



New South Wales

# Property Legislation Amendment Bill 2005

## Explanatory note

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

## Overview of Bill

The object of this Bill is to make miscellaneous amendments to the law relating to real property by amending the following Acts to achieve the aims described below:

- (a) the *Real Property Act 1900* so as:
  - (i) to require the boundaries of land to be adequately defined before an ordinary folio of the Register kept under that Act (*the Register*) is created for the land instead of a qualified folio, and
  - (ii) to require the Registrar-General to have regard to a survey report and an identification survey before cancelling a caution on a qualified folio after receipt of an official title search under the *Conveyancing Act 1919*, and
  - (iii) to authorise the Registrar-General to record a note in a folio of the Register indicating that land has the benefit of a permit to enclose a road or watercourse, or a licence authorising the use or occupation of Crown land, granted under the *Crown Lands Act 1989*, or a permissive occupancy granted over Crown land, and

- (iv) to allow the creation of easements, profits à prendre and restrictions on the use of land that will only affect land subject to the provisions of the *Real Property Act 1900* (otherwise than by the registration of an instrument under section 88B of the *Conveyancing Act 1919*) where the same person will be the proprietor of the parcels burdened and benefited by them,
- (v) to provide for the registration in the Register of dealings affecting a common law lease that is recorded as an encumbrance in the Register,
- (b) the *Conveyancing Act 1919* so as to remove a reference to a “general order” setting costs that is no longer provided for by that Act and omit an amendment to another Act that has already taken effect,
- (c) the *Strata Schemes (Freehold Development) Act 1973* and *Strata Schemes (Leasehold Development) Act 1986* to make it clear that a by-law cannot be made under either of those Acts allowing the proprietors in a strata scheme to avoid any of their responsibilities under a strata management statement,
- (d) the *Local Government Act 1993* to provide for the dedication and vesting in a council of land as a council public reserve, and the vesting in a council of land as a drainage reserve, on registration of a transfer or conveyance of the land to the council for that purpose (as may presently be effected by the registration of a plan of subdivision that identifies land as a “public reserve” or “drainage reserve”).

The Bill also makes some minor amendments to the *Real Property Act 1900* that are consequential on other amendments described above, repeals an archaic and redundant provision (section 99 of that Act) and makes other minor amendments by way of statute law revision.

## 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 that gives effect to the amendments to the *Real Property Act 1900* set out in Schedule 1 and described above in the Overview.

**Clause 4** is a formal provision that gives effect to the amendments to the *Conveyancing Act 1919* set out in Schedule 2 and described above in the Overview.

**Clause 5** is a formal provision that gives effect to the amendments to the *Strata Schemes (Freehold Development) Act 1973* set out in Schedule 3 and described above in the Overview.

**Clause 6** is a formal provision that gives effect to the amendments to the *Strata Schemes (Leasehold Development) Act 1986* set out in Schedule 4 and described above in the Overview.

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**Clause 7** is a formal provision that gives effect to the amendments to the *Local Government Act 1993* set out in Schedule 5 and described above in the Overview.





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New South Wales

# Property Legislation Amendment Bill 2005

No. , 2005

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## **A Bill for**

An Act to amend the *Real Property Act 1900*, the *Conveyancing Act 1919*, the *Local Government Act 1993* and Acts relating to strata titles to make miscellaneous provisions concerning real property; and for other purposes.

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|---|----------|
| <b>The Legislature of New South Wales enacts:</b>   | 1        |
| <b>1 Name of Act</b>  | 2        |
| This Act is the <i>Property Legislation Amendment Act 2005</i> .                                | 3        |
| <b>2 Commencement</b>   | 4        |
| This Act commences on a day or days to be appointed by proclamation.                            | 5        |
| <b>3 Amendment of Real Property Act 1900 No 25</b>  | 6        |
| The <i>Real Property Act 1900</i> is amended as set out in Schedule 1.                          | 7        |
| <b>4 Amendment of Conveyancing Act 1919 No 6</b>  | 8        |
| The <i>Conveyancing Act 1919</i> is amended as set out in Schedule 2.                           | 9        |
| <b>5 Amendment of Strata Schemes (Freehold Development) Act 1973 No 68</b>                      | 10       |
| The <i>Strata Schemes (Freehold Development) Act 1973</i> is amended as set out in Schedule 3.  | 11<br>12 |
| <b>6 Amendment of Strata Schemes (Leasehold Development) Act 1986 No 219</b>                    | 13<br>14 |
| The <i>Strata Schemes (Leasehold Development) Act 1986</i> is amended as set out in Schedule 4. | 15<br>16 |
| <b>7 Amendment of Local Government Act 1993 No 30</b>   | 17       |
| The <i>Local Government Act 1993</i> is amended as set out in Schedule 5.                       | 18       |



|                   |   |                  |
|-------------------|---|------------------|
| <b>Schedule 1</b> | <b>Amendment of Real Property Act 1900</b>  | 1                |
|                   | (Section 3)   | 2                |
| <b>[1]</b>        | <b>Section 28EA Ordinary folio may be created in certain cases</b>  | 3                |
|                   | Insert at the end of the section:   | 4                |
|                   | (2) The Registrar-General may create an ordinary folio of the Register under this section only for land the boundaries of which, in the opinion of the Registrar-General, are adequately defined without further survey definition. | 5<br>6<br>7<br>8 |
| <b>[2]</b>        | <b>Section 28MC Application for cancellation of caution accompanied by search</b>   | 9<br>10          |
|                   | Insert after section 28MC (3) (a):  | 11               |
|                   | (a1) the Registrar-General has had regard to a survey report and an identification survey relating to the land that have been prepared by a registered surveyor, and  | 12<br>13<br>14   |
| <b>[3]</b>        | <b>Section 28MC (3) (c)</b>   | 15               |
|                   | Insert at the end of section 28MC (3) (b):  | 16               |
|                   | , and   | 17               |
|                   | (c) the boundaries of the land, in the opinion of the Registrar-General, are adequately defined without further survey definition.  | 18<br>19<br>20   |
| <b>[4]</b>        | <b>Section 36A</b>  | 21               |
|                   | Insert after section 36:  | 22               |
| <b>36A</b>        | <b>Notification of permits, licences and permissive occupancies affecting Crown land</b>  | 23<br>24         |
|                   | (1) In this section:  | 25               |
|                   | <i>enclosure permit</i> means a permit granted under the <i>Crown Lands Act 1989</i> to enclose a road or watercourse or part of a road or watercourse.   | 26<br>27<br>28   |
|                   | <i>licence</i> means a licence granted under the <i>Crown Lands Act 1989</i> authorising the use or occupation of Crown land.   | 29<br>30         |
|                   | <i>permissive occupancy</i> has the same meaning as in the <i>Crown Lands (Continued Tenures) Act 1989</i> .  | 31<br>32         |

|            |   |                            |
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| (2)        | The Registrar-General may record a note in a folio of the Register to indicate that land has the benefit of an enclosure permit, licence or permissive occupancy and may alter or remove any such note.   | 1<br>2<br>3<br>4           |
| (3)        | The Registrar-General is not liable if such a recording:  | 5                          |
| (a)        | could be made, but is not made, or  | 6                          |
| (b)        | is made or retained, but should not have been made or retained, or is incomplete or inaccurate.   | 7<br>8                     |
| <b>[5]</b> | <b>Section 46 Transfers</b>   | 9                          |
|            | Insert at the end of the section:   | 10                         |
| (2)        | This section does not apply to the creation of an easement or profit à prendre that burdens and benefits separate parcels of land if the same person is the proprietor of the separate parcels of land.   | 11<br>12<br>13             |
| <b>[6]</b> | <b>Section 46A</b>  | 14                         |
|            | Omit the section. Insert instead:   | 15                         |
| <b>46A</b> | <b>Creation of easements etc over own land by a dealing</b>   | 16                         |
| (1)        | An easement, profit à prendre or restriction on the use of land that burdens and benefits separate parcels of land all under the provisions of this Act may be created even though the same person is the proprietor of those separate parcels of land, notwithstanding any rule of law or equity in that behalf. | 17<br>18<br>19<br>20<br>21 |
| (2)        | Any such easement, profit à prendre or restriction on the use of land may be created under this section only by registration in the Register of an instrument that is in the form approved for the purpose by the Registrar-General.  | 22<br>23<br>24<br>25       |
| (3)        | The Registrar-General may refuse to register such an instrument if the Registrar-General is not satisfied that the boundaries of the land concerned, or the site of the easement or the land to which the profit à prendre or restriction applies, are adequately defined.  | 26<br>27<br>28<br>29       |
| (4)        | The Registrar-General may make such recordings in the Register as are necessary to give effect to the easement, profit à prendre or restriction on the use of land.   | 30<br>31<br>32             |
| (5)        | The instrument creating the easement, profit à prendre or restriction on the use of land must be executed:  | 33<br>34                   |
| (a)        | by the registered proprietor of the land burdened and the land benefited by the easement, profit à prendre or restriction, and  | 35<br>36<br>37             |

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| (b)         | by every mortgagee, chargee or covenant chargee under a mortgage, charge or covenant charge recorded in the folio of the Register relating to that land.  | 1<br>2<br>3                |
| (6)         | The Registrar-General may refuse to register any such instrument unless consents in writing to the registration of the instrument signed by (or by an agent authorised by) such of the following persons as the Registrar-General may determine:  | 4<br>5<br>6<br>7           |
| (a)         | the lessee under any lease, or the judgment creditor under any writ, recorded in the folio of the Register relating to the land to be burdened or benefited by the easement, profit à prendre or restriction,   | 8<br>9<br>10<br>11         |
| (b)         | the caveator under a caveat relating to any estate or interest in that land,  | 12<br>13                   |
|             | are lodged in the office of the Registrar-General.  | 14                         |
|             | <b>Note.</b> This section allows an easement, profit à prendre or restriction on the use of land to be created by registration of a dealing under this Act as an alternative to registration of a plan to which section 88B of the <i>Conveyancing Act 1919</i> applies, if all the land concerned is held under the provisions of this Act by the same person. | 15<br>16<br>17<br>18<br>19 |
| <b>[7]</b>  | <b>Section 47 Recording, variation and release of easements etc</b>   | 20                         |
|             | Insert before section 47 (1):   | 21                         |
| (1A)        | In this section, <i>affecting interest</i> means an easement, profit à prendre or restriction on the use of land.   | 22<br>23                   |
| <b>[8]</b>  | <b>Section 47 (1)–(7)</b>   | 24                         |
|             | Omit “easement or profit à prendre” wherever occurring (except where lastly occurring in section 47 (5A)).  | 25<br>26                   |
|             | Insert instead “affecting interest”.  | 27                         |
| <b>[9]</b>  | <b>Section 47 (5A)</b>  | 28                         |
|             | Omit the second sentence.   | 29                         |
| <b>[10]</b> | <b>Section 47 (5B) and (5C)</b>   | 30                         |
|             | Insert after section 47 (5A):   | 31                         |
| (5B)        | The dealing effecting the variation and the plan (if any) must be executed:   | 32<br>33                   |
| (a)         | by the registered proprietors of the land burdened, and of any land benefited, by the affecting interest, and   | 34<br>35                   |

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|             | (b) by every mortgagee, chargee or covenant chargee under a mortgage, charge or covenant charge recorded in the folio of the Register relating to that land.   | 1<br>2<br>3          |
| (5C)        | The Registrar-General may refuse to register any such dealing or plan unless consents in writing to the registration of the dealing or plan signed by (or by an agent authorised by) such of the following persons as the Registrar-General may determine: | 4<br>5<br>6<br>7     |
|             | (a) the lessee under any lease, or the judgment creditor under any writ, recorded in the folio of the Register relating to that land,  | 8<br>9<br>10         |
|             | (b) the caveator under a caveat relating to any estate or interest in that land,   | 11<br>12             |
|             | are lodged in the office of the Registrar-General.   | 13                   |
| <b>[11]</b> | <b>Section 47 (9)</b>  | 14                   |
|             | Insert after section 47 (8):   | 15                   |
|             | (9) Subsection (7) applies only to a restriction on the use of land recorded under this section after the commencement of Schedule 1 [10] to the <i>Property Legislation Amendment Act 2005</i> .  | 16<br>17<br>18       |
| <b>[12]</b> | <b>Section 55B</b>   | 19                   |
|             | Insert after section 55A:  | 20                   |
|             | <b>55B Dealings affecting common law leases</b>  | 21                   |
|             | (1) Provisions of this Act that apply to and in respect of dealings affecting registered leases apply to and in respect of any dealings affecting a lease that is recorded as an encumbrance in a folio of the Register (a <i>common law lease</i> ).      | 22<br>23<br>24<br>25 |
|             | (2) However, registration of a dealing affecting a common law lease does not:  | 26<br>27             |
|             | (a) imply that the lease is registered, or   | 28                   |
|             | (b) otherwise alter the effect that lease would have had in the absence of this section.   | 29<br>30             |
|             | (3) The Registrar-General may reject or refuse to register a dealing lodged for registration that purports to affect a common law lease:   | 31<br>32<br>33       |
|             | (a) if not satisfied as to the devolution of the lease, or   | 34                   |

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|             |   |                      |
|-------------|---|----------------------|
|             | (b) if, for any other reason, of the opinion that the dealing would not have been registered if it had been a dealing lodged for registration that purported to affect a registered lease.                                      | 1<br>2<br>3<br>4     |
| <b>[13]</b> | <b>Section 99 Proprietor may vest estate jointly in himself or herself and others without limiting any use or without re-assignment</b>   | 5<br>6               |
|             | Omit the section.   | 7                    |
| <b>[14]</b> | <b>Schedule 3 Savings and transitional provisions</b>   | 8                    |
|             | Insert after Part 1:  | 9                    |
|             | <b>Part 1A Real Property (Amendment) Act 1970</b>   | 10                   |
|             | <b>1A Construction of references to former section 46A</b>  | 11                   |
|             | A reference to section 46A in any other Act or in any instrument, whether or not made under an Act, is taken to be:   | 12<br>13             |
|             | (a) in relation to anything done before the commencement of the <i>Real Property (Amendment) Act 1970</i> , a reference to section 46A as in force when the thing was done, or  | 14<br>15<br>16       |
|             | (b) in relation to anything done after that commencement but before the commencement of Schedule 1 [6] to the <i>Property Legislation Amendment Act 2005</i> , a reference to section 31A (Creation of folio for resumed land). | 17<br>18<br>19<br>20 |

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|-------------------|--|----|
| <b>Schedule 2</b> | <b>Amendment of Conveyancing Act 1919</b>  | 1  |
|                   | (Section 4)  | 2  |
| <b>[1]</b>        | <b>Section 98 Facilitation of redemption in case of absent or unknown mortgagees</b>   | 3  |
|                   | Omit section 98 (1B) (b). Insert instead:  | 4  |
|                   | (b) the reasonable costs that would have been incurred by the mortgagee in discharging the mortgage, whether or not they would have been payable by the mortgagee. | 5  |
| <b>[2]</b>        | <b>Section 98 (5)</b>  | 6  |
|                   | Omit the subsection.   | 7  |
|                   |  | 8  |
|                   |  | 9  |
|                   |  | 10 |

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|                   |   |             |
|-------------------|---|-------------|
| <b>Schedule 3</b> | <b>Amendment of Strata Schemes<br/>(Freehold Development) Act 1973</b>  | 1           |
|                   |   | 2           |
|                   | (Section 5)   | 3           |
| <b>[1]</b>        | <b>Section 25 Transfer or lease of common property</b>  | 4           |
|                   | Insert after section 25 (2):  | 5           |
|                   | (2A) A body corporate may, pursuant to a special resolution, execute<br>a variation of any such lease or sublease pursuant to section 55A<br>of the <i>Real Property Act 1900</i> . | 6<br>7<br>8 |
| <b>[2]</b>        | <b>Section 25 (4)</b>   | 9           |
|                   | Omit “subsection (1), (2) or (3)”. Insert instead “this section”.   | 10          |
| <b>[3]</b>        | <b>Section 28W Effect of strata management statement</b>  | 11          |
|                   | Omit “a by-law or” from section 28W (5).  | 12          |

|                   |   |                  |
|-------------------|---|------------------|
| <b>Schedule 4</b> | <b>Amendment of Strata Schemes<br/>(Leasehold Development) Act 1986</b>   | 1                |
|                   |   | 2                |
|                   | (Section 6)   | 3                |
| <b>[1]</b>        | <b>Section 29 Transfer or lease of common property</b>  | 4                |
|                   | Insert after section 29 (1):  | 5                |
|                   | (1A) A body corporate may, pursuant to a special resolution and with<br>the consent of the lessor under the leasehold strata scheme,<br>execute a variation of any such lease or sublease pursuant to<br>section 55A of the <i>Real Property Act 1900</i> . | 6<br>7<br>8<br>9 |
| <b>[2]</b>        | <b>Section 29 (3)</b>   | 10               |
|                   | Omit “subsection (1) or (2)”. Insert instead “this section”.  | 11               |
| <b>[3]</b>        | <b>Section 57F Effect of strata management statement</b>  | 12               |
|                   | Omit “a by-law or” from section 57F (5).  | 13               |



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**Schedule 5      Amendment of Local Government  
Act 1993**

|  |  |    |
|--|--|----|
|  | (Section 7)  | 1  |
|  |  | 2  |
| <b>[1] Section 49 Public reserves and drainage reserves dedicated on subdivision, transfer or conveyance</b> |  | 3  |
|  |  | 4  |
|  |  | 5  |
|  | Insert “or of a transfer or conveyance to a council of land identified in the transfer or conveyance as being for use as a public reserve,” before “the land” in section 49 (1). | 6  |
|  |  | 7  |
|  |  | 8  |
| <b>[2] Section 49 (2)</b>  |  | 9  |
|  | Insert “or transfer” after “plan”.   | 10 |
| <b>[3] Section 49 (3)</b>  |  | 11 |
|  | Insert “or of a transfer or conveyance to a council of land identified in the transfer or conveyance as being for use as a drainage reserve,” before “the land”.                 | 12 |
|  |  | 13 |
|  |  | 14 |