

[Act 1997 No 17]



New South Wales

Conveyancing Amendment Bill 1997

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.*

Overview of Bill

The objects of this Bill are:

- (a) to abolish the rule of the common law known as the rule in *Bain v Fothergill* which, in some circumstances, limits the damages that might otherwise be awarded for a breach of contract resulting from a defect in the title of a vendor of land, and
- (b) to remove the need for an option for the sale of residential property to be signed in duplicate by both parties and to provide instead that such an option is to be granted by the usual method used to make a contract for the sale of residential property (that is, the purchaser signs one copy, the vendor signs another copy and the copies are exchanged), and
- (c) to extend the existing power to create easements in gross (that is, an easement without a dominant tenement) in favour of the Crown or a public or local authority to other corporations prescribed by the regulations (for example, private corporations providing public utility services).

* Amended in committee—see table at end of volume.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 is a formal provision giving effect to the amendments to the *Conveyancing Act 1919* set out in Schedule 1.

Clause 4 is a formal provision giving effect to the consequential amendments to other Acts set out in Schedule 2.

Clause 5 is a formal provision giving effect to the consequential amendments to the *Conveyancing (General) Regulation 1992* set out in Schedule 3.

Schedule 1 Amendment of Conveyancing Act 1919

Schedule 1 [1] Abolition of the rule in *Bain v Rothergill* (1874)

LR 7 HL 158

At common law, the rule known as the rule in *Bain v Fothergill* is (with some exceptions) to the effect that, in a proposed purchase of land, the intending purchaser is not entitled to *expectation damages* for loss of bargain if the vendor cannot make a good title. At present, the proposed purchaser can recover only *reliance damages* for expenses incurred as a result of the agreement.

Abolition of the rule was recommended by the Law Reform Commission in its report *Damages for Vendor's Inability to Convey Good Title* (LRC 64, 1990). The amendment made by Schedule 1 [1] will give effect to that recommendation. Accordingly, the result of the amendment will be that a proposed purchaser can recover both expectation and reliance damages if the vendor is unable to make a good title.

The amendment, however, does not give effect to the further recommendation of the Commission that the parties to the contract should be able to reinstate the rule by a provision in their contract and thereby deny the prospective purchaser the entitlement to expectation damages.

Schedule 1 [2] Alteration of method of granting options for sale of residential property

At present, section 66ZG (1) (a) of the *Conveyancing Act 1919* requires an option for the sale of residential property to be signed in duplicate by both parties. The existing provision has been criticised for causing inconvenience to the parties and uncertainty as to the precise time at which the option is granted (*See Lindsay v Balgi and Anor (1993) NSW Conv R 55-658*). The existing provision seeks to prevent an option coming into effect under the general law when the option document is signed by the person giving the option (and without any signature of the person who is granted the option). In order to overcome the inconvenience and uncertainty caused by the existing provision, Schedule 1 [2] amends section 66ZG to alter the method of granting an option by adopting the usual method used for making a contract to sell residential property. The standard conveyancing practice for making a contract for sale is for the vendor to sign one copy of the contract, the purchaser to sign another copy, and for those copies to be exchanged. The conveyancing practice for effecting an exchange includes physical exchange, exchange by post, exchange through the document exchange and exchange by telephone.

Schedule 1 [3]–[11] Granting of easements in gross in favour of prescribed corporations

An easement is a right annexed to land to utilise other land of different ownership in a particular manner— the land benefited by the easement is the dominant tenement and the land burdened by the easement is the servient tenement. Section 88A of the *Conveyancing Act 1919* provides an exception to the requirement for a dominant tenement by allowing an easement without a dominant tenement to be created in favour of the Crown or a public or local authority constituted by an Act (known as an “easement in gross”). This enables the Crown or such an authority to accept an easement that allows public access to a service (for example, a water main or other utility service) without owning any neighbouring land that is benefited by the easement (that is, there is no dominant tenement). The class of authorities concerned has been extended by amendments to section 88A to cover various State owned corporations, namely, Hunter Water Corporation Limited, Sydney Water Corporation Limited, irrigation corporations, energy services corporations and Rail Access Corporation.

Schedule 1 [5] amends section 88A to extend the section to other corporations prescribed by the regulations (for example, a private corporation

providing gas or other public utility services). A power to prescribe other corporations has already been included in the Act in respect of the power of public and local authorities to impose restrictions on the use of or impose public positive covenants on their own lands (section 88D) and in respect of the power to accept a restriction on the use of or public positive covenant on other land without that restriction being annexed to any particular land (section 88E).

Schedule 1 [3] is consequential on the amendments made by Schedule 1 [5] and [9].

Schedule 1 [4] is consequential on the amendment made by Schedule 1 [5]. It transfers to a separate section a provision in section 88A that is not limited to the Crown or public or local authorities, being a provision relating to other easements, or the benefit of a restriction on the use of land, being made appurtenant or annexed to an easement.

Schedule 1 [6] and [7] are consequential on the amendment made by Schedule 1 [5].

Schedule 1 [8] continues the retrospective operation of section 88A, but enables the extension of the section to prescribed corporations not to have retrospective effect.

Schedule 1 [9] omits provisions in section 88A that deem the State owned corporations to be public authorities for the purposes of obtaining the benefit of that section. The prescription of those corporations is to be continued by the regulations made under the proposed power conferred by Schedule 1 [5]—see Schedule 3.

Schedule 1 [10] and [11] are consequential on the amendment made by Schedule 1 [5].

Schedule 2 Consequential amendment of other Acts

Schedules 2.1, 2.2, 2.3, 2.4 and 2.6 amend the *Bicentennial Park Trust Act 1987*, the *Centennial Park and Moore Park Trust Act 1983*, the *Crown Lands Act 1989*, the *Darling Harbour Authority Act 1984* and the *Royal Botanic Gardens and Domain Trust Act 1980* as a consequence of the amendment made by Schedule 1 [5]. The amendments to those Acts revise definitions of easements in gross as referred to in section 88A of the *Conveyancing Act 1919* so as to extend those definitions to easements in gross in favour of prescribed corporations under section 88A, as amended by Schedule 1 [5].

Schedule 25 repeals section 62 of the Pipelines Act 1967 which confers the benefit of section 88A of the *Conveyancing Act 1919* on holders of permits and licences under that Act to construct and use pipelines. The provision enables easements in gross to be created in favour of those permittees and licensees in connection with the construction and use of pipelines and associated matters. As a result of the extension of section 88A by the amendments made in Schedule 1, it will no longer be necessary to make a special extension of section 88A in the *Pipelines Act 1967*. The prescription of the permittees and licensees in connection with pipelines is to be continued by the regulations made under the proposed power conferred by Schedule 1 [5]—see Schedule 3.

Schedule 3 Consequential amendment of Conveyancing (General) Regulation 1992

The Schedule amends the regulation to insert a clause to continue the prescription of the State owned corporations that currently have the benefit of section 88A (as a consequence of the omission by Schedule 1 of the express reference to those corporations in section 88A). The Schedule also continues the prescription of permittees and licensees under the *Pipelines Act 1967* that currently have the benefit of section 88A in connection with pipelines (as a consequence of the repeal of section 62 of the *Pipelines Act 1967* by Schedule 2).