

First print



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.

First print



New South Wales

# Real Property Amendment Bill 1998

## Contents

---

	Page
1 Name of Act	2
2 Commencement	2
3 Amendment of Real Property Act 1900 No 25	2
 Schedule 1 Amendments	 3

---



New South Wales

## Real Property Amendment Bill 1998

No. , 1998

---

### **A Bill for**

An Act to amend the *Real Property Act 1900* to provide for the extinguishment of certain restrictive covenants, including those that are no longer of any practical value, and to provide for the lodgment of caveats against such extinguishment; and for other purposes.

---

**The Legislature of New South Wales enacts:**

**1 Name of Act**

This Act is the *Real Property Amendment Act 1998*.

**2 Commencement**

This Act commences on a day or days to be appointed by proclamation.      5

**3 Amendment of Real Property Act 1900 No 25**

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



---

## Schedule 1 Amendments

(Section 3)

[1] **Part 7A, Division 3, heading**

Omit the heading. Insert instead:

**Division 3 Caveats against dealings, possessory applications, plans and applications for cancellation of easements or extinguishment of restrictive covenants** 5

[2] **Section 74F Lodgment of caveats against dealings, possessory applications, plans and applications for cancellation of easements or extinguishment of restrictive covenants** 10

Insert after section 74F (4A):

(4B) Any of the following persons may lodge with the Registrar-General a caveat prohibiting the Registrar-General from granting an application to extinguish a restrictive covenant: 15

(a) a person who has a registered interest in the land to which the benefit of the restrictive covenant is appurtenant,

(b) a person who claims to be entitled to an equitable estate or interest in that land, 20

(c) a person who is recorded in the Register as having the right to release, vary or modify the restrictive covenant,

(d) a person who is recorded in the Register as a person whose consent is required to a release, variation or modification of the restrictive covenant. 25

(4C) A caveat may be lodged under subsection (4B) whether or not the restrictive covenant is already the subject of an application for extinguishment under Part 8A. However, if such an application has been made and a notice in relation to the application has been given under section 81D then, to be effective, the caveat may only be lodged before the end of the period specified in the notice. 30  
35

**[3] Section 74F (5) (b) (v)**

Insert “, or the right arising out of a restrictive covenant,” after “interest”.

**[4] Section 74F (11)**

Insert after section 74F (10):

5

- (11) On the lodgment of a caveat under subsection (4B) in relation to a restrictive covenant, the Registrar-General must, if an application for extinguishment of the restrictive covenant has been lodged in the office of the Registrar-General, or is later lodged, give notice in writing of the lodgment of the caveat to the applicant concerned.

10

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

Insert after section 74H (1) (a) (iv):

, or

15

- (v) extinguish any restrictive covenant,

**[6] Section 74H (1) (a)**

Omit “or the cancellation of the recording of the easement”.

Insert instead “, the cancellation of the recording of the easement or the extinguishment of the restrictive covenant”.

20

**[7] Section 74H (1) (b) (v)**

Insert after section 74H (1) (b) (iv):

, or

- (v) the extinguishment of a restrictive covenant,

**[8] Section 74H (1) (b)**

25

Omit “or the cancellation of the recording of such an easement”.  
Insert instead “, the cancellation of the recording of such an easement or the extinguishment of such a restrictive covenant”.

---

**[9] Section 74H (1) (b)**

Omit "estate or interest".  
Insert instead "estate, interest or right".

**[10] Section 74H (5)**

Insert ", or a particular right arising out of a restrictive covenant," 5  
after "land" where firstly occurring.

**[11] Section 74H (5) (r)**

Insert ", extinguishing" after "releasing".

**[12] Section 74H (5) (t)**

Omit "or 74J (1)". Insert instead ", 74J (1) or 74JA (2)". 10

**[13] Section 74JA**

Insert after section 74J:

**74JA Lapse of caveat regarding extinguishment of restrictive covenant**

(1) This section applies if: 15

(a) an application has been made to the Registrar-General under Part 8A to extinguish a restrictive covenant, and

(b) a caveat prohibiting the granting of such an application has been lodged under section 74F (4B) within the time required by section 74F (4C). 20

(2) The person who made the application for extinguishment may apply to the Registrar-General, in the approved form, for the Registrar-General to serve a notice under this section. 25

- (3) If the person makes such an application, the Registrar-General must prepare for service on the caveator a notice to the effect that the application for lapsing has been made and that unless, before the expiry of 21 days after the date on which the notice is served, the caveator takes the action referred to in subsection (4), the caveat will lapse and the restrictive covenant will be extinguished. 5
- (4) Where a notice prepared under this section has been served on a caveator, the caveat, to the extent that it would, but for this subsection, prohibit the extinguishment of the restrictive covenant to which the notice relates, lapses at the end of 21 days after the date on which the notice was so served unless, before the expiry of that period, the caveator has: 10
- (a) obtained from the Supreme Court an order extending the operation of the caveat for such further period as is specified in the order or until the further order of that Court, and 15
- (b) lodged with the Registrar-General the order or an office copy of the order. 20

**[14] Section 74K Power of Supreme Court to extend operation of a caveat lodged under section 74F**

Omit "or 74J (1)". Insert instead ", 74J (1) or 74JA (3)".

**[15] Section 74K (6)** 25

Inset after section 74K (5):

- (6) For the purposes of this section, a caveator served with a notice under section 74JA (3) (in relation to a restrictive covenant) is taken to have a claim that has substance if the caveator: 30
- (a) has a registered interest, or has or may have an equitable estate or interest, in land burdened by the restrictive covenant, or

- (b) is recorded in the Register as having the right to release, vary or modify the restrictive covenant, or as being a person whose consent is required to a release, variation or modification of the restrictive covenant, and should have been so recorded. 5

**[16] Section 74M Withdrawal of caveats**

Omit section 74M (2). Insert instead:

- (2) If:
- (a) a caveat lodged under section 74F prohibits the granting of a possessory application, the registration of a delimitation plan or the grant of an application to extinguish a restrictive covenant, and 10
- (b) the caveator has consented to the granting of the possessory application, the registration of the delimitation plan or the extinguishment of the restrictive covenant, 15

the caveat is taken to have been withdrawn.

**[17] Section 74O Restrictions on lodgment of further caveats if earlier caveat lapses or is withdrawn 20**

Insert "or any particular right arising out of a restrictive covenant" after "land" in section 74O (1).

**[18] Section 74O (1) (b)**

Omit "or 74J (1)". Insert instead ", 74J (1) or 74JA (3)".

**[19] Section 74O (1) 25**

Omit "same estate or interest".  
Insert instead "same estate, interest or right".

**[20] Section 74R Right to obtain injunction not affected**

Insert after section 74R (e):

, or

- (f) where the caveat relates to an application for the extinguishment of a restrictive covenant—  
restraining the extinguishment of the restrictive covenant. 5

**[21] Part 8A (sections 81–81L)**

Insert after section 80A:

**Part 8A Extinguishment of restrictive covenants 10**

**Division 1 Preliminary**

**81 Definitions**

In this Part:

*building materials covenant* means a restrictive covenant that restricts the type, style or proportion of building materials that may be used in the construction or repair of buildings or other structures. 15

*fencing covenant* means a restrictive covenant:

- (a) that relates to liability for the erection, replacement or maintenance of fences by imposing a condition that contributions to the cost of erecting, replacing or maintaining the fence be made, or 20
- (b) that imposes any condition that either restricts permissible building materials for fencing or restricts the style, height or other dimension of fencing that may be constructed. 25

*restrictive covenant* means an express or implied obligation, originating in an instrument, to refrain from using land in a particular way or from doing a particular thing in relation to land. 30

*value of structures covenant* means a restrictive covenant that restricts the construction or repair of any building or other structure by a condition that the building or structure must have a value of, or above, a specific amount.

5

**Division 2 Applications to have restrictive covenants extinguished**

**81A Registered proprietor of land may apply to have a restrictive covenant extinguished**

- (1) 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 at least 12 years may make a written application in the approved form to the Registrar-General to have the restrictive covenant extinguished. 10  
15
- (2) If more than one person is the registered proprietor of the relevant burdened land, all of the registered proprietors must join in the application or consent to the application.
- (3) An application may relate to more than one restrictive covenant. 20
- (4) The Registrar-General may require an application to be accompanied by either or both of the following:
  - (a) a list of the names and addresses of all persons who are required to be notified of the application under section 81D of which the applicant is aware or, if the addresses of those persons are unknown, with evidence of the efforts made by the applicant to ascertain the addresses of those persons, 25
  - (b) any other evidence. 30

**81B Registrar-General may ask the registered proprietor for further information**

- (1) The Registrar-General may ask any person who has applied for a restrictive covenant to be extinguished to provide further information to support the application. 35

- (2) Such a request must be made in writing and must specify a date by which the person is required to provide the information.
  - (3) If the person does not respond to the request of the Registrar-General to the Registrar-General's satisfaction by the date specified, the Registrar-General may give the person a further written notice requiring the person to provide the information within 28 days after the date of service of the second notice and warning the person that failure to respond to the notice may result in the rejection of the application. 5
  - (4) If the person who applied does not respond to the request of the Registrar-General within that 28-day period, the Registrar-General may reject the application. 10
- 81C Registrar-General must reject invalid application without further consideration** 15
- (1) The Registrar-General must reject an application to extinguish a restrictive covenant if, in the opinion of the Registrar-General, the restrictive covenant to which the application relates: 20
    - (a) is not a building covenant, fencing covenant or value of structures covenant, or
    - (b) took effect less than 12 years before the date on which the application was made.
  - (2) The Registrar-General must reject the application if, for any other reason, the Registrar-General is satisfied that the application should not be accepted. 25
- Division 3 Right to be notified of application for extinguishment of restrictive covenant**
- 81D Registrar-General must notify certain persons of application for extinguishment of restrictive covenant** 30
- The Registrar-General must give written notice of any application to extinguish a restrictive covenant accepted under this Part to each of the following:
- (a) every person with a registered interest in the land to which the benefit of the restrictive covenant is appurtenant, 35



- (b) every person of whom the Registrar-General has notice who, in the opinion of the Registrar-General, has an equitable estate or interest in that land,
- (c) every person who is recorded in the Register as having the right to release, vary or modify the restrictive covenant, 5
- (d) every person who is recorded in the Register as a person whose consent is required to a release, variation or modification of the restrictive covenant. 10

**81E Form of notice**

A notice under section 81D:

- (a) must specify the restrictive covenant to which the application relates, and 15
- (b) must specify the land to which the restrictive covenant relates (the land benefited and the land burdened by the restrictive covenant concerned), and
- (c) must set out the procedure for extinguishment of the restrictive covenant, and 20
- (d) must specify that the person to whom the notice is addressed has the right to object to the extinguishment by lodging a caveat under section 74F (4B), and 25
- (e) must state that the application will not be granted before the end of such period as is specified in the notice.

**81F Period of notice**

- (1) The period specified in a notice under section 81D must be: 30
  - (a) for a notice given during the first 2 years after the date of commencement of this section—at least 3 months, or
  - (b) for any other notice—at least 1 month. 35

- (2) The Registrar-General may specify a longer period of notice or may give a second or subsequent notice in accordance with section 12 (1) or 12A. Where a second, or subsequent, notice is given, a reference in this Act to the period specified in a notice under section 81D is a reference to the period specified in the last such notice given. 5

**81G Service of notice**

- (1) A notice given under section 81D must be served personally or by registered post at the last address of the recipient known to the Registrar-General. 10
- (2) However, the Registrar-General may, if he or she considers it appropriate, give notice to some or all of the persons referred to in section 81D by advertisement rather than by personal or postal service. Notice may be given to a person by advertisement only if the Registrar-General considers that the relevant restrictive covenant is unlikely to be of real benefit to the person: 15
- (a) because of the distance of the land in relation to which the person has an estate or interest from the land burdened by the restrictive covenant the subject of the application, or 20
- (b) because of any other factor causing a lack of connection between the two relevant parcels of land, or 25
- (c) by otherwise having regard to the benefit conferred by the covenant.
- (3) If the Registrar-General gives notice by advertisement, that notice must comply with section 81E and must be published in a newspaper circulating generally throughout the State. 30
- (4) To avoid doubt, section 77 of the *Interpretation Act 1987* does not apply to subsection (1).

---

**81H Service of notice by person other than Registrar-General**

- (1) The Registrar-General may, instead of complying with the service obligations created under this Division, if he or she thinks it appropriate, direct the person who made the application to meet those obligations by serving notice on specified persons in a manner and form approved by the Registrar-General. 5
- (2) The Registrar-General may require that the service of any person, and the particulars of the address of any postal service, be verified by statutory declaration of the person who served them or of some other person specified by the Registrar-General. 10
- (3) The Registrar-General may reject an application to extinguish a restrictive covenant if not satisfied that a person directed to meet the service obligations under this Division has met those obligations in the manner and form approved by the Registrar-General. 15
- (4) If the person directed under this section proves to the satisfaction of the Registrar-General that the person has tried to serve all relevant persons personally or by registered post, the Registrar-General may, if he or she considers it appropriate in accordance with section 81G (2), decide that the persons who have not been given such notice may be given notice by advertisement under that subsection. The Registrar-General may further direct the person to give that notice and to verify by statutory declaration that he or she did so. 20  
25
- (5) If the Registrar-General has given written notice to a person that he or she is satisfied that the person has met the service obligations under this Division, the relevant persons referred to in section 81D are taken to have been properly served with notice for the purposes of this Part. 30

**Division 4 Extinguishment of restrictive covenants**

**81I Registrar-General may extinguish a restrictive covenant after application made**

- (1) This section applies if:
  - (a) an application has been made to extinguish a restrictive covenant, and 5
  - (b) notice of that application has been given in accordance with Division 3, and
  - (c) the time period specified in that notice has ended, and 10
  - (d) there is no caveat (lodged before or within the relevant time period) still in force prohibiting the granting of an application to extinguish the restrictive covenant.
  
- (2) The Registrar-General may grant the application if the Registrar-General is satisfied that the application was properly made, and that the restrictive covenant to which the application relates: 15
  - (a) is a building materials covenant, a fencing covenant or a value of structures covenant, and 20
  - (b) is of a type likely to lose any practical value after 12 years of operation, and
  - (c) took effect at least 12 years before the date on which the application was made.

**81J Registrar-General may extinguish a restrictive covenant without receiving an application** 25

- (1) The Registrar-General may extinguish a restrictive covenant without receiving an application if the Registrar-General is satisfied that:
  - (a) the restrictive covenant is expressed to be limited in operation, and the time of its operation has expired, or 30
  - (b) the separate parcels of land that were respectively burdened and benefited by the restrictive covenant have been consolidated into a single parcel, or 35

- (c) the restrictive covenant is personal to the covenantee or that the covenantee owned no neighbouring land in connection with which the benefits of the covenant can be enjoyed, or
  - (d) there is no express annexation of the benefit of the covenant to ascertainable land and the relevant covenant was created before 1 July 1920, or 5
  - (e) the restrictive covenant has no practical value or no practical application.
- (2) This section does not apply if the Registrar-General has received an application under this Part to extinguish the relevant restrictive covenant and has not rejected the application under Division 2 or 3. 10

**81K Cancellation of recording of restrictive covenant**

- (1) If the Registrar-General decides to grant an application to extinguish a restrictive covenant, or otherwise decides to extinguish a restrictive covenant, the Registrar-General must cancel the recording of the restrictive covenant in the Register. 15
- (2) A restrictive covenant is extinguished when the recording of the restrictive covenant in the Register is cancelled. 20

**81L Effect of extinguishment**

- (1) If a restrictive covenant is extinguished under this Part, the restrictive covenant is not enforceable and is of no effect. 25
- (2) The extinguishment of a restrictive covenant under this Part is binding on all persons, whether of full age or capacity or not, interested in enforcing the restrictive covenant whether or not they have had notice of its proposed extinguishment. 30

**[22] Section 130 Barring of actions**

Insert after section 130 (4):

- (5) No action based on the extinguishment of a restrictive covenant can be brought against the Registrar-General where the person alleging loss from that extinguishment had notice, by personal service or otherwise, or was otherwise aware, that an application for extinguishment of the restrictive covenant had been made, and had omitted to lodge a caveat forbidding the grant of the application or had allowed such a caveat to lapse. 5  
10

**[23] Schedule 3 Savings and transitional provisions**

Insert at the end of clause 1 (1):

*Real Property Amendment Act 1998*