EAS-03 Removal of Easements

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1 Surrender

*****THIS SURRENDER PART IS UNDER REVIEW BY THE COMMISSIONER OF TITLES @ 20 December 2019*****

The requirements to discharge or modify easements are determined at law on the basis of how those easements were created; that is; the head of power

Agreement or Consents to discharge, surrender or modify easements may be required under the following including but not limited to:

- Transfer of Land Act 1893 (TLA) section 129B
- TLA section 129BB
- TLA section 129C(1)(b)
- TLA section 136J
- Strata Titles Act 1985 section 5F
- Planning and Development Act 2005 section 167
- Land Administration Act section 196

Susan Dukes Commissioner of Titles

A surrender of easement, except where the easement was created under s.167 of the P&D Act (formerly s.27A of the TP&D Act) or under s.136C of the TLA (one copy only), may be registered. The form to be used to surrender other easements is Blank Instrument form and it is a requirement that a surrender be assessed for duty by the Office of State Revenue (Stamp Duties Division).

The form should contain:

- the names and addresses of the dominant and servient owners
- a description of the lands affected
- the nature of the easement and its registered number
- the extent of the surrender, i.e. whole or partial

and

- formal words of surrender.

The properly attested signatures of all the grantors and grantees complete the form. Any encumbrancer of the dominant tenement should be asked to consent to the surrender, as he or she is losing something beneficial to his or her security. Where the easement was created by implication (i.e. an implied easement over a right of way on a survey) no application is required.

Note: The production of the duplicate certificate of title (if any) for the land burdened by the easement is desirable but will not be insisted upon.

2 Abandonment

Where an easement has not been used or enjoyed for a period of not less than twenty years, the registered proprietor of the servient tenement may apply to have the easement removed as an encumbrance.

The application is made on a General Application form by the registered proprietor of the land affected by the easement. The land description panel should contain the current land description of the affected land or right of way. The text of the application, in the third section of the application could be either:

"for the removal pursuant to s.229A of the TLA from the above certificate of title of the easement contained in transfer (number of transfer)"

or

"for the removal pursuant to s.229A of the TLA from the above certificate of title of the easement created in favour of the registered proprietors of the lots created on plan (or diagram) (number of plan or diagram)".

The duplicate title for the affected land, if there is one, must be produced. To support the application, the applicant should supply a statutory declaration setting out the circumstances that substantiate his or her claim and further stating that neither the grantees of the easement nor their invitees or servants have exercised those rights for a minimum period of 20 years up to the time of application.

To be successful the applicant must also demonstrate that:

- the rights have been totally abandoned (e.g. not just reduced from vehicular access to persons on foot)

and

- the rights have been abandoned over the full extent of the land described in the land description panel of the application.

In many cases the provision by the applicant of a sketch of the affected land, depicting any obstructions such as buildings, trees, or fences, and other relevant details such as garages or
gates opening onto the affected land greatly simplifies the matters to be explained in the declaration.

Although it is desirable that such a sketch is prepared by a licensed surveyor, the Registrar may accept one drawn by the applicant but reserve the right to request one from a surveyor. Photographs are also useful in providing proof of the existence of obstructions to the use of the easement. When produced the photographs and sketch should be annexed as exhibits to the declaration of the person producing them. Further declarations by two persons who are not related to or in business with the applicant are also required to support the application.

Where the Commissioner is satisfied with the evidence, notice of intention to remove the easement will be given to the interested parties, and at the expiration of twenty-one days from the notice, without response, a direction to remove the easement as an encumbrance will be issued (s.229A of the TLA).

Note: Where the duplicate of a digital title has been produced with the application, the Registrar will cancel it and create a new edition of the duplicate title. Where the duplicate of a paper title has been produced with the application, the Registrar will make the relevant endorsement on that duplicate title.

If a response to the above-mentioned notice is received, it will be considered and a decision whether the easement is to be removed will be made based on the merits of the case. When the easement is removed from the burdened land, the Registrar will, if and when they are produced, create another edition of the duplicate titles (if any) that carry the benefit of the easement so that the benefit will be removed.

Note: The provision of Abandonment under s.229A of the TLA does not apply to any easement created on a subdivision under Part IVA (see s.229A (5) of the TLA).

3 Merger

At common law, when the dominant and servient tenements come into a common ownership, an easement affecting those lands is merged and extinguished. Office practice, however, is that a merger will not be noted without the request in writing of the common owner. Such request may be written on the transfer by which common ownership is achieved.

If the common ownership is not achieved at the same time by a transfer (or transfers registered at the same time) the common owner must, on a General Application form quoting both the original land and the land newly acquired by transfer, request that the easement be merged and extinguished.

Note: Statutory easements (e.g. those created under Part IVA of the TLA as amended and s.5D of the STA as amended) must be removed by the provisions of that particular statute.

4 Taking

Easements may also be removed by the taking of the easement interest or the servient tenement for the purpose of a public work under Part 9 of the LAA. All encumbrances are removed by a taking (ie: the land is held free of encumbrances in the taking authority). The rights of the dominant owner will, on taking, be converted to a right to compensation.
5 By Court Order

Any person interested in land may make application to the Court or a Judge for an order modifying or removing, wholly or partially, an easement. Upon the application of the registered proprietor of the land together with a certified copy of the order and the duplicate certificates of title (if any), the Registrar will make the necessary amendments to the Register (s.129C).

6 By Order of the Registrar

The grantee of an easement created by s.167 of the P&D Act (formerly s.27A of the T P&D Act) may apply on a General Application form to vary or extinguish the easement. The first panel of the Form AS should contain the lot or location affected by the easement, the second panel should be the grantee and the next panel should contain words requesting that the easement be varied or extinguished.

The written consent of all persons with a registered interest in the land must be filed with the application. Provided all the consents have been supplied, the Registrar will order that the easement be removed from the title or varied by endorsement.

7 Discharge and Modification of Easement Created under Part IVA (s136C TLA)

The registered proprietor of land burdened or benefited by an easement created on a Plan under Part IVA of the TLA may apply on an application General Application e-form for the easement to be discharged or to be modified.

The application should contain the written consent of each person who has a registered interest in, or is a caveator in respect of, any land that is burdened or benefited by the easement.

Where the above mentioned written consent has not been obtained, the procedures as set out in s.136J (3) of the TLA must be complied with prior to the lodgement of the application. In this circumstance the application must be accompanied by a statutory declaration that contains the following information:

- That each person who has a registered interest in, or is a caveator in respect of, any land that is either burdened or benefited by the easement has been given 28 days’ written notice of both the intention to make the application and the substance of it.

- That the notice(s) in writing (referred to above) have been properly served in accordance with s.240 of the TLA by ........................................ (insert the specific mode of service used, as authorised under s.240).

- That notice of both the intention to make the application and the substance of it has been published at least 28 days before the day on which the application is made in a newspaper circulating either throughout the State or in a district where the land is situated.

- That both of the notices referred to above contained the address for service of notices of objection to the proposed application or to any part of it.

- That both of the notices referred to above contained the expiry date for objections to be received
and the day on which the proposed application is to be lodged, that day being at least 3 days after the expiry date for objections to be received.

A copy of the notice that was published in a newspaper, showing the name of the newspaper and the day of publication should be attached to the statutory declaration of the applicant (Full page of newspaper required to be lodged with the application).

The above-mentioned statutory declaration must state the content of the notices to the registered interest holders and the newspaper notice and not merely state that sections 136J (3) (a) and (b) of the TLA have been complied with.

The notices must clearly state:

- the applicant's address for the serving of notices of objections to the proposed application or any part of it

- the commencement date and the expiry date for the 28-day notice period in which objections can be received

and

- the approximate date on which the application will be lodged at Landgate, that date being at least 3 days after the expiry date for objections to be received.

The Commissioner will not direct the Registrar to discharge or modify the easement if any objection has been made to the application or any part of it. Receipt of an objection will require the applicant to utilise s.129C of the TLA and obtain a Court Order for the removal or modification of the easement.

Note: It is recommended that the application be lodged as soon as possible after written consent has been obtained or as soon as possible after the expiration of the 3-day period in the case where consent has not been obtained.

This will reduce the possibility of the registration of new proprietors or other interest holders before lodgement of the application. In this circumstance extra other notices would need to be sent.

8 Discharge or Variation of Easements Created under Section 5D by Notation on Survey-Strata Plans

Section 5F of the STA as amended provides for the discharge or variation of easements created by notation on a survey-strata plan (in this paragraph referred to as the Plan).

8.1 Discharge

An easement created on the Plan may be discharged by an instrument (prepared on a General Application e-form) signed by each person who has a registered interest in, or is a caveator in respect of, the dominant lot and must be accompanied by the written approval of the Western Australian Planning Commission.

Note: An easement created on the Plan is automatically discharged by the termination of the survey-strata scheme.
The registered proprietors of the land burdened and benefited by an easement created on the Plan may vary the terms of the easement by an instrument (prepared on a General Application e-form) signed by each person who has a registered interest in, or is a caveator in respect of, the dominant lot and the servient lot and must be accompanied by the written approval of the Western Australian Planning Commission.

1[Guide updated on 2/11/2018 to specify form type: 'General Application']

9 Cancellation of Easements Over Crown Land

The Minister for Lands has power in certain circumstances to cancel easements 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 to cancel an easement. Under s.144(3) of the LAA, the Minister may then cancel the easement or refuse the application.

Where a grantee has exceeded the rights or conditions of an easement created under s.144 of the LAA or the grantee in writing requests the easement to be cancelled, the Minister may serve notice in writing on the grantee and any management body or lessee of the relevant land, of his intention to cancel the easement.

A grantee may appeal against the proposed cancellation within the time period allowed. Under s.145(1) of the LAA the Minister may cancel the easement when no appeals remain outstanding.

A management body, lessee or other interest holder, of Crown land, may request the Minister to cancel an easement where it no longer serves any purpose. Where the Minister agrees, he must serve notice on the grantee, any person with an estate or interest in a dominant tenement of the easement and the Registrar, of his intention to cancel the easement.

Under s.150(5) of the LAA the Minister may cancel the easement if satisfied the easement no longer serves any purpose.

No registration fee or stamp duty is required for a Cancellation of Easement document by the Minister for Lands.

10 Also see

- EAS-01 Easements