



New South Wales

Real Property and Conveyancing Legislation Amendment Bill 1999

Explanatory note

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

Overview of Bill

The objects of this Bill are as follows:

- (a) to amend the *Real Property Act 1900*:
 - (i) to enable the Registrar-General to correct the Register kept under the *Real Property Act 1900* (the **Register**) by amending wrong references to lot numbers, and
 - (ii) to clarify the circumstances in which a caution affecting a qualified certificate of title lapses if title derives otherwise than from a transaction for value, and
 - (iii) to provide for additional circumstances in which cross-easements for support for party walls may be created by application, and
 - (iv) to make it clear that the Registrar-General may cancel an easement in relation to the whole or part of land affected by the easement, and

- (v) to provide for a caveat on title to land, that is extended by an order of the Supreme Court, to cease to have effect if the period specified in the order expires or relevant proceedings are finalised, and
 - (vi) to make it clear that a joint tenancy is not severed until the instrument from which severance arises is registered or recorded, and
 - (vii) to extend the Registrar-General's powers to determine boundary disputes to disputes involving land that is not Torrens title land, and
 - (viii) to make additional amendments to provisions relating to boundary determinations, including requirements as to lodgment of plans and the manner in which appeals against determinations may be made, and
 - (ix) to enable a court (not being a Local Court or a tribunal) to make orders relating to folios in the Register, and certificates of title, in certain proceedings before it, and
 - (x) to make other amendments of a consequential, savings and transitional and statute law revision nature,
- (b) to amend the *Conveyancing Act 1919* to make amendments of a statute law revision nature to provisions relating to covenants and easements,
- (c) to amend the *Land and Environment Court Act 1979* as a consequence of amendments relating to appeals from boundary determinations.

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 proclaimed.

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* and the *Land and Environment Court Act 1979* set out in Schedule 2.

Schedule 1 Amendment of Real Property Act 1900

Registrar-General's powers to correct lot numbers

Currently, the Registrar-General does not have power to correct references to wrong lot numbers referred to in the Register.

Schedule 1 [1] enables the Registrar-General to correct such mistakes.

Schedule 1 [2] inserts provisions that set out the manner in which the correction is to be shown and provides for the effect of the correction.

Cautions

When a qualified folio of the Register is created by the Registrar-General, a caution warning persons that the land is held subject to any subsisting interest is recorded in that folio. The caution lapses in the circumstances set out in sections 28M and 28MA of the *Real Property Act 1900*. Section 28MA sets out the circumstances in which a caution will lapse where the title documents evidencing title of the land for which a qualified folio is issued included a conveyance or purported conveyance other than for value.

Schedule 1 [4] makes it clear that the first circumstance is where there have been 2 successive registered proprietors who have paid valuable consideration and have become registered without fraud subsequent to the creation of the qualified title. The caution will lapse on the expiration of 6 years after the first registered proprietor became registered or when the second person became registered, whichever is the later.

Cross-easements for support for party walls

Currently, cross-easements for support of a party wall are provided when a plan referring to a wall described in the plan as a “party wall” through which a boundary of a lot in the plan passes longitudinally is registered under the *Conveyancing Act 1919*.

Schedule 1 [6] provides for the creation of cross-easements, on the application of all persons having a registered interest in land benefited or burdened by the cross-easements, when a plan registered or recorded under Division 3 of Part 23 of the *Conveyancing Act 1919* shows a boundary of a lot passing longitudinally through a wall that is described as a “proposed party wall”.

Schedule 1 [7] makes a consequential amendment.

Easements

The Registrar-General has power under the *Real Property Act 1900* to cancel recordings of easements in the Register if the easements have been abandoned. An easement may be treated as abandoned if the Registrar-General is satisfied that it has not been used for at least 20 years.

Schedule 1 [8] provides that the Registrar-General may cancel an easement wholly or partially, so that cancellation may be with respect to all land affected, any one or more of the lots, or part of a lot burdened, or any one or more lots benefited by the easement.

Schedule 1 [9] makes it clear that the period of 20 years for which the easement must not have been used relates to the time before the application for cancellation of an easement is lodged with the Registrar-General.

Caveats

Caveats against primary applications, dealings, possessory applications, plans and applications for cancellation of easements or extinguishment of restrictive covenants may be lodged with the Registrar-General. The *Real Property Act 1900* provides for the circumstances when caveats will lapse. Under that Act the Supreme Court may extend by order the operation of such caveats for a period specified in the order or until the further order of the Court.

Schedule 1 [11] inserts proposed section 74LA. The proposed section provides that a caveat lapses if the period of extension of the operation of the caveat ends and no further order is made by the Court to extend the caveat. In the case of an order extending the operation of a caveat until the further order of the Court, a caveat will lapse if the Registrar-General is satisfied that the relevant proceedings have been finalised and that no further order is likely to be sought and makes a recording in the Register that the caveat has lapsed.

Severance of joint tenancies

Section 97 of the *Real Property Act 1900* sets out the process by which and the circumstances in which a joint tenancy can be severed by the unilateral action of one of the joint tenants. The provision was inserted by the *Real Property and Conveyancing Amendment Act 1997*. Severance occurs, and was intended when the legislation was enacted to occur, only on registration of the relevant transfer or on recording of the relevant dealing from which severance arises.

Schedule 1 [12], [13], [14] and [15] amend section 97 to clarify that the intended point at which severance occurs is registration of a transfer or recording of a dealing and not at any earlier point.

Schedule 1 [16] extends the category of joint tenants not required to be notified of lodgment of a dealing for registration or recording that may sever a joint tenancy to joint tenants who execute any such dealing or on whose behalf any such dealing is executed.

Schedule 1 [17] creates additional circumstances in which the Registrar-General is not required to give notice to a joint tenant of a lodgment of a dealing for registration or recording that may sever a joint tenancy.

Boundary determinations by Registrar-General

Part 14A of the *Real Property Act 1900* sets out procedures enabling applications to be made to the Registrar-General for determination of the position of the common boundary of adjoining lands.

Schedule 1 [21] applies the Part to land that is not under the *Real Property Act 1900* (that is, land that is not Torrens title land), in addition to land that has been brought under the Act. Currently, the Part does not apply to land held under common law title or that is comprised in a limited folio of the Register or that is the subject of a primary application to bring it under the Act.

Schedule 1 [22] substitutes section 135J containing rights to appeal against determinations by the Registrar-General as to boundaries. At present, appeal is by way of referral to the Land and Environment Court by the Registrar-General, at the request of a person dissatisfied with a determination. The new section 135J confers on the dissatisfied person a direct right of appeal to the Land and Environment Court and also enables a public or local authority or the Head of a Government Department to appeal. The Registrar-General may not take action to note the revised boundaries until the expiration of the period for making an appeal (without an appeal being made) or the determination of any appeal.

Schedule 1 [23] enables the Registrar-General, after determining the position of a boundary, to require the applicant for the determination to deposit in the office of the Registrar-General a plan showing details of the boundary as so determined. Copies may also be required to be lodged. The Registrar-General may refuse to take action to note the boundary if any such requirement is not complied with.

Schedule 1 [24] makes a consequential amendment.

Cancellation of folios and other actions at court direction

Schedule 1 [25] substitutes section 138 which sets out the power of a court, for the purposes of any proceedings before it, to direct the Registrar-General to take actions in relation to the Register. The new section 138 specifies a court's power to direct that the Registrar-General cancel or amend a folio, cancel, amend or make a recording on a folio, create a new folio or issue a new certificate of title. A court may also direct that a person deliver a certificate of title or other instrument to the Registrar-General. The new section retains the existing power to make such orders

and also enables such orders to be made in proceedings for the possession or production of certificates of title, or proceedings where a determination is made as to an estate or interest in land, if the court is of the opinion that the certificate of title has not been, or is not likely to be, produced for registration. It also re-enacts existing provisions excluding the Registrar-General from liability resulting from compliance with the proposed section.

Statute law revision

Schedule 1 [3] and **[5]** update references to an Act.

Schedule 1 [10], [18], [19] and **[20]** omit outdated references to insolvency.

Savings and transitional provisions

Schedule 1 [26] and **[27]** insert savings and transitional provisions consequent on the enactment of the proposed Act.

Schedule 2 Amendment of other Acts

Conveyancing Act 1919

Schedule 2.1 [1] provides for an instrument creating a positive covenant for maintenance or repair of land that is subject to an easement to indicate the name of the prescribed authority in whose favour the easement is created, if the land is subject to an easement without a dominant tenement created in favour of a prescribed authority.

Schedule 2.1 [2] omits unnecessary words.

Schedule 2.1 [3] requires a plan lodged in the office of the Registrar-General for registration or recording under Division 3 of Part 23 of the *Conveyancing Act 1919* (which provides for the registration of plans) to contain details of any easements or profits à prendre that are intended to be partially released.

Schedule 2.1 [4] excludes positive covenants for maintenance or repair from provisions relating generally to the creation of easements and other interests in land. Positive covenants are dealt with under other provisions.

Schedule 2.1 [5] makes it clear that the Supreme Court, when considering whether to make an order imposing an easement on land on the ground that it is reasonably necessary for the development or use of the land, is to consider whether the use of the land benefited by the proposed easement will not be inconsistent with the public interest. Currently, the requirement is not limited to land benefited by the easement.

Schedule 2.1 [6] corrects a wrong reference to the lot benefited in provisions relating to easements for repair.

Schedule 2.1 [7] enables savings and transitional regulations to be made as a consequence of the enactment of the proposed Act.

Land and Environment Court Act 1979

Schedule 2.2 makes a consequential amendment as a result of the amendments made by the proposed Act to the provisions in the *Real Property Act 1900* for appeals against boundary determinations by the Registrar-General.

First print



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New South Wales

Real Property and Conveyancing Legislation Amendment Bill 1999

No. , 1999

A Bill for

An Act to amend the *Real Property Act 1900* with respect to corrections to the Register, cautions, easements, caveats, severance of joint tenancies and appeals from boundary determinations, and for other purposes; to amend the *Conveyancing Act 1919* with respect to easements and positive covenants, and for other purposes; and to consequentially amend the *Land and Environment Court Act 1979*.

The Legislature of New South Wales enacts:	1
1 Name of Act	2
This Act is the <i>Real Property and Conveyancing Legislation Amendment Act 1999</i> .	3 4
2 Commencement	5
This Act commences on a day or days to be appointed by proclamation.	6 7
3 Amendment of Real Property Act 1900 No 25	8
The <i>Real Property Act 1900</i> is amended as set out in Schedule 1.	9
4 Amendment of other Acts	10
The Acts specified in Schedule 2 are amended as set out in that Schedule.	11 12

Schedule 1	Amendment of Real Property Act 1900	1
	(Section 3)	2
[1]	Section 12 Powers of Registrar-General	3
	Insert after section 12 (1) (d):	4
	(d1) The Registrar-General may, subject to subsection (3A), on such evidence and after such notices (if any) as appear to the Registrar-General to be sufficient, and with the consent of the proprietors and any mortgagees of the land, correct the Register by correcting a reference to one or more lot numbers in a plan. The Registrar-General may make the correction on the application of a proprietor or mortgagee or on the Registrar-General's own initiative.	5 6 7 8 9 10 11 12 13
[2]	Section 12 (3A)	14
	Insert after section 12 (3):	15
	(3A) If the Registrar-General makes a correction referred to in subsection (1) (d1):	16 17
	(a) the correction:	18
	(i) must not make original words or symbols illegible, and	19 20
	(ii) must be dated, and	21
	(iii) must be initialled by the Registrar-General, and	22
	(b) the correction takes effect as if the error corrected had not occurred, and	23 24
	(c) the correction does not affect the construction of any instrument made or entered into before the correction so as to prejudice any person claiming under that instrument.	25 26 27 28
[3]	Section 23A Instruments of title, how to be dealt with	29
	Omit "section 14 of the <i>Archives Act 1960</i> " from section 23A (4) (c).	30
	Insert instead "section 21 of the <i>State Records Act 1998</i> ".	31

[4] Section 28MA Lapsing of caution on qualified folio created after registered deed other than for value (section 28JA (1A))	1 2
Omit section 28MA (2). Insert instead:	3
(2) Firstly, if after the creation of the qualified folio, a person for valuable consideration and without fraud to which the person is a party becomes registered or, pursuant to section 36 (8), is taken to have become registered, as proprietor of an estate or interest in the land comprised in the folio, and another person subsequently for valuable consideration and without fraud to which that other person is a party becomes, or is taken to have become, registered as proprietor of that estate or interest, the caution recorded on the folio lapses as regards the estate or interest:	4 5 6 7 8 9 10 11 12 13
(a) on the expiration of 6 years after the time when the firstmentioned person becomes, or is taken to have become, registered, or	14 15 16
(b) at the time the other person becomes, or is taken to have become, registered,	17 18
whichever is the later.	19
[5] Section 38 Recording dealings on certificate of title etc	20
Omit “ <i>Archives Act 1960</i> ” wherever occurring in section 38 (5) (b) and (6). Insert instead “ <i>State Records Act 1998</i> ”.	21 22
[6] Section 48 Creation of cross-easements for party walls by plans on application	23 24
Insert after section 48 (1):	25
(1A) A plan registered or recorded under Division 3 of Part 23 of the <i>Conveyancing Act 1919</i> on or after 1 August 1996 creates cross-easements if:	26 27 28
(a) a boundary of a lot is shown in the plan as passing longitudinally through the whole or any part of a wall, and	29 30 31
(b) the wall is described in the plan as a “proposed party wall”, and	32 33

(c)	the Registrar-General has recorded in the Register an application to create cross-easements for support of the wall made in the approved form by each person having a registered estate or interest in the land that will be benefited or burdened by the cross-easements.	1 2 3 4 5
[7]	Section 48 (2)	6
	Omit “such an easement”.	7
	Insert instead “an easement referred to in subsection (1) or (1A)”.	8
[8]	Section 49 Cancellation of recordings of easements after abandonment, consolidation of tenements or release	9 10
	Insert after section 49 (1):	11
	(1A) The Registrar-General may, under this section, cancel a recording relating to an easement in relation to:	12 13
	(a) all of the land benefited or burdened by the easement, or	14
	(b) any one or more of the lots, or part of a lot, burdened by the easement, or	15 16
	(c) any one or one or more of the lots benefited by the easement.	17 18
[9]	Section 49 (2)	19
	Insert “before the application for the cancellation of the recording is made to the Registrar-General” after “years”.	20 21
[10]	Section 54 Lease may be surrendered by execution of surrender in approved form	22 23
	Omit “or insolvent” from section 54 (1).	24

[11] Section 74LA	1
Insert after section 74L:	2
74LA Caveat lapses when order ceases to have effect	3
(1) If the operation of a caveat is extended for a specified period by an order of the Supreme Court under this Part and no further order is made by the Court extending the operation of the caveat before the expiration of the period specified in the order, the caveat lapses on the expiration of that period.	4 5 6 7 8
(2) If the operation of a caveat is extended until the further order of the Court by an order of the Supreme Court under this Part, the caveat lapses if the Registrar-General, on being satisfied that the proceedings in which the order was obtained have been finalised and that no further order is likely to be sought, makes a recording in the Register to the effect that the caveat has lapsed.	9 10 11 12 13 14 15
[12] Section 97 Severance of joint tenancy by unilateral action	16
Omit “A transfer” from section 97 (1).	17
Insert instead “Registration of a transfer”.	18
[13] Section 97 (2)	19
Insert “proposed to be” before “severed”.	20
[14] Section 97 (2)	21
Omit “severs” where firstly occurring.	22
Insert instead “proposes to sever”.	23
[15] Section 97 (3)	24
Omit “severs”. Insert instead “proposes to sever”.	25
[16] Section 97 (5)	26
Omit “lodges the dealing”.	27
Insert instead “executed the dealing, or on whose behalf the dealing was executed”.	28 29

[17] Section 97 (6)	1
Insert after section 97 (5):	2
(6) Despite subsection (5), the Registrar-General is not required to give notice of the lodgment of a dealing for registration or recording that may sever a joint tenancy to a joint tenant in any of the following circumstances:	3 4 5 6
(a) if the proposed severance is to arise from the recording of a court order made in proceedings to which the joint tenant is a party,	7 8 9
(b) if the proposed severance is to arise from the registration of a transfer pursuant to a writ in respect of an interest of any of the joint tenants,	10 11 12
(c) if the dealing concerned is witnessed by the joint tenant and the dealing indicates that the joint tenancy is to be severed,	13 14 15
(d) if the dealing is accompanied by a written acknowledgment by the joint tenant that he or she has received legal advice as to the effects of the severance of the joint tenancy,	16 17 18 19
(e) if the proposed severance is to arise out of registration following an application under section 90.	20 21
[18] Section 126 Compensation for party deprived of land	22
Omit “dead, bankrupt, or insolvent,” from section 126 (5) (b).	23
Insert instead “dead or bankrupt”.	24
[19] Section 131 Money paid in respect of a claim on Torrens Assurance Fund may be recovered against estate of deceased or bankrupt person	25 26
Omit “insolvent or” wherever occurring in section 131 (2).	27
[20] Section 133 Torrens Assurance Fund not liable in certain cases	28
Omit “insolvent or” from section 133 (1) (c).	29

[21] Section 135C	1
Omit the section. Insert instead:	2
135C Boundaries to which Part applies	3
This Part authorises the determination of the position of a boundary between adjoining parcels of land, whether or not each parcel is under the provisions of this Act.	4 5 6
[22] Section 135J	7
Omit the section. Insert instead:	8
135J Appeals to Land and Environment Court	9
(1) A person who is dissatisfied with a determination under this Part may appeal to the Land and Environment Court for determination by the Court of the position of the boundary.	10 11 12
(2) Only the following persons can appeal:	13
(a) an owner of land adjoining the boundary,	14
(b) a person who applied for the determination as purchaser under a contract for the sale of land adjoining the boundary,	15 16 17
(c) a public or local authority or the Head of a Government Department.	18 19
(3) An appeal must be made not later than 28 days after notice of the Registrar-General's determination is given to the person concerned.	20 21 22
(4) The Registrar-General is not to take action under section 135K (Noting of boundary on plans etc):	23 24
(a) until the expiration of the period during which an appeal can be made against the determination concerned to the Land and Environment Court, and	25 26 27
(b) (if an appeal is made during that period) until the matter has been determined by the Land and Environment Court.	28 29 30

(5) The Registrar-General is entitled to be joined as a party, and to appear and be heard either personally or by his or her duly appointed agent, at the hearing of an appeal under this section and at the hearing of any appeal under the <i>Land and Environment Court Act 1979</i> in respect of any such appeal.	1 2 3 4 5
[23] Section 135K Noting of boundary on plans etc	6
Insert after section 135K (3):	7
(4) The Registrar-General may, if the position of a boundary is determined under this Part, request the applicant for the boundary determination to deposit in the office of the Registrar-General a plan (being, if the Registrar-General so specifies, a plan of survey) showing details of the boundary as so determined, together with the number of copies of the plan specified by the Registrar-General.	8 9 10 11 12 13 14
(5) The Registrar-General may refuse to take action under this section if an applicant fails to comply with a request under subsection (4).	15 16 17
[24] Section 135O Owners may agree to dispense with certain requirements	18
Omit “referral” from section 135O (b). Insert instead “appeal”.	19
[25] Section 138	20
Omit the section. Insert instead:	21
138 Court may direct cancellation of folios and other actions related to folios	22 23
(1) A court may, in proceedings for the recovery of any land, estate or interest from the person registered as proprietor of the land, make ancillary orders of the kind set out in subsection (3), if the court is of the opinion that the circumstances of the case require any such order to be made.	24 25 26 27 28

(2) A court may, in proceedings for the possession or production of a certificate of title or in proceedings in which the court makes a determination as to an estate or interest in land, make ancillary orders of the kind set out in subsection (3), if the court is of the opinion that the certificate of title has not been, or is not likely to be, produced by a person for the purposes of the registration of a dealing affecting the land concerned.	1 2 3 4 5 6 7
(3) A court may order the Registrar-General to do one or more of the following:	8 9
(a) cancel or amend a folio of the Register,	10
(b) cancel, amend or make a recording in a folio of the Register,	11 12
(c) create a new folio of the Register,	13
(d) issue a new certificate of title.	14
(4) The Registrar-General must give effect to any such order.	15
(5) A court that makes an order under this section may order that a person deliver a certificate of title or other instrument to the Registrar-General for the purpose of giving effect to any such order.	16 17 18 19
(6) An action does not lie against the Registrar-General for recovery of damages sustained through deprivation of land, or any estate or interest in land, because of compliance by the Registrar-General with an order under this section.	20 21 22 23
(7) In this section:	24
<i>court</i> does not include a Local Court or a tribunal.	25
[26] Schedule 3 Savings and transitional provisions	26
Insert at the end of clause 1 (1):	27
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[27] Schedule 3, Part 4	1
Insert at the end of Part 3:	2
Part 4 Real Property and Conveyancing Legislation Amendment Act 1999	3 4
6 Definition	5
In this Part:	6
<i>amending Act</i> means the <i>Real Property and Conveyancing Legislation Amendment Act 1999</i> .	7 8
7 Lapsing of existing caveats	9
Section 74LA, as inserted by the amending Act, applies to orders made by the Supreme Court before the commencement of that section and in force immediately before that commencement in the same way as it applies to orders made after that commencement.	10 11 12 13 14
8 Severance of joint tenancies	15
Section 97, as amended by the amending Act, does not apply to or in respect of a dealing lodged, but not registered or recorded, immediately before the commencement of this clause.	16 17 18
9 Objections to boundary determinations	19
(1) Section 135J, as in force immediately before the commencement of this clause, continues to apply in respect of a request made under that section before that commencement.	20 21 22
(2) The Land and Environment Court has jurisdiction to deal with a referral arising out of a request referred to in subclause (1) as if the <i>Land and Environment Court Act 1979</i> was not amended by the amending Act.	23 24 25 26

Schedule 2	Amendment of other Acts	1
	(Section 4)	2
2.1	Conveyancing Act 1919 No 6	3
[1]	Section 88BA Positive covenants for maintenance or repair	4
	Insert “If the land is subject to an easement without a dominant tenement created in favour of a prescribed authority (as referred to in section 88A), the instrument must indicate the name of the prescribed authority.” after “covenant.” in section 88BA (3).	5 6 7 8
[2]	Section 88BA (6) (a)	9
	Omit “transfer and”.	10
[3]	Section 88B Creation and release of easements, profits à prendre and restrictions on use of land by plans	11 12
	Insert “or partially released” after “released” in section 88B (2) (c1).	13
[4]	Section 88B (3) (c)	14
	Insert “88BA,” before “88D”.	15
[5]	Section 88K Power of Court to create easements	16
	Omit “in accordance with the easement” from section 88K (2) (a).	17
	Insert instead “having the benefit of the easement”.	18
[6]	Schedule 4A Easements in gross	19
	Omit “the lot benefited” from clause 2 (a) of Part 5.	20
	Insert instead “any structure used by that body”.	21

[7] Schedule 9 Savings, transitional and other provisions	1
Insert at the end of clause 1 (1):	2
<i>Real Property and Conveyancing Legislation Amendment Act</i>	3
1999	4
2.2 Land and Environment Court Act 1979 No 204	5
Section 19 Class 3—land tenure, valuation, rating and compensation matters	6
	7
Omit section 19 (c). Insert instead:	8
(c) appeals against boundary determinations under Part 14A	9
(Boundary determinations) of the <i>Real Property Act</i>	10
1900,	11