

[Act 1999 No 58]



New South Wales

Real Property and Conveyancing Legislation Amendment Bill 1999

Explanatory note

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

Overview of Bill

The objects of this Bill are as follows:

- (a) to amend the *Real Property Act 1900*:
 - (i) to enable the Registrar-General to correct the Register kept under the *Real Property Act 1900* (the **Register**) by amending wrong references to lot numbers, and
 - (ii) to clarify the circumstances in which a caution affecting a qualified certificate of title lapses if title derives otherwise than from a transaction for value, and
 - (iii) to provide for additional circumstances in which cross-easements for support for party walls may be created by application, and
 - (iv) to make it clear that the Registrar-General may cancel an easement in relation to the whole or part of land affected by the easement, and
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- (v) to provide for a caveat on title to land, that is extended by an order of the Supreme Court, to cease to have effect if the period specified in the order expires or relevant proceedings are finalised, and
 - (vi) to make it clear that a joint tenancy is not severed until the instrument from which severance arises is registered or recorded, and
 - (vii) to extend the Registrar-General's powers to determine boundary disputes to disputes involving land that is not Torrens title land, and
 - (viii) to make additional amendments to provisions relating to boundary determinations, including requirements as to lodgment of plans and the manner in which appeals against determinations may be made, and
 - (ix) to enable a court (not being a Local Court or a tribunal) to make orders relating to folios in the Register, and certificates of title, in certain proceedings before it, and
 - (x) to make other amendments of a consequential, savings and transitional and statute law revision nature,
- (b) to amend the *Conveyancing Act 1919* to make amendments of a statute law revision nature to provisions relating to covenants and easements,
- (c) to amend the *Land and Environment Court Act 1979* as a consequence of amendments relating to appeals from boundary determinations.

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 proclaimed.

Clause 3 is a formal provision giving effect to the amendments to the *Real Property Act 1900* set out in Schedule 1.

Clause 4 is a formal provision giving effect to the amendments to the *Conveyancing Act 1919* and the *Land and Environment Court Act 1979* set out in Schedule 2.

Schedule 1 Amendment of Real Property Act 1900

Registrar-General's powers to correct lot numbers

Currently, the Registrar-General does not have power to correct references to wrong lot numbers referred to in the Register.

Schedule 1 [1] enables the Registrar-General to correct such mistakes.

Schedule 1 [2] inserts provisions that set out the manner in which the correction is to be shown and provides for the effect of the correction.

Cautions

When a qualified folio of the Register is created by the Registrar-General, a caution warning persons that the land is held subject to any subsisting interest is recorded in that folio. The caution lapses in the circumstances set out in sections 28M and 28MA of the *Real Property Act 1900*. Section 28MA sets out the circumstances in which a caution will lapse where the title documents evidencing title of the land for which a qualified folio is issued included a conveyance or purported conveyance other than for value.

Schedule 1 [4] makes it clear that the first circumstance is where there have been 2 successive registered proprietors who have paid valuable consideration and have become registered without fraud subsequent to the creation of the qualified title. The caution will lapse on the expiration of 6 years after the first registered proprietor became registered or when the second person became registered, whichever is the later.

Cross-easements for support for party walls

Currently, cross-easements for support of a party wall are provided when a plan referring to a wall described in the plan as a “party wall” through which a boundary of a lot in the plan passes longitudinally is registered under the *Conveyancing Act 1919*.

Schedule 1 [6] provides for the creation of cross-easements, on the application of all persons having a registered interest in land benefited or burdened by the cross-easements, when a plan registered or recorded under Division 3 of Part 23 of the *Conveyancing Act 1919* shows a boundary of a lot passing longitudinally through a wall that is described as a “proposed party wall”.

Schedule 1 [7] makes a consequential amendment.

Easements

The Registrar-General has power under the *Real Property Act 1900* to cancel recordings of easements in the Register if the easements have 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.

Schedule 1 [8] provides that the Registrar-General may cancel an easement wholly or partially, so that cancellation may be with respect to all land affected, any one or more of the lots, or part of a lot burdened, or any one or more lots benefited by the easement.

Schedule 1 [9] makes it clear that the period of 20 years for which the easement must not have been used relates to the time before the application for cancellation of an easement is lodged with the Registrar-General.

Caveats

Caveats against primary applications, dealings, possessory applications, plans and applications for cancellation of easements or extinguishment of restrictive covenants may be lodged with the Registrar-General. The *Real Property Act 1900* provides for the circumstances when caveats will lapse. Under that Act the Supreme Court may extend by order the operation of such caveats for a period specified in the order or until the further order of the Court.

Schedule 1 [11] inserts proposed section 74LA. The proposed section provides that a caveat lapses if the period of extension of the operation of the caveat ends and no further order is made by the Court to extend the caveat. In the case of an order extending the operation of a caveat until the further order of the Court, a caveat will lapse if the Registrar-General is satisfied that the relevant proceedings have been finalised and that no further order is likely to be sought and makes a recording in the Register that the caveat has lapsed.

Severance of joint tenancies

Section 97 of the *Real Property Act 1900* sets out the process by which and the circumstances in which a joint tenancy can be severed by the unilateral action of one of the joint tenants. The provision was inserted by the *Real Property and Conveyancing Amendment Act 1997*. Severance occurs, and was intended when the legislation was enacted to occur, only on registration of the relevant transfer or on recording of the relevant dealing from which severance arises.

Schedule 1 [12], [13], [14] and [15] amend section 97 to clarify that the intended point at which severance occurs is registration of a transfer or recording of a dealing and not at any earlier point.

Schedule 1 [16] extends the category of joint tenants not required to be notified of lodgment of a dealing for registration or recording that may sever a joint tenancy to joint tenants who execute any such dealing or on whose behalf any such dealing is executed.

Schedule 1 [17] creates additional circumstances in which the Registrar-General is not required to give notice to a joint tenant of a lodgment of a dealing for registration or recording that may sever a joint tenancy.

Boundary determinations by Registrar-General

Part 14A of the *Real Property Act 1900* sets out procedures enabling applications to be made to the Registrar-General for determination of the position of the common boundary of adjoining lands.

Schedule 1 [21] applies the Part to land that is not under the *Real Property Act 1900* (that is, land that is not Torrens title land), in addition to land that has been brought under the Act. Currently, the Part does not apply to land held under common law title or that is comprised in a limited folio of the Register or that is the subject of a primary application to bring it under the Act.

Schedule 1 [22] substitutes section 135J containing rights to appeal against determinations by the Registrar-General as to boundaries. At present, appeal is by way of referral to the Land and Environment Court by the Registrar-General, at the request of a person dissatisfied with a determination. The new section 135J confers on the dissatisfied person a direct right of appeal to the Land and Environment Court and also enables a public or local authority or the Head of a Government Department to appeal. The Registrar-General may not take action to note the revised boundaries until the expiration of the period for making an appeal (without an appeal being made) or the determination of any appeal.

Schedule 1 [23] enables the Registrar-General, after determining the position of a boundary, to require the applicant for the determination to deposit in the office of the Registrar-General a plan showing details of the boundary as so determined. Copies may also be required to be lodged. The Registrar-General may refuse to take action to note the boundary if any such requirement is not complied with.

Schedule 1 [24] makes a consequential amendment.

Cancellation of folios and other actions at court direction

Schedule 1 [25] substitutes section 138 which sets out the power of a court, for the purposes of any proceedings before it, to direct the Registrar-General to take actions in relation to the Register. The new section 138 specifies a court's power to direct that the Registrar-General cancel or amend a folio, cancel, amend or make a recording on a folio, create a new folio or issue a new certificate of title. A court may also direct that a person deliver a certificate of title or other instrument to the Registrar-General. The new section retains the existing power to make such orders

and also enables such orders to be made in proceedings for the possession or production of certificates of title, or proceedings where a determination is made as to an estate or interest in land, if the court is of the opinion that the certificate of title has not been, or is not likely to be, produced for registration. It also re-enacts existing provisions excluding the Registrar-General from liability resulting from compliance with the proposed section.

Statute law revision

Schedule 1 [3] and **[5]** update references to an Act.

Schedule 1 [10], [18], [19] and **[20]** omit outdated references to insolvency.

Savings and transitional provisions

Schedule 1 [26] and **[27]** insert savings and transitional provisions consequent on the enactment of the proposed Act.

Schedule 2 Amendment of other Acts

Conveyancing Act 1919

Schedule 2.1 [1] provides for an instrument creating a positive covenant for maintenance or repair of land that is subject to an easement to indicate the name of the prescribed authority in whose favour the easement is created, if the land is subject to an easement without a dominant tenement created in favour of a prescribed authority.

Schedule 2.1 [2] omits unnecessary words.

Schedule 2.1 [3] requires a plan lodged in the office of the Registrar-General for registration or recording under Division 3 of Part 23 of the *Conveyancing Act 1919* (which provides for the registration of plans) to contain details of any easements or profits à prendre that are intended to be partially released.

Schedule 2.1 [4] excludes positive covenants for maintenance or repair from provisions relating generally to the creation of easements and other interests in land. Positive covenants are dealt with under other provisions.

Schedule 2.1 [5] makes it clear that the Supreme Court, when considering whether to make an order imposing an easement on land on the ground that it is reasonably necessary for the development or use of the land, is to consider whether the use of the land benefited by the proposed easement will not be inconsistent with the public interest. Currently, the requirement is not limited to land benefited by the easement.

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Schedule 2.1 [6] corrects a wrong reference to the lot benefited in provisions relating to easements for repair.

Schedule 2.1 [7] enables savings and transitional regulations to be made as a consequence of the enactment of the proposed Act.

Land and Environment Court Act 1979

Schedule 2.2 makes a consequential amendment as a result of the amendments made by the proposed Act to the provisions in the *Real Property Act 1900* for appeals against boundary determinations by the Registrar-General.