

[Act 1997 No 95]



New South Wales

Real Property and Conveyancing Amendment Bill 1997

Explanatory note

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

Overview of Bill

The object of this Bill is to make a number of miscellaneous amendments to the provisions of the *Real Property Act 1900* and the *Conveyancing Act 1919* that deal with the following:

- the effect of uplifting caveats after lodgment,
- caveats against cancellation of notifications of easements,
- the severance of joint tenancies by unilateral action,
- notice of severance of joint tenancies,
- the effect of the death of a co-owner on proceedings for partition or sale,
- the power of the Registrar-General to give notice of the registration, recording or amendment of plans,
- various consequential matters.

* 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 1 January 1998.

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* set out in Schedule 2.

Schedule 1 Amendment of Real Property Act 1900

Effect of uplifting caveats after lodgment

The *Real Property Act 1900* (in this Schedule called the *Principal Act*) is amended to make it clear that a caveat that is uplifted from the Land Titles Office after lodgment is ineffective and does not act as an injunction against the recording or registration of any dealing or the granting of any application (the recording, registration or granting of which is prohibited by the caveat) until the caveat is relodged. This provision formally places caveats that are uplifted in a similar position to dealings that are lodged for registration and subsequently uplifted, such dealings being deemed by the Principal Act not to be in registrable form.

In the past, the Land Titles Office has viewed dealings and caveats that are uplifted as occupying a similar position. However, the Supreme Court in *JA Westaway & Son Pty Ltd v Registrar General & ors* (Young J, Equity Division, 6 September 1996, unreported) has held that a caveat that is under requisition and has been uplifted from the Land Titles Office remains effective as an injunction against the registration of dealings as long as reference to it is noted in the Register. As noted above, the proposed amendment restores previous practice by placing caveats on the same footing as dealings so far as uplifted documents are concerned. (See Schedule 1 [2].)

Schedule 1 [1] and [7] make consequential and other minor amendments.

Caveats against cancellation of notifications of easements

Provisions are inserted in the Principal Act to enable a person who claims to have an interest in an easement to lodge a caveat to prohibit the cancellation of the notification of the easement as the result of an application for such cancellation that is lodged with the Registrar-General before the lodgment of the caveat.

The proposed amendments will bring the treatment of such an application in line with that of other types of applications, such as primary applications and possessory applications, that are publicised before being granted and the grant of which can be prevented by the lodgment of caveats after the applications are made. (See Schedule 1 [4] and [6].)

Schedule 1 [3], [5], [8] and [9] make consequential amendments.

Severance of joint tenancy by unilateral action

It is proposed that the Principal Act be amended to include a provision, declaratory of the common law, confirming that a joint tenant may sever a joint tenancy unilaterally by transferring his or her interest in the land that is the subject of the joint tenancy to himself or herself.

If a joint tenancy is severed by unilateral action on the part of one joint tenant or a third party (such as on the lodgment of a bankruptcy application in relation to one joint tenant), the Registrar-General may require the person who effects the severance to provide the Registrar-General with the names and addresses of the joint tenants and a statement that the person is not aware of any impediment to his or her capacity or entitlement to sever the joint tenancy.

The Registrar-General may also call on the person to provide additional information concerning other persons who may be affected by the severance or any possible limitation or restriction on the person's capacity or entitlement to sever the joint tenancy. (The information provided may, if the Registrar-General considers it appropriate, be used by the Registrar-General, in the exercise of powers under Part 2 of the Principal Act, to give notice of the severance to persons who may be affected by it, including joint tenants.)

The proposed amendment is not intended to displace any private or statutory obligation pursuant to which a joint tenant is required to continue to hold his or her interest in a joint tenancy with the other joint tenants. (See Schedule 1 [10].)

Schedule 2 Amendment of conveyancing Act 1919

Notice of severance of joint tenancy

A provision is inserted in the *Conveyancing Act 1919* (in this Schedule called the *Principal Act*) to require a person who unilaterally severs, or causes the severance of, a joint tenancy in land to which the *Real Property Act 1900* does not apply to give notice of the severance to all joint tenants who have an interest in the land. The notice is to be given in a form approved by the Registrar-General. Failure to give the notice does not invalidate or otherwise affect the severance of the joint tenancy. (See Schedule 2 [1].)

Effect of death of co-owner on proceedings for partition or sale under section 66G

The Principal Act is amended to expressly provide that any action for the partition or sale of property held in co-ownership survives the death of any co-owner against or for the benefit of the deceased co-owner's estate despite, in the case of a joint tenancy, the rule of survivorship. (See Schedule 2 [2].)

Power of Registrar-General to give notice of registration, recording or amendment of plans

The Principal Act is amended to give the Registrar-General the power to serve notice of the intention to register, record or amend plans (including plans creating easements, restrictions on the use of land or positive covenants) under that Act on any person who the Registrar-General considers may be affected by the taking of such action.

The terms of the inserted provision are similar to those of section 12A of the *Real Property Act 1900* that empower the Registrar-General to give notice to affected persons of proposed action, such as the registration of a dealing, in respect of the Register maintained under that Act. (See Schedule 2 [3].)