

## Information Bulletin No 56

November 2000

### Property Legislation Amendment (Easements) Act 1995 - Commencement of balance of Act

#### Commencement

As set out in Information Bulletin No. 54 the above Act partially commenced on 12 February 1996. The balance of the Act will commence on 1 August 1996 and on the same date supporting amendments to the Conveyancing (General) Regulation 1992, Real Property Regulation 1993 and the Survey Practice Regulation 1990 will also commence.

#### 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. Those provisions of the Act that will commence on 1 August 1996 are discussed below.

#### Amendment of Conveyancing Act 1919

##### New short forms of words to create easements

At present sections 88A and 181A of the Conveyancing Act provide that if in an instrument creating an easement the expressions 'right of carriage way', 'right of footway', 'easement to drain water' or 'easement to drain sewage' are used, then the terms relating to those expressions set out in Schedules 4A (easements in gross) or 8 (easements benefiting land), whichever is applicable, are deemed to be incorporated in the instrument.

Those sections and schedules are now amended to provide for new short forms of words to be used when creating easements. The new short forms for Schedule 4A are 'easement for repairs', 'easement for drainage of sewage', 'easement for drainage of water', 'easement for electricity purposes', 'easement for services', 'easement for water supply' and 'right of access'. The new short forms for Schedule 8 are 'easement for repairs', 'easement for batter', 'easement for drainage of sewage', 'easement for drainage of water', 'easement for electricity purposes', 'easement for overhang', 'easement for services', 'easement for water supply', 'easement to permit encroaching structure to remain' and 'right of access'.

The existing short forms are not being repealed. This will mean that parties will have a choice between using an old short form or a new short form when the same subject matter is dealt with by both the old and new forms (e.g. 'easement to drain water' (old short form) and 'easement for drainage of water' (new short form)).

### Creation of cross-easement for party walls by deposited plans

Section 88BB is inserted into the Act to provide that when a deposited plan is registered that shows a boundary of a lot as a 'party wall', then cross-easements for support of that wall are automatically created on the titles for the lots on either side of the wall. Accordingly if the deposited plan is accompanied by a section 88B instrument there is no need for the cross easements to be mentioned in the section 88B instrument.

Section 181B (which formerly governed the automatic creation of cross-easements for party walls) will not be applicable to plans illustrating party walls lodged after 1 August 1996.

### Release of easements by deposited plans

Sections 88B and 195D are amended to allow an easement to be released upon registration of a deposited plan.

The Conveyancing (General) Regulation 1992 has been amended to prescribe a new form of 's. 88B Instrument' which contains a Part 1A detailing the easement to be released. The new form of s.88B instrument ('Form 5') is reproduced below.

The s.88B Instrument must be signed by the registered proprietor of the land benefited by the easement to be released and by the registered proprietor of the land burdened by the easement. Other parties with a registered estate in the land benefited must consent in writing to the release. Further information on this topic is contained in Chapter 10 Vol.1 Registrar General's Directions for Plans.

Form 5

**INSTRUMENT SETTING OUT TERMS OF EASEMENTS INTENDED TO BE  
CREATED OR RELEASED, AND OF PROFITS À PRENDRE,  
RESTRICTIONS ON THE USE OF LAND AND POSITIVE COVENANTS  
INTENDED TO BE CREATED PURSUANT TO SECTION 88B OF THE  
CONVEYANCING ACT, 1919.**

**Plan:** Plan of (*heading of plan*) covered by  
Council Certificate No. (*add reference as  
appropriate*):

Full name and address of the owner of  
the land:

**PART 1**

1. Identity of easement, profit à prendre, restriction, or positive covenant to be created and firstly referred to in the plan: (*Brief description in same terms as used in relevant statement in the plan*)

**SCHEDULE OF LOTS ETC. AFFECTED**

**Lots burdened.** Lots benefited, relevant roads, bodies or prescribed authorities.

*(Set out vertically in numerical sequence of lot numbers. Title details should be added if the land referred to is outside the plan).*

*(Continue above pattern until all easements, profits à prendre, restrictions, or positive covenants to be created and referred to in the plan have been dealt with).*

**PART 1A**

- 1 Identity of easement to be released and firstly referred to in the plan. (*Brief description in same terms as used in relevant statement in the plan*).

**SCHEDULE OF LOTS ETC. AFFECTED**

**Lots burdened by existing easement.** Lots benefited by existing easement, relevant roads, bodies or prescribed authorities.

*(Set out vertically in numerical sequence of lot numbers. Title details should be added if the land referred to is outside the plan).*

*(Continue above pattern until all easements to be released and referred to in the plan have been dealt with).*

## PART 2

**Terms of easement, profit à prendre, restriction, or positive covenant (*'firstly', or as the case may be*) referred to in the abovementioned plan.**

*(Continue above pattern until all easements, profits à prendre, restrictions or positive covenants referred to in the plan have been dealt with).*

**Name of person empowered to release, vary or modify restriction or positive covenant (*'firstly', or as the case may be*) referred to in the abovementioned plan.**

*(Not required where it is intended that the restriction may only be released, varied or modified by the owners for the time being of all lots benefited, or by order of the Supreme Court).*

## Amendment of Real Property Act 1900

### Variation of Easements

Section 47 is amended by the addition of sub-section (5A) which allows for the terms or the site of an easement to be varied. The variation should be made by means of a RP form (20EV) which contains the terms of the variation and which is signed by the registered proprietors of the land benefited and the land burdened by the easement. Other parties with a registered estate in either the land benefited or the land burdened must also sign the Request, or provide written consent to the variation.

If the site of an easement is to be varied then as well as a Request form a plan will have to be lodged illustrating the varied site. This plan will be a Deposited Plan except where prior permission is obtained from Land and Property Information New South Wales (LPINSW) to annex a sketch plan to the Request. In either case (i.e. for deposited plans and sketch plans) the plan must be a plan of survey except where prior permission is obtained for the plan to be a compiled plan.

### Creation of cross-easements in respect of existing registered plans

Section 48 is inserted into the Act to provide that where an existing registered plan shows a boundary between lots as a 'party-wall', then the registered proprietors of the lots on either side of the wall may request the Registrar General to record cross-easements for support of the wall on the titles to the lots. The application should be made on a Request form and its success will depend on whether the subject plan defines the party wall boundary in a satisfactory manner.

### Cancellation of easements for abandonment

Section 49 is added to the Act to allow the Registrar General to cancel an easement recorded in the Register on the basis that it has been abandoned. An easement may be treated as abandoned if the Registrar General is satisfied that it has not been used for at least 20 years. However easements in gross (i.e. that do not benefit land) or easements in favour of the Crown, or a public or local authority constituted by an Act, are not capable of being cancelled for abandonment.

An application for cancellation due to abandonment should be made on RP form 20EA supported by statutory declarations from the applicant and at least two independent witnesses providing evidence of non-use of the easement. If it is stated that the easement cannot be used because of buildings or other obstructions on the site of the easement, then a certificate from a registered surveyor should be provided showing the location of such obstructions in relation to the easement site.

The applicant is required to pay the standard dealing lodgment fee and a further fee based on the time taken to investigate and determine the application. This fee is set at \$100 per hour (or part hour) occupied in examining the application.

Notice of the application will be given to each party having a registered estate or interest in the land benefited by the easement, and any submission by such a party will be taken into account.

A sample application and instructions for completion appear hereunder.

#### Applications for Cancellation of Easements due to Abandonment

1. An application should be made on a Request form (Form 97-11R), and the following instructions relate to the marginal letters on that form.

A) Stamp duty                      there is no need for the Request to be stamped

B) Title                                put 'Servient land' at the top of the left hand panel, and then list the title references to the land for which the recording of the easement is sought to be cancelled

put 'Dominant land' at the top of the right hand panel and then list the title references for the land benefited by the easement

C) Registered Dealing    leave blank

D) Lodged by                        fill in details of the lodging party

E) Applicant                        fill in the name of the registered proprietors of the land listed above as 'Servient land'

F) Request                            complete as follows: 'Application to Cancel recording of easement due to abandonment. Section 49 Real Property Act'

'Easement to be cancelled' - provide the registered number of the easement to be cancelled

'The Applicant applies to have the recording of the easement cancelled on the folios of the Register referred to above'

'The names and addresses of all parties having registered interests in land benefited by the easement is set out below'

Name Address Nature of Interest Land Benefited

G) Standard Execution    do not complete

Execution including statutory declaration - the applicant should complete the declaration before a person authorised under the Oaths Act 1900 (NSW) to take the declaration.

2. The application should be supported by statutory declarations by the Applicant and as many disinterested witnesses as practicable, as to the non-use of the easement.

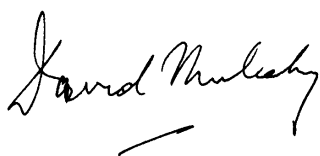
The declarants should state:

- i. their means of knowledge of the matters contained in the declaration
- ii. the length of non-use of the easement that they have personally observed
- iii. the date that the easement ceased to be used, and any circumstances relevant to that cessation
- iv. particulars of any structures erected on the site of the easement, or other factors which make the easement physically unusable (A certificate from a registered surveyor should also be provided showing the location of such structures in relation to the easement site)
- v. when and by whom such structures were erected
- vi. whether they know of any litigation involving the subject easement and, if so, the nature and result of the litigation

All facts should be given with as much detail as possible.

All declarations should be signed on each page by the declarant and the person taking the declarant's declaration.

Inquiries relating to dealings may be made in person at the Client Service Counter, ground floor, by telephone on 9228 6713 or fax 9223 9464. Inquiries relating to plans should be made at the Plan Support Counter, level 2, North wing, Land and Property Information, 1 Prince Albert Road, Queens Square, Sydney by telephone on 9228 6798 or by fax on 9221 4405.



David Mulcahy  
**Registrar General**

Legal Division

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