inclined to tolerate, as a private household, an ethnic club which has only say one hundred members, but when a club such as the Dockers' club has a potential patronage of one million members, discriminatory practices on the basis of colour will deprive those discriminated against of valuable social and business advantages.

The Australian Government has recently enacted the Racial Discrimination Act 1975,[8] s. 13 of which makes it unlawful to discriminate on racial grounds in the provision of goods or services 'to the public or to any section of the public'.[9] If liberally interpreted it is arguable that s. 13 could very easily embrace licensed premises particularly in the case of Australian clubs with such large potential patronage as the Working Men's Club & Institute Union Limited. However, it is likely that the Australian courts would follow the lead of the House of Lords and hold that licensed clubs are within the private and domestic sphere.

At present the British Government is preparing to amend its Act to legislatively reverse the decision in the *Dockers'* case. Though it is usually inadvisable to amend recently enacted legislation before it has been interpreted by the courts, we believe that the Australian Act should be promptly amended to make it clear that its provisions apply to large clubs (which receive licensing and other privileges), thus preventing them from practicing the archaic and morally indefensible practice of racial and ethnic discrimination.

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and
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RILEY v. PENTTILA[1]

In this case Gillard J. had occasion to consider the nature of an easement, and the concepts of adverse possession and abandonment as such are applicable to land registered under the Transfer of Land Act 1958.

On a plan of subdivision a number of allotments backed onto and surrounded a common area known as 'Outlook Park Reserve'. A right to use and enjoy the reserve 'for the purposes of a recreation or a garden or a park' was expressly granted to each transferee of the lots by the registered proprietor of the reserve and original subdivider. In 1967, thirty nine years after all the allotments were transferred by the subdivider, the defendants[2] purchased lot No. 36, and in 1971 commenced an

[8] Act No. 52 of 1975. See also Prohibition of Discrimination Act, 1966-70, (S.A.). The weaknesses of the South Australian legislation are discussed by Ligertwood A. in Nettheim G. (ed.) *Aborigines, Human Rights and the Law* (1974) p. 23-7.

[9] Section 13 of the Act reads as follows:

13. It is unlawful for a person who supplies goods or services to the public or to any section of the public —

(a) to refuse or fail on demand to supply those goods or services to another person; or

(b) to refuse or fail on demand to supply those goods or services to another person except on less favourable terms or conditions than those upon or subject to which he would otherwise supply those goods or services,

by reason of the race, colour or national or ethnic origin of that other person or of any relative or associate of that other person.

See Evans G., 'New Directions in Australian Race Relations Law', (1974) 48 *Australian Law Journal* 479, 484.

[1] [1974] V.R. 547. Supreme Court of Victoria. Gillard J.

[2] Mr and Mrs Penttila, registered joint proprietors of lot No. 36 of Plan of Subdivision No. 6665 lodged in the Office of Titles.

excavation for a swimming pool in part of the reserve which had been from the rest thereof partially fenced off for over forty years. The plaintiffs who were the registered proprietors of the several allotments of the subdivision abutting onto the common area, commenced an action seeking a declaration as to their rights over the area proposed to be used for a swimming pool and appropriate injunctions against the defendants to protect such rights.

The first question to arise for determination concerned the nature of the right or liberty granted by the subdivider to his transferees. Gillard J. stated as a general principle that

> [i]n interpreting "the liberty" granted the physical condition of the area, the intent of the designer of the scheme and the purpose of the grant of "the liberty" are all relevant to assist in finding the true nature of the grant.[3]

After briefly dismissing the defendants' contention that the grant was so indefinite and uncertain having regard to the variety of descriptions in the grant itself as to be unenforceable,[4] His Honour then outlined the four characteristics of an easement.

> First, there must be a dominant and a servient tenement; secondly, an easement must accommodate the dominant tenement; thirdly, the dominant and servient owners must be different persons; fourthly, a right over land cannot amount to an easement unless it is capable of forming the subject matter of a grant.[5]

On the authority of *Re Ellenborough Park*,[6] Gillard J. found the liberty granted did accommodate the dominant tenement and could not be said to possess no quality or utility to the land transferred to the grantees. Furthermore, having regard to the fact that the metes and bounds of the common area were so explicitly designated, His Honour found the liberty conferred in the case before him to be even stronger than that considered in *Re Ellenborough Park*.[7] No attempt was made to discuss the concept of *jus spatiandi*, it being considered that the right granted was properly annexed and appurtenant to a defined hereditament.[8] His Honour was obviously influenced by the clear physical connexion between the right over the Reserve and the premises of the relevant house owners, although presumably such is not required for the valid grant of an easement.

Turning to the requirement that the right be capable of forming the subject matter of a grant, His Honour concluded

> [i]n my opinion, enjoyment of a defined area for recreation not given to the public, but given to a limited number of lot holders is just as certain as the rights referred to in the above cases,[9] or the right to walk for pleasure referred to in *Duncan v. Louch*,[10] which was approved in the *Ellenborough Park* case by the Court of Appeal at (Ch.) pp. 184-5.[11]

As the right granted was obviously more than a 'mere personal advantage'[12] to the transferee of the allotments involved, it was finally concluded that the grant possessed all the four characteristics of an easement.

[3] [1974] V.R. 547, 549. See also [1974] V.R. 547, 559.
[4] *Ibid.* 556-7 where *Pwllbach Colliery Co. Ltd v. Woodman* [1915] A.C. 634 was referred to in connection with this submission.
[5] [1974] V.R. 547, 557.
[6] [1956] Ch. 131, [1955] 3 All E.R. 667.
[7] *Ibid.* See [1974] V.R. 547, 557-8, 559.
[8] See *Duncan v. Louch* (1845) 6 Q.B. 904.
[9] *Re Ellenborough Park* [1956] Ch. 131, [1955] 3 All E.R. 667; *Miller v. Emcer Products Ltd* [1956] Ch. 304, [1956] 1 All E.R. 237; *Heywood v. Mallalieu* (1883) 25 Ch. D. 357; *Maurice Toltz Pty Ltd v. Macey's Emporium Pty Ltd* [1970] 1 N.S.W.R. 474; *Treweeke v. 36 Wolseley Road Pty Ltd* (1973) 47 A.L.J.R. 394, 1 A.L.R. 104.
[10] (1845) 6 Q.B. 904.
[11] [1974] V.R. 547, 559.
[12] *Ibid.* 559.

Gillard J. then considered the submission that the defendants and their predecessors in title had by adverse prosession obtained a fee simple of the disputed area, and accordingly, the defendants were now entitled to apply to the Registrar of Titles for an order vesting the land in them for an estate in fee simple.

As the original subdivider, one Peter Ernest Keam, was still registered proprietor of the reserve, it was against him that the claim for possession was made by the defendants. After Gillard J. determined there was no tenancy agreement between the registered proprietor and the defendants,[13] His Honour stated that in order to show Keam's title was extinguished it must be proved that the defendants and their predecessors dispossessed the true owner and were intentionally in actual possession of the disputed area adverse to the possession of and with intent to exclude the true owner.[14]

Therefore, in considering whether or not there was a case of dispossession, Gillard J. carefully examined the intentions of both the true owner and the squatter. Undoubtedly,

> [t]he character and value of the property, the suitable and natural mode of using it, having regard to all the circumstances, and the course of conduct which a proprietor might reasonably be expected to follow with due regard to his own interests, varying as they will from case to case, must be taken into account.[15]

In this case, Keam would not be expected to use the reserve for any purpose of his own, for in his very grant such was left to the transferees to control for their own mutual benefit. He was title holder in name only, intending to take little part in the future activities of the reserve. Therefore, Gillard J. concluded that there was no proof of Keam's dispossession, for although he never sought to exercise his rights over the disputed area, there was no occasion for him to do so. Further, the erection of the fence by the defendants' predecessor in title was an equivocal act, and it was considered that such was more for the convenience of those using the area fenced off and did not evince any intention or evidence of a fact to exclude the true owner from the area.[16]

While Gillard J. clearly restricted his remarks to the facts of this case, it is respectfully suggested that the propositions of law he adhered to may have been too widely enunciated. While the relevance of the intention of the squatter cannot be doubted,[17] one may query the like requirement that the squatter prove that his acts are inconsistent with the future plan or intention of the true owner.

In the case of *Wallis's Cayton Bay Holiday Camp Ltd v. Shell-Mex and B.P. Ltd*[18] Lord Denning M.R. applied a subjective test of intention.

> When the true owner of land intends to use it for a particular purpose in the future, but meanwhile has no immediate use for it, and so leaves it unoccupied, he does not lose his title to it simply because some other person enters on it and uses it for some temporary purpose, like stacking materials; or for some seasonal purpose, like growing vegetables.[19]

[13] *Ibid.* 560-1.
[14] *Ibid.* 561, referring to *Murnane v. Findlay* [1926] V.L.R. 80. See too *Rains v. Buxton* (1880) 14 Ch. D. 537.
[15] [1974] V.R. 547, 561.
[16] See *Clement v. Jones* (1909) 8 C.L.R. 133; *Littledale v. Liverpool College* [1900] 1 Ch. 19; *Philpot v. Bath* (1904) 20 T.L.R. 589; *Duke of Beaufort v. John Aird Co.* (1904) 20 T.L.R. 602; *Leigh v. Jack* (1879) 5 Ex.D. 264; and *George Wimpey & Co. Ltd v. Sohn* [1967] Ch. 487.
[17] See *British Railways Board v. G.J. Holdings* (1974) 230 Estates Gazette 973 and *Clement v. Jones* (1909) 8 C.L.R. 133.
[18] [1974] 3 All E.R. 575; Note, (1975) 39 *The Conveyancer & Property Lawyer* 57.
[19] *Ibid.* 580. See too *Leigh v. Jack* (*supra*) and *Williams Brothers Direct Supply Stores Ltd v. Raftery* [1958] 1 Q.B. 159, [1957] 3 All E.R. 593.

Similarly, in *Hayward v. Challoner*,[20] Lord Denning M.R. stated:

> In any case acts of user are not enough to take title out of the plaintiff unless they are "inconsistent with the enjoyment of the soil for the purpose for which he intended to use it". The user of this little piece as a garden was not inconsistent with the owner's enjoyment. He was content to let it be so used: just as if he had permitted it to be used in this way under a licence.[21]

However, in *Wallis's Cayton Bay Holiday Camp Ltd v. Shell-Mex and B.P. Ltd*,[22] Stamp L.J. dissenting laid stress more on the nature of the property than upon the pure subjective intention of the owner.[23]

> Reading the judgments in *Leigh v. Jack* and *Williams Brothers Direct Supply Store Ltd v. Raftery*, I conclude that they establish that in order to determine whether the acts of user do or do not amount to dispossession of the owner, the character of the land, the nature of the acts done on it and the intention of the squatter fall to be considered. Where the land is waste land and the true owner cannot and does not for the time being use it for the purpose for which he acquired it, one may more readily conclude that the acts done on the waste land do not amount to dispossession of the owner. But I find it impossible to regard those cases as establishing that so long as the true owner cannot use his land for the purpose for which he acquired it the acts done by the squatter do not amount to possession of the land. One must look at the facts and circumstances and determine whether what has been done in relation to the land constitutes possession.[24]

It could be argued that Gillard J. in *Riley's* case[25] was more concerned with the possession being inconsistent with the intention of the true owner than with the possession being inconsistent with the title of the true owner, the latter being the real basis of adverse possession.[26] Nevertheless, His Honour concluded that the defendants had failed to establish they or their predecessors in title were intentionally in actual possession of the disputed area adverse to the possession of and with the intent to exclude the true owner.

The final question for determination concerned the principle of abandonment. In regard to land under the general law, an easement may be extinguished by abandonment if there is a period of non-user coupled with other circumstances, but whether or not an inference of abandonment is warranted is in each case a question of fact.[27] Gillard J. after discussing the history of the development, concluded that there was no abandonment, and adopting the view expressed by Chief Baron Pollock in *Ward's* case[28] stated that '[t]he only inference that could reasonably be drawn from the non-user of the party is, that he had no occasion for it.'[29]

However, as the land in question was registered under the Transfer of Land Act 1958, His Honour went further to consider the application of the doctrine of abandonment to land under the Torrens System. First, section 73 of the Transfer of Land Act 1958 was said to confer the right only on the registered proprietor of a servient

[20] [1967] 3 All E.R. 122.
[21] *Ibid.* 125.
[22] [1974] 3 All E.R. 575.
[23] This is not to say that Lord Denning M.R. and Ormrod L.J. did not consider this criteria, and see especially Ormrod L.J.'s reference to *Lord Advocate v. Lord Lovat* (1880) 5 App. Cas. 273.
[24] [1974] 3 All E.R. 575, 585. See also *Martin v. Brown* (1912) 31 N.Z.L.R. 1084, 1092 *per* Chapman J.
[25] [1974] V.R. 547.
[26] See Omotola J. A., 'Adverse Possession and the Intention of the True Owner' (1974) 38 *The Conveyancer & Property Lawyer* 172 where it is argued that a squatter's title should not depend on the intention of the owner.
[27] See *Ward v. Ward* (1852) 7 Ex. Ch. 838, 155 E.R. 1189; *Crossley & Sons Ltd v. Lightowler* (1867) 2 Ch. App. 478; *Cook v. Mayor & Corporation of Bath* (1868) L.R. 6 Eq. 177; and *Re Marriott* [1968] V.R. 260.
[28] (1852) 7 Ex. Ch. 838, 155 E.R. 1189.
[29] [1974] V.R. 547, 571.

tenement to make an application to the Registrar of Titles to remove an easement in whole or in part where it has been abandoned or extinguished. Secondly, on the authority of *Webster v. Strong*,[30] so long as the easement remains upon the register, the Certificate of Title of the dominant owner constitutes conclusive evidence that he is entitled to that easement, even though in accordance with the rules of common law he would be deemed to have abandoned his rights.[31] While one does not wish to over-state the principle of 'indefeasibility',[32] it is respectfully suggested that such view is correct in that it accords with the general concept of certainty of registration, a concept upheld in such cases as *Frazer v. Walker*[33] and *Breskvar v. Wall*.[34] As Gillard J. stated, the reasoning of *Webster v. Strong*[35] has in fact been recently strengthened by the effect of those two cases.[36]

This decision of *Riley v. Penttila*[37] is of particular interest in that it demonstrates that the mere running of time does not enable a squatter to gain title, even where the area claimed is fenced off, and that the nature of the adverse possession must at all times be examined by the court. While the relevant principles are easily stated, their application to the peculiar circumstances of each case poses some difficulty. Further complications arise where, as occurred in *Higgs v. Nassauvian Ltd*,[38] the court must determine whether acts tending to prove possession of part of the land are also capable of proving possession of the whole. Nevertheless, it is respectfully suggested that the judgment of Gillard J. in that it succinctly states the current law as applicable to Victoria is to be welcomed, and will surely act as a useful guide for practitioners in the future.

J. E. MIDDLETON, LL.B. (HONS.)

[30] [1926] V.L.R. 509, [1926] A.L.R. 323.
[31] See Voumard L. C., *The Sale of Land* (2nd ed. 1965) 488.
[32] See the comments in *Travinto Nominees Pty Ltd v. Vlattas* (1973) 129 C.L.R. 1, 17 *per* Barwick C.J.
[33] [1967] 1 A.C. 569.
[34] (1971) 126 C.L.R. 376. See also *Treweeke v. 36 Wolseley Road Pty Ltd* (1973) 47 A.L.J.R. 394; Note, (1974) 9 *M.U.L.R.* 774.
[35] [1926] V.L.R. 509, [1926] A.L.R. 323.
[36] [1974] V.R. 547, 574.
[37] [1974] V.R. 547.
[38] [1975] 1 All E.R. 95.