



New South Wales

# Property Legislation Amendment (Easements) Bill 1995

## Explanatory note

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

### Overview of Bill

The objects of this Bill are:

- to provide for the creation of covenants requiring the repair or maintenance of the sites of easements (known as “positive covenants”) that are not able to be created under the present law, and
- to simplify the creation of various kinds of easements by giving expanded meanings to short forms of words when they are used with the intention of creating easements of those kinds, and
- to allow the Supreme Court to make orders imposing easements that are not inconsistent with the public interest, subject to it being practicable to provide adequate compensation, and
- to remove impediments to the effectiveness of certain easements, and
- to provide greater certainty in various aspects of the law relating to easements.

For those purposes, the Bill amends the *Conveyancing Act 1919* and the *Real Property Act 1900*.

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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 a day or days to be proclaimed.

**Clause 3** gives effect to the amendments to the *Conveyancing Act 1919*.

**Clause 4** gives effect to the amendments to the *Real Property Act 1900*.

## **Schedule 1     Amendment of Conveyancing Act 1919**

### **Positive covenants for repair and maintenance**

Under common law principles, it is not possible when creating an easement to include a covenant that will automatically impose positive obligations on successors in title each time land having the burden of the easement changes hands. Various devices have been used in an attempt to avoid the problem (such as imposing a contractual obligation requiring each person who disposes of such land to obtain a personal covenant from the next successor in title) but none has been found to be completely satisfactory.

Proposed section 88BA and consequential amendments to sections 87A and 88F will allow covenants that require repair or maintenance of the site of an easement to continue to apply after ownership of the land having the benefit or burden of the covenant changes. (Schedule 1 [1], [6] and [12])

### **Descriptions of sites of easements and restrictions on land use and of the land burdened or benefited by them**

Instruments creating easements or restrictions on the use of land must clearly indicate their sites and the land burdened or benefited by them or they will be unenforceable because of section 88. However, it is only necessary to show the approximate position of existing tunnels, pipes, conduits, wires or other similar objects that are underground or within or beneath an existing building. It is presently not clear how accurate a description must be of the site of certain easements (such as tracks in use) the position of which may be uncertain or vary over time.

Amendments to section 88 will provide that the land having the burden or benefit of an easement, and the site of an easement, will be adequately specified if it is shown in accordance with regulations made under the

*Conveyancing Act 1919* or the *Real Property Act 1900* or (in particular cases) in any other way that is satisfactory to the Registrar-General. (Schedule 1 [3])

### **Revision of inappropriate provision**

It is inconsistent with the principle that easements continue to apply to successors in title to the land benefited and burdened by them to contemplate that third parties may release, vary or modify them.

Amendments to section 88 remove inappropriate requirements which imply that third parties may release, vary or modify an easement. (Schedule 1 [2])

### **Use of short forms of words to create easements that do not benefit other land**

Certain easements (known as easements in gross) do not benefit other land. Examples of these kinds of easements are drainage easements for the benefit of local councils and easements to lay water pipes or to erect transmission lines for the benefit of water or electricity supply authorities.

Section 88A is amended to add to the short forms of words that, when used to create easements in gross, are taken to have the expanded meanings set out in Schedule 4A. A power to vary those expanded meanings is also conferred by the amendments to section 88A. (Schedule 1 [4] and [5])

Schedule 4A is amended to insert the additional expanded meanings. (Schedule 1 [20])

### **Cross-easements for party walls**

A convenient method of creating easements, profits à prendre and restrictions on the use of land when plans are registered or recorded under the Act is presently provided for by section 88B.

Proposed section 88BB will allow cross-easements for the support of party walls to be created under section 88B simply by registration or recording of a plan that shows a lot boundary within a length of the wall and refers to the wall as a "party wall". Such easements will be created even if they apply to different lots owned by the same person. (Schedule 1 [6])

Section 181B, which provides for the creation of easements for the support of party walls by assurances of land, is amended so that it ceases to apply when section 88BB commences. Easements created by section 181B before that commencement will not be affected. (Schedule 1 [17])

### **Release of easements on registration of plans**

Although section 88B provides for the creation of easements and other interests on the registration of plans, there is presently no equivalent provision for their being extinguished.

Sections 88B and 195D are amended to allow for the release of easements on registration or recording of a plan under Division 3 of Part 23 of the Act. (Schedule 1 [7], [11] and [19])

### **Creation of easements and other interests on recording of plans**

The purpose of section 88B is explained above. The section is directed at the creation of easements and other interests when plans are either registered or recorded under the Act.

Section 88B is amended to make it clear that easements and other interests may be created under that section by plans recorded under the Act in the same way as they may be created by plans registered under the Act. (Schedule 1 [8])

### **Effect of merger of ownership on easements created under section 88B**

Common law principles have the result of preventing the creation of easements that benefit and burden land owned by the same person and of extinguishing an easement that has been created if the land benefited and burdened by the easement becomes owned by the same person at any time after the easement was created. Use of section 88B has always been intended to be excepted from those consequences.

Section 88B is amended to make it clear that an easement or other interest created under that section is not affected when only part of the land having the benefit of the easement comes into the same ownership as the parcel of land having the burden of the easement. (Schedule 1 [9] and [10])

### **Creation of easements on application to Supreme Court**

Proposed section 88K provides that the Supreme Court may impose an easement burdening land if the easement is reasonably necessary for the effective use or development of other land that will have the benefit of the easement and use of the land in accordance with the easement would not be inconsistent with the public interest. The applicant for an order imposing such an easement must bear the costs of the application and must establish that all reasonable attempts have been made to acquire the easement before the Court will impose it.

Provision is also made for the payment of compensation to be assessed by the Court and for the release and modification of such an easement by the persons affected and benefited by it. Easements created under the proposed section may also be extinguished or modified by the Court under section 89 of the Act. (Schedule 1 [13])

### **Use of short forms of words to create easements for the benefit of other land**

Section 181A contains short forms of words that, when used to create easements for the benefit of other land, are taken to have the expanded meanings set out in Schedule 8. The section and Schedule are amended to add to the short forms.

A power to vary those meanings is also conferred by the amendments to section 181A. (Schedule 1 [14], [15], [16], [21] and [22])

### **Abolition of defunct committee**

Section 184 provides for a committee having the function of devising additional expanded meanings required to be given to short forms of words used to describe easements. The section is repealed because the committee has ceased to function. (Schedule 1 [18])

## **Schedule 2     Amendment of Real Property Act 1900**

### **Easements affecting estate or interest of registered proprietor even though unrecorded or misdescribed**

Section 42 declares the extent to which the estate or interest in land of a registered proprietor is paramount if it is recorded in a folio of the Register kept under the Act.

The section is amended so as to specify separately the easements that will affect such an estate or interest, even though they are omitted from or are misdescribed in the folio. Such an easement must have subsisted when the land concerned was brought under the Act or have been validly created under an Act at or after that time. In the case of an easement that is omitted, it does not make any difference if the easement has never been recorded in the folio or, although previously recorded, it is omitted from the folio because of an administrative error.

The amendment is consistent with the decision of the New South Wales Court of Appeal in *Dobbie & Anor v Davidson & Ors* (1991) 23 NSWLR 625. (Schedule 2 [1] and [2])

#### **Easement (and profit à prendre) to be recorded on folio for servient tenement**

Subject to a limited number of exceptions (such as that relating to easements referred to above), interests registered under the Act need to be recorded on the folio for the land affected by them if they are to be enforceable against the registered proprietor of an estate or another interest in land recorded in that folio.

Section 47 is amended to confirm that the Registrar-General must enter particulars of a registered easement (or profit à prendre) on the folio for the land to be burdened by the easement (or profit à prendre) and on any folio for the land benefited. (Schedule 2 [3])

#### **Variation of a registered easement**

At present, there is no direct way provided by the Act for varying the terms or site of an easement after it has been registered. However, it may be wholly or partly released under section 47 (6).

Section 47 is amended to provide a simple procedure for the variation, by registration of a memorandum of variation, of an easement registered under the Act. (Schedule 2 [4])

#### **Effect of partial merger of ownership on easements**

The consequence of common law principles resulting in an easement being extinguished if separate parcels of land burdened and benefited by it come within the same ownership is mentioned above.

Section 47 is amended to make it clear that, when only part of the land having the benefit of an easement recorded in the Register kept under the Act comes into the same ownership as a separate parcel of land having the burden of the easement, the easement continues to apply. (Schedule 2 [5])

**Recording of cross-easements for party walls on application to Registrar-General**

Proposed section 48 will allow the Registrar-General, on the application of persons having registered estates or interests in parts of a building separated by a common wall situated on land under the provisions of the Act that will be affected by the easements, to create cross-easements for support of the wall if it is shown as a "party wall" in any plan registered or recorded under the *Conveyancing Act 1919*.

The proposed section will apply only to plans that were registered or recorded before it commences because later plans will be able to take advantage of proposed section 88BB of the *Conveyancing Act 1919* referred to above. The proposed section may be able to be used if plans were registered or recorded under that Act to show the location of party walls referred to in assurances intended to create cross-easements under section 181B of that Act. (Schedule 2 [6])

**Cancellation of references to easements abandoned or rendered ineffective by consolidation of land or registration of plan**

Proposed section 49 will allow the Registrar-General, after giving notice of intention to do so, to cancel the registration of certain easements that have been abandoned. Lack of use of an easement for a period of 20 years or more (whether commencing before or after the amendments commence) will be sufficient evidence of abandonment.

The new power to cancel the registration of easements does not extend to easements in gross (such as those for the benefit of public authorities) and may be exercised only after at least one month's notice of intention to do so has been given to each person having a registered estate or interest in land benefited by the easement.

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The proposed section will also expressly allow the Registrar-General to remove recordings from folios of the Register that relate to easements which have ceased to have any practical application because land burdened by the easement and other land benefited by the easement has been consolidated into a single parcel or because the easement has been released by registration of a plan as provided for by proposed section 88B (3AA) of the *Conveyancing Act 1919*. (**Schedule 2 [6]**)



First print



New South Wales

# Property Legislation Amendment (Easements) Bill 1995

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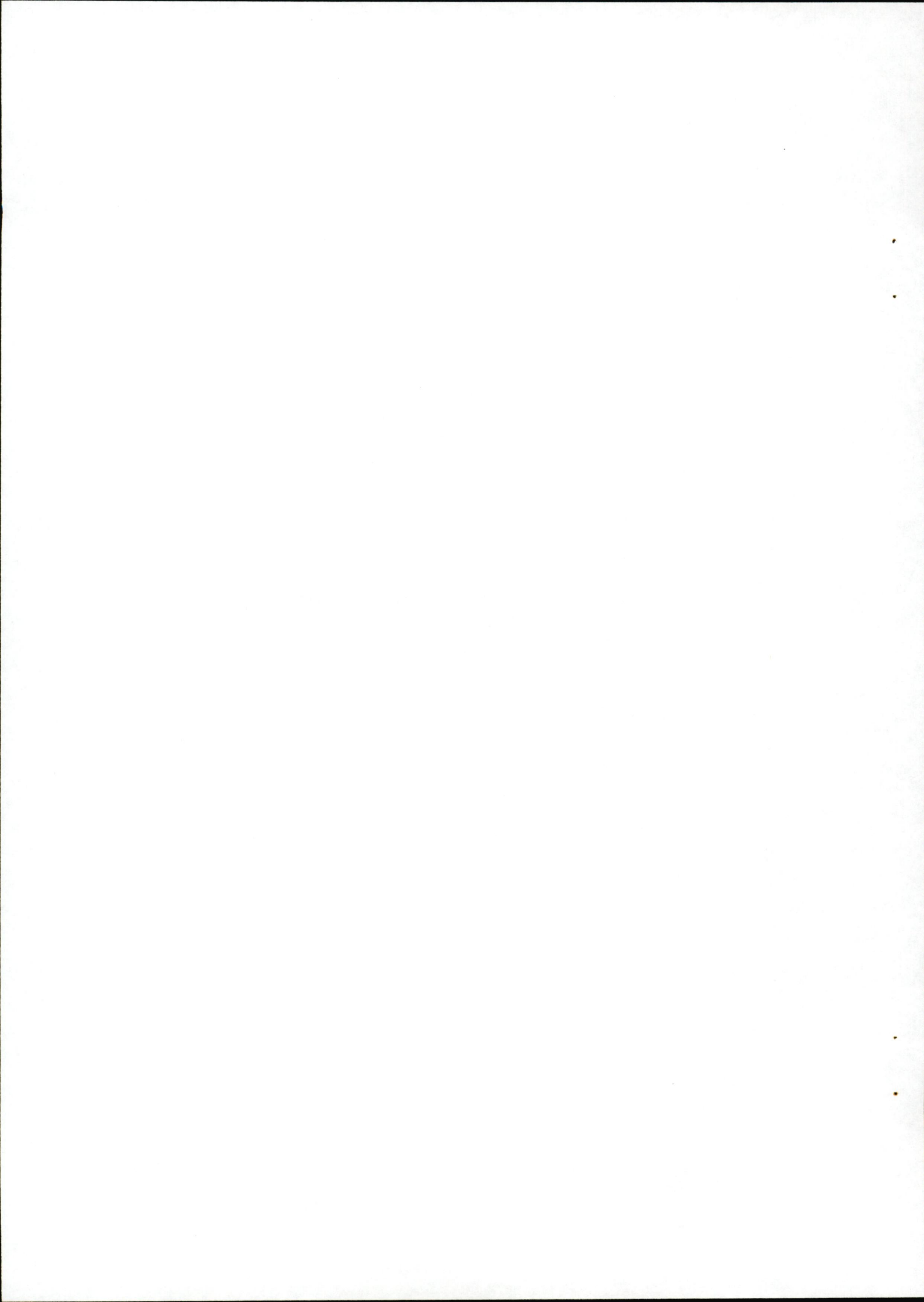
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New South Wales

## Property Legislation Amendment (Easements) Bill 1995

No. , 1995

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### **A Bill for**

An Act to amend the *Conveyancing Act 1919* and the *Real Property Act 1900* with respect to easements.

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

**1 Name of Act**

This Act is the *Property Legislation Amendment (Easements) Act 1995*.

**2 Commencement**

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

**3 Amendment of Conveyancing Act 1919 No 6**

The *Conveyancing Act 1919* is amended as set out in Schedule 1.

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

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The *Real Property Act 1900* is amended as set out in Schedule 2.

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## Schedule 1 Amendment of Conveyancing Act 1919

(Section 3)

**[1] Section 87A Definitions**

Omit the definition of *positive covenant*. Insert instead:

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*positive covenant* means a covenant for maintenance or repair imposed under section 88BA, a public positive covenant or a forestry covenant.

**[2] Section 88 Requirements for easements and restrictions on use of land**

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**Section 88 (1) (c)**

Omit "easement or" wherever occurring.

**[3] Section 88 (1A)**

Insert after section 88 (1):

(1A) Land (including the site of an easement) is clearly indicated for the purposes of this section if it is shown:

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(a) in the manner prescribed by regulations made under this Act or the *Real Property Act 1900*, or

(b) in any other manner satisfactory to the Registrar-General in the particular case or class of cases concerned.

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This subsection does not limit other ways in which land may be clearly indicated.

**[4] Section 88A Easements in gross, other easements and restrictions appurtenant to easements**

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**Section 88A (2) (a)**

Omit "after the commencement of the *Local Government and Conveyancing (Amendment) Act 1964*".

Insert instead "on or after 15 June 1964 (the commencement of the *Local Government and Conveyancing (Amendment) Act 1964*)".

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**[5] Section 88A (2A)–(2C)**

Insert after section 88A (2):

(2A) In an instrument which takes effect after the commencement of Schedule 1 [5] to the *Property Legislation Amendment (Easements) Act 1995* and purports to create or assure an easement without a dominant tenement of the following kind in favour of or to the Crown or any public or local authority constituted by an Act, the following expressions have effect as if the words attributed in Schedule 4A to those expressions were inserted instead:

- easement for repairs
- easement for drainage of sewage
- easement for drainage of water
- easement for electricity purposes
- easement for services
- easement for water supply
- right of access

(2B) The meaning given to an expression by this section and Schedule 4A may be varied (whether by way of addition, exception, qualification or omission), and is taken to have always been capable of being so varied, by the instrument in which the expression is used.

(2C) In Schedule 4A:

- (a) a body includes any person for the time being authorised by the body, and
- (b) a lot includes any other distinct piece or parcel of land (such as an island, a portion of a Parish or a Section).

**[6] Sections 88BA, 88BB**

Insert after section 88A:

**88BA Positive covenants for maintenance or repair**

(1) A covenant may be imposed requiring the maintenance or repair, or the maintenance and repair, of land that is the site of an easement or other land that is subject to the

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- burden of the easement (or both) by any one or more of the persons from time to time having the benefit or burden of the easement.
- (2) Such a covenant may be imposed:
- (a) by registration under this Act or the *Real Property Act 1900* (as the case may require) of the instrument indicating the persons bound by or including the terms of the easement, if the terms of the covenant are included in that instrument, or 5
  - (b) by registration under the *Real Property Act 1900* of a memorandum of positive covenant in the form approved under that Act that includes the terms of the covenant, if the site of the easement is under the provisions of that Act, or 10
  - (c) by registration under Division 1 of Part 23 of a deed expressed to be made under this section and including the terms of the covenant, if the site of the easement is not under the provisions of that Act. 15
- (3) The instrument including the covenant must clearly indicate the land which is to be maintained or repaired, the land to which the benefit of the covenant is appurtenant and the land which is subject to the burden of the covenant. 20
- (4) The instrument must be executed by each person to be bound by the covenant: 25
- (a) who has an estate or interest registered under the *Real Property Act 1900* in land to which the benefit or burden of the covenant relates, or
  - (b) who is seised or possessed of an estate or interest in land to which the benefit or burden of the covenant relates, if the land is not under the provisions of that Act. 30
- (5) When recorded in the Register kept under the *Real Property Act 1900*, such a covenant is an interest within the meaning of section 42 of that Act. 35

- (6) Such a covenant may be released or varied:
  - (a) by registration under the *Real Property Act 1900* of a dealing in the form approved under that Act providing for the transfer and release of the covenant or for variation of the covenant, if the site is under the provisions of that Act, or 5
  - (b) by registration under Division 1 of Part 23 of a deed of release or a deed of variation, if the site is not under the provisions of that Act.
- (7) The instrument releasing or varying the covenant must be executed by: 10
  - (a) each person for the time being entitled to enforce the covenant or otherwise having the benefit of the covenant, and
  - (b) each person against whom the covenant may be enforced for the time being, in the case of a variation. 15

**88BB Creation of cross-easements for party walls by plans**

- (1) A plan lodged for registration or recording under Division 3 of Part 23 after the commencement of this section is, for the purposes of section 88B (2) (c), taken to be intended to create cross-easements if: 20
  - (a) a boundary of a lot is shown in the plan as passing longitudinally through the whole or any part of a wall, and 25
  - (b) the wall is described in the plan as a "party wall".
- (2) The benefit of such an easement is appurtenant to each lot shown in the plan as consisting of or including a portion of the wall.
- (3) Each lot shown in the plan as consisting of or including another portion of the wall is subject to the burden of the easement. 30



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- (4) The easement entitles each person for the time being having the benefit of the easement to the continued existence of each portion of the wall:
- (a) that is necessary for the support of so much of the building as is contained within the lot to which the easement is appurtenant, and 5
  - (b) that consists of or is included within another lot which is subject to the burden of the easement.
- [7] Section 88B Creation and release of easements, profits à prendre and restrictions on use of land by plans 10**
- Section 88B (2) (c1)**
- Insert after section 88B (2) (c):
- (c1) what easements, if any, appurtenant to or burdening land comprised in the plan are intended to be released, and 15
- [8] Section 88B (3) (c) (ii)**
- Insert “or recording” and “or recorded”, respectively, after “registration” and “registered”.
- [9] Section 88B (3) (c) (iii)**
- Omit “the land” where firstly occurring. 20  
Insert instead “a parcel of land”.
- [10] Section 88B (3) (c) (iii)**
- Omit “the land” where secondly occurring.  
Insert instead “a separate parcel of land”.
- [11] Section 88B (3AA)** 25
- Insert after section 88B (3):
- (3AA) On registration or recording under Division 3 of Part 23 of a plan on which a release of an easement is indicated in accordance with subsection (2) (c1), the easement is released. 30

**[12] Section 88F Effect of certain positive covenants**

**Section 88F (1)**

Omit "under section 88D, 88E or 88EA".

**[13] Section 88K**

Insert after section 88J:

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**88K Power of Court to create easements**

- (1) The Court may make an order imposing an easement over land if the easement is reasonably necessary for the effective use or development of other land that will have the benefit of the easement. 10
- (2) Such an order may be made only if the Court is satisfied that:
  - (a) use of the land in accordance with the easement will not be inconsistent with the public interest, and 15
  - (b) the owner of the land to be burdened by the easement and each other person having an estate or interest in that land that is evidenced by an instrument registered in the General Register of Deeds or the Register kept under the *Real Property Act 1900* can be adequately compensated for any loss or other disadvantage that will arise from imposition of the easement, and 20
  - (c) all reasonable attempts have been made by the applicant for the order to obtain the easement or an easement having the same effect but have been unsuccessful. 25
- (3) The Court is to specify in the order the nature and terms of the easement and such of the particulars referred to in section 88 (1) (a)–(d) as are appropriate and is to identify its site by reference to a plan that is, or is capable of being, registered or recorded under Division 3 of Part 23. The terms may limit the times at which the easement applies. 30

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- (4) The Court is to provide in the order for payment by the applicant to specified persons of such compensation as the Court considers appropriate, unless the Court determines that compensation is not payable because of the special circumstances of the case. 5
- (5) The costs of the proceedings are payable by the applicant, subject to any order of the Court to the contrary.
- (6) Such an easement may be:
- (a) released by the owner of the land having the benefit of it, or 10
  - (b) modified by a deed made between the owner of the land having the benefit of it and the persons for the time being having the burden of it or (in the case of land under the provisions of the *Real Property Act 1900*) by a dealing in the form approved under that Act giving effect to the modification. 15
- (7) An easement imposed under this section, a release of such an easement or any modification of such an easement by a deed or dealing takes effect: 20
- (a) if the land burdened is under the *Real Property Act 1900*, when the Registrar-General registers a dealing in the form approved under that Act setting out particulars of the easement, or of the release or modification, by making such recordings in the Register kept under that Act as the Registrar-General considers appropriate, or 25
  - (b) in any other case, when a minute of the order imposing the easement or the deed of release or modification is registered in the General Register of Deeds. 30
- (8) An easement imposed under this section has effect (for the purposes of this Act and the *Real Property Act 1900*) as if it was contained in a deed. 35
- (9) Nothing in this section prevents such an easement from being extinguished or modified under section 89 by the Court.

**[14] Section 181A Construction of expressions used to create easements**

**Section 181A (1)**

Insert “executed or made after 1 January 1931 (the commencement of the *Conveyancing (Amendment) Act 1930*) and” after “instrument”.

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**[15] Section 181A (1A)**

Insert “executed or made after 15 June 1964 (the commencement of the *Local Government and Conveyancing (Amendment) Act 1964*) and” after “instrument”.

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**[16] Section 181A (2)–(3A)**

Omit section 181A (2) and (3). Insert instead:

(2) In an instrument which takes effect after the commencement of Schedule 1 [16] to the *Property Legislation Amendment (Easements) Act 1995* and purports to create an easement of the following kind, the following expressions have effect as if the words attributed in Schedule 8 to those expressions were inserted instead:

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easement for repairs

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easement for batter

easement for drainage of sewage

easement for drainage of water

easement for electricity purposes

easement for overhang

25

easement for services

easement for water supply

easement to permit encroaching structure to remain

right of access

(3) The meaning given to an expression by this section and Schedule 8 may be varied (whether by way of addition, exception, qualification or omission), and is taken to have always been capable of being varied, by the instrument in which the expression is used.

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- (3A) In Schedule 8:
- (a) a lot includes any other distinct piece or parcel of land (such as an island, a portion of a Parish or a Section), and
  - (b) an owner of a lot benefited includes: 5
    - any person entitled to possession of the whole of the lot benefited or any person authorised by such a person, and
    - any person entitled to possession of any part of that lot which is capable of benefiting 10 from the easement or any person authorised by such a person.
- [17] Section 181B Construction of expression “party wall” in assurances of land**
- Section 181B (2)** 15
- Insert “and before the commencement of section 88BB” after “1930”.
- [18] Section 184 Committee for framing short forms**
- Omit the section.
- [19] Section 195D Signatures and consents** 20
- Section 195D (1) (d)**
- Insert “, or to release an easement” after “covenant”.
- [20] Schedule 4A Easements in gross**
- Parts 5–11**
- Insert at the end of Schedule 4A: 25
- Part 5 Easement for repairs**
- 1. The body having the benefit of this easement may:
    - (a) at the expiration of at least one week’s notice served on the owner or occupier of a lot burdened, use the lot for the purpose of carrying out 30

- necessary work on any structure used by that body which cannot otherwise reasonably be carried out, and
- (b) do anything reasonably necessary for that purpose, including: 5
- entering the lot burdened, and
  - taking anything on to the lot burdened.
2. In exercising those powers, the body having the benefit of this easement must:
- (a) ensure all work on the lot benefited is done properly and carried out as quickly as is practicable, and 10
- (b) cause as little inconvenience as is practicable to the owner and any occupier of the lot burdened, and 15
- (c) cause as little damage as is practicable to the lot burdened and any improvement on it, and
- (d) restore the lot burdened as nearly as is practicable to its former condition, and
- (e) make good any collateral damage. 20

**Part 6 Easement for drainage of sewage**

1. The body having the benefit of this easement may:
- (a) drain sewage, sullage and other fluid wastes in pipes through each lot burdened, but only within the site of this easement, and 25
- (b) do anything reasonably necessary for that purpose, including:
- entering the lot burdened, and
  - taking anything on to the lot burdened, and
  - using any existing line of pipes, and 30
  - carrying out works, such as constructing, placing, repairing or maintaining pipes and equipment.

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2. In exercising those powers, the body having the benefit of this easement must:
- (a) ensure all work is done properly, and
  - (b) cause as little inconvenience as is practicable to the owner and any occupier of the lot burdened, and 5
  - (c) cause as little damage as is practicable to the lot burdened and any improvement on it, and
  - (d) restore the lot burdened as nearly as is practicable to its former condition, and 10
  - (e) make good any collateral damage.

**Part 7 Easement for drainage of water**

1. The body having the benefit of this easement may:
- (a) drain water from any natural source through each lot burdened, but only within the site of this easement, and 15
  - (b) do anything reasonably necessary for that purpose, including:
    - entering the lot burdened, and
    - taking anything on to the lot burdened, and 20
    - using any existing line of pipes, and
    - carrying out work, such as constructing, placing, repairing or maintaining pipes, channels, ditches and equipment.
2. In exercising those powers, the body having the benefit of this easement must: 25
- (a) ensure all work is done properly, and
  - (b) cause as little inconvenience as is practicable to the owner and any occupier of the lot burdened, and 30
  - (c) cause as little damage as is practicable to the lot burdened and any improvement on it, and
  - (d) restore the lot burdened as nearly as is practicable to its former condition, and
  - (e) make good any collateral damage. 35

**Part 8 Easement for electricity purposes**

1. The body having the benefit of this easement may:
  - (a) transmit electricity through each lot burdened, but only within the site of this easement, and
  - (b) do anything reasonably necessary for that purpose, 5 including:
    - entering the lot burdened, and
    - taking anything on to the lot burdened, and
    - carrying out work, such as constructing, 10 placing, repairing or maintaining poles, wires, conduits and equipment.
2. In exercising those powers, the body having the benefit of this easement must:
  - (a) ensure all work is done properly, and
  - (b) cause as little inconvenience as is practicable to 15 the owner and any occupier of the lot burdened, and
  - (c) cause as little damage as is practicable to the lot burdened and any improvement on it, and
  - (d) restore the lot burdened as nearly as is practicable 20 to its former condition, and
  - (e) make good any collateral damage.

**Part 9 Easement for services**

1. The body having the benefit of this easement may:
  - (a) provide domestic services supplied by that body 25 through each lot burdened, but only within the site of this easement, and
  - (b) do anything reasonably necessary for that purpose, including:
    - entering the lot burdened, and 30
    - taking anything on to the lot burdened, and



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- carrying out work, such as constructing, placing, repairing or maintaining pipes, poles, wires, cables, conduits, structures and equipment.
2. In exercising those powers, the body having the benefit of this easement must: 5
- (a) ensure all work is done properly, and
  - (b) cause as little inconvenience as is practicable to the owner and any occupier of the lot burdened, and 10
  - (c) cause as little damage as is practicable to the lot burdened and any improvement on it, and
  - (d) restore the lot burdened as nearly as is practicable to its former condition, and
  - (e) make good any collateral damage. 15
3. For the purposes of this easement, *domestic services* includes supply of water, gas, electricity, telephone and television and discharge of sewage, sullage and other fluid wastes.
- Part 10 Easement for water supply 20**
1. The body having the benefit of this easement may:
- (a) run water in pipes through each lot burdened, but only within the site of this easement, and
  - (b) do anything reasonably necessary for that purpose including: 25
    - entering the lot burdened, and
    - taking anything on to the lot burdened, and
    - carrying out work, such as constructing, placing, repairing or maintaining pipes and equipment. 30
2. In exercising those powers, the body having the benefit of this easement must:

- (a) ensure all work is done properly, and
- (b) cause as little inconvenience as is practicable to the owner and any occupier of the lot burdened, and
- (c) cause as little damage as is practicable to the lot burdened and any improvement on it, and 5
- (d) restore the lot burdened as nearly as is practicable to its former condition, and
- (e) make good any collateral damage.

**Part 11 Right of access 10**

- 1. The body having the benefit of this easement may:
  - (a) by any reasonable means pass across each lot burdened, but only within the site of this easement, for the purpose of exercising or performing any of its powers, authorities, duties or functions, and 15
  - (b) do anything reasonably necessary for passing across each such lot, including:
    - entering the lot burdened, and
    - taking anything on to the lot burdened, and 20
    - carrying out work within the site of this easement, such as constructing, placing, repairing or maintaining trafficable surfaces, driveways or structures.
- 2. In exercising those powers, the body having the benefit of this easement must: 25
  - (a) ensure all work is done properly, and
  - (b) cause as little inconvenience as is practicable to the owner and any occupier of the lot burdened, and 30
  - (c) cause as little damage as is practicable to the lot burdened and any improvement on it, and
  - (d) restore the lot burdened as nearly as is practicable to its former condition, and
  - (e) make good any collateral damage. 35

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**[21] Schedule 8, heading**

Omit the heading. Insert instead:

**Schedule 8 Construction of certain expressions**

**[22] Schedule 8, Parts 5–14**

Insert at the end of Schedule 8:

5

**Part 5 Easement for repairs**

1. The owner of the lot benefited may:

(a) at the expiration of at least one week's notice served on the owner or occupier of a lot burdened, use the lot burdened for the purpose of carrying out necessary work on, or on any structure on, the lot benefited which cannot otherwise reasonably be carried out, and

10

(b) do anything reasonably necessary for that purpose, including:

15

- entering the lot burdened, and
- taking anything on to the lot burdened.

2. In exercising those powers, the owner of the lot benefited must:

(a) ensure all work on the lot benefited is done properly and carried out as quickly as is practicable, and

20

(b) cause as little inconvenience as is practicable to the owner and any occupier of the lot burdened, and

25

(c) cause as little damage as is practicable to the lot burdened and any improvement on it, and

(d) restore the lot burdened as nearly as is practicable to its former condition, and

(e) make good any collateral damage.

30

**Part 6 Easement for batter**

1. The owner of the lot benefited may:
  - (a) construct and maintain on the lot burdened, but only within the site of this easement, whatever batter or embankment is reasonably necessary to support the surface or subsurface of the lot benefited or any part of it, or any structure or works on the lot benefited, and 5
  - (b) do anything reasonably necessary for that purpose, including: 10
    - entering the lot burdened, and
    - taking anything on to the lot burdened, and
    - carrying out work.
2. The owner of the lot burdened must not:
  - (a) interfere with the batter or embankment or the support it offers, or 15
  - (b) use the site of this easement, or any other part of the lot burdened, or any other land, in a way which may detract from the stability of or the support provided by the batter or embankment. 20
3. If the owner of the lot burdened does or allows anything to be done which damages the batter or embankment or impairs its effectiveness, the owner of the lot benefited may serve not less than 14 days' notice on the owner of the lot burdened requiring the damage to be repaired or the impairment removed. 25

If the owner of the lot burdened does not comply with the notice, the owner of the lot benefited may enter and repair the damage or remove the impairment and may recover any reasonable costs from the owner of the lot burdened. 30
4. In exercising those powers (whether or not after serving such a notice), the owner of the lot benefited must:
  - (a) ensure all work is done properly, and

- 
- (b) cause as little inconvenience as is practicable to the owner and any occupier of the lot burdened, and
  - (c) cause as little damage as is practicable to the lot burdened and any improvement on it, and 5
  - (d) restore the lot burdened as nearly as is practicable to its former condition, and
  - (e) make good any collateral damage.

**Part 7 Easement for drainage of sewage**

- 1. The owner of the lot benefited may: 10
  - (a) drain sewage, sullage and other fluid wastes in pipes through each lot burdened, but only within the site of this easement, and
  - (b) do anything reasonably necessary for that purpose, including: 15
    - entering the lot burdened, and
    - taking anything on to the lot burdened, and
    - using any existing line of pipes, and
    - carrying out works, such as constructing, placing, repairing or maintaining pipes and equipment. 20
- 2. In exercising those powers, the owner of the lot benefited must:
  - (a) ensure all work is done properly, and
  - (b) cause as little inconvenience as is practicable to the owner and any occupier of the lot burdened, and 25
  - (c) cause as little damage as is practicable to the lot burdened and any improvement on it, and
  - (d) restore the lot burdened as nearly as is practicable to its former condition, and 30
  - (e) make good any collateral damage.

**Part 8 Easement for drainage of water**

1. The owner of the lot benefited may:
  - (a) drain water from any natural source through each lot burdened, but only within the site of this easement, and 5
  - (b) do anything reasonably necessary for that purpose, including:
    - entering the lot burdened, and
    - taking anything on to the lot burdened, and
    - using any existing line of pipes, and 10
    - carrying out work, such as constructing, placing, repairing or maintaining pipes, channels, ditches and equipment.
2. In exercising those powers, the owner of the lot benefited must: 15
  - (a) ensure all work is done properly, and
  - (b) cause as little inconvenience as is practicable to the owner and any occupier of the lot burdened, and
  - (c) cause as little damage as is practicable to the lot burdened and any improvement on it, and 20
  - (d) restore the lot burdened as nearly as is practicable to its former condition, and
  - (e) make good any collateral damage.

**Part 9 Easement for electricity purposes** 25

1. The owner of the lot benefited may:
  - (a) transmit electricity through each lot burdened, but only within the site of this easement, and
  - (b) do anything reasonably necessary for that purpose, including: 30
    - entering the lot burdened, and

- 
- taking anything on to the lot burdened, and
  - carrying out work, such as constructing, placing, repairing or maintaining poles, wires, conduits and equipment.
2. In exercising those powers, the owner of the lot benefited must: 5
- (a) ensure all work is done properly, and
  - (b) cause as little inconvenience as is practicable to the owner and any occupier of the lot burdened, and 10
  - (c) cause as little damage as is practicable to the lot burdened and any improvement on it, and
  - (d) restore the lot burdened as nearly as is practicable to its former condition, and
  - (e) make good any collateral damage. 15

**Part 10 Easement for overhang**

1. The owner of the lot benefited:
- (a) may insist that the parts of the structure (*the overhanging structure*) on the lot benefited which, when this easement was created, overhung the lot burdened remain, but only to the extent they are within the site of this easement, and 20
  - (b) must keep the overhanging structure in good repair and safe condition, and
  - (c) may do anything reasonably necessary for those purposes, including: 25
    - entering the lot burdened, and
    - taking anything on to the lot burdened, and
    - carrying out work.
2. In exercising those powers, the owner of the lot benefited must: 30
- (a) ensure all work is done properly, and

- (b) cause as little inconvenience as is practicable to the owner and any occupier of the lot burdened, and
  - (c) restore the lot burdened as nearly as is practicable to its former condition, and 5
  - (d) make good any collateral damage.
3. The owner of the lot burdened may insist that this easement be extinguished when the structure on the lot benefited is removed.
4. The owner of the lot burdened must not do or allow anything to be done to damage or interfere with the overhanging structure. 10

**Part 11 Easement for services**

1. The owner of the lot benefited may:
- (a) use each lot burdened, but only within the site of this easement, to provide domestic services to or from each lot burdened, and 15
  - (b) do anything reasonably necessary for that purpose, including:
    - entering the lot burdened, and 20
    - taking anything on to the lot burdened, and
    - carrying out work, such as constructing, placing, repairing or maintaining pipes, poles, wires, cables, conduits, structures and equipment. 25
2. In exercising those powers, the owner of the lot benefited must:
- (a) ensure all work is done properly, and
  - (b) cause as little inconvenience as is practicable to the owner and any occupier of the lot burdened, and 30
  - (c) cause as little damage as is practicable to the lot burdened and any improvement on it, and



- 
- (d) restore the lot burdened as nearly as is practicable to its former condition, and
- (e) make good any collateral damage.
3. For the purposes of this easement, *domestic services* includes supply of water, gas, electricity, telephone and television and discharge of sewage, sullage and other fluid wastes. 5

**Part 12 Easement for water supply**

1. The owner of the lot benefited may:
- (a) run water in pipes through each lot burdened, but only within the site of this easement, and 10
- (b) do anything reasonably necessary for that purpose including:
- entering the lot burdened, and
  - taking anything on to the lot burdened, and 15
  - carrying out work, such as constructing, placing, repairing or maintaining pipes and equipment.
2. In exercising those powers, the owner of the lot benefited must: 20
- (a) ensure all work is done properly, and
- (b) cause as little inconvenience as is practicable to the owner and any occupier of the lot burdened, and
- (c) cause as little damage as is practicable to the lot burdened and any improvement on it, and 25
- (d) restore the lot burdened as nearly as is practicable to its former condition, and
- (e) make good any collateral damage.

**Part 13 Easement to permit encroaching structure to remain**

1. The owner of the lot benefited:
  - (a) may insist that the parts of the structure (*the encroaching structure*) on the lot benefited which, when this easement was created, encroached on the lot burdened remain, but only to the extent they are within the site of this easement, and 5
  - (b) must keep the encroaching structure in good repair and safe condition, and 10
  - (c) may do anything reasonably necessary for those purposes, including:
    - entering the lot burdened, and
    - taking anything on to the lot burdened, and
    - carrying out work. 15
2. In exercising those powers, the owner of the lot benefited must:
  - (a) ensure all work is done properly, and
  - (b) cause as little inconvenience as is practicable to the owner and any occupier of the lot burdened, and 20
  - (c) restore the lot burdened as nearly as is practicable to its former condition, and
  - (d) make good any collateral damage.
3. The owner of the lot burdened may insist that this easement be extinguished when the structure on the lot benefited is removed. 25
4. The owner of the lot burdened must not do or allow anything to be done to damage or interfere with the encroaching structure. 30

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**Part 14 Right of access**

1. The owner of the lot benefited may:
  - (a) by any reasonable means pass across each lot burdened, but only within the site of this easement, to get to or from the lot benefited, and 5
  - (b) do anything reasonably necessary for that purpose, including:
    - entering the lot burdened, and
    - taking anything on to the lot burdened, and
    - carrying out work within the site of this easement, such as constructing, placing, repairing or maintaining trafficable surfaces, driveways or structures. 10
2. In exercising those powers, the owner of the lot benefited must: 15
  - (a) ensure all work is done properly, and
  - (b) cause as little inconvenience as is practicable to the owner and any occupier of the lot burdened, and
  - (c) cause as little damage as is practicable to the lot burdened and any improvement on it, and 20
  - (d) restore the lot burdened as nearly as is practicable to its former condition, and
  - (e) make good any collateral damage.

## **Schedule 2 Amendment of Real Property Act 1900**

(Section 4)

### **[1] Section 42 Estate of registered proprietor paramount**

#### **Section 42 (1) (a1) 5**

Insert after section 42 (1) (a):

- (a1) in the case of the omission or misdescription of an easement subsisting immediately before the land was brought under the provisions of this Act or validly created at or after that time under this or any other Act or a Commonwealth Act, 10

### **[2] Section 42 (1) (b)**

Omit "easement or".

### **[3] Section 47 Creation of easements etc**

#### **Section 47 (1) 15**

Omit subsection (1). Insert instead:

- (1) When an easement or profit à prendre that burdens land under the provisions of this Act is created, the Registrar-General is to record particulars of the dealing creating the easement or profit à prendre: 20
- (a) in the folio of the Register for the land burdened, and
- (b) in the folio of the Register for the land benefited, if the easement or profit à prendre benefits land under the provisions of this Act. 25

**[4] Section 47 (5A)**

Insert after section 47 (5):

(5A) The terms or site of a registered easement may be varied by a registered dealing in the approved form, or by such a dealing and a plan illustrating the varied site registered or recorded under Division 3 of Part 23 of the *Conveyancing Act 1919*. The dealing and any such plan are to be executed by each person having a registered estate or interest in the land burdened or in any land benefited by the easement.

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**[5] Section 47 (7)**

Omit “both of the land burdened and of the land benefited”.  
Insert instead “of separate parcels of land respectively burdened and benefited”.

**[6] Sections 48, 49**

15

Insert after section 47:

**48 Creation of cross-easements for party walls by plans on application**

(1) A plan registered or recorded under Division 3 of Part 23 of the *Conveyancing Act 1919* before the commencement of this section creates cross-easements if:

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(a) a boundary of a lot is, in a manner satisfactory to the Registrar-General, shown in the plan as passing longitudinally through the whole or any part of a wall, and

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(b) the wall is described in the plan as a “party wall”, and

(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 land that will be benefited or burdened by the cross-easements.

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- (2) The benefit of such an easement is appurtenant to each lot shown in the plan as consisting of or including a portion of the wall.
- (3) Each lot shown in the plan as consisting of or including another portion of the wall is subject to the burden of the easement. 5
- (4) The easement entitles each person for the time being having the benefit of the easement to the continued existence of each portion of the wall:
- (a) that is necessary for the support of so much of the building as is contained within the lot to which the easement is appurtenant, and 10
- (b) that consists of or is included within another lot which is subject to the burden of the easement.
- 49 Cancellation of recordings of easements after abandonment, consolidation of tenements or release 15**
- (1) The Registrar-General may cancel a recording relating to an easement in the Register if the easement has been abandoned.
- (2) An easement may be treated as abandoned if the Registrar-General is satisfied it has not been used for at least 20 years, whether that period commenced before, on or after, the date of assent to the *Property Legislation Amendment (Easements) Act 1995*. 20
- (3) However, an easement is not capable of being abandoned: 25
- (a) if the easement does not benefit land, or
- (b) to the extent (if any) that the easement benefits land owned by the Crown, or by a public or local authority constituted by an Act, or 30
- (c) if the easement is of a class of easements prescribed by the regulations as being incapable of being abandoned.

- 
- (4) Before cancelling any such recording, the Registrar-General must consider any submission made, by a person having a registered estate or interest in land benefited by the easement, within the period fixed by the Registrar-General in a notice of intention to cancel the recording served personally or by post on the person. The period must be not less than one month from the date of the notice. 5
- (5) The Registrar-General may cancel a recording in the Register relating to an easement: 10
- (a) if satisfied that the recording relates to land for which the easement has no practical application because separate parcels of land that were respectively burdened and benefited by the easement have been consolidated into a single parcel, or 15
- (b) if the easement has been released under section 88B of the *Conveyancing Act 1919*.
- (6) An application for cancellation of any such recording must be made in the approved form or in a form prescribed by regulations made under the *Conveyancing Act 1919*. 20





(a)

PROPERTY LEGISLATION AMENDMENT (EASEMENTS) BILL 1995

LEGISLATIVE COUNCIL

SECOND READING

THE HON J W SHAW QC MLC

Attorney General and Minister for Industrial Relations.

I move:

That this Bill be now read a second time.



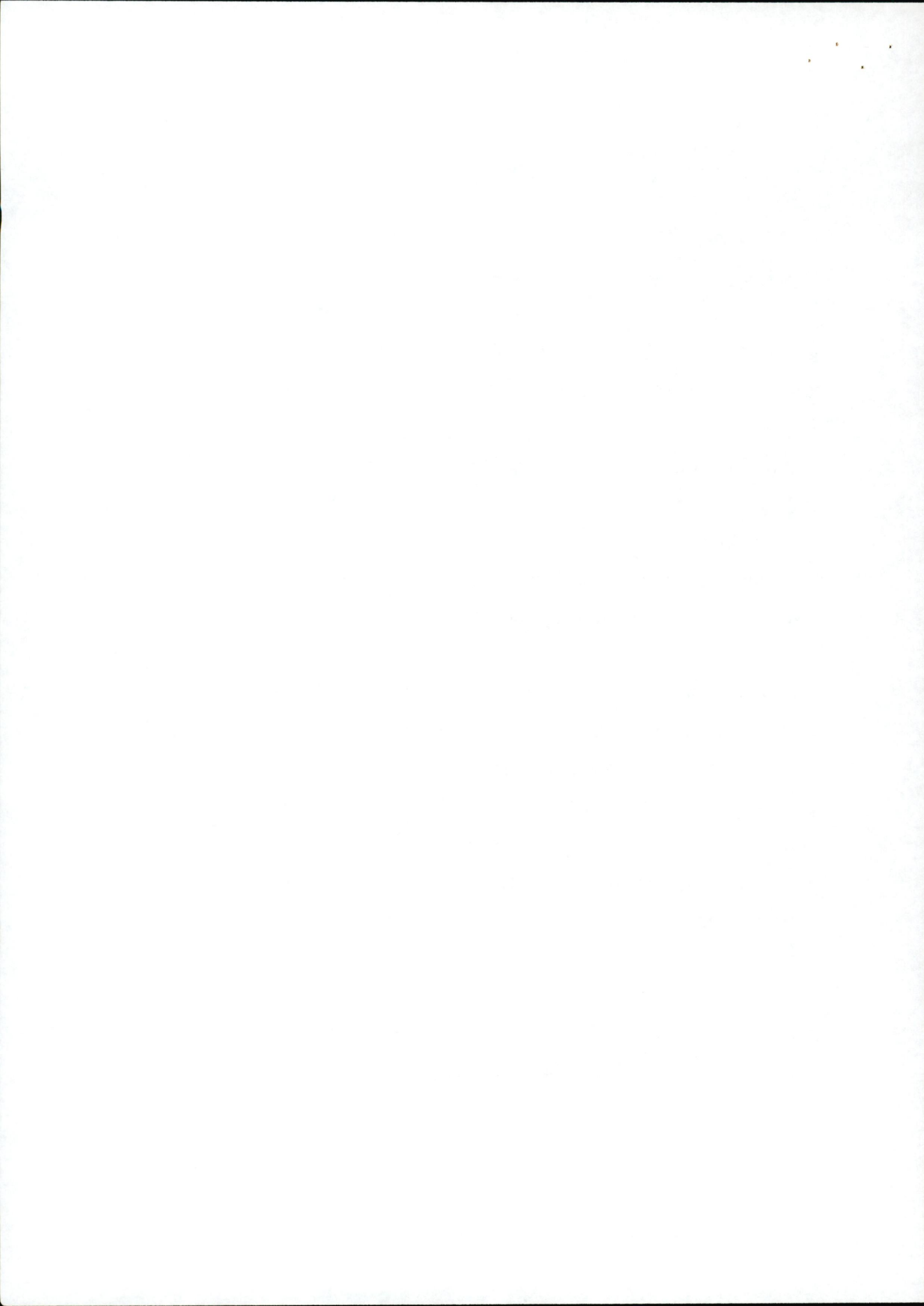
Mr President,

If I own a parcel of land that has no frontage to a public road then it is most likely that my access to that road will be via a "right of way" over my neighbour's land. That right of way is a common example of an easement. Other common examples are easements for drainage, easements for sewage, and easements for transmission lines.

In general terms then, an easement may be described as a right belonging to a parcel of land, for the owner of that parcel to use another parcel of land owned by someone else. The laws governing easements are a confusing mix of old English common law and local statutory provisions, and they are crying out for reform.

The Director of Land Titles has prepared and circulated a discussion paper identifying problem areas of the law of easements, suggesting proposals for reform, and calling for comments. Many comments were received and the Director subsequently convened a consultative committee to consider the submissions and formulate final proposals. The committee comprised representatives of government, legal, surveying, and academic groups, and has suggested the reforms embodied in this Bill.

Many of the reforms are of a technical legal nature but I will concentrate on those reforms that have the greatest practical effect.

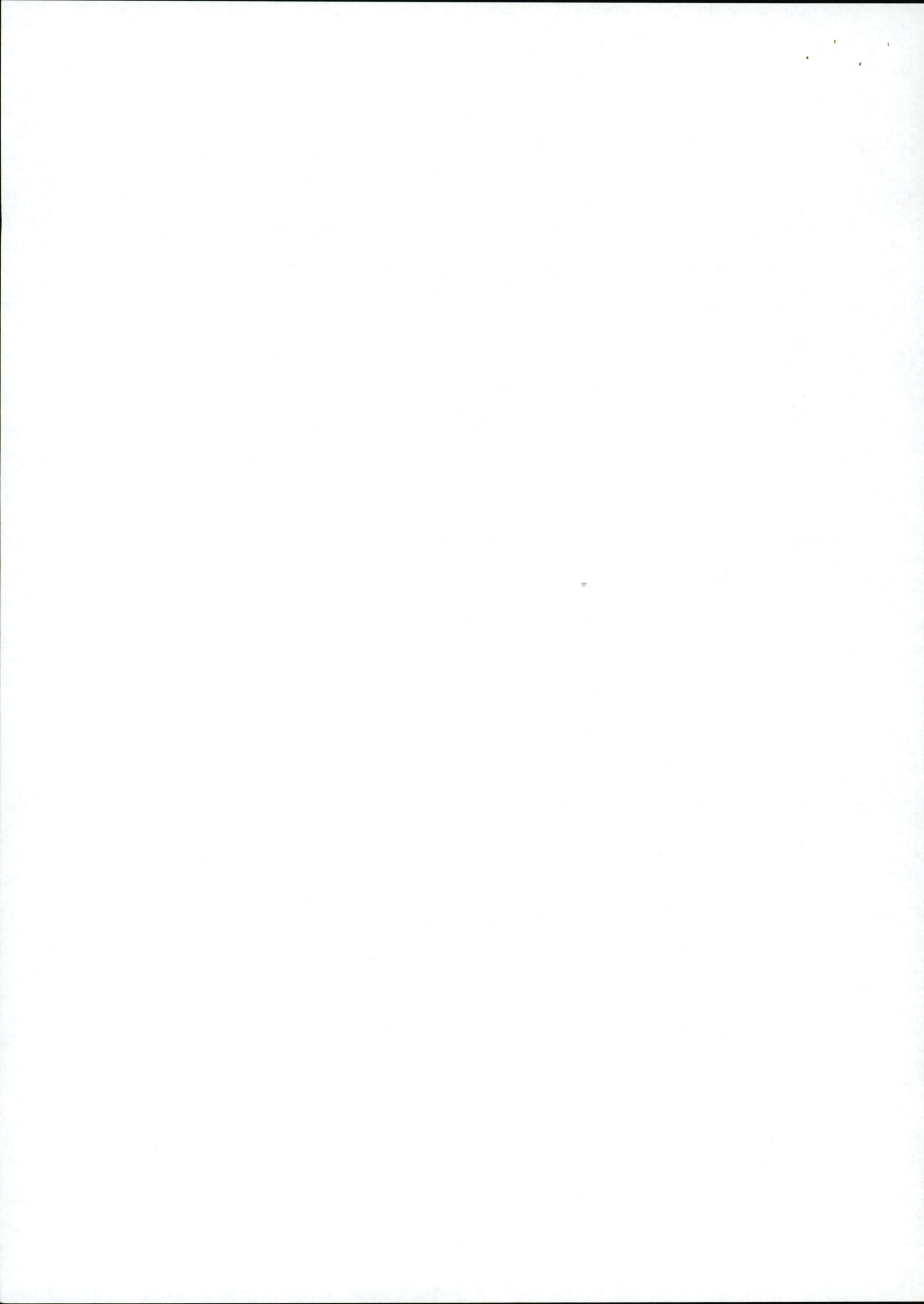


Let me begin by illustrating an existing problem which must be solved. A multi-storey building was being erected in the City. During the course of construction a crane would sometimes swing over neighbouring land, and scaffolding also encroached into the air space of the neighbouring land. None of these activities had any detrimental effect on the neighbouring land or impeded its use. Indeed, the scaffolding was erected in order to implement construction safety regulations. Nevertheless the owner of the neighbouring land was able to obtain an injunction preventing the building activities from encroaching into the owner's airspace. This forced the building to be erected using different methods which greatly increased the cost of construction.

It is not hard to imagine other situations where such an injunction would prevent the building from being erected at all. It may well be that, in cases like these the real motivation in seeking the injunction is not so much to prevent the actual trespass to air space, as to force the other party to pay an exorbitant amount for use of that air space.

Clearly there is a need in such a case for a court to be able to grant an easement for the encroaching activity. Of course the easement would be granted on condition that the party having its benefit pay reasonable compensation to the party whose land is burdened. This Bill provides the Supreme Court with such a power.

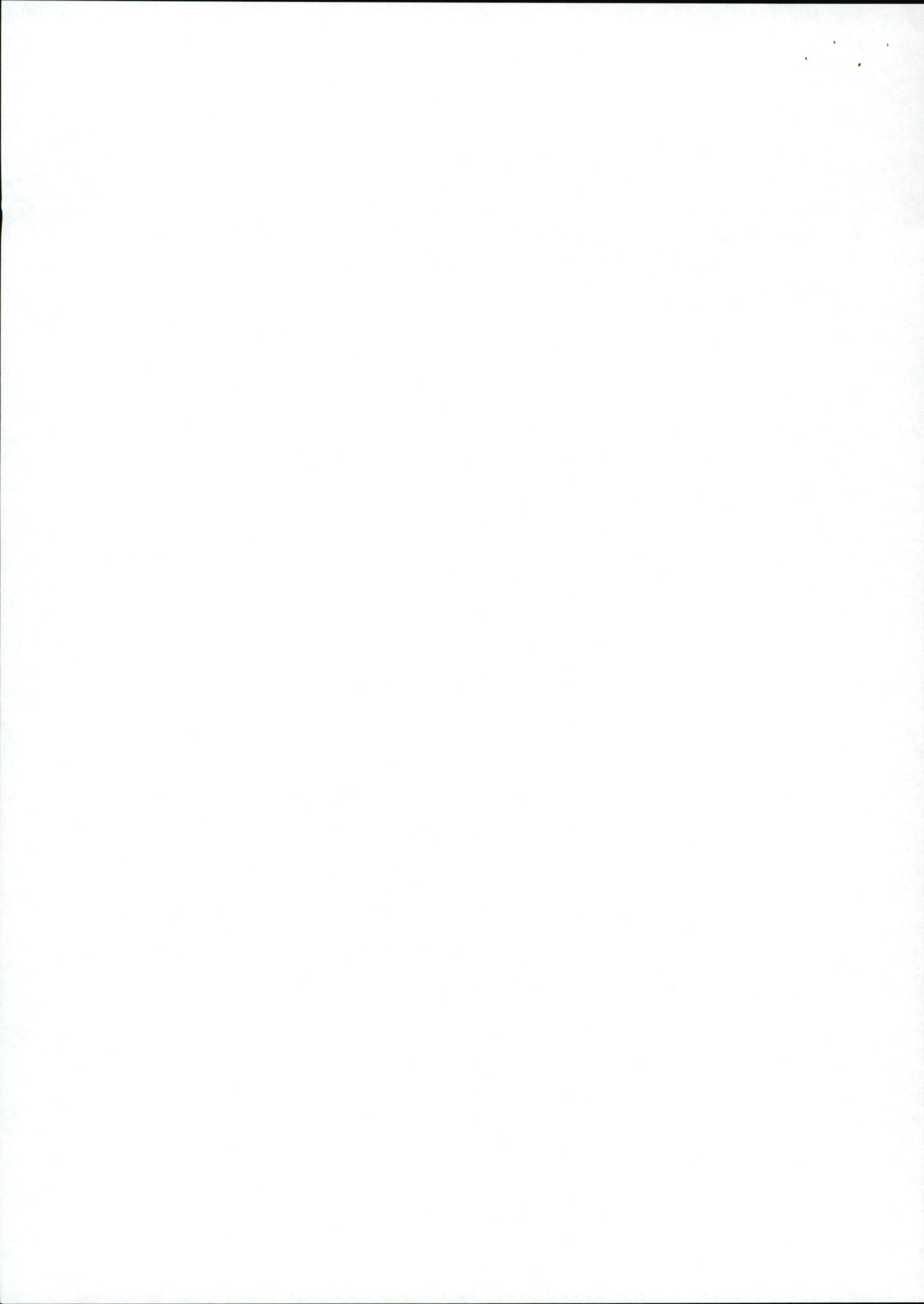
The power however, can only be used in the following circumstances:



- first it must not be inconsistent with the public interest for the land having the benefit of the easement to be used in the manner proposed (in our example, the construction of a multi-storey building);
- secondly the owner of the land burdened must be able to be adequately compensated for any loss suffered as a result of the imposition of the easement; and
- thirdly all reasonable attempts made by the applicant to obtain the easement must have been unsuccessful. This condition will be satisfied either where the owner of the land to be burdened has unreasonably refused to grant the easement, or where the owner of the land cannot be found.

The Court will be empowered to specify all the terms of the easement including any limitation on the times during which it is to apply.

The applicant for the order will ordinarily bear the cost of the proceedings for both parties, and the easement can be varied either by agreement of the parties, or by order of court.





It is recognised that this law interferes with private property rights. However it must also be recognised that when Government is carrying out development for housing or drainage or electricity, it routinely resumes the necessary easements needed for the development. All that these provisions reflect is a realization that private development may also be beneficial for the public, and that such developments should not be unreasonably frustrated or held to ransom.

Honourable members will be aware that this is not the only legislative provision in New South Wales that allows a Court to impose an easement on privately owned land for the benefit of other privately owned land. Since 1922 the Encroachment of Buildings Act has authorised a Court to create an easement over private land for encroachment of a building, in favour of the owner of the adjoining land on which the rest of the building stands.

So these provisions are not entirely innovative but they are very necessary. They will aid the development of land whilst still ensuring that just compensation will be paid for any erosion of private property rights. They are therefore appropriate measures for enactment by the Parliament.

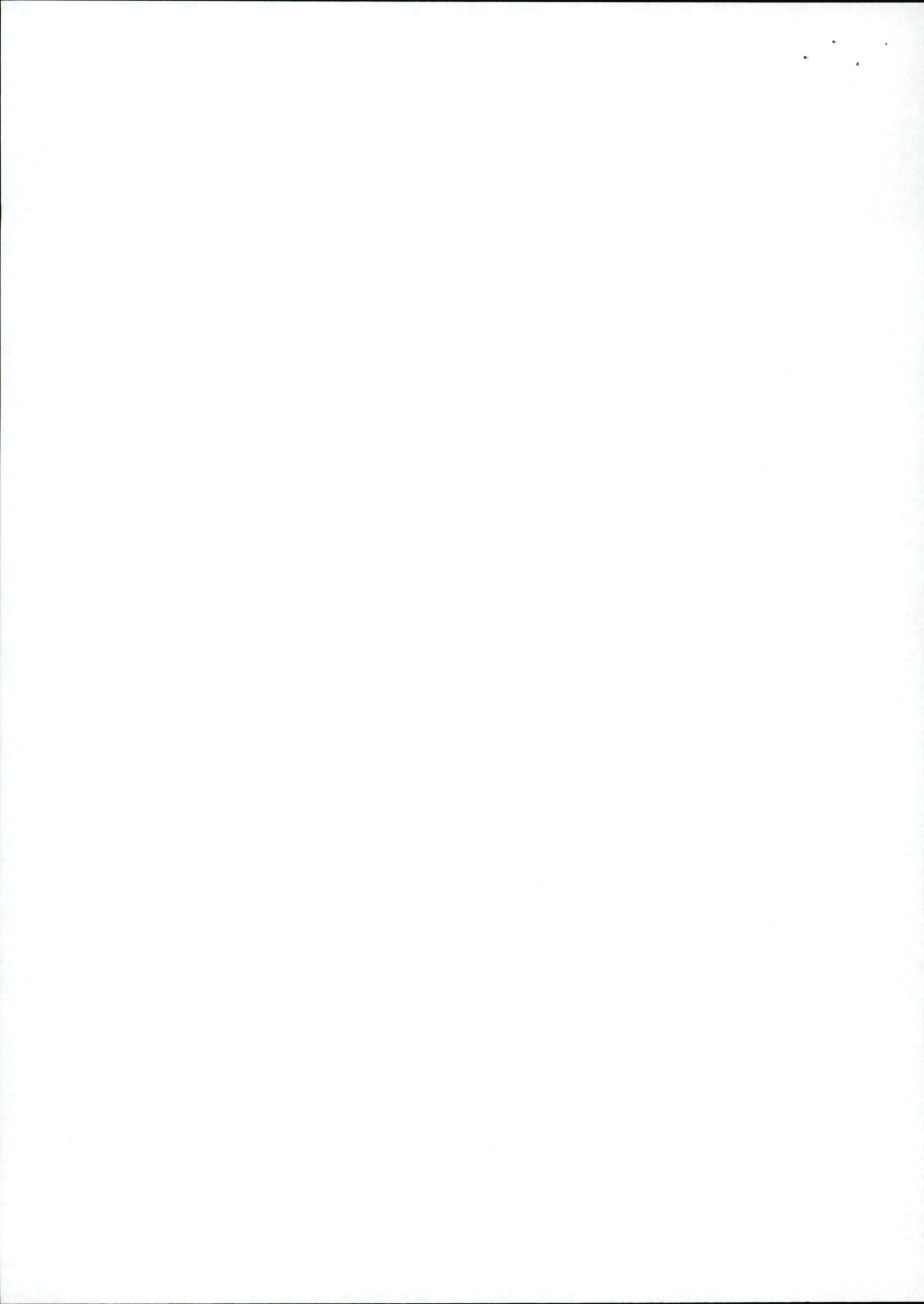


Another important issue dealt with by this legislation concerns the variation of easements affecting land held under the Real Property Act (or "Torrens Title" land as it is more commonly known). The following comments only apply to land held under that type of title.

At present the parties to an easement may agree to vary its terms. However, there is no facility to ensure that the agreed variation will bind subsequent owners of the relevant parcels of land. For example, the parties to an easement for right of way may agree to vary its terms so as to provide that it shall not be used by any trucks. If the parcel of land having the benefit of the easement is sold then that variation to the easement will not bind the new owner of that parcel.

The only method available for varying an easement so that it binds subsequent parties is to obtain a court order for variation. Obviously this method is expensive and time consuming. Furthermore an application for variation can only be made in very limited situations such as where the character of the neighbourhood has changed, or where the use of the land benefited by the easement has changed.

Because of these difficulties, parties wanting to create a binding variation of an easement have been forced to extinguish the existing easement and enter into a new one in the desired terms. This method is also obviously unduly cumbersome and expensive.

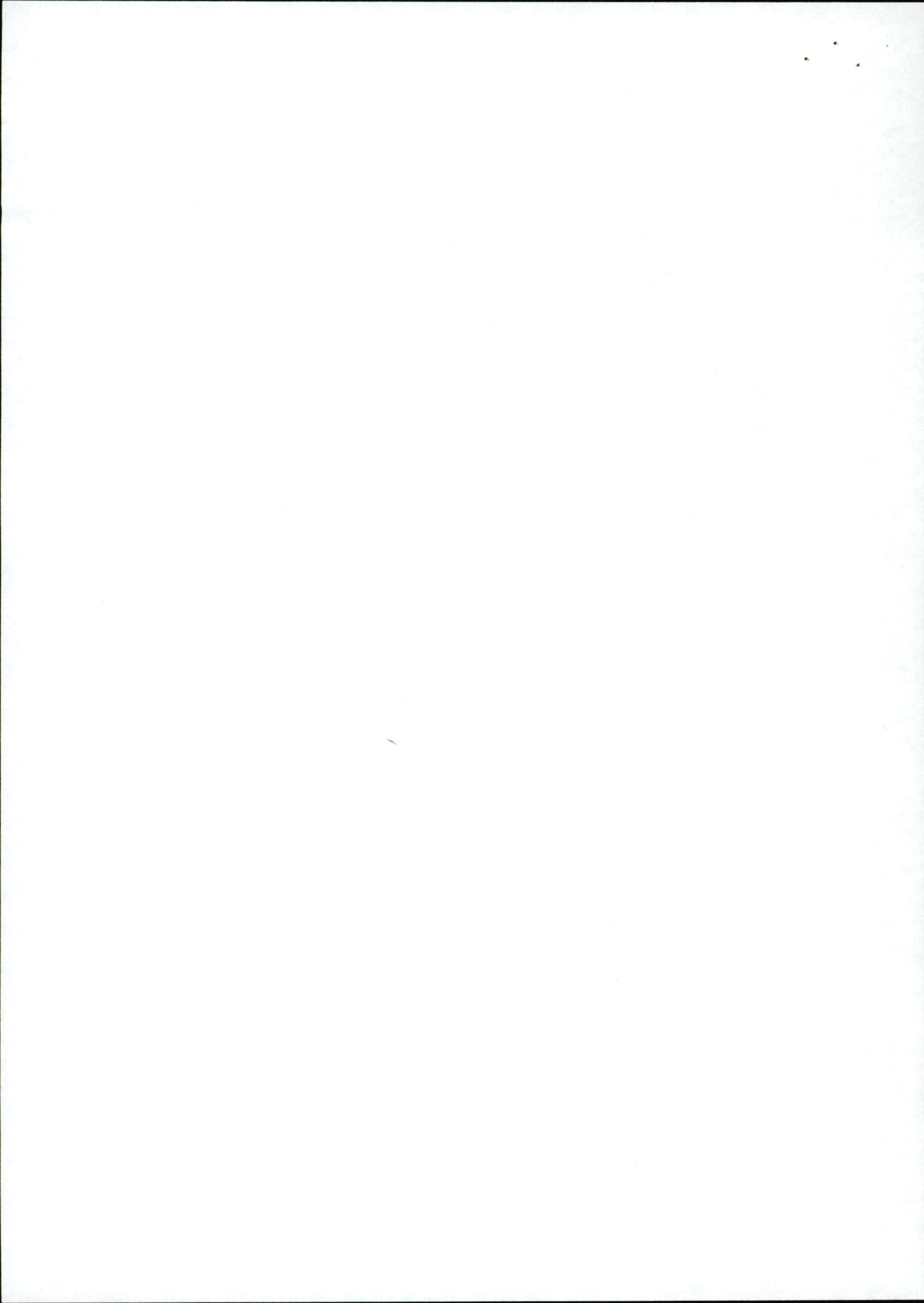


Other interests in land, such as leases, mortgages, and restrictive covenants can be varied by consent of the parties to the interest. That variation can then be registered against the title of the subject land so that future owners of the land are bound by the terms of the variation. It is anomalous that the same facility is not available for easements, and this legislation corrects that anomaly.

The parties to an easement will be able to enter into a simple form of variation, and have that variation registered against the relevant titles for the land benefited and burdened by the easement. The registered variation will then bind subsequent owners of those parcels of land.

They are two of the major reforms which this Bill effects, but there are others which I now draw to the attention of honourable members.

- 1) The Bill defines clearly the instances where easements not registered on the title for Real Property Act land, will nevertheless affect that land. This reform, which is consistent with the 1991 NSW Court of Appeal decision in *Dobbie v Davidson*, will end any existing speculation and confusion on this issue.



- 2) The Bill allows easier creation of cross-easements for support in respect of party walls. Party walls are shared walls that usually exist in semi-detached or terrace houses. Unfortunately, because of the highly technical requirements of the current law, many premises which need cross-easements for support do not have them.
- 3) Covenants which deal with responsibility for the maintenance and repair of an easement will now be permitted to bind subsequent owners of the lands benefited and burdened by the easement. Up until now such covenants only bound the original parties to their creation.
- 4) Authority is given to the Registrar General to investigate and remove from the Register, easements that have been abandoned by non-use. This provision will aid in the removal of obsolete data from the Register.
- 5) Similarly the Registrar General is empowered to remove from the Register an easement that has become unnecessary due to subdivision or consolidation of parcels of land.
- 6) The opportunity will also be taken to correct a drafting error in the Conveyancing Act which wrongly implies that a third party to an easement may have the power to vary it.





- 7) More flexibility is provided for the definition of the site of an easement. This will facilitate the creation of easements over large parcels of land normally in rural areas where the present strict requirements for site definition make it too expensive for the creation of easements.
- 8) The Bill expressly allows the Registrar General to record an easement on the title for the land burdened by the easement as well as on the title for the land benefited. This provision merely gives express authority for a long standing, accepted and beneficial practice of the Registrar General.
- 9) The existing list of short forms of easement contained in the Conveyancing Act are revised and expanded. Short forms of easement allow a document to describe an easement in a certain way, for example "right of carriage way". The use of those precise words means that the full text of that easement as set out in the Conveyancing Act is deemed to be incorporated in the document.

The reforms that I have outlined will simplify and clarify the law relating to easements. I thank the members of the Consultative committee for their work in formulating the reforms and I commend the Bill to the House.





New South Wales

# Property Legislation Amendment (Easements) Act 1995 No 71

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New South Wales

# Property Legislation Amendment (Easements) Act 1995 No 71

Act No 71, 1995

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An Act to amend the *Conveyancing Act 1919* and the *Real Property Act 1900* with respect to easements. [Assented to 12 December 1995]

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

**1 Name of Act**

This Act is the *Property Legislation Amendment (Easements) Act 1995*.

**2 Commencement**

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

**3 Amendment of Conveyancing Act 1919 No 6**

The *Conveyancing Act 1919* is amended as set out in Schedule 1.

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

The *Real Property Act 1900* is amended as set out in Schedule 2.

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## Schedule 1 Amendment of Conveyancing Act 1919

(Section 3)

### [1] Section 87A Definitions

Omit the definition of *positive covenant*. Insert instead:

*positive covenant* means a covenant for maintenance or repair imposed under section 88BA, a public positive covenant or a forestry covenant.

### [2] Section 88 Requirements for easements and restrictions on use of land

#### Section 88 (1) (c)

Omit "easement or" wherever occurring.

### [3] Section 88 (1A)

Insert after section 88 (1):

- (1A) Land (including the site of an easement) is clearly indicated for the purposes of this section if it is shown:
- (a) in the manner prescribed by regulations made under this Act or the *Real Property Act 1900*, or
  - (b) in any other manner satisfactory to the Registrar-General in the particular case or class of cases concerned.

This subsection does not limit other ways in which land may be clearly indicated.

### [4] Section 88A Easements in gross, other easements and restrictions appurtenant to easements

#### Section 88A (2) (a)

Omit "after the commencement of the *Local Government and Conveyancing (Amendment) Act 1964*".

Insert instead "on or after 15 June 1964 (the commencement of the *Local Government and Conveyancing (Amendment) Act 1964*)".

**[5] Section 88A (2A)–(2C)**

Insert after section 88A (2):

(2A) In an instrument which takes effect after the commencement of Schedule 1 [5] to the *Property Legislation Amendment (Easements) Act 1995* and purports to create or assure an easement without a dominant tenement of the following kind in favour of or to the Crown or any public or local authority constituted by an Act, the following expressions have effect as if the words attributed in Schedule 4A to those expressions were inserted instead:

easement for repairs  
easement for drainage of sewage  
easement for drainage of water  
easement for electricity purposes  
easement for services  
easement for water supply  
right of access

(2B) The meaning given to an expression by this section and Schedule 4A may be varied (whether by way of addition, exception, qualification or omission), and is taken to have always been capable of being so varied, by the instrument in which the expression is used.

(2C) In Schedule 4A:

- (a) a body includes any person for the time being authorised by the body, and
- (b) a lot includes any other distinct piece or parcel of land (such as an island, a portion of a Parish or a Section).

**[6] Sections 88BA, 88BB**

Insert after section 88A:

**88BA Positive covenants for maintenance or repair**

- (1) A covenant may be imposed requiring the maintenance or repair, or the maintenance and repair, of land that is the site of an easement or other land that is subject to the



burden of the easement (or both) by any one or more of the persons from time to time having the benefit or burden of the easement.

- (2) Such a covenant may be imposed:
  - (a) by registration under this Act or the *Real Property Act 1900* (as the case may require) of the instrument indicating the persons bound by or including the terms of the easement, if the terms of the covenant are included in that instrument, or
  - (b) by registration under the *Real Property Act 1900* of a memorandum of positive covenant in the form approved under that Act that includes the terms of the covenant, if the site of the easement is under the provisions of that Act, or
  - (c) by registration under Division 1 of Part 23 of a deed expressed to be made under this section and including the terms of the covenant, if the site of the easement is not under the provisions of that Act.
- (3) The instrument including the covenant must clearly indicate the land which is to be maintained or repaired, the land to which the benefit of the covenant is appurtenant and the land which is subject to the burden of the covenant.
- (4) The instrument must be executed by each person to be bound by the covenant:
  - (a) who has an estate or interest registered under the *Real Property Act 1900* in land to which the benefit or burden of the covenant relates, or
  - (b) who is seised or possessed of an estate or interest in land to which the benefit or burden of the covenant relates, if the land is not under the provisions of that Act.
- (5) When recorded in the Register kept under the *Real Property Act 1900*, such a covenant is an interest within the meaning of section 42 of that Act.

- (6) Such a covenant may be released or varied:
  - (a) by registration under the *Real Property Act 1900* of a dealing in the form approved under that Act providing for the transfer and release of the covenant or for variation of the covenant, if the site is under the provisions of that Act, or
  - (b) by registration under Division 1 of Part 23 of a deed of release or a deed of variation, if the site is not under the provisions of that Act.
- (7) The instrument releasing or varying the covenant must be executed by:
  - (a) each person for the time being entitled to enforce the covenant or otherwise having the benefit of the covenant, and
  - (b) each person against whom the covenant may be enforced for the time being, in the case of a variation.

**88BB Creation of cross-easements for party walls by plans**

- (1) A plan lodged for registration or recording under Division 3 of Part 23 after the commencement of this section is, for the purposes of section 88B (2) (c), taken to be intended to create cross-easements if:
  - (a) a boundary of a lot is shown in the plan as passing longitudinally through the whole or any part of a wall, and
  - (b) the wall is described in the plan as a "party wall".
- (2) The benefit of such an easement is appurtenant to each lot shown in the plan as consisting of or including a portion of the wall.
- (3) Each lot shown in the plan as consisting of or including another portion of the wall is subject to the burden of the easement.

- 
- (4) The easement entitles each person for the time being having the benefit of the easement to the continued existence of each portion of the wall:
- (a) that is necessary for the support of so much of the building as is contained within the lot to which the easement is appurtenant, and
  - (b) that consists of or is included within another lot which is subject to the burden of the easement.

**[7] Section 88B Creation and release of easements, profits à prendre and restrictions on use of land by plans**

**Section 88B (2) (c1)**

Insert after section 88B (2) (c):

- (c1) what easements, if any, appurtenant to or burdening land comprised in the plan are intended to be released, and

**[8] Section 88B (3) (c) (ii)**

Insert "or recording" and "or recorded", respectively, after "registration" and "registered".

**[9] Section 88B (3) (c) (iii)**

Omit "the land" where firstly occurring.  
Insert instead "a parcel of land".

**[10] Section 88B (3) (c) (iii)**

Omit "the land" where secondly occurring.  
Insert instead "a separate parcel of land".

**[11] Section 88B (3AA)**

Insert after section 88B (3):

- (3AA) On registration or recording under Division 3 of Part 23 of a plan on which a release of an easement is indicated in accordance with subsection (2) (c1), the easement is released.

**[12] Section 88F Effect of certain positive covenants**

**Section 88F (1)**

Omit "under section 88D, 88E or 88EA".

**[13] Section 88K**

Insert after section 88J:

**88K Power of Court to create easements**

- (1) The Court may make an order imposing an easement over land if the easement is reasonably necessary for the effective use or development of other land that will have the benefit of the easement.
- (2) Such an order may be made only if the Court is satisfied that:
  - (a) use of the land in accordance with the easement will not be inconsistent with the public interest, and
  - (b) the owner of the land to be burdened by the easement and each other person having an estate or interest in that land that is evidenced by an instrument registered in the General Register of Deeds or the Register kept under the *Real Property Act 1900* can be adequately compensated for any loss or other disadvantage that will arise from imposition of the easement, and
  - (c) all reasonable attempts have been made by the applicant for the order to obtain the easement or an easement having the same effect but have been unsuccessful.
- (3) The Court is to specify in the order the nature and terms of the easement and such of the particulars referred to in section 88 (1) (a)–(d) as are appropriate and is to identify its site by reference to a plan that is, or is capable of being, registered or recorded under Division 3 of Part 23. The terms may limit the times at which the easement applies.

- (4) The Court is to provide in the order for payment by the applicant to specified persons of such compensation as the Court considers appropriate, unless the Court determines that compensation is not payable because of the special circumstances of the case.
- (5) The costs of the proceedings are payable by the applicant, subject to any order of the Court to the contrary.
- (6) Such an easement may be:
  - (a) released by the owner of the land having the benefit of it, or
  - (b) modified by a deed made between the owner of the land having the benefit of it and the persons for the time being having the burden of it or (in the case of land under the provisions of the *Real Property Act 1900*) by a dealing in the form approved under that Act giving effect to the modification.
- (7) An easement imposed under this section, a release of such an easement or any modification of such an easement by a deed or dealing takes effect:
  - (a) if the land burdened is under the *Real Property Act 1900*, when the Registrar-General registers a dealing in the form approved under that Act setting out particulars of the easement, or of the release or modification, by making such recordings in the Register kept under that Act as the Registrar-General considers appropriate, or
  - (b) in any other case, when a minute of the order imposing the easement or the deed of release or modification is registered in the General Register of Deeds.
- (8) An easement imposed under this section has effect (for the purposes of this Act and the *Real Property Act 1900*) as if it was contained in a deed.
- (9) Nothing in this section prevents such an easement from being extinguished or modified under section 89 by the Court.

**[14] Section 181A Construction of expressions used to create easements**

**Section 181A (1)**

Insert “executed or made after 1 January 1931 (the commencement of the *Conveyancing (Amendment) Act 1930*) and” after “instrument”.

**[15] Section 181A (1A)**

Insert “executed or made after 15 June 1964 (the commencement of the *Local Government and Conveyancing (Amendment) Act 1964*) and” after “instrument”.

**[16] Section 181A (2)–(3A)**

Omit section 181A (2) and (3). Insert instead:

- (2) In an instrument which takes effect after the commencement of Schedule 1 [16] to the *Property Legislation Amendment (Easements) Act 1995* and purports to create an easement of the following kind, the following expressions have effect as if the words attributed in Schedule 8 to those expressions were inserted instead:
- easement for repairs
  - easement for batter
  - easement for drainage of sewage
  - easement for drainage of water
  - easement for electricity purposes
  - easement for overhang
  - easement for services
  - easement for water supply
  - easement to permit encroaching structure to remain
  - right of access
- (3) The meaning given to an expression by this section and Schedule 8 may be varied (whether by way of addition, exception, qualification or omission), and is taken to have always been capable of being varied, by the instrument in which the expression is used.

(3A) In Schedule 8:

- (a) a lot includes any other distinct piece or parcel of land (such as an island, a portion of a Parish or a Section), and
- (b) an owner of a lot benefited includes:
  - any person entitled to possession of the whole of the lot benefited or any person authorised by such a person, and
  - any person entitled to possession of any part of that lot which is capable of benefiting from the easement or any person authorised by such a person.

**[17] Section 181B Construction of expression “party wall” in assurances of land**

**Section 181B (2)**

Insert “and before the commencement of section 88BB” after “1930”.

**[18] Section 184 Committee for framing short forms**

Omit the section.

**[19] Section 195D Signatures and consents**

**Section 195D (1) (d)**

Insert “, or to release an easement” after “covenant”.

**[20] Schedule 4A Easements in gross**

**Parts 5–11**

Insert at the end of Schedule 4A:

**Part 5 Easement for repairs**

1. The body having the benefit of this easement may:
  - (a) at the expiration of at least one week’s notice served on the owner or occupier of a lot burdened, use the lot for the purpose of carrying out

- necessary work on any structure used by that body which cannot otherwise reasonably be carried out, and
- (b) do anything reasonably necessary for that purpose, including:
- entering the lot burdened, and
  - taking anything on to the lot burdened.
2. In exercising those powers, the body having the benefit of this easement must:
- (a) ensure all work on the lot benefited is done properly and carried out as quickly as is practicable, and
- (b) cause as little inconvenience as is practicable to the owner and any occupier of the lot burdened, and
- (c) cause as little damage as is practicable to the lot burdened and any improvement on it, and
- (d) restore the lot burdened as nearly as is practicable to its former condition, and
- (e) make good any collateral damage.

## **Part 6 Easement for drainage of sewage**

1. The body having the benefit of this easement may:
- (a) drain sewage, sullage and other fluid wastes in pipes through each lot burdened, but only within the site of this easement, and
- (b) do anything reasonably necessary for that purpose, including:
- entering the lot burdened, and
  - taking anything on to the lot burdened, and
  - using any existing line of pipes, and
  - carrying out works, such as constructing, placing, repairing or maintaining pipes and equipment.



2. In exercising those powers, the body having the benefit of this easement must:
  - (a) ensure all work is done properly, and
  - (b) cause as little inconvenience as is practicable to the owner and any occupier of the lot burdened, and
  - (c) cause as little damage as is practicable to the lot burdened and any improvement on it, and
  - (d) restore the lot burdened as nearly as is practicable to its former condition, and
  - (e) make good any collateral damage.

#### **Part 7 Easement for drainage of water**

1. The body having the benefit of this easement may:
  - (a) drain water from any natural source through each lot burdened, but only within the site of this easement, and
  - (b) do anything reasonably necessary for that purpose, including:
    - entering the lot burdened, and
    - taking anything on to the lot burdened, and
    - using any existing line of pipes, and
    - carrying out work, such as constructing, placing, repairing or maintaining pipes, channels, ditches and equipment.
2. In exercising those powers, the body having the benefit of this easement must:
  - (a) ensure all work is done properly, and
  - (b) cause as little inconvenience as is practicable to the owner and any occupier of the lot burdened, and
  - (c) cause as little damage as is practicable to the lot burdened and any improvement on it, and
  - (d) restore the lot burdened as nearly as is practicable to its former condition, and
  - (e) make good any collateral damage.

## **Part 8 Easement for electricity purposes**

1. The body having the benefit of this easement may:
  - (a) transmit electricity through each lot burdened, but only within the site of this easement, and
  - (b) do anything reasonably necessary for that purpose, including:
    - entering the lot burdened, and
    - taking anything on to the lot burdened, and
    - carrying out work, such as constructing, placing, repairing or maintaining poles, wires, conduits and equipment.
2. In exercising those powers, the body having the benefit of this easement must:
  - (a) ensure all work is done properly, and
  - (b) cause as little inconvenience as is practicable to the owner and any occupier of the lot burdened, and
  - (c) cause as little damage as is practicable to the lot burdened and any improvement on it, and
  - (d) restore the lot burdened as nearly as is practicable to its former condition, and
  - (e) make good any collateral damage.

## **Part 9 Easement for services**

1. The body having the benefit of this easement may:
  - (a) provide domestic services supplied by that body through each lot burdened, but only within the site of this easement, and
  - (b) do anything reasonably necessary for that purpose, including:
    - entering the lot burdened, and
    - taking anything on to the lot burdened, and

- carrying out work, such as constructing, placing, repairing or maintaining pipes, poles, wires, cables, conduits, structures and equipment.
2. In exercising those powers, the body having the benefit of this easement must:
    - (a) ensure all work is done properly, and
    - (b) cause as little inconvenience as is practicable to the owner and any occupier of the lot burdened, and
    - (c) cause as little damage as is practicable to the lot burdened and any improvement on it, and
    - (d) restore the lot burdened as nearly as is practicable to its former condition, and
    - (e) make good any collateral damage.
  3. For the purposes of this easement, *domestic services* includes supply of water, gas, electricity, telephone and television and discharge of sewage, sullage and other fluid wastes.

### **Part 10 Easement for water supply**

1. The body having the benefit of this easement may:
  - (a) run water in pipes through each lot burdened, but only within the site of this easement, and
  - (b) do anything reasonably necessary for that purpose including:
    - entering the lot burdened, and
    - taking anything on to the lot burdened, and
    - carrying out work, such as constructing, placing, repairing or maintaining pipes and equipment.
2. In exercising those powers, the body having the benefit of this easement must:

- (a) ensure all work is done properly, and
- (b) cause as little inconvenience as is practicable to the owner and any occupier of the lot burdened, and
- (c) cause as little damage as is practicable to the lot burdened and any improvement on it, and
- (d) restore the lot burdened as nearly as is practicable to its former condition, and
- (e) make good any collateral damage.

### **Part 11 Right of access**

1. The body having the benefit of this easement may:
  - (a) by any reasonable means pass across each lot burdened, but only within the site of this easement, for the purpose of exercising or performing any of its powers, authorities, duties or functions, and
  - (b) do anything reasonably necessary for passing across each such lot, including:
    - entering the lot burdened, and
    - taking anything on to the lot burdened, and
    - carrying out work within the site of this easement, such as constructing, placing, repairing or maintaining trafficable surfaces, driveways or structures.
2. In exercising those powers, the body having the benefit of this easement must:
  - (a) ensure all work is done properly, and
  - (b) cause as little inconvenience as is practicable to the owner and any occupier of the lot burdened, and
  - (c) cause as little damage as is practicable to the lot burdened and any improvement on it, and
  - (d) restore the lot burdened as nearly as is practicable to its former condition, and
  - (e) make good any collateral damage.

**[21] Schedule 8, heading**

Omit the heading. Insert instead:

**Schedule 8 Construction of certain expressions**

**[22] Schedule 8, Parts 5–14**

Insert at the end of Schedule 8:

**Part 5 Easement for repairs**

1. The owner of the lot benefited may:
  - (a) at the expiration of at least one week's notice served on the owner or occupier of a lot burdened, use the lot burdened for the purpose of carrying out necessary work on, or on any structure on, the lot benefited which cannot otherwise reasonably be carried out, and
  - (b) do anything reasonably necessary for that purpose, including:
    - entering the lot burdened, and
    - taking anything on to the lot burdened.
2. In exercising those powers, the owner of the lot benefited must:
  - (a) ensure all work on the lot benefited is done properly and carried out as quickly as is practicable, and
  - (b) cause as little inconvenience as is practicable to the owner and any occupier of the lot burdened, and
  - (c) cause as little damage as is practicable to the lot burdened and any improvement on it, and
  - (d) restore the lot burdened as nearly as is practicable to its former condition, and
  - (e) make good any collateral damage.

## **Part 6 Easement for batter**

1. The owner of the lot benefited may:
  - (a) construct and maintain on the lot burdened, but only within the site of this easement, whatever batter or embankment is reasonably necessary to support the surface or subsurface of the lot benefited or any part of it, or any structure or works on the lot benefited, and
  - (b) do anything reasonably necessary for that purpose, including:
    - entering the lot burdened, and
    - taking anything on to the lot burdened, and
    - carrying out work.
2. The owner of the lot burdened must not:
  - (a) interfere with the batter or embankment or the support it offers, or
  - (b) use the site of this easement, or any other part of the lot burdened, or any other land, in a way which may detract from the stability of or the support provided by the batter or embankment.
3. If the owner of the lot burdened does or allows anything to be done which damages the batter or embankment or impairs its effectiveness, the owner of the lot benefited may serve not less than 14 days' notice on the owner of the lot burdened requiring the damage to be repaired or the impairment removed.

If the owner of the lot burdened does not comply with the notice, the owner of the lot benefited may enter and repair the damage or remove the impairment and may recover any reasonable costs from the owner of the lot burdened.
4. In exercising those powers (whether or not after serving such a notice), the owner of the lot benefited must:
  - (a) ensure all work is done properly, and

- (b) cause as little inconvenience as is practicable to the owner and any occupier of the lot burdened, and
- (c) cause as little damage as is practicable to the lot burdened and any improvement on it, and
- (d) restore the lot burdened as nearly as is practicable to its former condition, and
- (e) make good any collateral damage.

### **Part 7 Easement for drainage of sewage**

1. The owner of the lot benefited may:
  - (a) drain sewage, sullage and other fluid wastes in pipes through each lot burdened, but only within the site of this easement, and
  - (b) do anything reasonably necessary for that purpose, including:
    - entering the lot burdened, and
    - taking anything on to the lot burdened, and
    - using any existing line of pipes, and
    - carrying out works, such as constructing, placing, repairing or maintaining pipes and equipment.
2. In exercising those powers, the owner of the lot benefited must:
  - (a) ensure all work is done properly, and
  - (b) cause as little inconvenience as is practicable to the owner and any occupier of the lot burdened, and
  - (c) cause as little damage as is practicable to the lot burdened and any improvement on it, and
  - (d) restore the lot burdened as nearly as is practicable to its former condition, and
  - (e) make good any collateral damage.

## **Part 8 Easement for drainage of water**

1. The owner of the lot benefited may:
  - (a) drain water from any natural source through each lot burdened, but only within the site of this easement, and
  - (b) do anything reasonably necessary for that purpose, including:
    - entering the lot burdened, and
    - taking anything on to the lot burdened, and
    - using any existing line of pipes, and
    - carrying out work, such as constructing, placing, repairing or maintaining pipes, channels, ditches and equipment.
2. In exercising those powers, the owner of the lot benefited must:
  - (a) ensure all work is done properly, and
  - (b) cause as little inconvenience as is practicable to the owner and any occupier of the lot burdened, and
  - (c) cause as little damage as is practicable to the lot burdened and any improvement on it, and
  - (d) restore the lot burdened as nearly as is practicable to its former condition, and
  - (e) make good any collateral damage.

## **Part 9 Easement for electricity purposes**

1. The owner of the lot benefited may:
  - (a) transmit electricity through each lot burdened, but only within the site of this easement, and
  - (b) do anything reasonably necessary for that purpose, including:
    - entering the lot burdened, and



- taking anything on to the lot burdened, and
  - carrying out work, such as constructing, placing, repairing or maintaining poles, wires, conduits and equipment.
2. In exercising those powers, the owner of the lot benefited must:
- (a) ensure all work is done properly, and
  - (b) cause as little inconvenience as is practicable to the owner and any occupier of the lot burdened, and
  - (c) cause as little damage as is practicable to the lot burdened and any improvement on it, and
  - (d) restore the lot burdened as nearly as is practicable to its former condition, and
  - (e) make good any collateral damage.

## **Part 10 Easement for overhang**

1. The owner of the lot benefited:
- (a) may insist that the parts of the structure (*the overhanging structure*) on the lot benefited which, when this easement was created, overhung the lot burdened remain, but only to the extent they are within the site of this easement, and
  - (b) must keep the overhanging structure in good repair and safe condition, and
  - (c) may do anything reasonably necessary for those purposes, including:
    - entering the lot burdened, and
    - taking anything on to the lot burdened, and
    - carrying out work.
2. In exercising those powers, the owner of the lot benefited must:
- (a) ensure all work is done properly, and

- (b) cause as little inconvenience as is practicable to the owner and any occupier of the lot burdened, and
  - (c) restore the lot burdened as nearly as is practicable to its former condition, and
  - (d) make good any collateral damage.
3. The owner of the lot burdened may insist that this easement be extinguished when the structure on the lot benefited is removed.
4. The owner of the lot burdened must not do or allow anything to be done to damage or interfere with the overhanging structure.

#### **Part 11 Easement for services**

1. The owner of the lot benefited may:
- (a) use each lot burdened, but only within the site of this easement, to provide domestic services to or from each lot burdened, and
  - (b) do anything reasonably necessary for that purpose, including:
    - entering the lot burdened, and
    - taking anything on to the lot burdened, and
    - carrying out work, such as constructing, placing, repairing or maintaining pipes, poles, wires, cables, conduits, structures and equipment.
2. In exercising those powers, the owner of the lot benefited must:
- (a) ensure all work is done properly, and
  - (b) cause as little inconvenience as is practicable to the owner and any occupier of the lot burdened, and
  - (c) cause as little damage as is practicable to the lot burdened and any improvement on it, and

- (d) restore the lot burdened as nearly as is practicable to its former condition, and
  - (e) make good any collateral damage.
3. For the purposes of this easement, *domestic services* includes supply of water, gas, electricity, telephone and television and discharge of sewage, sullage and other fluid wastes.

## **Part 12 Easement for water supply**

1. The owner of the lot benefited may:
- (a) run water in pipes through each lot burdened, but only within the site of this easement, and
  - (b) do anything reasonably necessary for that purpose including:
    - entering the lot burdened, and
    - taking anything on to the lot burdened, and
    - carrying out work, such as constructing, placing, repairing or maintaining pipes and equipment.
2. In exercising those powers, the owner of the lot benefited must:
- (a) ensure all work is done properly, and
  - (b) cause as little inconvenience as is practicable to the owner and any occupier of the lot burdened, and
  - (c) cause as little damage as is practicable to the lot burdened and any improvement on it, and
  - (d) restore the lot burdened as nearly as is practicable to its former condition, and
  - (e) make good any collateral damage.

**Part 13 Easement to permit encroaching structure to remain**

1. The owner of the lot benefited:
  - (a) may insist that the parts of the structure (*the encroaching structure*) on the lot benefited which, when this easement was created, encroached on the lot burdened remain, but only to the extent they are within the site of this easement, and
  - (b) must keep the encroaching structure in good repair and safe condition, and
  - (c) may do anything reasonably necessary for those purposes, including:
    - entering the lot burdened, and
    - taking anything on to the lot burdened, and
    - carrying out work.
2. In exercising those powers, the owner of the lot benefited must:
  - (a) ensure all work is done properly, and
  - (b) cause as little inconvenience as is practicable to the owner and any occupier of the lot burdened, and
  - (c) restore the lot burdened as nearly as is practicable to its former condition, and
  - (d) make good any collateral damage.
3. The owner of the lot burdened may insist that this easement be extinguished when the structure on the lot benefited is removed.
4. The owner of the lot burdened must not do or allow anything to be done to damage or interfere with the encroaching structure.

## **Part 14 Right of access**

1. The owner of the lot benefited may:
  - (a) by any reasonable means pass across each lot burdened, but only within the site of this easement, to get to or from the lot benefited, and
  - (b) do anything reasonably necessary for that purpose, including:
    - entering the lot burdened, and
    - taking anything on to the lot burdened, and
    - carrying out work within the site of this easement, such as constructing, placing, repairing or maintaining trafficable surfaces, driveways or structures.
  
2. In exercising those powers, the owner of the lot benefited must:
  - (a) ensure all work is done properly, and
  - (b) cause as little inconvenience as is practicable to the owner and any occupier of the lot burdened, and
  - (c) cause as little damage as is practicable to the lot burdened and any improvement on it, and
  - (d) restore the lot burdened as nearly as is practicable to its former condition, and
  - (e) make good any collateral damage.

## **Schedule 2 Amendment of Real Property Act 1900**

(Section 4)

### **[1] Section 42 Estate of registered proprietor paramount**

#### **Section 42 (1) (a1)**

Insert after section 42 (1) (a):

- (a1) in the case of the omission or misdescription of an easement subsisting immediately before the land was brought under the provisions of this Act or validly created at or after that time under this or any other Act or a Commonwealth Act,

### **[2] Section 42 (1) (b)**

Omit "easement or".

### **[3] Section 47 Creation of easements etc**

#### **Section 47 (1)**

Omit subsection (1). Insert instead:

- (1) When an easement or profit à prendre that burdens land under the provisions of this Act is created, the Registrar-General is to record particulars of the dealing creating the easement or profit à prendre:
  - (a) in the folio of the Register for the land burdened, and
  - (b) in the folio of the Register for the land benefited, if the easement or profit à prendre benefits land under the provisions of this Act.

**[4] Section 47 (5A)**

Insert after section 47 (5):

- (5A) The terms or site of a registered easement may be varied by a registered dealing in the approved form, or by such a dealing and a plan illustrating the varied site registered or recorded under Division 3 of Part 23 of the *Conveyancing Act 1919*. The dealing and any such plan are to be executed by each person having a registered estate or interest in the land burdened or in any land benefited by the easement.

**[5] Section 47 (7)**

Omit “both of the land burdened and of the land benefited”.  
Insert instead “of separate parcels of land respectively burdened and benefited”.

**[6] Sections 48, 49**

Insert after section 47:

**48 Creation of cross-easements for party walls by plans on application**

- (1) A plan registered or recorded under Division 3 of Part 23 of the *Conveyancing Act 1919* before the commencement of this section creates cross-easements if:
- (a) a boundary of a lot is, in a manner satisfactory to the Registrar-General, shown in the plan as passing longitudinally through the whole or any part of a wall, and
  - (b) the wall is described in the plan as a “party wall”, and
  - (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 land that will be benefited or burdened by the cross-easements.

- (2) The benefit of such an easement is appurtenant to each lot shown in the plan as consisting of or including a portion of the wall.
- (3) Each lot shown in the plan as consisting of or including another portion of the wall is subject to the burden of the easement.
- (4) The easement entitles each person for the time being having the benefit of the easement to the continued existence of each portion of the wall:
  - (a) that is necessary for the support of so much of the building as is contained within the lot to which the easement is appurtenant, and
  - (b) that consists of or is included within another lot which is subject to the burden of the easement.

**49 Cancellation of recordings of easements after abandonment, consolidation of tenements or release**

- (1) The Registrar-General may cancel a recording relating to an easement in the Register if the easement has been abandoned.
- (2) An easement may be treated as abandoned if the Registrar-General is satisfied it has not been used for at least 20 years, whether that period commenced before, on or after, the date of assent to the *Property Legislation Amendment (Easements) Act 1995*.
- (3) However, an easement is not capable of being abandoned:
  - (a) if the easement does not benefit land, or
  - (b) to the extent (if any) that the easement benefits land owned by the Crown, or by a public or local authority constituted by an Act, or
  - (c) if the easement is of a class of easements prescribed by the regulations as being incapable of being abandoned.



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- (4) Before cancelling any such recording, the Registrar-General must consider any submission made, by a person having a registered estate or interest in land benefited by the easement, within the period fixed by the Registrar-General in a notice of intention to cancel the recording served personally or by post on the person. The period must be not less than one month from the date of the notice.
- (5) The Registrar-General may cancel a recording in the Register relating to an easement:
- (a) if satisfied that the recording relates to land for which the easement has no practical application because separate parcels of land that were respectively burdened and benefited by the easement have been consolidated into a single parcel, or
  - (b) if the easement has been released under section 88B of the *Conveyancing Act 1919*.
- (6) An application for cancellation of any such recording must be made in the approved form or in a form prescribed by regulations made under the *Conveyancing Act 1919*.

[Minister's second reading speech made in—  
Legislative Assembly on 10 October 1995  
Legislative Council on 4 December 1995]

BY AUTHORITY

