

NOTICE TO LODGING PARTIES

LAND SERVICES GROUP

Colonel Light Centre
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AMENDMENT TO EASEMENT PROVISIONS: SECTIONS 90a TO 90e OF THE REAL PROPERTY ACT 1886 No.103

Clients were advised in Notice to Lodging Parties No.99 of the introduction of amendments to the easement provisions of the Real Property Act by the Real Property (Miscellaneous) Amendment Act 1994. As a result of that legislation the existing section 90a was repealed and new sections 90a to 90e substituted. The new section 90b was then itself further amended by the Real Property (Variation and Extinguishment of Easements) Amendment Act 1994 which came into operation on 15 September 1994.

The above legislation rationalises and streamlines dealings with easements in general and in particular the extinguishment of rights of way. While it is the responsibility of clients to familiarise themselves with the content of any new legislation, the following summary, if read in conjunction with the new sections, will illustrate the intended application of the provisions.

SECTION 90a - APPLICATION OF SECTIONS 90b TO 90e

This section provides in general terms that the provisions of sections 90b to 90e apply to all easements regardless of their manner of creation and whether the dominant or servient land is under the Real Property Act or not.

They will, for example, apply to:

- easements created by the registration of either a "grant of easement" (Form T5) instrument or a transfer of land together with or reserving an easement (Form T2);
- easements for a term of years created by the registration of a memorandum of lease;
- "private" easements created in the land division or strata titling process by Form 9A;
- "service" easements created by the deposit of a plan of division or subdivision under the Real Property Act or a previous enactment such as the Planning and Development Act 1966;
- statutorily "implied" easements created by the deposit of a plan of subdivision under section 90 of the Real Property Act; or
- easements created by or under another Act of Parliament (but see section 90b(12) discussed below).

Clients should note, however, that several of the provisions of section 90b together with section 90e are restricted to rights of way only.

Sections 90b to 90e will also apply where either the dominant or servient tenement is under the Real Property Act and the other tenement is held under common law title. In all cases where "old system" land is involved, enquiry must first be made with the Examiner of Titles before proceeding under any of the new provisions.

SECTION 90b - VARIATION AND EXTINGUISHMENT OF EASEMENTS

90b(1) - Application for Variation or Extinguishment

This subsection provides for the Registrar-General to:

- vary the position of, or extend or reduce the extent of, an easement over servient land;
- vary an easement by extending its appurtenance to other land owned by the proprietor of the dominant land; or
- extinguish an easement.

The Registrar-General may act either upon an application (in a form approved by him or her) by the proprietor of either the dominant or servient land or on his or her own initiative.

Panel Form 13, currently approved for similar purposes under section 223/0 of the Real Property Act (land division), section 17b of the Strata Titles Act 1988 and section 41 of the Roads (Opening and Closing) Act 1991 will continue for the time being as the approved form for the variation or extinguishment of easements under section 90b. However, the heading of the form should be amended to substitute a reference to section 90b for the existing reference to section 17b (as the variation and extinguishment provisions of that section have now been repealed). The references to the other sections should also be deleted when application is made under section 90b.

The form is relatively self explanatory and must be certified correct and completed in much the same way as it currently is. Annexure form B1 should be used where panels contain insufficient space. Subject to what appears below, the duplicate certificates of title for the dominant and servient land must be produced. The basic lodgement fee (currently \$66.00) applies and, in a non-land division and strata titling context, new title fees will be required for each certificate of title affected by the application. When the application is used in concert with either a new strata plan or plan of division and relates to land wholly within that plan, no new title fees will be required (they will have already been paid for on the strata application or Form 9).

The application should be submitted to the Commissioner of Stamps for the assessment of duty. Whether stamp duty is chargeable will depend upon the nature of the individual application.

Clients should note that applications made on Form 13 under section 223/0 of the Real Property Act or section 41 of the Roads (Opening and Closing) Act 1991 must also be submitted to the Commissioner, a requirement which will be enforced for applications lodged on or after the 10th of April, 1995.

A new version of Form 13, containing minor amendments to make it more amenable to section 90b and the Stamp Duties Act, will be introduced as stocks of the existing form are depleted.

90b(2) - Required Consents

The application must be made by the proprietor of either the dominant or servient land and should be accompanied by the written consent of:

- the dominant owner (if not the applicant);
- the servient owner (if not the applicant); and
- any person having or claiming an estate or interest in either tenement (where the land is under the Act). This includes a caveator and will be taken to extend to a lienor under the Workers' Liens Act 1893.

Where either tenement is not under the Act, the consent of all persons known to the Registrar-General (after making reasonable enquiry) to have or to claim an estate or interest therein will be required.

The applicant (be it the servient or dominant proprietor or both) must execute the document and be formally witnessed and proved. However, parties who merely consent to the application (which will include a servient or dominant proprietor if they are not the applicant) need only have their signature witnessed. Corporate bodies can affix their seal in the usual way.

The consents will avoid the need for partial discharges, etc. For example, a mortgagee of the dominant tenement will not be required to discharge their mortgage as regards an easement being extinguished over servient land. Consequently, duplicate mortgages and other instruments need not be produced. However, if so advised, a mortgagee may choose to register a partial discharge before the application. In this event the execution of the discharge by the mortgagee will be taken as a consent to the extinguishment.

In accordance with long standing practice, the lodgement of a mortgage over the servient land with respect to the right which has been merged and extinguished therein, such mortgage being collateral to an existing mortgage over the servient title, will also not be required.

90b(3) - Dispensation with Consent of Dominant or Servient Proprietor to Variation or Extinguishment of Easement

This subsection is a general provision which allows the Registrar-General, upon application being made under section 90b(1) (or on his/her own initiative), to vary or extinguish an easement under that section without the consent of the proprietor of either the dominant or servient land as is normally required by subsection 90b(2). Although consents may be dispensed with, the Application form must still refer to all certificates of title and fee simple proprietors affected by the variation or extinguishment.

Before dispensing with consent the Registrar-General must be satisfied that:

- 28 days notice complying with subsection 90b(3e) (see below) has been given to the proprietor; and
- the proprietor's estate or interest in the land will not be detrimentally affected by the proposed variation or extinguishment of the easement.

Servient Proprietors: In the case of extinguishment, the servient proprietor will not be detrimentally affected and in fact will benefit as their land is no longer burdened by the easement. However, the power to waive consents is discretionary and it is not intended to dispense with them without a compelling reason being shown. One possible ground may be the existence of a very large number of servient titles subject to the same easement. In this case an application by the dominant proprietor for the extinguishment of the easement without the consent of the servient owners would be given favourable consideration. With a variation, it is expected that the servient owner's consent will virtually always be required.

Dominant Proprietors: Prima facie, a dominant proprietor will be detrimentally affected by the extinguishment or variation of an easement appurtenant to their land (but see subsections (3b) and (3c) below) and their consent should be obtained. However, the circumstances of each application will be considered on their merits and sufficiently strong cases may arise to justify a consent being waived. It is anticipated that this will more likely occur in the case of a right of way than an easement.

Supporting Evidence: The Registrar-General will normally require supporting evidence in the form of a statutory declaration by the applicant and, in some situations (such as where the applicant has only recently acquired the land), a relevant person (eg. a previous owner or a neighbour) who has personal knowledge of factors which indicate that the non-consenting proprietor's estate and interest will not be detrimentally affected.

The preamble to a declaration by a servient applicant should include his or her name and address and state that they are the registered proprietor of the whole of the land comprised and described in (CT reference for servient land) subject to (describe the easement). The declarant should then refer to the application (e.g. for extinguishment of that easement) and state that in support thereof they do solemnly and sincerely declare... (the substance of the declaration will then follow).

By way of illustration only, a declaration may include all or several of the following points in a situation where the dominant proprietor has not consented to an application by the servient proprietor for extinguishment:-

- the applicant (or other person) should first establish their means of knowledge of the facts, eg. that they have lived on the servient land (or that it has been their principal place of employment) for a specified number of years and that they have observed the land subject to the easement. A neighbour would state the length of the time of their residence in the neighbourhood and the physical location of the land of

which they are the registered proprietor in relation to the servient land, e.g. it may adjoin it on its northern boundary. They should also state that they have observed the land subject to the easement;

the manner and extent to which the servient tenement has been used and occupied should be described including:

- whether it has been enclosed in such a way as to exclude the dominant proprietor;
- whether any improvements have been erected over the easement. If so, the date they were erected and whether they prevent or impede any exercise of the right;
- whether, if the land has been enclosed or improvements have been erected thereon such that they exclude the dominant proprietor or otherwise impede or prevent the exercise of the right, the servient proprietor has any present intention of demolishing or otherwise removing any such enclosure or improvement in the reasonably foreseeable future;
- whether the dominant proprietor or any other person claiming either at law or in equity through or under the dominant proprietor in any way has exercised or purported or attempted to exercise the right and, if so, when. If not, the period of time during which they have failed to exercise the right should be included;
- whether the declarant is aware of any incident or occurrence when a dominant proprietor or a person claiming through or under them complained that the actions of or improvements affected by the servient owner (or, where relevant, a predecessor registered proprietor of the servient land) prevented or impeded their exercise of the right or requested the permission or cooperation of the servient owner (or their predecessor in title) to enable the exercise of their right;
- if relevant, whether (in the case of an easement which is not a right of way) the dominant land is physically separated from the servient land such that the dominant proprietor can not exercise the rights conferred by the easement. (For rights of way which are physically separated from the dominant land, see sections 90b(3b) and (3c) below);
- whether the declarant is aware of any litigation concerning the easement and if so the nature and result thereof;
- whether the dominant land abuts a public road (and, in the case of a right of way, whether the declarant is aware of any legal or physical reason why it would not be possible to access the land from that public road);
- whether the declarant is aware of any reason why the dominant proprietor(s) has not asserted their rights over the easement including any evidence from which might be inferred an intention on the part of that proprietor to abandon the right.

If the consent of a proprietor is dispensed with, the duplicate certificate of title for their land will also not be required. Their original title will be cancelled and a new certificate issued in accordance with the application. The duplicate will then be updated the next time it is produced with a dealing.

90b(3a) - Dispensation with Consent of person having or claiming a subsidiary estate or interest in dominant or servient land to a Variation or Extinguishment of Easement

Consent may be waived where the Registrar-General is satisfied that the person's estate or interest in the dominant or servient land will not be detrimentally affected by the proposed variation or extinguishment. In this case there is no requirement that notice be given to the proprietor of the interest.

Similar considerations to those discussed above in relation to section 90b(3) as to when a person's interest may or may not be detrimentally affected apply here. For instance, all registered subsidiary interests in the servient land will benefit from an extinguishment, although this would not necessarily be the case with a variation. Obviously, a mortgagee of the dominant land would normally be detrimentally affected by the extinguishment of an easement and their consent could not be waived. However, a lessee of portion of the dominant land without any registered or contractual rights over the easement may not be detrimentally affected by the extinguishment and their consent could (in an appropriate case) be waived. A statutory declaration will normally not be required to establish why the proprietor of a subsidiary interest is not detrimentally affected by an application, especially where sufficient evidence is provided to allow the Registrar-General to waive the consent of the registered proprietor of the fee simple.

Any interest subsisting over the easement, such as a mortgage of the dominant land, will be extinguished at the same time as the easement. The production of duplicate instruments is not required.

90b(3b) - Extinguishment of Right of Way without consent - division of the dominant land

This is a special provision dealing only with the extinguishment of rights of way. It applies where a dominant tenement has been subdivided and the right of way appurtenant thereto can no longer be exercised by the proprietor(s) of one or more of the new lots due to the creation of intervening allotments in different ownership.

The Registrar-General, upon application being made under section 90b(1) (or on his/her own initiative), can extinguish the right of way as regards the separated allotment without the consents normally required under 90b(2) if satisfied that the proprietor of the dominant tenement has no reasonable prospect of using the right for access to their land in the future. A statutory declaration based on the guidelines appearing at 90b(3) above and incorporating a reference to the physical separation of the dominant tenement from the servient land should accompany the application.

Before acting under this provision, the Registrar-General is required by subsection 90b(3d) to be satisfied that 28 days notice complying with subsection 90b(3e) (see below) has been given to the proprietor of the dominant land.

Any interest subsisting over the right of way, such as mortgage of the dominant land, will be extinguished at the same time as the right of way.

It is anticipated that, in those circumstances where the Registrar-General is not acting on his or her own initiative, it will normally be on the application of the proprietor of the servient land. In such cases the servient title should be produced. However, as the dominant proprietor's consent is waived under this subsection, their duplicate title and any other affected duplicate instruments need not be produced. The original title will be cancelled and a new certificate issued, free of the right, leaving the duplicate to be updated when next lodged with a dealing.

90b(3c) - Extinguishment of Right of Way without consent where the right does not enhance the use and enjoyment of the dominant land

As with the preceding subsection, this is a special provision dealing only with the extinguishment of **rights of way**. It applies where dominant land is separated from an appurtenant right of way by intervening land and the Registrar-General is satisfied that the continued existence of the right would not enhance the use or enjoyment of that dominant land.

The subsection is aimed specifically at land divisions which occurred before the advent of the Town Planning Acts. In such plans it was a common practice for the developer to transfer off each allotment together with a right of way over the streets and roads in the plan, which remained in his or her private ownership. In some cases those rights may still remain over portion of a road which was first declared public and then closed under the old Roads (Opening and Closing) Act and added to a contiguous owner's title. Often they have been built over. In such a case, the continued existence of the right does not enhance the use or enjoyment of the dominant land (which may be several street blocks away and is now serviced by public roads) and the Registrar-General may, upon application being made under section 90b(1) (or on his or her own initiative) extinguish the right of way.

The comments made under subsection 90b(3b) above with respect to the notice which must be given to the proprietor of the dominant land, the extinguishment of interests over the right of way and the production of duplicate titles apply equally here. A statutory declaration will be required in support of the application (see the guidelines which appear at 90b(3) above).

90b(3e) - Notice of a Proposed Variation or Extinguishment

Where notice is required by one of the above subsections, it must be in a form approved by the Registrar-General and include details of the proposed variation or extinguishment of the easement. To ensure that the recipient can readily identify the easement's position in relation to the land in which they have or claim an estate or interest, the Lands Titles Office will prepare the notice. It may in appropriate cases include a plan depicting the easement. It will then either be mailed by certified post or published in the Advertiser and a local paper (or both).

As a guideline, it is intended that all those affected by the proposed application who have or claim an estate or interest in the servient land or in dominant land which directly abuts the easement will have the notice mailed directly to them.

Similarly, if there is only a small and easily ascertainable number of dominant owners, they will receive a mailed notice. However, where there are numerous dominant owners, etc. whose land is physically separated from the easement, notice by publication as described above will be deemed sufficient.

Due to the flexibility required to achieve the above, no advertising fee will be chargeable when an application is lodged. Following examination and a decision being made regarding the manner of service, clients will be contacted and requested to provide the necessary fee. An easement will not be varied or extinguishment until the fee is received.

In addition to including details of the proposal, the notice must also invite the person to whom it is given to make representations to the Registrar-General in relation to the variation or extinguishment within 28 days.

Obviously, the content of any representations received by the due date will be a part of the totality of evidence considered by the Registrar-General before he or she decides whether to proceed with a variation or extinguishment. A representation should demonstrate that the party will suffer an objective and material detriment or loss of amenity to their land or estate or interest therein. An objection based on what appears to the Registrar-General to be a mere perceived or imaginary loss will not, by itself, suffice to prevent an application proceeding.

90b(4) - Extinguishment of Easement without consent: identity or whereabouts of proprietor unknown and easement abandoned

An easement may be extinguished under section 90b(1) without the consents required by 90b(2) if the Registrar-General is satisfied that:

- it is not reasonably practicable to ascertain the identity or whereabouts of the person whose consent is required; and
- the proprietor of the dominant land has ceased to exercise the easement.

An example of the application of this provision would be where the dominant owner has been deceased for many years, an unsuccessful probate search has been made and no one is in adverse possession of the land. A statutory declaration covering the two points mentioned above and including relevant points from the guidelines appearing at 90b(3) will be required.

If a party's consent is dispensed with, the duplicate of their title need not be produced. Any interests subsisting over the easement will be extinguished at the same time as the easement, removing the need for partial discharges, etc.

Before acting under this subsection, the Registrar-General must advertise his or her intention to do so in the Government Gazette and a newspaper circulating throughout the State. Where the identity of the person whose consent is required is known, the Registrar-General must also mail a notice of his or her intention to that person at their last known address. Twenty one days must have elapsed since the notice was published and, where applicable, posted, before the easement can be varied or extinguished.

90b(6), (7) and (8) - Express Exclusion of Easements

90b(6) Subject to section 90b(7), a dominant proprietor cannot transfer or convey their land without an easement that is appurtenant to it.

90b(7) The proprietor of dominant land or of some part of it may transfer or convey part of that land without the appurtenant easement if rights under the easement continue in existence in respect of some other part of the dominant land.

Under this provision, portion of the land in a certificate of title can be conveyed, expressly excluding an easement, provided that another portion of the dominant land retains the appurtenance. Similarly, the whole of the land in a certificate of title can be conveyed, expressly excluding an easement, if it can be shown that some other parcel of land comprised in another certificate has an appurtenance to the same easement. In this latter case, the onus will be on the conveyancer to provide evidence to the Registrar-General of the existence of the other land.

90b(8) An easement excluded by the use of section 90b(7) is extinguished in respect of the land which has been transferred.

90b(9) - Consent of Development Assessment Commission

An easement created as a requirement of the consent or approval under a planning statute cannot be varied, extinguished or have its appurtenance extended without the consent of the Development Assessment Commission. Where this consent is required, clients must ensure that it is endorsed on Form 13. (The existing reference to the South Australian Planning Commission should be deleted).

Similarly, part of the dominant land cannot be transferred separately from such an easement, thereby extinguishing the easement in respect of that parcel of land, without the consent of the Commission. The same principle applies to prevent an easement being merged and extinguished by transfer of the easement to the proprietor of the servient land or the transfer of the servient land to the proprietor of the easement without consent having first been obtained.

Clients should note that the Planning Services Branch of the Department of Housing and Urban Development has advised that, before the Commission will give their consent to an application or transfer, the consent of the relevant local council under the Development Act 1993 must be endorsed on the instrument.

90b(11) - Easements in gross

By virtue of this subsection, the variation and extinguishment provisions of section 90b apply to easements in gross.

90b(12) - Relationship of section 90b to other Acts dealing with the variation or extinguishment of easements

This provides that section 90b is subject to and does not derogate from any other Act relating to the variation or extinguishment of easements of a particular class. As such it is a qualification on section 90a (see above). By virtue of the provision, section 90b does not reduce the effectiveness of any other Act and, in particular, will not apply to easements created under another statute where that Act either expressly or impliedly evinces an intention to be a code with respect to the variation or extinguishment of those easements. It should also be noted that other provisions contained elsewhere in the Real Property Act which permit the extinguishment of easements can still be used. For example, the ability to transfer back and merge and extinguish certain easements in the servient land remains unchanged.

SECTION 90c - EASEMENT AND SERVIENT LAND MAY BE VESTED IN SAME PERSON

This section provides that a person may be the proprietor of both dominant and servient land at the same time. It further provides that common ownership is not a bar to the creation of an easement, and accordingly a person can grant an easement over their own land in favour of themselves in their capacity as the proprietor for the time being of the dominant land. This will apply to a grant of easement in any situation, including dealings outside of a land division or a strata titling context.

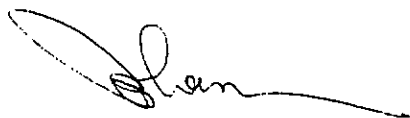
The section also clarifies the point that where the dominant and servient tenements of an easement become registered in the same ownership, merger will not occur unless the instrument which caused the common ownership expresses the intention that such should happen. However, an easement will be extinguished where the dominant and servient land is contained in the same allotment formed by the amalgamation of land under Part XIXAB of the Act. (In this last case, a separate application is not required to achieve the extinguishment, as it occurs automatically by virtue of section 90c(3)).

SECTION 90d - SURVEY OF EASEMENT

Where an easement is to be created or varied by the registration of an instrument, the Registrar-General may, before registering that instrument, require a survey delineating the easement. This provision will not affect simple easements that may be located on or near a title or other surveyed cadastral boundary line. However, it will apply to those easements which are extensive and wind through a site unrelated to any boundary or are merely tied to a physical or natural monument traversing the land. Clients should liaise with either Plans or Survey section to determine whether, in a given case, a survey will be required.

SECTION 90e - NO PRIVATE RIGHTS OF WAY OVER PUBLIC STREETS OR ROADS

By virtue of this section, private rights of way can no longer be granted, reserved or otherwise created over a public street or road. The provision is also retrospective and extinguished all rights of way that subsisted over public streets as at the 8th September, 1994. Clients should note that only that portion of a right of way which was over a public street is extinguished, and that the right remains in force in respect of any other land that is subject to it. It is also pointed out that the section has no application to those easements which are not rights of way. An internal procedure is currently being developed whereby certificates of title affected by the provision will be progressively updated.



ALAN J SHARMAN
REGISTRAR-GENERAL
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