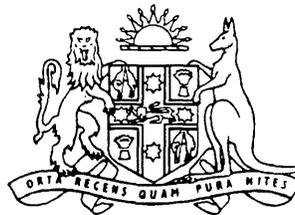


[Act 1998 No 31]



New South Wales

Real Property Amendment Bill 1998

Explanatory note

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

Overview of Bill

The object of this Bill is to amend the *Real Property Act 1900* to allow the Registrar-General, independently or in response to an application, to extinguish certain restrictive covenants, including restrictive covenants that are no longer of any practical application or value, and to cancel the recording of such covenants in the register of land titles kept under the Act.

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 *Real Property Act 1900* set out in Schedule 1.

Schedule 1 Amendments

Extinguishment of restrictive covenants

A restrictive covenant is an express or implied obligation, originating in an instrument, to refrain from using land in a particular way or to refrain from doing a particular thing on or in relation to land.

Schedule 1 amends the *Real Property Act 1900* to empower the Registrar-General to extinguish certain restrictive covenants, including restrictive covenants that are no longer of any practical application or value. The amendments create a procedure, including court action, to protect the interests of those with the benefit of a restrictive covenant.

Schedule 1 [21] inserts a new Part 8A in the *Real Property Act 1900*. The provisions of that Part are as follows:

Part 8A Extinguishment of restrictive covenants

Division 1 Preliminary

Proposed section 81 defines terms used in the proposed Part, including *building materials covenant*, *fencing covenant* and *value of structures covenant*, the three types of restrictive covenants in relation to which an application for extinguishment can be made.

Division 2 Applications to have restrictive covenants extinguished

Proposed section 81A provides that a person who is the registered proprietor of land that is subject to the burden of a building materials covenant, fencing covenant or value of structures covenant, that has been in effect for 12 years or more, can apply to the Registrar-General for the extinguishment of the restrictive covenant.

Proposed section 81B empowers the Registrar-General to ask for further information to support an application.

Proposed section 81C empowers the Registrar-General to reject an application for extinguishment without going through all the procedures in proposed Part 8A if, in the opinion of the Registrar-General, the relevant restrictive covenant is not a building covenant, fencing covenant or value of structures covenant or is less than 12 years old.

Division 3 Right to be notified of proposed extinguishment of restrictive covenant

Proposed section 81D sets out the persons who have a right to receive written notice of any application to extinguish a restrictive covenant. These include every person who has a registered or equitable interest in the land benefited by the restrictive covenant and every person who has the right to release, vary or modify the restrictive covenant or to consent to such release, variation or modification.

Proposed section 81E sets out the form of notice that must be given to those interested persons, informing them of the making of an application for extinguishment of the restrictive covenant by another person. That notice must inform the interested person of the person's right to object to the proposed extinguishment, by lodging a caveat against the grant of the application within a specified time.

Proposed section 81F sets out the minimum time to be allowed for such a person to lodge a caveat, that is, the time during which the application will not be determined.

Proposed section 81G sets out the way in which a notice of an application is to be served. Generally, service is to be in person or by registered post, but the Registrar-General may give notice by way of a newspaper advertisement if certain conditions are satisfied.

Proposed section 81H allows the Registrar-General to direct the person who made the application for extinguishment to meet the obligations relating to the giving of notice that the proposed Division imposes on the Registrar-General. The Registrar-General may reject the person's application if the person does not notify all interested persons in the appropriate way.

Division 4 Extinguishment of restrictive covenants

Proposed section 81I sets out the circumstances in which the application may be granted. namely, if the application was properly made, appropriate notice was given and no caveat was lodged within the required time.

Proposed section 81J provides that the Registrar-General may extinguish a restrictive covenant without receiving an application if the restrictive covenant is of no practical value or practical application or in other specified circumstances.

Proposed section 81K provides for the Registrar-General to cancel the recording in the Register of any restrictive covenant that he or she has decided to extinguish. A restrictive covenant is taken to have been extinguished when that recording is cancelled.

Proposed section 81L provides that if a restrictive covenant is extinguished it is not enforceable.

Caveats against extinguishment of restrictive covenants

Provisions are also inserted in the *Real Property Act 1900* to enable a person to lodge a caveat prohibiting the extinguishment of a restrictive covenant if the person has a registered interest, or claims to be entitled to any equitable estate or interest, in land benefited by the restrictive covenant or has a right to release, vary or modify the restrictive covenant or to consent to that release, variation or modification.

The proposed amendments will result in an application for the extinguishment of a restrictive covenant being dealt with in a similar way to other types of applications, such as primary applications, possessory applications and applications for the cancellation of easements, that are publicised before being granted and the grant of which can be prevented by the lodgment of caveats.

Schedule 1 [2] provides for the lodgment of caveats prohibiting the Registrar-General from granting an application to extinguish a restrictive covenant.

Schedule 1 [4] requires the Registrar-General to notify any person who has made an application for the extinguishment of a restrictive covenant that a caveat has been lodged against the extinguishment of the covenant.

Schedule 1 [5]–[11] specify that the effect of a caveat lodged under proposed section 74F (4B) is that the Registrar-General cannot extinguish any restrictive covenant to which the caveat relates.

Schedule 1 [13] deals with the lapsing of caveats on the application of the person who made the original application for the extinguishment of the restrictive covenant.

Schedule 1 [14] and [15] make consequential amendments to the provision of the Act that empowers the Supreme Court to extend the operation of a caveat if the Court is satisfied that the caveator has a claim that has substance.

Schedule 1 [16] makes a consequential amendment to the provision that sets out the circumstances in which a caveat is taken to be withdrawn.

Schedule 1 [17]–[19] make consequential amendments to the provision that sets out the circumstances in which the Act restricts the lodgment of further caveats by the same caveator.

Schedule 1 [20] makes it clear that a caveator retains the right to apply to the Supreme Court for an injunction for the purposes of restraining the granting of an application to extinguish a restrictive covenant.

Schedule 1 [1], [3], [9] and [12] make other consequential amendments.

Barring of actions relating to extinguishment of restrictive covenants

Schedule 1 [22] provides that no action can be brought against the Registrar-General in relation to any loss arising from the extinguishment of a restrictive covenant if the person alleging the loss was notified, or was otherwise aware, that an application for the extinguishment of the restrictive covenant had been made and the person did not lodge a caveat in the appropriate time, or allowed the caveat to lapse.

Savings and transitional regulation-making power

Schedule 1 [23] inserts a power to make savings and transitional regulations consequent on the enactment of the proposed Act.