decision with the other participants involved
- ▶ Want advice on the facts in their dispute

Conciliation may also be suitable if the participants have tried mediation and still cannot reach agreement with the other participants.

The participants legal representatives can usually be present during conciliation. In some cases, experts may also be present. Some conciliation processes do not require lawyers to participate. If lawyers are to participate in the conciliation process or experts are to attend, this is to be discussed with the conciliator before the process begins.

### 7.4. Arbitration

Arbitration is where the parties to the dispute present arguments and evidence to an independent third party, the arbitrator, who makes a determination. Arbitration is particularly useful where the subject matter is highly technical, or where the parties seek greater confidentiality than in an open court.

Arbitration may be voluntary, ordered by the court or required as part of a contract.

Arbitration can be a much more formal and structured process than mediation or conciliation. In some ways it is more similar to court, because at the end of the session the arbitrator makes a **binding decision**.

Some of the main differences between arbitration and other forms of ADR, include:




- ▶ The people in dispute need to agree before the process that the arbitrator's decision will be binding and enforceable
- ▶ There is a much greater need to produce evidence or facts
- ▶ There may be one arbitrator or a group of arbitrators to hear the dispute
- ▶ The arbitrator may be a specialist in the subject matter of the dispute or have legal qualifications
- ▶ At the end of the process the arbitrator will make a decision for the parties.

If an arbitrator makes a decision that your client is not happy with, they may be able to appeal to a court or other higher authority. However, this may be difficult and require your client to point to particular problems with the decision, such as it being biased or unfair.

If you or someone you are representing have questions about the binding nature of arbitration, we recommend seeking additional legal support.

Arbitration can be particularly useful where mediation or conciliation have not led to an agreement or if your client wants a process where a decision is made for them but is confidential and generally cheaper and quicker than going to court.

Lawyers are often involved in arbitration and may represent the participants. Experts may also attend to give evidence for the arbitrator to consider.



# **SECTION 8: Making a claim in court**

## 8. Making a claim in court

**This resource provides a general overview of the relevant jurisdictions and types of claims to a private roads dispute.**

**If the road user or the owner of the road does not wish to participate in Alternative Dispute Resolution, or they have been unable to reach an agreement via Alternative Dispute Resolution, they can initiate legal action.**

This resource does not contain extensive information on how to prepare the claims.

---

This resource includes:

- ▶ Commencing a claim as a landowner
  - ▶ Commencing a claim as a neighbour or other party using the private road, where:
    - a) They have already suffered harm
    - b) They have not suffered harm but have an easement and require the road to be repaired
    - c) They have not suffered harm and do not have an easement, or the right to one.
  - ▶ Drafting statements of claim
-



## 8.1. Private road owner

A landowner may bring various claims against a road user to recover the costs payable in proportion to the terms of the relevant easement for access.

If a road user does not hold a registered easement over the road then they are not required to contribute to the costs of repair. If this is the case, the landowner may prohibit their use of the road by erecting gates or otherwise prohibiting entry.

Claims of less than \$10,000 are brought and heard in the Small Claims Division of the Local Court. Small claims proceedings are conducted with far less formality than most other civil proceedings and the costs involved in commencing proceedings and litigating a dispute are much smaller.

Claims greater than \$10,000 may be brought in the Local, District or Supreme Courts, depending on the monetary value of the claim.

Local, District and Supreme Court Jurisdiction	
<b>Small Claims Division of the Local Court</b>	Small claims proceedings are to be commenced by filing a Statement of Claim at the Small Claims Division of the Local Court where the claim is less than \$10,000.
<b>Local Court</b>	Civil proceedings in the local court are to be commenced by filing a Statement of Claim at any local court office where the claim is less than \$100,000.
<b>District Court</b>	Civil proceedings in the district court are to be commenced by filing a Statement of Claim at any district court office where the claim is less than \$750,000
<b>Supreme Court</b>	Civil proceedings in the Supreme Court are to be commenced by filing a summons or statement of claim at the Supreme Court where the claim is above \$750,000.

## 8.2. Neighbour or third party using the road



### If you are acting for the private road user:

How you take action will depend on whether your client has suffered any harm.

### 8.2.1. Your client has already suffered harm

A neighbour or third party using a private road can make a claim for monetary compensation if they have already suffered harm. A claim is to be commenced in the court in which it will be heard and the relevant court will depend on the amount of money being claimed from the owner of the private road.





The claim must be brought within 3 years from the incident the claim is based upon.

The following thresholds will determine the court in which the claim will be brought and the required documents.

Local, District and Supreme Court Jurisdiction	
<b>Local Court</b>	Civil proceedings in the local court are to be commenced by filing a Statement of Claim at any local court office where the claim is less than \$100,000.
<b>District Court</b>	Civil proceedings in the district court are to be commenced by filing a Statement of Claim at any district court office where the claim is less than \$750,000
<b>Supreme Court</b>	Civil proceedings in the Supreme Court are to be commenced by filing a summons or statement of claim at the Supreme Court where the claim is above \$750,000.

### **8.2.2. Your client has not suffered harm, but has an easement and requires the road to be repaired**

A third party is only entitled to request the road to be repaired where they are an interested party under an easement.

If your client qualifies for an easement of necessity but does not yet hold one, see Section 4.

If a dispute arises between the owners of the dominant and servient lots about who has responsibility to repair the road which cannot be resolved directly or through alternative dispute resolution, the claim would be initiated in the Supreme Court of NSW.

### **8.2.3. Your client has not suffered harm and does not have a right to access the road**

The general public is not entitled to request a private road to be repaired and the private road owner may prohibit access to the private road by a gate and lock or by other means.

If your client has no right to access the land (i.e. a right of carriage way or easement of necessity) they have no standing to commence a claim.

You should advise a client early in the process that they do not have the ability to commence a claim in situations where they have no legal right to access the road and do not qualify for an easement of necessity.

## **8.3. Statements of claim**

A statement of claim is a written statement that sets out the facts of the case and what it is your client is seeking. Statement of claim forms can be downloaded from this website: <https://www.ucprforms.nsw.gov.au/>.



The best way to draft a statement of claim is to write a series of numbered short paragraphs, each containing a separate fact that is central to the claim. If the statement of claim does not accurately outline the claim, or if parts of the claim are inadequate or do not comply with the rules, the court may decide to throw out part of the claim or the whole claim in its entirety.



# **SECTION 9: Templates**



## Annex 1: Template Letter Notifying of damage and projected costs

[INSERT LETTERHEAD]

[Date]

[your name]

[other party's name]

[your address]

[other party's address]

[your contact details]

Dear [name]

### Notice of Damage - [road address]

I am writing in relation to the damage to [road address] as a result of [details of natural disaster] on [date].

Please consider this letter a notice of repair required for the roadway at [road address].

A proposed amount of \$[amount including/excluding GST] is to be payable for the costs incurred for the repair of the road located at [address]. Please be advised the proposed costs are an estimate only and final invoices will be provided following repair of the relevant roadway.

As provided in easement [easement reference], you are liable to pay [percentage payable by other easement party]% OR [equal proportion amount]% [NOTE: where proportions are not specified in the easement, costs are to be shared in equal proportions] in accordance with Schedule 8B, section 7 of the *Conveyancing Act 1919* (NSW).

Please see **enclosed** the following documents:

- 1 [quotes for proposed works]
- 2 [image showing where damage has occurred]

Your execution below will confirm your acceptance of the proposed costs provided by the quotes enclosed in order to repair the damaged road at [road address].

### SIGNED SEALED AND DELIVERED

by [NAME] in the presence of:

Signature of [name]

Signature of [name]

Yours faithfully

[insert signature]



## Annex 2: Letter of Demand for payment (to be sent by the landowner)

[INSERT LETTERHEAD]

[Date]

[your name]

[other party's name]

[your address]

[other party's address]

[your contact details]

Dear [name]

### Letter of Demand - Payment for maintenance and repair costs for [road address]

I am writing in relation to the amount of \$[amount including/excluding GST] payable for the costs incurred for the repair of the private road located at [address] as a result of the recent natural disaster referenced in the originating letter dated [date].

As provided in easement [easement reference], you are liable to pay \$[percentage payable by other easement party]% OR [equal proportion amount][NOTE: where proportions are not specified in the easement, costs are to be shared in equal proportions] in accordance with Schedule 8B, section 7 of the *Conveyancing Act 1919* (NSW).

Please find enclosed a dated copy of the invoice and note that it specifies [describe payment terms and instructions]. I have also **enclosed** the following documents:

- 3 [original notice of damage]
- 4 [easement agreement]
- 5 [relevant invoices]
- 6 [previous requests for payment]

*[List and enclose previous requests for payment and any other relevant documents that support your claim for the amount owing.]*

Please be advised that I demand payment of the invoiced within [payment period] days of the date of this letter.

Payment should be made by [describe how you'd like to be paid, including any bank details].

If payment is not received within [payment period] days of the date of this letter I reserve the right to take further action to recover the money without further notice to you.

Yours faithfully

[insert signature]



## Annex 3: Letter – Request for Repair (to be sent by road user)

[INSERT LETTERHEAD]

[Date]

[your name]

[other party's name]

[your address]

[other party's address]

[your contact details]

Dear [name]

### Request for Repair - [road address]

I am writing in relation to the damage to [road address] as a result of [details of natural disaster] on [date].

Please consider this letter a demand to repair the roadway at [road address].

As a party to easement [easement details/reference] and pursuant to Schedule 8B section 2 of the *Conveyancing Act 1919* (NSW), I am entitled to the benefit of the easement giving right of vehicular access and at all times an unrestricted right to pass, repass, with or without vehicles, machinery, implements and other equipment of every kind, over the roadways, ramps and land over which the right of access is created.

**Enclosed** are images of the damages incurred following the [details of natural disasters] on [date].

Please provide relevant quotes for the proposed works to repair the damaged roadway at [road address].

Yours faithfully

[insert signature]

