

NOTICE TO LODGING PARTIES LAND SERVICES GROUP

Department for Administrative and Information Services
101 Grenfell Street Adelaide 5000



No. 129

CREATION OF EASEMENTS FOR ELECTRICITY SUPPLY PURPOSES

(in Plans of Division and Plans of Community Division)

Background

Clients may be aware that the electricity distribution network that was originally owned and operated by ETSA Corporation has been vested in a statutory corporation known as Distribution Lessor Corporation ("DLC"). In simple terms, DLC can be regarded as the "owner" of the assets (including fee simple land and easements for electricity supply purposes) that comprise the network.

The assets that comprise the network were then leased to the following five companies:

- CKI Utilities Development Ltd;
- HEI Utilities Development Ltd;
- CKI Utilities Holdings Ltd;
- HEI Utilities Holdings Ltd; and
- CKI/HEI Utilities Distribution Ltd.

The five companies trade under the business name of ETSA Utilities. That name is used in this Notice as a shorthand way of referring to the five companies.

The lease was effected by two separate documents: the Distribution Network Lease and the Distribution Network Land Lease. Both leases were made under the Electricity Corporations (Restructuring and Disposal) Act 1999. This office is only concerned with the Distribution Network Land Lease, which has been registered and is numbered 8890000.

The general thrust of the Electricity Corporations (Restructuring and Disposal) Act and of Lease 8890000 is that the assets (including easements) that comprise the electricity distribution network will be owned by DLC and leased to ETSA Utilities. There are a few minor exceptions to this principle. To avoid undue complication, those exceptions have been ignored in this Notice.

Creation of Service Easements in Plans of Division

Section 223/g(3) of the Real Property Act 1886 provides for the creation of a "service" easement for electricity supply purposes by the deposit of a Plan of Division. In broad terms, all that is required to create such easements is the delineation of the easement on the plan of division, and the inclusion of a statement in the plan's annotation panel stating that the relevant portion will be subject to a service easement for electricity supply purposes.

The ability to create service easements for electricity supply purposes in this way has been available for years. Thousands of easements of this sort were created in favour of the Electricity Trust of South Australia (the old name for ETSA Corporation). The overwhelming majority of these **existing** easements have been vested in DLC by action taken under the Electricity Corporations (Restructuring and Disposal) Act.

New Service Easements cannot be vested in Distribution Lessor Corporation

New service easements for electricity supply purposes **cannot** be created in favour of DLC. A service easement for electricity supply purposes can only be created in favour of an "electricity entity". An "electricity entity" is defined by s 223/a(1) of the Real Property Act in the following way:

"'Electricity entity' means a person who holds a licence under the Electricity Act 1996 authorising the operation of a transmission or distribution network or a person exempted from the requirement to hold such a licence."

This amendment to the Real Property Act was made by Parliament to facilitate the restructuring and disposal of the assets of ETSA Corporation and its associated entities.

However, DLC does not hold a licence under the Electricity Act 1996 authorising the operation of a transmission or distribution network. Neither has any evidence been produced to the Registrar-General that indicates that DLC has been exempted from the requirement to hold a licence.

Doubt whether new service easements can be vested in ETSA Utilities

The five companies that trade as ETSA Utilities are an "electricity entity". This means that the Real Property Act permits service easements to be vested in ETSA Utilities by the deposit of a plan of division.

However, discussions with legal consultants to the Electricity Reform and Sales Unit (ERSU) and representatives from ETSA Utilities have revealed that ETSA Utilities either:

- lacks the right to hold such easements under the terms of its agreement with the South Australian government; or
- accepts that it is inappropriate for such easements to be vested in it.

To reiterate my earlier comments, the scheme of the Electricity Corporations (Restructuring and Disposal) Act and of Lease 8890000 is that the assets (including easements) that comprise the electricity distribution network will be **owned** by DLC and **leased** to ETSA Utilities.

On that basis, it appears that service easements either cannot or should not be created in favour of the five companies that constitute ETSA Utilities.¹

Procedure to Create Easements for Electricity Supply Purposes

Representations are being made to ERSU for action to be taken to permit service easements to be created in favour of DLC. There are several possible options, one of which may be an amendment to the Real Property Act.

In the interim, however, all easements for electricity supply purposes that are to be created in Plans of Division must be vested in DLC under s 223/e of the Real Property Act.

This will result in the following procedures being adopted:

Plans

ETSA Utilities have advised that an easement:

- for the transmission of electricity by underground cable will normally be created by the use of the "short form" easement contained in the Sixth Schedule to the Real Property Act; whilst an easement
- for the transmission of electricity by overhead cable will be created by a "long form" easement (that is, it will be fully set out in the application that accompanies the plan).

Depending upon which type of easement is being created, the annotation panel of the plan must be drafted as follows:

An easement for the transmission of electricity by underground cable

"Portion of Allotment ... marked ... is to be subject to an easement for the transmission of electricity by underground cable to ...".

An easement for the transmission of electricity by overhead cable

"Portion of Allotment ... marked ... is to be subject to an easement for electricity supply purposes to ... as set forth in the accompanying application".

¹ There may be certain, minor exceptions to this proposition. Those exceptions are ignored in this Notice.

An easement for the erection of a transformer

"Portion of Allotment ... marked ... is to be subject to an easement for electricity supply purposes to ... as set forth in the accompanying application".*

* Note: The easement must not be designated "T/F" on the plan. This designation is reserved for service easements.

Documents

- **an RTC form must be used** - an RTU form will not be accepted;
- the RTC must be "certified correct" for the purposes of the RPA;
- the RTC attracts a fee of \$222 instead of the \$84 that applies for an RTU;
- a fee of \$50 will be required for each easement in gross certificate of title that issues;
- the easement must be set out in the "Details of Transactions" panel of the RTC in the following way, "Creation of easement over ... to Distribution Lessor Corporation" (the consideration/value for the creation of the easement must also be included);
- if the easement is to be set forth in "short form" and no "long form" easements are being created, delete the following pre-printed text from the "Schedule of Easements Created by Deposit of the Accompanying Plan of Division" panel of the RTC: "Long form: Easement(s) indicated on the plan to be set out in full in this instrument are as follows:";
- if the easement is to be set forth in "long form" and no "short form" easements are being created, delete the following pre-printed text from the "Schedule of Easements Created by Deposit of the Accompanying Plan of Division" panel of the RTC: "Short form: The Easement(s) expressed on the plan to which the provisions of Sections 89 and 89a of the Real Property Act 1886 apply". The easement that is to be created must then be fully described in the space provided in the panel;
- DLC must consent to the vesting of the easement on the "Statement of Effect on Estates or Interests of Consenting Parties/Certificate of Consent for the Deposit of a Plan of Division" page (or a Form 2 attached to the RTC);
- if DLC and/or ETSA Utilities direct that Lease 8890000 is to be registered over the easement, a suitable application for that to occur must be embodied within DLC's consent to the vesting of the easement;
- suitable arrangements must be made concerning any registered mortgages, encumbrances and leases that are registered over the servient land. For example, a partial discharge of mortgage or encumbrance must be incorporated within the RTC if the servient land is subject to one of those interests.
- in the case of a caveat or statutory encumbrance (such as a land management agreement) noted against the land, a withdrawal of caveat or rescission of the statutory encumbrance must be lodged prior to the RTC;
- the fact that a certificate of title will issue to DLC for an easement in gross must be included in the "Schedule of Mode of Issue" page of the RTC.

