

Information Bulletin No 54

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Property Legislation Amendment (Easements) Act 1995 - Partial Commencement

Commencement

The Property Legislation Amendment (Easements) Act 1995 will partially commence on 12 February 1996. The balance of the Act will commence later in the year at the same time as supporting regulations are made.

Object

The object of the Act is to amend the Conveyancing Act 1919 and the Real Property Act 1900 in respect of various matters relating to easements. The provisions commencing on 12 February 1996 relate to the matters discussed below.

Amendment of Conveyancing Act 1919

Positive Covenants for maintenance or repair

Under common law principles, it is not possible when creating an easement to include a covenant that will automatically impose positive obligations on successors in title each time land having the burden of the easement changes hands. Various devices have been used in an attempt to avoid the problem (such as imposing a contractual obligation requiring each person who disposes of such land to obtain a personal covenant from the next successor in title) but none has been found to be completely satisfactory.

The new section 88BA and consequential amendments to sections 87A and 88F allow covenants that require repair or maintenance of the site of an easement to continue to apply after ownership of the land having the benefit or burden of the covenant changes.

The persons who can be specified as having to comply with the positive covenant are one or more of the owners (from time to time) of the land benefited or burdened by the easement. The example in Figure 1, overleaf, shows lot A as being subject to a right of way in favour of lots B and C.

The terms of the positive covenant may state that the owners of lots B and C must maintain the site of the right of way and are to share costs equally, or it may state that the owners of lots A, B and C are to maintain the site and share costs equally. Other combinations are also possible.

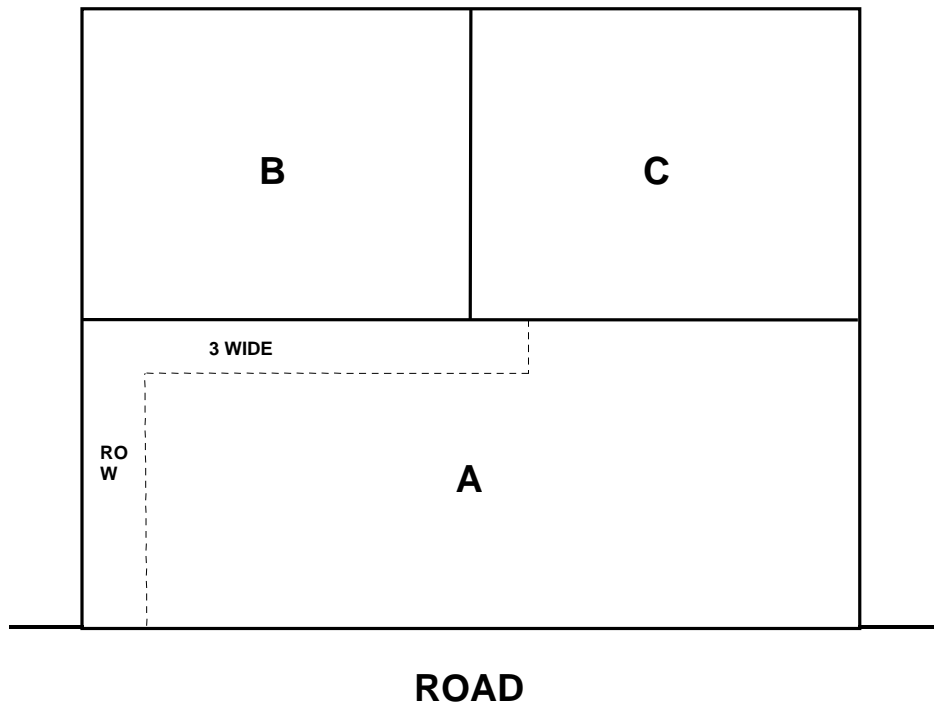


Figure 1

The positive covenant may be created as follows:

- a) By including it in the terms of the easement itself: ie it can be created in the same ways as an easement can be created.
- b) In respect of land under the Real Property Act, by registration of a Request form containing the terms of the covenant, or annexed to which is a deed (on which stamp duty has been paid) containing those terms. The Request and deed (if there is one) must be signed by the respective owners of the land benefited and burdened by the covenant and by any registered mortgagees or lessees of such land.
- c) In respect of land not under the Real Property Act, by registration of a deed containing the terms of the covenant in the General Register of Deeds kept under the Conveyancing Act.

In whatever manner the positive covenant is created, the instrument creating it must specify the land to be maintained or repaired, the land benefited by the covenant, and the land burdened by the covenant.

Once created, the positive covenant may be released or varied in the same manner as a restrictive covenant. That is, for land under the Real Property Act, by registration of a Request form containing the terms of the release or variation, or annexed to which is a stamped deed containing those terms, and signed by the current owners of the lands benefited and burdened by the covenant, and by any registered mortgagees of such land.

Descriptions of sites of easements

Section 88 is amended by inserting new clause (1A) to provide that the requirement in section 88(1) to indicate clearly the land burdened by an easement (including the site of the easement) is satisfied if it is shown in a manner satisfactory to the Registrar

General. For example, the sites of easements over tracks in use may be defined as set out in *Information Bulletin No. 43*.

Variation or release of easements

It is inconsistent with the principle that easements continue to apply to successors in title to the land benefited and burdened by them, to contemplate that third parties may release, vary or modify them.

Section 88(1)(c) is amended to make it clear that, unlike the case of a restrictive covenant, someone who doesn't own land benefited by an easement cannot release or vary it (eg the original subdivider).

Note: While it is not presently possible to vary a registered easement, a provision of the Act to commence at a later date will introduce a means of effecting such a variation.

Power of Court to create easements

The new section 88K empowers the Supreme Court to impose an easement over a parcel of land provided that the easement is reasonably necessary for the effective use or development of another parcel of land to be benefited by the easement.

The Court will only make the order if it is satisfied that certain conditions exist, including the following:

- a) use of the land in accordance with the easement will not be inconsistent with the public interest; and
- b) the owner of the land to be burdened by the easement can be adequately compensated for any detriment caused by imposition of the easement; and
- c) all reasonable attempts have been made by the applicant to obtain the easement by agreement with the owner of the land sought to be burdened.

The Court, when ordering that an easement be imposed, must identify the site of the easement by reference to a plan suitable for lodgment as a deposited plan.

The order is to provide for payment of compensation (at the discretion of the Court) not only to the owner of the land to be burdened, but also to other parties with registered interests in the land (eg mortgagees, lessees). Unless the Court otherwise orders, the costs of the proceedings are to be paid by the applicant.

An easement imposed by the Court, like other easements, may be released or varied by the parties concerned, or modified or released by the Court under section 89 Conveyancing Act. An easement imposed by the Court only takes effect once it is registered by the Registrar General. For land under the Real Property Act, the order should be annexed to a Request form requesting that the Registrar General give effect to the order. It may also be necessary to lodge a deposited plan indicating the site of the easement or to annex an approved sketch plan of the site to the Request. For land not under the Real Property Act, the order should be registered in the General Register of Deeds.

Section 88K is similar to section 180 *Property Law Act 1974* (Qld) and cases concerning applications made under that section may be relevant to the interpretation of section 88K.

Amendment of Real Property Act 1900

Omitted easements

Section 42 is amended so as to clarify that an easement not registered on the title for a parcel of land affects that parcel only if:

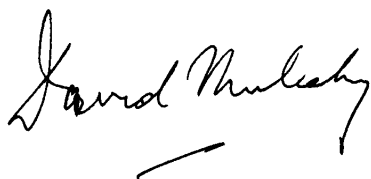
- a) the easement affected the parcel before the parcel was converted to Real Property Act land; or
- b) the easement was validly created after the parcel was brought under the Real Property Act.

The first exception will mainly be concerned with easements created by prescription (that is by more than 20 years' use) but which cannot be registered on the title as there is no written instrument creating the easement.

The second exception will mainly apply to easements left off titles by error of the Registrar General, either by failure to register an easement lodged for registration, or by deleting an easement that has been registered. The amendment is consistent with the decision of the New South Wales Court of Appeal concerning section 42, in *Dobbie and anor v Davidson & ors* (1991) 23 NSWLR 625.

Recording of easements

Section 47 is amended so as to require the Registrar General to record an easement on the title of the land burdened by the easement, as well as the title of the land benefited by it. This merely confirms the existing long-standing practice of the Registrar General.



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