

³Part 9 – Easement

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³Part 9 – Easement

General Law

The Nature of Easements

[9-0000]

An easement is a right annexed to land to utilise other land in a particular manner. It does not involve the taking of any part of natural produce of the land or any part of its soil. It may, however, prevent the owner of the other land from utilising his/her land in a particular manner (*Halsbury's Laws of England* (4th edn, 1975) Volume 14, page 4).

An example of an easement is where one owner (of the 'burdened lot') allows another owner (of the 'benefited lot') to pass over his/her land.

The land advantaged by the easement is called the 'benefited lot' or 'dominant tenement'. The land over which the easement is granted is called the 'burdened lot' or 'servient tenement'. The benefit of an easement runs with the benefited lot, ie it passes from one owner to the next, and the burden of the easement runs with the burdened lot. Therefore, all future owners of the burdened lot are bound by the easement, unless it is surrendered or extinguished.

Generally, for an easement to exist there must be a benefited and a burdened lot. The exception to this is the case of an 'easement in gross' (where there is a burdened lot only) to serve the purposes of local government or a government instrumentality.

An easement (other than an easement in gross) must accommodate the benefited lot and contribute to the full enjoyment of the benefited lot.

Re Ellenborough Park [1956] 1 Ch 131 is the landmark case which established the essential characteristics of an easement, which are:

- (a) There must be a benefited lot and a burdened lot.
- (b) An easement must 'accommodate' the benefited lot.
- (c) Benefited and burdened lot owners must be different persons.
- (d) A right over land cannot amount to an easement unless it is capable of forming the subject matter of a grant.

Note:

- (i) As previously mentioned, easements in gross are not required to exhibit the characteristics in (a) and (b) above.
- (ii) Section 86 of the *Land Title Act* 1994 allows easements to be granted if the benefited and burdened lot are owned by the same person.

It is sometimes a matter of great difficulty to determine whether a particular 'right' is capable of forming the subject matter of a grant. Some examples will demonstrate this:

- an easement over the whole of the land is capable of forming the subject matter of a grant;

- but it cannot confer **exclusive** rights, since it would then effectively be a lease or transfer (*Copeland v Greenhalf* [1952] 1 Ch 488);
- a right to provide a wind break is capable of forming the subject matter of a grant (*Ford v Heathwood* [1946] QWN 11);
- but a right to privacy is not (*Brown v Flower* [1911] 1 Ch 219).

Many other examples could be given of these difficulties.

A further difficulty arises in attempting to distinguish easements from other rights.

Easements Distinguished from Other Rights

Appurtenant or Natural Rights

[9-0010]

These rights arise at common law as an incident of land ownership and include:

- a right to support and bind in its natural state; and
- a right to surface water.

Unlike an easement, these rights will not of themselves be an interest in land.

Profits a prendre

[9-0020]

That is, a right to remove soil, produce or animals from the land.

These interests arise by agreement and relate to the right to enter upon land and extract or remove part of its substance, for example, sand, gravel, trees etc (see part 29 – Profits a prendre). They may be granted to any person, not just another property owner.

Licence

[9-0030]

An agreement whereby an owner permits another person to act in a way which would otherwise involve trespass or nuisance is a licence. A licence:

- is a personal right and not an interest in land; and
- falls short of a grant of exclusive use (as does an easement).

Some Examples of Easements

[9-0040]

The easement right must be for an acceptable purpose which is capable of precise definition. Some easements that are regularly created include easements:

- of right of way for access;
- of support of buildings;
- for party (or shared) walls;
- for drainage or sewerage reticulation;

- for water storage/supply;
- of retention of light or air;
- for electricity transmission;
- for encroachment;
- for eavesdrop.

Examples of frequently encountered purposes which are not acceptable are ‘view’ or ‘environmental’ purposes. An easement may be granted for more than one purpose.

The right granted must not be vague, imprecise or indefinite and must be for a matter which is capable of being the subject of a grant.

Whilst the category of easements is not closed, it has been stated that it will be unlikely that any easements of a new nature will be readily recognised at law, particularly in circumstances where they would be of a character of the owner agreeing not to exercise some of the owner’s rights of ownership (see *Phipps v Pears* [1965] 1 QB 76).

Currency of Easement

[9-0050]

An easement, unless otherwise stated, is granted in perpetuity. However, easements can be granted for life only, for a term of years or for some other period, such as until the happening of an agreed upon event. For example, if the grantee is a lessee, the easement will expire on the termination of the lease.

Restrictive Covenants

[9-0060]

A restriction on a user of land, not in the nature of an easement, is not capable of being registered in Queensland (s 4 of the *Property Law Act* 1974). This prohibits the registration of covenants contained in an easement that restrict registered owners from exercising a right that they would otherwise be entitled to exercise as owner of that land.

It should be noted, however, that should the subject matter of the covenant be capable of sustaining an easement (eg a right of support for buildings), then some effective result could be obtained by the parties agreeing to an easement. This would also enable the registration of the agreement in the Freehold Land Register and would grant an interest in land.

Easement to Self

[9-0070]

A person may grant an easement to himself/herself as owner of both the benefited and burdened lots (s 86 of the *Land Title Act* 1994).

Practice

Creation of Easement

[9-2000]

Easements are created:

- (a) by a grant of easement under the provisions of Part 6 Division 4 of the *Land Title Act* 1994;
- (b) by resumption of land, generally under the provisions of the *Acquisition of Land Act* 1967;
- (c) by a court ordering a statutory right of user under the provisions of the *Property Law Act* 1974; or
- (d) in the past, by an ‘Old System’ deed.

Easement Created by Grant

[9-2010]

An owner of a lot may grant an easement over his/her lot either for the benefit of an owner of another lot (the benefited lot) or to a body such as a local government. The latter is an example of an easement in gross, where there is only a burdened lot and not a benefited lot. Under s 82 of the *Land Title Act* 1994, easements are created upon the registration of an instrument of easement. The instrument of easement is a Form 9 – Easement.

Definition by Plan

[9-2020]

An easement may only be created by registering an instrument of easement and the instrument must state the nature of the easement and its terms, the land to be benefited and the land to be burdened.

An easement must be defined by a registered survey plan or explanatory format plan before the instrument of easement (Form 9 – Easement) can register (s 83(1)(a) of the *Land Title Act* 1994). This requirement does not apply to an easement over the whole of a lot.

A possible exception might be an easement to a public utility provider over large areas of undeveloped lands. In these cases, identification by a sketch certified by a licensed surveyor may, at the Registrar’s discretion, be sufficient.

However, an easement is not created on the registration of an easement plan. An easement is created only on the registration of the Form 9 – Easement, or a Form 14 – General Request if the easement is created by resumption (s 83A of the *Land Title Act* 1994).

The instrument of easement must set out the nature of the easement and its terms and specify the benefited lot and the burdened lot. This latter requirement does not of course apply to an easement in gross.

A plan designating an easement must include the words ‘proposed easement’ if it is lodged without the instrument of easement. When the plan and instrument of easement are lodged at the same time the word ‘proposed’ should not be shown on the plan. The designation of proposed easement does not create an easement and is not evidence of a present intention to create an easement.

Plans for easement purposes must comply with directions 4.8.2, and either direction 6, 8 or 10 of the Registrar of Titles Directions for the Preparation of Plans (see also part 21 – Plans and Associated Documents, esp ¶[21-0020] and ¶[21-2010] to ¶[21-2025]).

When the Form 9 is lodged, the Certificates of Title for both the benefited and burdened lots must be lodged (if they are in existence). However, as an easement in gross has only a burdened lot, only the Certificate of Title (if it exists) for that lot is required. For more information on easements in gross, refer to ¶[9-2180].

Any easement whether proposed or created by registration of an instrument of easement will not be affected by a subsequent plan of subdivision, unless the easement is affected by the boundaries of that survey.

The effect of this is that where a subsequent plan has been registered cancelling a lot over which an easement plan has been surveyed, that easement area, whether granted or not, may subsequently be granted or further granted, provided that the boundaries of the easement area have not been altered or amended in any way and are not intersected by a lot boundary on any further plan of subdivision.

Both transfer duty and lodgement fees are payable on an instrument of easement.

Easement Created by Resumption

[9-2040]

Many easements in gross are created by way of resumption under the provisions of the *Acquisition of Land Act 1967*. This Act authorises constructing authorities to acquire an easement. A ‘constructing authority’ is defined in the Act as the State or a local government or any other person authorised by legislation to acquire land. This power enables constructing authorities to acquire an easement without affecting a pre-existing easement.

Under the *Land Act 1994*, the Governor in Council can resume an easement over a holding. Under the Act, the Governor in Council can also resume an easement on behalf of a constructing authority. Under the *Lands Acquisition Act 1989 (Cth)*, the Commonwealth has the power to resume an easement.

Such easements are created on the registration of a Form 14 – Request to Register a Resumption, which is lodged with a copy of the gazetted proclamation of the resumption, or, where the Brisbane City Council is resuming the land, a copy of the gazetted notification of resumption. An easement plan is lodged prior to the Form 14. Normal registration fees are payable on the Form 14. The Certificate of Title (if it exists) for the burdened lot does not have to be produced.

Easement Created by a Court Ordering a Statutory Right of User

[9-2050]

A statutory right of user is defined in s 180 of the *Property Law Act 1974* as a right of way, access to or entry upon land. The imposition of a statutory right of user occurs when a court, on the application of the registered owner of the proposed benefited lot, orders that the registered owner of the proposed burdened lot provide an easement to the owner of the benefited lot. The conditions under which a statutory right of user can be imposed are set out in s 180 of the *Property Law Act 1974*.

The registration of an easement created by a statutory right of user is usually effected in the same manner as an easement created by an express grant. That is, a survey plan of the easement and an easement instrument in Form 9 are lodged. The court order should be produced as

evidence. However, any court order contrary to these requirements must be referred to the Registrar for consideration.

Where there is no person with the necessary capacity to accept the imposition of the easement by the court, the court has power to order any person to execute any instrument (s 180(5) of the *Property Law Act 1974*). This includes the execution of the plan of survey, in order to give effect to the easement as ordered. Usually, the Registrar of the Court is ordered to execute the easement documentation.

Easement Created Pursuant to s 250 of the *Property Law Act 1974*

[9-2060]

Section 250 of the *Property Law Act 1974* provides a procedure for requiring old system land to be brought under the *Land Title Act 1994*. Any person claiming to have any interest in the land, which interest includes an easement, may make application to have that interest noted on any Certificate of Title which may issue for the land. If the applicant establishes its claim, then the Registrar notes the Certificate of Title accordingly.

Restriction as to Height, Depth or Volume

[9-2070]

Easement Over the Whole of a Lot

Where an easement over the whole of a lot is restricted to a specified height above or below a horizontal plane or between horizontal planes, the height restrictions must refer to Reduced Levels on Australian Height Datum (RL on AHD) and be shown in Item 2 of Form 9 – Easement. For example:

2. Description of Easement/Lot on Plan	County	Parish	Title Reference
Servient Tenement (burdened land) LOT 1 ON RP145897 (Restricted to the land between RL1 and RL5 on AHD)	STANLEY	NUNDAH	14500101

Where an easement over the whole of a lot is restricted by an inclined plane or a series of different horizontal planes, a volumetric plan depicting the easement is required.

Easement Over Part of a Lot

Where an easement is over part of a lot and is restricted, a survey plan in either standard or volumetric format is required. If the easement, depicted on a standard format plan is restricted, the restriction must be shown on the face of the plan.

Consent of Local Government

[9-2080]

There is no requirement for the deposit of local government approval to an easement. This includes an easement that gives access to a road if the easement is executed on or after 25 May 2001. After this date it is the plan of survey that depicts the easement that requires local government approval (see part 21, esp ¶[21-0065]).

Easement Executed by the Body Corporate for a Community Titles Scheme

[9-2085]

When the Body Corporate for a community titles scheme executes an instrument of easement a copy of the resolution, in accordance with the scheme's regulation module, must be deposited with the instrument of easement.

Easement Granted by Party to Itself

[9-2090]

An easement from a person to himself/herself created by registering a plan under Part 6 Division 4 of the *Land Title Act* 1994 can include covenants as s 82(2) requires the instrument of easement to specify 'the nature of the easement and its terms'. The covenants would only be enforceable when the benefited and burdened lots were no longer in common ownership. Section 50 of the *Property Law Act* 1974 makes covenants enforceable by a person against himself/herself and one or more other persons, but not covenants between a person and himself/herself alone.

Easement Granted to Lessee

[9-2100]

An easement can be given by a lessor to a lessee over land not included in the lease. In this respect the easement would be cancelled when the lessee surrenders his/her interest in the lease. Once the lease expires, so does the interest in the easement. There is no need for an easement to a lessee of an expired lease to be formally surrendered.

Easement Dedicated as a Road

[9-2110]

For information on easement dedicated as road see part 21 – Plans and Associated Documents, esp ¶[21-2210].

Resumption of Land

[9-2120]

A resumption of land cancels any encumbrance registered over that land (s 12(5) of the *Acquisition of Land Act* 1967). The resumption is registered in a Form 14 – Request to Record Resumption, supported by a copy of the gazetted proclamation or, where the Brisbane City Council is resuming land, the gazetted notification of resumption.

However, where land is resumed for the purpose of creating an easement and the new easement intersects or follows an existing easement registered under the *Land Title Act* 1994, the prior registered easement continues to exist and the resumed easement is subject to the former's covenants.

If land benefited by an easement is resumed, the easement is not cancelled, as the benefit passes to the resuming authority.

Transfer Duty

[9-2130]

An easement is a dutiable instrument under the *Duties Act* 2001. When an easement is presented for registration, evidence of payment of transfer duty will be required either:

- by impressed duty by the Office of State Revenue; or
- stamped as duty paid by an authorised self assessor.

Easement Over State Leasehold and Freehold Land

[9-2140]

Easements can be registered over State leasehold land.

Where one of the lots in an easement is State leasehold land and the other lot is freehold land, the easement is registered in both the Freehold Land Register and the State Leasehold Land Register. Only one copy of the easement is required and normal registration fees are payable.

State Land Easement – Action When Land is Subsequently Made Freehold

[9-2150]

Where an easement has been registered and both the benefited and burdened lots are State tenure land, and one of the parcels is subsequently freeholded, the dealing number is carried forward to the deed of grant created in the freehold land register. This number is then carried forward to the indefeasible title created for the lot.

Prior to November 1995 the procedure was for the State land administration office to forward the original easement instrument to the land registry for notation on the original deed of grant. The instrument received a land registry dealing number for filing purposes. The original dealing number allocated by the State land administration office was also referred to in the endorsement recorded on the deed of grant.

New Easement Over Land to be Dedicated for Public Use

[9-2155]

An easement to be registered over land that is to be dedicated for public use on registration of a plan of survey and the easement is depicted on that plan, the easement may only be lodged once the plan has been registered and the title for the reserve or unallocated State land has been created. On the plan the easement must be referred to as ‘proposed’.

The easement must be referred to State Land Asset Management of the department prior to lodgement.

Easement Endorsement

[9-2160]

Benefit easements are endorsed on the benefited lot as, eg, ‘Easement No [number] benefiting the land over easement A on RP 123457’.

Burden easements are endorsed on the burdened lot as, eg, ‘Easement No [number] burdening the land to Lot 1 on RP 145762 over Easement A on RP 123457’.

If the benefited lot is amalgamated with land that does not have the benefit of the easement, the endorsement of the easement on the new indefeasible title created will state that the easement is to only part of the lot.

Care should be taken to ascertain if the endorsement on the benefited lot contains a ‘part of’ notation, in which case any subsequent survey of that lot will require the allocation of the benefit in whole or part to any new lots created by that survey.

If a burdened lot is the subject of a plan of subdivision, then the easement will only be recorded on the indefeasible titles for any new lots through which that easement passes.

Merger of an Easement Within a Lot

[9-2170]

If the Registrar creates a single indefeasible title for a number of lots and those lots comprise both the dominant and servient tenements of an easement, the easement is extinguished by virtue of s 87(b) of the *Land Title Act 1994*.

Similarly, if lots that contain both the dominant and servient tenements of an easement are amalgamated into one lot by survey, on creation of the indefeasible title for the amalgamated lot the easement is extinguished by virtue of s 87(b) of the *Land Title Act 1994*.

Easement in Gross

[9-2180]

An easement in gross is only registered against the burdened lot. These easements are granted to public utility providers under s 81A of the *Land Title Act 1994*. Public utility providers are:

- (a) the State or another entity representing the State;
- (b) the Commonwealth or another entity representing the Commonwealth;
- (c) a local government;
- (d) another person authorised by law to provide a public utility service;
- (e) a person approved by the Minister as suitable to provide a particular public utility service; and
- (f) a mill owner, but only for the registration of a cane railway easement.

An easement may only be registered in favour of a person mentioned in (e) above if it is for the public utility service mentioned.

Public utility easements may only be created in favour of a public utility provider for:

- (a) right of way;
- (b) drainage or sewerage;
- (c) supply of water, gas, electricity, telecommunication facilities or other public utility service;
- (d) water storage; or

Note – The term ‘water storage’ relates to the inundation of water upstream of a weir or the barrier of a dam outside the storage area at full supply level. The easement instrument must include a ‘sketch’ that shows the extent of inundation. This is to ensure that the owner of the land or any interested party is able to establish the limits, on the land, of inundation.

- (e) an infrastructure corridor; or

- (f) a purpose mentioned in s 125(1) of the *State Development and Public Works Act 1971*;
or

Note – A public utility easement for the purposes (e) and (f) must be granted to only The Coordinator General.

- (g) cane railway; or

Note – A public utility easement for cane railway must be granted to a mill owner and only for a purpose for which a cane railway easement may be granted under the *Sugar Industry Act 1999*, for example to facilitate harvest of cane and supply of cane to any mill or between any mills.

- (h) public thoroughfare.

Note – A public utility easement for ‘right of way’ for the public must be a public thoroughfare easement created in favour of the State or a local government only, and the use of the easement is limited to pedestrian access, cyclists and vehicles reasonably necessary for the building and maintenance of the easement.

A combination of these purposes is allowable in a single easement instrument. However, public utility easements given to a person approved by the Minister may only be for the service approved by the Minister.

Examples of easements in gross are easements given to local governments for drainage and sewerage purposes or to electricity authorities for the supply of electricity.

As with other easements, there must be an easement plan unless:

- (a) the easement is over the whole of a lot; or
- (b) the easement is to an electricity authority over a large area of undeveloped land, in which case a sketch plan approved by the Registrar may be sufficient; or
- (c) the easement is for water storage, in which case it must include a ‘sketch’ that shows the extent of inundation behind the weir. The ‘sketch’ may be in the form of a sketch, plan or map.

Easements in gross over part of a lot may only be created if a plan of survey designating the easement area an easement instrument are registered in accordance with s 82(1) of the *Land Title Act 1994*. The instrument must be executed by the owner of the lot being burdened and must specify the nature of the easement and its terms.

A public utility easement for water storage may only be registered over the whole of the land.

Plans for gas or oil pipeline easements are generally signed by the authority nominated by the relevant legislation. In easements taken by resumption, the easement plan is signed by the constructing authority.

An easement in gross may contain multiple servient lots in different ownerships. The grantors should be separately described in Item 1 of the Form 9 – Easement, eg ‘AB (Parcel 1), CD (Parcel 2), EF (Parcel 3), etc’ and the descriptions of the servient tenements in Item 2 should be similarly identified.

As s 60(1) of the *Land Title Act 1994* provides that ‘A lot or an **interest in a lot** may be transferred...’. An easement in gross may be transferred from one public utility provider to another.

However, this does not apply to easements with both dominant and servient tenements as in those cases the benefit and burden pass with the ownership of the land.

Except for a public thoroughfare easement, s 85B of the *Land Title Act* 1994 authorises the registered owner of a lot burdened by a public utility easement to recover a reasonable contribution towards the upkeep of the easement from the public utility provider. It also allows for the liability to be amended or excluded by agreement.

Both transfer duty and lodgement fees are payable on an easement in gross to a public utility provider.

Modification or Extinguishment of Easement by Surrender

By Order of the Court

[9-2190]

Section 181 of the *Property Law Act* 1974 enables the court to modify or wholly or partially extinguish an easement. The court has power to:

- (a) direct a survey of the land to be made and a plan of survey to be prepared;
- (b) order any person to execute any instrument/s in registrable form to give effect to the order; and
- (c) order the production of any Certificate of Title, deed or other instrument or document relating to any land.

If the court orders that the applicant is to execute instrument/s for giving effect to the order, the Registrar's requirements in the following cases are set out below:

- (a) If the court order alters the easement in any way other than by a reduction or partial extinguishment of the easement, that is, it relocates all or part of the easement, then the following is required:
 - (i) lodgement of a Form 10 – Surrender of Easement for the existing easement;
 - (ii) lodgement of a survey plan of the new easement;
 - (iii) lodgement of a Form 9 – Easement for the new easement; and
 - (iv) lodgement of the Certificates of Title (if issued) for both the benefited and burdened lots. An office copy of the court order is also required if any person other than the registered proprietors of the benefited and burdened lots have executed any instrument.
- (b) If the court order modifies some or any of the covenants of the easement, then a Form 14 – General Request to register the order of the court is lodged, together with an office copy of the order and the Certificates of Title for both the benefited and burdened lots (if issued).
- (c) If the order is for partial extinguishment of the easement, a Form 10 – Surrender of Easement to partially extinguish the easement is lodged, together with a plan of survey of the area of the burdened lot being extinguished bound into the Surrender. The Certificates of Title for both the benefited and burdened lots (if issued) and an office copy of the court order are also required.

- (d) If the court order is for the full surrender of the easement, then a Form 10 – Surrender of Easement, together with the Certificates of Title for both the benefited and burdened lots (if issued) are lodged. An office copy of the court order is required if any person other than the registered proprietor of the lots has executed any instrument, that is some person authorised to do so by the court.

However, if the court makes a direct order of extinguishment or modification, a Form 14 – Request to Register Court Order is required.

See also part 10 – Surrender of Easement, part 13, esp ¶[13-0020] and ¶[13-2040] to ¶[13-2050] and part 14 – General Request, esp ¶[14-2430].

Forms

General Guide to Completion of Forms

[9-4000]

For general requirements for completion of forms see part 59 – Forms, esp ¶[59-2000].

Dealing Number



OFFICE USE ONLY

Privacy Statement

Collection of this information is authorised by the Land Title Act 1994 and the Land Act 1994 and is used to maintain the publicly searchable registers in the land registry. For more information about privacy see the department's website.

1. Grantor WILLIAM JOHN SMITH and MARY ISABELL SMITH	Lodger (Name, address, E-mail & phone number) CLINTON & ASSOCIATES SOLICITORS 391 QUEEN STREET BRISBANE QLD 4000 info@clintons.com.au (07) 3228 3349	Lodger Code 94
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2. Description of Easement/Lot on Plan	County	Parish	Title Reference
Servient Tenement (burdened land) EASEMENT A ON RP145897	STANLEY	NUNDAH	14500101
#Dominant Tenement (benefited land) LOT 140 ON RP103010	STANLEY	NUNDAH	13429151

not applicable if easement in gross

3. Interest being burdened FEE SIMPLE	#4. Interest being benefited FEE SIMPLE # not applicable if easement in gross
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5. Grantee Given names LAWRENCE ARTHUR	Surname/Company name and number MORGAN	(include tenancy if more than one)
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6. Consideration \$1.00	7. Purpose of easement RIGHT OF WAY
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8. Grant/Execution

The Grantor for the above consideration grants to the Grantee the easement over the servient tenement for the purpose stated in item 7 and the Grantor and Grantee covenant with each other in terms of:- *the attached schedule; *~~the attached schedule and document no.~~; *document no.

* delete if not applicable

Witnessing officer must be aware of his/her obligations under section 162 of the Land Title Act 1994

J I Clinton
.....signature
JONATHON IAN CLINTON
.....full name
SOLICITOR
.....qualification

Witnessing Officer
(Witnessing officer must be in accordance with Schedule 1 of the Land Title Act 1994 eg Legal Practitioner, JP, C Dec)

7/10/2007
Execution Date

.....
W J Smith
M I Smith
Grantor's Signature

V N Stinson
.....signature
VALDA NORMA STINSON
.....full name
JUSTICE OF THE PEACE (C.DEC) #42345
.....qualification

Witnessing Officer
(Witnessing officer must be in accordance with Schedule 1 of the Land Title Act 1994 eg Legal Practitioner, JP, C Dec)

10/10/2007
Execution Date

.....
L A Morgan
Grantee's Signature

Guide to Completion of Form 9

General

[9-4010]

A Form 9 is used when an easement is granted after the registration of a plan under Part 6 Division 4 of the *Land Title Act 1994*.

An easement may be granted for the same purposes and covenants in one instrument by the registered owners of the following lots:

- (a) one servient lot to one dominant lot;
- (b) multiple servient lots in different ownership to one dominant lot; and
- (c) one servient lot to multiple dominant lots in different ownership.

In the case of (b), the grantors should be separately described in Item 1 of the Form 9 as ‘AB (Parcel 1), CD (Parcel 2), EF (Parcel 3), etc’ and the descriptions of the servient tenements in Item 2 should be identified by parcel numbers.

In the case of (c), the grantees should be separately described in Item 5 of Form 9 as ‘AB (Parcel 1), CD (Parcel 2), EF (Parcel 3), etc’ and the description of the dominant tenements in Item 2 should be identified by parcel numbers.

Item 1

[9-4020]

Insert the full name of the grantor of the easement, ie the registered owner of the burdened lot. If the grantor is:

- (a) A trustee or personal representative, this information should appear at Item 1. For example, ‘as trustee under Transfer to Trustees No [number]’, or ‘as personal representative of the estate of [name of deceased] deceased’. A trustee or personal representative can grant an easement by virtue of s 33(1)(h) of the *Trusts Act 1973*.
- (b) A body corporate for a community titles scheme, the following words must be inserted ‘Body Corporate for [name of scheme] community titles scheme [scheme number]’, eg ‘Body Corporate for Seaview community titles scheme 1234’.
- (c) A minor (a person who has not yet reached the age of 18 years). A minor cannot be a grantor of an easement. However, this does not affect the court’s ability to order a statutory right of user over land where one of or the sole registered owner is a minor (s 180 of the *Property Law Act 1994*).
- (d) A mortgagee in possession, the mortgagee may grant an easement for right of way or drainage under s 83(1)(a) of the *Property Law Act 1974* or as defined in the mortgage instrument. A declaration as to default and service of a notice of demand would be required to accompany the Form 9.
- (e) A lessor (registered owner), the lessor may grant in a separate instrument, to his/her lessee, an easement over land not covered by the lease.
- (f) A tenant in common, all tenants in common should join in one instrument and not grant easements individually.

A grantor may, by separate instruments, grant the same or different easement rights over the burdened lot to any number of different benefited lots. However, each successive grant is subject to the rights of the prior grantees.

Item 2

[9-4030]

Servient Tenement (burdened land)

For an easement over part of a lot insert the description of the easement, eg. 'Easement A on SP 145897'.

For an easement over the whole of a lot insert only the description of the lot.

For information about completing Item 2 for an easement restricted in height or depth or between certain horizontal planes see [9-2070].

Dominant Tenement (benefited land)

For an easement other than an easement in gross insert description of benefited lot.

For an easement in gross insert 'Not applicable'.

Item 3

[9-4040]

Insert the interest being burdened, eg 'Fee Simple' or 'State Tenure No [number]'.

Item 4

[9-4050]

Insert the interest being benefited, eg 'Fee Simple' or 'State Tenure No [number]' or 'Lease No [number]'.

Note: For an easement in gross, Item 4 must be marked 'Not applicable'.

A lessee can be granted an easement from his/her lessor over other parts of the lessor's land in order to reach and enjoy his/her lease, so this Item can also refer to an estate or interest in a lease.

Item 5

[9-4060]

Insert the full name and tenancy of the grantees for each benefited title.

The grantee may be any registered owner of land and this includes a minor (with execution by the legal guardian or solicitor for the legal guardian).

If the grantees are tenants in common, there must be only one grant in their favour. Easements cannot be granted to tenants in common individually.

The statutes are silent on the authority of a trustee to be a grantee under an easement. However, as the benefit accrues to the trust there is nothing to prevent a trustee acting in that capacity.

If a mortgage instrument enables a mortgagee in possession to be the grantee of an easement, a declaration of default and service of notice of demand are required to accompany the Form 9.

Item 6

[9-4070]

Insert the monetary or other consideration.

Item 7

[9-4080]

Insert a short description of the purpose of the easement, eg right of way, drainage, cane railway etc or, if this is not possible, indicate ‘see schedule for attachment of covenants and description of use’.

Item 8

[9-4090]

The parties complete where indicated and execute as required.

See also part 60 – Miscellaneous, esp ¶[60-0900] *ff*.

¶[9-6000] deleted

Case Law

***Re Broons* [1989] 1 Qd R 315**

[9-7000]

This case is authority for the proposition that tenants in common who are both grantors and grantees can grant easements to themselves which contain enforceable covenants.

¶[9-7010] deleted

***Re Ellenborough Park* [1956] 1 Ch 131**

[9-7020]

This case is the landmark case which established the essential characteristics of an easement.

Fees

[9-8000]

Fees payable to the land registry are subject to an annual review. See the current *Land Title Regulation* 2005 – Schedule 2, item numbers 2(h) and 2(m).

Cross References and Further Reading

[9-9000]

Part 10 – Surrender of Easement

Part 13 – Amendment of Lease, Easement, Mortgage, Covenant, Profit a prendre or Building Management Statement.

Part 60 – Miscellaneous, esp ¶[60-0900] *ff*

Duncan and Vann, *Property Law and Practice*, Law Book Co Ltd (loose-leaf service)

Notes in text

[9-9050]

Note³ – This part is not applicable to water allocations or the Water Allocations Register.