

First print



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.
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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 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 *J A 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].)

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New South Wales

Real Property and Conveyancing Amendment Bill 1997

No. , 1997

A Bill for

An Act to amend the *Real Property Act 1900* and the *Conveyancing Act 1919* with respect to caveats, joint tenancy and the giving of certain notices; and for other purposes.

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Real Property and Conveyancing Amendment Act 1997*.

2 Commencement

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This Act commences on 1 January 1998.

3 Amendment of Real Property Act 1900 No 25

The *Real Property Act 1900* is amended as set out in Schedule 1.

4 Amendment of Conveyancing Act 1919 No 6

The *Conveyancing Act 1919* is amended as set out in Schedule 2. 10

**Schedule 1 Amendment of Real Property Act
1900**

(Section 3)

[1] Section 3 Definitions

Insert after section 3 (2):

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(3) Notes in the text of this Act do not form part of this Act.

[2] Section 36 Lodgment and registration of documents

Insert before section 36 (6A):

(6AA) A caveat that is lodged with the Registrar-General and is subsequently uplifted is ineffective to prohibit the recording or registration of any dealing or delimitation plan, or the granting of any application, the recording, registration or granting of which is prohibited by the caveat, until the caveat is relodged with the Registrar-General.

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[3] Part 7A, Division 3, heading

Omit the heading. Insert instead:

**Division 3 Caveats against dealings, possessory
applications, plans and applications for
cancellation of easements**

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**[4] Section 74F Lodgment of caveats against dealings, possessory
applications, plans and applications for cancellation of
easements**

Insert after section 74F (4):

(4A) Any person who claims to be entitled to any legal or equitable interest in an easement the recording of which is the subject of an application for cancellation under section 49 may, at any time before the application is granted, lodge with the Registrar-General a caveat prohibiting the Registrar-General from granting the application.

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[5] Section 74F (10)

Insert after subsection (9):

- (10) On the lodgment of a caveat under subsection (4A) in relation to an easement, the Registrar-General must, if an application for cancellation of the recording of the easement has been lodged in the office of the Registrar-General, give notice in writing of the lodgment of the caveat to the applicant concerned. 5

[6] Section 74H Effect of caveat lodged under section 74F

Omit section 74H (1). Insert instead: 10

- (1) Subject to this section, while a caveat lodged under section 74F remains in force:
- (a) the Registrar-General must not, except with the written consent of the caveator:
- (i) record in the Register any dealing, or 15
- (ii) grant any possessory application, or
- (iii) register any delimitation plan, or
- (iv) cancel the recording of any easement, if it appears to the Registrar-General that the recording of the dealing, the granting of the possessory application, the registration of the delimitation plan or the cancellation of the recording of the easement is prohibited by the caveat, and 20
- (b) the caveat does not have the effect of prohibiting: 25
- (i) the recording in the Register of a dealing, or
- (ii) the granting of a possessory application, or
- (iii) the registration of a delimitation plan, or
- (iv) the cancellation of the recording of an easement, 30
- except to the extent that the recording of such a dealing, the granting of such an application, the registration of such a plan or the cancellation of the recording of such an easement would affect the estate or interest claimed in the caveat. 35

[7] Part 7A, Division 4, note

Insert after the heading to Division 4 of Part 7A:

Note. Section 36 (6AA) provides that a caveat that is uplifted after it is lodged with the Registrar-General is ineffective until it is relogged with the Registrar-General.

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[8] Section 74R Right to obtain injunction not affected

Omit "or" from section 74R (c).

[9] Section 74R (e)

Insert after paragraph (d):

, or

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(e) where the caveat relates to an application for the cancellation of the recording of an easement—restraining the cancellation of the recording of the easement.

[10] Section 97

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Insert after the heading to Part 12:

97 Severance of joint tenancy by unilateral action

(1) A transfer by a joint tenant of the joint tenant's interest in the land that is the subject of a joint tenancy to himself or herself severs the joint tenancy.

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(2) If a joint tenancy is severed by unilateral action by one joint tenant or by a third party, the Registrar-General may require the person who severs the joint tenancy to provide the Registrar-General, before recording the instrument that severs the joint tenancy, with:

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(a) the names and addresses of the joint tenants or, if the addresses are unknown, evidence of the efforts made by the person to locate the addresses of the joint tenants, and

Real Property and Conveyancing Amendment Bill 1997

Schedule 1 Amendment of Real Property Act 1900

- (b) a statement that the person is not aware of any limitation or restriction on his or her capacity or entitlement to sever the joint tenancy (arising, for example, from the capacity in which the person holds an estate or interest in the land concerned or from a private agreement). 5
- (3) The Registrar-General may require the person who severs a joint tenancy to provide additional information concerning:
 - (a) other persons who may be affected by the severance of the joint tenancy, and 10
 - (b) any limitation or restriction on the capacity or entitlement of the person to sever the joint tenancy, and
 - (c) any other matter that the Registrar-General considers appropriate. 15
- (4) The Registrar-General may require any information provided for the purposes of this section to be provided by statutory declaration.

Schedule 2 Amendment of Conveyancing Act 1919

(Section 4)

[1] Section 30

Insert after section 29C: 5

30 Notice of severance of joint tenancy

- (1) 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 must give notice of the severance to all joint tenants in the joint tenancy as soon as practicable after the joint tenancy has been severed. 10
- (2) The notice is to be given in a form approved by the Registrar-General.
- (3) Failure to give notice as required by and in accordance with this section does not invalidate or otherwise affect the severance of the joint tenancy. 15

[2] Section 66G Statutory trusts for sale or partition of property held in co-ownership

Insert after section 66G (1):

- (1A) Subject to this section, on the death of a co-owner, any proceedings by or against the co-owner under subsection (1) (whether instituted before or after the commencement of this subsection) survive against or for the benefit of the estate of the deceased co-owner despite, in the case of a joint tenancy, the rule of survivorship. 20
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[3] Section 196AA

Insert after section 196:

196AA Power of Registrar-General to serve notice of proposed action 30

- (1) The Registrar-General may, before taking any action under this Division involving:

- (a) the registration or recording of a plan (including a plan on which any easement, profit à prendre, restriction or positive covenant is indicated in accordance with section 88B (2)), or
 - (b) the amendment of any such plan, 5

give notice of the proposed action to any person that the Registrar-General considers should be notified of it.
- (2) If the Registrar-General gives notice under this section, the Registrar-General:
 - (a) may refuse to take the action until after the expiration of a period specified in the notice, and 10
 - (b) may proceed to take the action at or after the expiration of the period so specified unless the Registrar-General is first served with, or with written notice of, an order of the Supreme Court restraining the Registrar-General from so doing. 15
- (3) If a person given notice under this section does not within the time limited by the notice serve on the Registrar-General or give the Registrar-General written notice of an order of the Supreme Court restraining the Registrar-General from taking the action, no action by that person or by any person claiming through or under that person may be instituted against the Registrar-General in respect of the taking of the action specified in the notice. 20
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- (4) No action may be instituted against the Registrar-General for failure to give a notice under this section.