

[Act 1995 No 71]



New South Wales

## Property Legislation Amendment (Easements) Bill 1995

### Explanatory note

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

#### Overview of Bill

The objects of this Bill are:

- to provide for the creation of covenants requiring the repair or maintenance of the sites of easements (known as “positive covenants”) that are not able to be created under the present law, and
- to simplify the creation of various kinds of easements by giving expanded meanings to short forms of words when they are used with the intention of creating easements of those kinds, and
- to allow the Supreme Court to make orders imposing easements that are not inconsistent with the public interest, subject to it being practicable to provide adequate compensation, and
- to remove impediments to the effectiveness of certain easements, and
- to provide greater certainty in various aspects of the law relating to easements.

For those purposes, the Bill amends the *Conveyancing Act 1919* and the *Red Property Act 1900*.

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## 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 proclaimed.

**Clause 3** gives effect to the amendments to the *Conveyancing Act 1919*.

**Clause 4** gives effect to the amendments to the *Real Property Act 1900*.

## Schedule 1 Amendment of Conveyancing Act 1919

### Positive covenants for repair and maintenance

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.

Proposed section 88BA and consequential amendments to sections 87A and 88F will 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. (**Schedule 1 [1], [6] and [12]**)

### Descriptions of sites of easements and restrictions on land use and of the land burdened or benefited by them

Instruments creating easements or restrictions on the use of land must clearly indicate their sites and the land burdened or benefited by them or they will be unenforceable because of section 88. However, it is only necessary to show the approximate position of existing tunnels, pipes, conduits, wires or other similar objects that are underground or within or beneath an existing building. It is presently not clear how accurate a description must be of the site of certain easements (such as tracks in use) the position of which may be uncertain or vary over time.

Amendments to section 88 will provide that the land having the burden or benefit of an easement, and the site of an easement, will be adequately specified if it is shown in accordance with regulations made under the *Conveyancing Act 1919* or the *Real Property Act 1900* or (in particular cases) in any other way that is satisfactory to the Registrar-General. **(Schedule 1 [3])**

### **Revision of inappropriate provision**

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.

Amendments to section 88 remove inappropriate requirements which imply that third parties may release, vary or modify an easement. **(Schedule 1 [2])**

### **Use of short forms of words to create easements that do not benefit other land**

Certain easements (known as easements in gross) do not benefit other land. Examples of these kinds of easements are drainage easements for the benefit of local councils and easements to lay water pipes or to erect transmission lines for the benefit of water or electricity supply authorities.

Section 88A is amended to add to the short forms of words that, when used to create easements in gross, are taken to have the expanded meanings set out in Schedule 4A. A power to vary those expanded meanings is also conferred by the amendments to section 88A. **(Schedule 1 [4] and [5])**

Schedule 4A is amended to insert the additional expanded meanings. **(Schedule 1 [20])**

### **Cross-easements for party walls**

A convenient method of creating easements, profits à prendre and restrictions on the use of land when plans are registered or recorded under the Act is presently provided for by section 88B.

Proposed section 88BB will allow cross-easements for the support of party walls to be created under section 88B simply by registration or recording of a plan that shows a lot boundary within a length of the wall and refers to the wall as a “party wall”. Such easements will be created even if they apply to different lots owned by the same person. **(Schedule 1 [6])**

Section 181B, which provides for the creation of easements for the support of party walls by assurances of land, is amended so that it ceases to apply when section 88BB commences. Easements created by section 181B before that commencement will not be affected. **(Schedule 1 [17])**

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## **Release of easements on registration of plans**

Although section 88B provides for the creation of easements and other interests on the registration of plans, there is presently no equivalent provision for their being extinguished.

Sections 88B and 195D are amended to allow for the release of easements on registration or recording of a plan under Division 3 of Part 23 of the Act. **(Schedule 1 [7], [11] and [19])**

## **Creation of easements and other interests on recording of plans**

The purpose of section 88B is explained above. The section is directed at the creation of easements and other interests when plans are either registered or recorded under the Act.

Section 88B is amended to make it clear that easements and other interests may be created under that section by plans recorded under the Act in the same way as they may be created by plans registered under the Act. **(Schedule 1 [8])**

## **Effect of merger of ownership on easements created under section 88B**

Common law principles have the result of preventing the creation of easements that benefit and burden land owned by the same person and of extinguishing an easement that has been created if the land benefited and burdened by the easement becomes owned by the same person at any time after the easement was created. Use of section 88B has always been intended to be excepted from those consequences.

Section 88B is amended to make it clear that an easement or other interest created under that section is not affected when only part of the land having the benefit of the easement comes into the same ownership as the parcel of land having the burden of the easement. **(Schedule 1 [9] and [10])**

## **Creation of easements on application to Supreme Court**

Proposed section 88K provides that the Supreme Court may impose an easement burdening land if the easement is reasonably necessary for the effective use or development of other land that will have the benefit of the easement and use of the land in accordance with the easement would not be inconsistent with the public interest. The applicant for an order imposing such an easement must bear the costs of the application and must establish that all reasonable attempts have been made to acquire the easement before the Court will impose it.

Provision is also made for the payment of compensation to be assessed by the Court and for the release and modification of such an easement by the persons affected and benefited by it. Easements created under the proposed section may also be extinguished or modified by the Court under section 89 of the Act. **(Schedule 1 [13])**

### **Use of short forms of words to create easements for the benefit of other land**

Section 181A contains short forms of words that, when used to create easements for the benefit of other land, are taken to have the expanded meanings set out in Schedule 8. The section and Schedule are amended to add to the short forms.

A power to vary those meanings is also conferred by the amendments to section 181A. **(Schedule 1 [14], [15], [16], [21] and [22])**

### **Abolition of defunct committee**

Section 184 provides for a committee having the function of devising additional expanded meanings required to be given to short forms of words used to describe easements. The section is repealed because the committee has ceased to function. **(Schedule 1 [18])**

## **Schedule 2 Amendment of Real Property Act 1900**

### **Easements affecting estate or interest of registered proprietor even though unrecorded or misdescribed**

Section 42 declares the extent to which the estate or interest in land of a registered proprietor is paramount if it is recorded in a folio of the Register kept under the Act.

The section is amended *so* as to specify separately the easements that will affect such an estate or interest, even though they are omitted from or are misdescribed in the folio. Such an easement must have subsisted when the land concerned was brought under the Act or have been validly created under an Act at or after that time. In the case of an easement that is omitted, it does not make any difference if the easement has never been recorded in the folio or, although previously recorded, it is omitted from the folio because of an administrative error.

The amendment is consistent with the decision of the New South Wales Court of Appeal in *Dobbie & Anor v Davidson & Ors* (1991) 23 NSWLR 625. (Schedule 2 [1] and [2])

### **Easement (and profit a pendre) to be recorded on folio for servient tenement**

Subject to a limited number of exceptions (such as that relating to easements referred to above), interests registered under the Act need to be recorded on the folio for the land affected by them if they are to be enforceable against the registered proprietor of an estate or another interest in land recorded in that folio.

Section 47 is amended to confirm that the Registrar-General must enter particulars of a registered easement (or profit à prendre) on the folio for the land to be burdened by the easement (or profit à prendre) and on any folio for the land benefited. (Schedule 2 [3])

### **Variation of a registered easement**

At present, there is no direct way provided by the Act for varying the terms or site of an easement after it has been registered. However, it may be wholly or partly released under section 47 (6).

Section 47 is amended to provide a simple procedure for the variation, by registration of a memorandum of variation, of an easement registered under the Act. (Schedule 2 [4])

### **Effect of partial merger of ownership on easements**

The consequence of common law principles resulting in an easement being extinguished if separate parcels of land burdened and benefited by it come within the same ownership is mentioned above.

Section 47 is amended to make it clear that, when only part of the land having the benefit of an easement recorded in the Register kept under the Act comes into the same ownership as a separate parcel of land having the burden of the easement, the easement continues to apply. (Schedule 2 [5])

### **Recording of cross-easements for party walls on application to Registrar-General**

Proposed section 48 will allow the Registrar-General, on the application of persons having registered estates or interests in parts of a building separated by a common wall situated on land under the provisions of the Act that will be affected by the easements, to create cross-easements for support of the wall if it is shown as a “party wall” in any plan registered or recorded under the *Conveyancing Act 1919*.

The proposed section will apply only to plans that were registered or recorded before it commences because later plans will be able to take advantage of proposed section 88BB of the *Conveyancing Act 1919* referred to above. The proposed section may be able to be used if plans were registered or recorded under that Act to show the location of party walls referred to in assurances intended to create cross-easements under section 181B of that Act. (Schedule 2 [6])

### **Cancellation of references to easements abandoned or rendered ineffective by consolidation of land or registration of plan**

Proposed section 49 will allow the Registrar-General, after giving notice of intention to do so, to cancel the registration of certain easements that have been abandoned. Lack of use of an easement for a period of 20 years or more (whether commencing before or after the amendments commence) will be sufficient evidence of abandonment.

The new power to cancel the registration of easements does not extend to easements in gross (such as those for the benefit of public authorities) and may be exercised only after at least one month’s notice of intention to do so has been given to each person having a registered estate or interest in land benefited by the easement.

The proposed section will also expressly allow the Registrar-General to remove recordings from folios of the Register that relate to easements which have ceased to have any practical application because land burdened by the easement and other land benefited by the easement has been consolidated into a single parcel or because the easement has been released by registration of a plan as provided for by proposed section 88B (3AA) of the *Conveyancing Act 1919*. (Schedule 2 [6])