EAS-01 Easements

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1 General

Easements may be registered against freehold or Crown land under the Transfer of Land Act 1893 (TLA). No detailed provisions are set out in the TLA and the general law in respect of easements must be followed.

A simple definition of an easement is:

"a right attached to a parcel of land which allows the proprietor of the parcel to use the land of another in a particular manner or to restrict its use to a particular extent."

"Under the general law an easement without a dominant tenement (an easement in gross) cannot exist. In this State, the State of Western Australia, a State Instrumentality, Statutory Body Corporate or a Local Government may be the grantees of an easement without a dominant tenement, as provided for under s.195 of the Land Administration Act 1997 (LAA). Other enabling legislation may also contain provisions for the creation of an easement in gross."

Easements may be said to be either:

- express easements, i.e. those created by a deed prepared for that purpose or incorporated in a transfer of land

or

- implied easements, i.e. a right of carriage way appurtenant to lots abutting on a right of way set out on a plan of subdivision (s.167A of the TLA).

2 Types of Easements

The usual types of easement presented for registration are:
- rights of carriage way
- rights of support to land burdened by buildings
- rights to erect a party wall
- rights to light and air (see Property Law Act, 1969, s.121)
- rights to take water from wells or bores
- rights to install and operate drains and drainage works
- rights to install, maintain and operate oil, gas or other pipelines

and

- rights to install, maintain and operate electric power lines, telephone and other cables and supporting pylons.

3 Essentials for the Registration of an Easement

An easement must contain certain essentials and the absence of any one essential will result in requisitions issuing to either correct the fault or refusal to register, should the fault be incapable of correction.

The essentials are:

- there must be a dominant tenement (which may be leasehold) i.e: the land which enjoys the benefit of the easement
- there must be a servient tenement (which must be free simple) i.e: the land which is burdened by the easement
- the dominant and servient tenements must be distinct and in separate ownerships (with the exception of easements created on subdivisions under Part IVA of the TLA)
- the easement must benefit the dominant tenement and impose an obligation on the servient tenement
- the easement created must be capable of running with the land and be made with the express intention of running with the land

and

- the dominant and servient tenements must be adjacent, although it is not essential that they must be contiguous.

4 How Created

There are five basic methods for the creation of express easements. These are:

- by the registration of a deed prepared and lodged expressly for the purpose of creating the easement
by granting to or reserving from the land the subject of a registered transfer, an easement embodied in and created by that transfer;

- the approval of a deposited plan containing an easement created pursuant to s.167 of the Planning and Development Act 2005 (P&D Act) – formerly s.27A of the Town Planning Development Act 1928 (TPD Act)

- by notation on deposited plans of subdivision under Part IVA of the TLA), and

- by notation on survey-strata plans under s.5D of the STA as amended.

5 Easements Created by Deed

A deed prepared for the sole purpose of creating an easement should be prepared on a Blank Instrument Form and the easement should be set out in narrative form.

The easement document must be stamped at the Office of State Revenue (Stamp Duties Division).

The following details should be clearly shown:

- the name and address of the grantor

- the name and address of the grantee

- an accurate description of the lands of the grantor and grantee and

- an accurate description of the land burdened and the land to be benefited by the easement. An Interest Only Deposited Plan should be prepared by a licensed surveyor and lodged at Landgate to define the position of the easement. The easement document can then make reference to the Deposited Plan.

Note: In the case of a simple bore easement, a Deposited Plan is not necessary. A suitable sketch can be drawn on the document or attached to it as a separate sheet.

The grantor should be described as:

"A of etc, the registered proprietor for the time being of (the land to be to be burdened)"

and the grantee should be described as:

"B of etc, the registered proprietor for the time being of (the land to be benefited)"

An easement by Deed needs no monetary consideration, the action of the parties in entering into the Deed is sufficient.

The purpose for which the easement is being created must be clearly stated e.g. a right of carriage way, a party wall, etc. The rights and obligations of the parties should be clearly stated. Any limitation as to duration or height must be set out. Where a limitation is imposed as to the height to which the easement affects the servient tenement, the height should be expressed as a distance in metres above the Australian Height Datum or A.H.D.

Note: The Australian Height Datum within the Perth Metropolitan Zone is based on mean sea level at Fremantle. Benchmarks, fixed at assigned heights are used to control all vertical measurements for mapping purposes.
When presented for registration the document must be accompanied by the duplicate certificates of title (if any) for the dominant and servient tenements.

Encumbrances etc. against the land affected by an easement created by a Deed must be shown in a section headed Limitations, Interests, Encumbrances and Notifications that is set out at the end of the document. A mortgagee of the servient tenement should be asked to give an unqualified consent to the easement.

With such a consent, the easement would survive the exercise of the mortgagee’s power to sell. Absolute caveats will prevent the registration of an easement, as will a prior registered easement which contains provisions which will prevent the use of the land in the manner set out in the new easement.

Reciprocal easements in a single document, i.e. where the parties are both grantor and grantee, will not be registered. A separate document is required for each easement.

6 Easements Incorporated in a Transfer

A transfer of land may incorporate a creation of an easement by grant or reservation. An easement is said to be granted where the land being transferred also carries the benefit of an easement over land belonging to the vendor in the same or another title. An easement is said to be reserved where the land being transferred is burdened with an easement in favour of land retained by the vendor in the same or another title.

A right of carriage way may be created in any transfer by the inclusion of the words:

"together with a right of carriage way over .......(specifying or describing the land over which the easement is created and referring to a map or plan endorsed whereon such land is defined by sufficient measurements to allow it to be accurately plotted)."

Where such words are used, they are construed as if all the words set out in the Ninth Schedule to the TLA have been used (s.65 of the TLA). Where the creation of an easement by transfer is contemplated, the form selected should be a Transfer of Land with additional pages form.

The words creating the easement should be shown on page 2 of the form immediately following the operative words of the transfer. Where the land affected cannot be properly described in words, an Interest Only Deposited Plan should be prepared by a licensed surveyor and lodged at Landgate to define the position of the easement. The transfer can then make reference to the Deposited Plan.

In the case of a simple bore easement a Deposited Plan is not necessary. A suitable sketch can be drawn on the transfer or attached to it as a separate sheet.

Easements may be incorporated in and created by the registration of a lease of freehold land. These are similar to the easements mentioned above except that they are effective only during the term of years created by the lease and any extension thereof. On expiry of the lease, or its surrender by the lessee or re-entry by the lessor, the easement ceases to have any effect.

7 Creation of Easements on Plans of Subdivisions under Part IVA of the TLA
The use of the word Plan in this section means a plan, deposited plan or diagram referred to in s.166 of the TLA or a strata / survey-strata plan within the meaning of the STA as amended.

A registered proprietor of land that is the subject of a Plan, a Public Authority or the Local Government in whose district the land is situated may have noted on the Plan the location of an easement to which the land will be subject. The easement will have effect even though any land burdened by the easement has the same proprietor as any land benefited by the easement.

The necessary information regarding the easement may be specified solely on the Plan itself or in both the Plan and an instrument lodged with the Plan.

7.1 On the Plan

Where the details of the easement are noted solely on the Plan, the following information is required:

- A description of the easement in short form, eg:

"Easement for right of carriage way under s.136C of the TLA."

- The land to be burdened by the easement.

- The land to be benefited by the easement or the name of the Local Government or Public Authority.

- The term of the easement (if applicable).

Note: No further information about the easement will be noted on the Plan unless the Registrar of Titles specifies it.

7.2 In an Instrument with the Plan

Where the details of the easement are more than the short form, it must be contained in an instrument lodged with the Plan. This must be in the form of a Deed, prepared on a Blank Instrument Form and be capable of registration. The instrument is to be duly stamped by the Office of State Revenue and must contain the following information:

- The proprietor(s) name and address.

- A description of the land to be burdened by the easement.

- A description of the land to be benefited by the easement or the name of the Local Government or Public Authority.

- An operative clause describing the easement and stating that the rights, are created pursuant to s.136C of the TLA and showing any limitations associated with the rights.

Limitations should be clearly specified:

"between the hours of ..........

or
"limited to a height/ depth of ......metres above/below the Australian Height Datum".

- Any encumbrances over the land burdened by the easement. (Absolute caveats must be withdrawn to allow registration of the instrument).

- The date of execution of the agreement.

- All of the required consents (see below).

- Signed by all parties and witnessed.

The land burdened by the easement must be contained within the plan, however any land to be benefited by the easement can be outside the Plan.

All duplicate certificate(s) of title (if any) for land receiving the benefit of the easement must be produced for endorsement.

7.3 Consents required

An easement cannot be created under Part IVA of the TLA unless the proprietor obtains the written consent of each of the following:

- A person having a registered interest in any land that would be burdened by the easement (i.e. mortgagees, chargees and lessees etc.)

- A caveator in respect of any land that would be burdened by the easement. (Where an instrument is lodged, absolute caveats must be withdrawn to allow registration of the instrument.).

- A person having a registered interest in any land that would be benefited by the easement (i.e. mortgagees, chargees and lessees etc).

- A caveator in respect of any land that would be benefited by the easement.

Where an instrument is lodged, the consents should be produced with the instrument. If the land has been further encumbered after lodgement of the Plan or the instrument, the additional consents of the subsequent encumbrances and caveators must be obtained prior to or attached to the application for the creation of the new titles.

7.4 When easements created on plans have effect

Land becomes subject to an easement noted on a Plan at the time the new title(s) for the land the subject of the Plan are created and registered.

Where an instrument is lodged under Part IVA of the TLA in relation to a Plan, the instrument shall be deemed to be registered at the time the land becomes subject to the easement.

7.5 Easements created on plans for a specific term

Where an easement created under Part IVA of the TLA is for a specific term, and that term has expired, the easement no longer has any effect. There is no need to apply for a discharge of the easement.
7.6 General comments

Although they are created at the same time, it is Landgate’s policy to endorse easements created under s.167 of the P&D Act on the relevant title(s) before any easements created on Plans pursuant to Part IVA of the TLA.

When two or more lots on an Approved Plan are subsequently amalgamated or re-subdivided, any Part IVA of the TLA easements created on the parent survey subsist and will be carried forward onto the new title.

8 Creation of Easements under Section 5D by Notation on Survey-Strata Plans

A survey-strata plan (in this paragraph referred to as the Plan) lodged for registration may create certain easements that will take effect upon registration of the Plan, under s.5D of the STA and Part IVA of the TLA.

Only Survey-Strata lots on the Plan may receive the benefit or have the burden of an easement created on the plan.

The following easements, as prescribed in the ST GR, can be created on the Plan:

- An easement relating to motor vehicle access, parking or turning (short form description- Vehicle Access Easement).
- An easement for access or use of light and air (short form description- Light and Air Easement)
- An easement for party wall rights (short form description- Party Wall Easement).
- An easement for the right of a structure to intrude into another lot where that intrusion would constitute a permitted deviation if the scheme were a single tier strata scheme (short form description- Intrusion Easement).
- An easement for pedestrian access (short form description- Pedestrian Access Easement).

To create one of the above mentioned easements, the plan must show:

- by dotted lines the location of the easement (see regulation 14B of the ST GR for the dimensional requirements of the various types of easement)
- in tabular form, the dominant and servient lots

and

- the type of easement being created by reference to its short form description.

The notation on the Plan may also include reference to a specific percentage in respect of the apportionment of liability for the costs of upkeep of an area over which the easement is created (where applicable).

Where the easement departs from the terms, conditions and provisions as set out in Regulations 14D to 14I of the ST GR, an instrument will need to be lodged with the Plan. This must be in the form of a DEED, prepared on a Blank Instrument form that is duly stamped by the Office of State
Revenue.

An easement cannot be created on the Plan unless the written consent of each of the following is obtained:

- a person having a registered interest in any lot that would be burdened by the easement (i.e. mortgagees, chargees and lessees etc.)
- a caveator in respect of any lot that would be burdened by the easement.

(Where an instrument is lodged, absolute caveats must be withdrawn to allow registration of the instrument).

Where an instrument is lodged, the consents should be produced with the instrument. If the land has been further encumbered after lodgement of the Plan or the instrument, the additional consents of the subsequent encumbrancers and caveators must be obtained before or attached to the application for the registration of the Plan.

The titles for any survey-strata lots receiving the benefit or burden of an easement created on the plan will be endorsed accordingly.

An easement of this type may not be created on a plan of re-subdivision or plan of consolidation in respect of a survey-strata scheme.

9 Easements over Crown Land

Generally, only the Minister for Lands has power under the LAA to grant easements over Crown land. However, other legislation can allow for the creation of an easement over Crown land.

Where the Minister for Lands grants an easement over Crown land that is the subject of a management order or an interest (e.g. lease, mortgage), then consent of the management body and/or interest holder must be obtained for the easement.

The Minister for Lands may grant an easement in gross over Crown land to any person or body. These easements are limited to the grantee only and cannot be transferred. For example, an easement in gross to a lessee is only valid for that lessee and not any new lessee on a transfer of that lease.

Generally, an easement between two Crown land parcels cannot be accepted as the State of Western Australia owns both. However, an easement between two Crown land parcels can be accepted where either or both the dominant or servient tenement was limited to a leasehold interest over the Crown land. In these instances, the easement is made with the lessee and continues on any transfer of the lease but only remains valid during the term of the affected lease.

If an easement is made between two separate Crown leasehold estates (e.g. one lease exists over the dominant tenement and a different lease exists over the servient tenement) then s.18 of the LAA consent of the Minister for Lands is required unless the Crown land is vested for purposes of another Act.

The land description in an easement where the dominant or servient tenement is limited to a leasehold interest must additionally refer to the lease affected by the easement. For example:

"As to Lease N123456 only"
or where the lease and easement are lodged together

"As to Lease ........ dated 0.0.2017 made between AB as lessor and CD as lessee only."

The lessee’s copy of a lease is not required to be provided with any easement where the dominant or servient tenement is limited to a lease interest.

10 Variation of Easement over Crown Land

A grantee of an easement, with the consent of any management body or lessee of the relevant land, may apply to the Minister for Lands to vary an easement. Under s.144(3) of the LAA, the Minister may then vary the easement or refuse the application.

A variation of easement cannot alter the easement area.

11 Also see

- EAS-02 Easements and restrictive covenants (strata companies)