

# 1Part 9 – Easement

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# <sup>1</sup>Part 9 – Easement

## General Law

In this part, unless otherwise stated, a reference to a lot means:

- a freehold lot;
- land granted in trust under the *Land Act 1994*; or
- non freehold land (including any lease of non-freehold land or sublease of non-freehold land) other than a road;

and

a reference to a registered owner or owner means:

- a registered owner of a freehold lot or interest; or
- a holder of land granted in trust under the Land Act; or
- a holder of non freehold land (including any lease of non-freehold land or sublease of non-freehold land) other than a road.

## 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, i.e. 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* and s. 367 of the *Land Act 1994* allow 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 rob the owner of the servient tenement of the reasonable use of their land (*Weigall v Toman* [2008] 1 Qd R 192.);
- 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.

## 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]

### Easement Granted for a Term

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.

### Easement to take effect in the future

An easement that is to take effect at some future time, can not be registered. Under the provisions of s. 85B of the *Land Title Act 1994* or s. 366 of the *Land Act 1994*, on registration of an easement, an easement is created and hence the grantee would have a title to this interest in the easement. However, in this case the grantee has no interest in the easement because the easement has not yet come into existence. Further, until the easement comes into effect:

- there is no dominant tenement (benefited lot) nor is there a servient tenement (burdened lot); and
- the dominant tenement is not accommodated nor benefited by the easement.

This means that until the easement operates as an easement, characteristics essential to an easement are not present, and no easement exists.

## Restrictive Covenants

[9-0060]

Except as provided in part 6 Division 4A of the *Land Title Act 1994* (Covenants), a restriction on a user of land 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.

However, in some cases the subject matter of the restriction may be capable of sustaining an easement (eg a right of support for buildings). In these cases, an appropriately drawn easement could be registered 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* or s. 367 of the *Land 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* and Part 4 Division 8 of the *Land 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 or lessee of a registered freehold lease may grant an easement over his/her lot or lease either for the benefit of an owner of another lot (the benefited lot) or freehold lease, 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* or s. 362 of the *Land Act 1994*, easements are created upon the registration of an easement. The easement is a Form 9 – Easement.

## Definition by Plan

[9-2020]

An easement may only be created by registering an easement and the easement 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 easement (Form 9 – Easement) can register (s. 83(1)(a) of the *Land Title Act 1994* or s. 363(1)(a) of the *Land 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.

The 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 easement. When the plan and 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 ¶[21-2080]).

Any easement whether proposed or created by registration of an 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 new lot boundary on any further plan of subdivision.

Lodgement fees are payable and a duty notation is required.

### **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.

Lodgement fees are payable.

### **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.

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 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). 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.

[9-2060] deleted

## Restriction as to Height, Depth or Volume

[9-2070]

### Easement Over the Whole of a Lot

Where an easement is over the whole of a lot and the easement is not defined on a survey plan, but 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	Title Reference
Servient Tenement (burdened land)	
LOT 1 ON RP145897 (Restricted to the land between RL1 and RL5 on AHD)	14500101

Where an easement over the whole of a lot is restricted, and the easement is defined on a survey plan, the restriction must be shown on the face of the plan. Item 2 of the Form 9 – Easement must not make reference to the RL on AHD. The following two examples indicate how the restriction may be described in Item 2 of the Form 9 – Easement:

2. Description of Easement/Lot on Plan	Title Reference
Servient Tenement (burdened land)	
Easement X (Restricted) in Lot 1 on SP111222 on SP123456	14500101

2. Description of Easement/Lot on Plan	Title Reference
Servient Tenement (burdened land)	
Easement X (Restricted) on SP123456	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. Item 2 of the Form 9 – Easement must not

make reference to the RL on AHD. The following two examples indicate how the restriction may be described in Item 2 of the Form 9 – Easement:

<p><b>2. Description of Easement/Lot on Plan</b> Servient Tenement (burdened land)</p> <p>Easement X (Restricted) in Lot 1 on SP111222 on SP123456</p>	<p><b>Title Reference</b></p> <p>14500101</p>
<p><b>2. Description of Easement/Lot on Plan</b> Servient Tenement (burdened land)</p> <p>Easement X (Restricted) on SP123456</p>	<p><b>Title Reference</b></p> <p>14500101</p>

## **<sup>2</sup>Approval of Planning Body**

[9-2080]

Easements generally do not require the approval of the planning body. However, easements that give access to a lot from a constructed road require the plan of survey depicting the easement to be approved by the planning body. For information relating to the required planning body approval of the plan of survey depicting an easement giving access to a lot from a constructed road see part [21-2080].

## **Consent to Easement by Lessee**

[9-2082]

In view of the provisions of s. 184(1) of the *Land Title Act 1994* or s. 302(2) of the *Land Act 1994*, a new easement requires the consent of every affected lessee of a lot burdened by the easement. The consent must be given on a Form 18 – General Consent and be deposited with the Form 9 – Easement.

## **<sup>3</sup>Consent to Easement for State Land**

[9-2083]

In view of s. 363(1)(c) of the *Land Act 1994*, an easement may be registered only if the Minister has given written approval to the easement. The approval must be given on a Form 18 – General Consent and be deposited with the Form 9 – Easement.

## **Easement Executed by the Body Corporate for a Community Titles Scheme**

[9-2085]

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

## **Easement Granted by Party to Itself**

[9-2090]

An easement from a person to himself/herself created by registering an easement under Part 6 Division 4 of the *Land Title Act 1994* or Part 4 Division 8 of the *Land Act 1994* can include covenants, as s. 82(3) of the *Land Title Act* or s. 362(2) of the *Land Act* require the 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 Granted by Lessee of a Freehold Lease

[9-2105]

An easement can be granted by a lessee of a freehold lease during the term of a lease.

A registered easement, to the extent it benefits or burdens a registered freehold lease ends when the lease ends (s. 90A(1) of the *Land Title Act 1994*).

The Registrar may remove an easement that has ended from the Freehold Land Register (s. 90A(3) of the Land Title Act).

If a registered freehold lease is surrendered in part, to the extent the registered easement benefits or burdens the part of the lease that was surrendered, the easement ends (s. 90A(2) of the Land Title Act).

An easement that burdens part or the whole of a lease of land (as identified at Item 3 of the Form 9 – Easement) that is over part of the lot, must be defined by a registered survey plan or explanatory format plan before the easement can register. This requirement does not apply to an easement over a lease, which is of the whole of a lot.

An easement that burdens part or the whole of a building in a lease (as identified at item 3 of the Form 9 – Easement) must be defined by a registered survey plan or explanatory format plan before the easement can register.

## Easement Dedicated as a Road

[9-2110]

For information on easement dedicated as road see part 21 – Plans and Associated Documents, esp ¶[21-2230].

## Resumption of Land

[9-2120]

For information on easement affected by resumption see ¶[14-2320].

¶[9-2130] deleted

## Easement Over Non-Freehold Land and Freehold Land

[9-2140]

Easements can be registered over non-freehold land.

Where one of the lots in an easement is non-freehold land and the other lot is freehold land, the easement is registered in both the Freehold Land Register and the relevant State 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 to the land registry for notation on the original deed of grant. The easement 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]

Where 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:

- after the easement has been consented to by the Minister;
- 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 consent must be deposited with the easement when it is lodged.

The easement must be referred to State Land Asset Management of the department prior to lodgement to request that Ministerial consent be given.

## Easement Endorsement

[9-2160]

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

Burden easements are endorsed on the burdened lot as, e.g. ‘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 titles for any new lots through which that easement passes.

## Merger of an Easement within a Lot

[9-2170]

<sup>2</sup>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*.

<sup>2</sup>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*.

<sup>3</sup>Under the provisions of s. 368(2) of the *Land Act 1994*, if the same person becomes the trustee, lessee or licensee of the land benefited and burdened by an easement, the easement is extinguished only if:

- the trustee, lessee or licensee asks the chief executive to extinguish the easement; or
- the land benefited and the land burdened are amalgamated.

## Easement in Gross

[9-2180]

An easement in gross is only registered against the burdened lot and is granted to public utility providers under s. 81A of the *Land Title Act 1994* or Schedule 6 of the *Land 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) a person authorised by law to provide a public utility service;
- (e) a person authorised under an Act to provide a public utility service;
- (f) an entity approved by the Minister as suitable to provide infrastructure for use by another entity in the provision of a particular public utility service;
- (g) a person approved by the Minister as suitable to provide a particular public utility service; and
- (h) 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 (g) 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. 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 and an easement are registered in accordance with s. 82(1) of the Land Title Act or s. 362(1) of the Land Act. The easement 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.

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.

<sup>2</sup>As s. 60(1) of the Land Title Act 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.

<sup>3</sup>A public utility easement under the Land Act may be transferred to another public utility provider. The written approval of the Minister’s is required (s. 369A (1) of the Land Act).

Except for a public thoroughfare easement, s. 85B of the Land Title Act or s. 366 of the Land Act 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.

Lodgement fees are payable on an easement in gross to a public utility provider and a duty notation is required.

## **Easement Created Pursuant to s. 437A of the *Petroleum and Gas (Production and Safety) Act 2004***

[9-2185]

Section 437A of the *Petroleum and Gas (Production and Safety) Act 2004*, enables the creation of an easement to benefit the holder of a pipeline licence under that Act, by registering an instrument under the *Land Title Act 1994* or a document under the *Land Act 1994* to create the easement.

The Land Title Act, part 6, division 4, or the Land Act, chapter 6, part 4, division 8 applies to the easement as if:

- a) it were a public utility easement; and
- b) the pipeline licence holder were a public utility provider.

The completion of the Form 9 – Easement is the same as an Easement in Gross except for Item 7 – Purpose of Easement which should include wording similar to the following:

- Gas pipeline purposes pursuant to Pipeline Licence No [insert number] granted under the Petroleum and Gas (Production and Safety) Act.

A copy of the pipeline licence must be deposited with a Form 9 – Easement, or alternatively Item 7 may refer to a dealing number where the evidence was previously deposited.

An easement created under s. 437A of the Petroleum and Gas (Production and Safety) Act may be transferred to another pipeline licence holder. A Form 1 – Transfer of the easement and a copy of the approval by the State authorising the transfer must be deposited. For information about depositing supporting documentation see [60-1030].

An easement in favour of a public utility provider as defined in s. 81A of the Land Title Act or in Schedule 6 of the Land Act may be transferred to a pipeline licence holder under the Petroleum and Gas (Production and Safety) Act. A copy of the pipeline licence and a letter on the relevant firm's letterhead confirming that the pipeline licence relates to the easement shown in Item 1 must be deposited with a Form 1 – Transfer, or alternatively Item 5 may refer to a dealing number where the evidence was previously deposited.

Lodgement fees are payable and a duty notation is required.

## **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 deed or other instrument or document relating to any land.

If the court orders that the applicant is to execute instrument/s or document/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) a copy of the court order 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 a copy of the order.
- (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. A copy of the court order is also required.
- (d) If the court order is for the full surrender of the easement, then a Form 10 – Surrender of Easement is lodged. A copy of the court order is required if any person authorised by the court, other than the registered proprietor of the lots has executed any instrument or document.

For information about depositing supporting documentation see ¶[60-1030].

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 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.

Dealing Number



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<b>1. Grantor</b>	<b>Lodger</b> (Name, address, E-mail & phone number)	<b>Lodger Code</b>
WILLIAM JOHN SMITH and MARY ISABELL SMITH	CLINTON & ASSOCIATES SOLICITORS 391 QUEEN STREET BRISBANE QLD 4000 info@clintons.com.au (07) 3228 3349	94

<b>2. Description of Easement/Lot on Plan</b>	<b>Title Reference</b>
Servient Tenement (burdened land) EASEMENT A ON RP145897	14500101
#Dominant Tenement (benefited land) LOT 140 ON RP103010	13429151

# Insert "Not applicable" if easement in gross

<b>3. Interest being burdened</b>	<b>#4. Interest being benefited</b>
FEE SIMPLE	FEE SIMPLE
	# Insert "Not applicable" if easement in gross

<b>5. Grantee</b> Given names	Surname/Company name and number	(include tenancy if more than one)
LAWRENCE ARTHUR	MORGAN	

<b>6. Consideration</b>	<b>7. Purpose of easement</b>
\$1.00	RIGHT OF WAY

**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* or Part 4 Division 8 of the *Land Act 1994*.

An easement may be granted for the same purposes and covenants in one easement 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, i.e. the registered owner of the burdened lot or lessee of the freehold lease. 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]’, e.g. ‘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* or as defined in the mortgage. 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 easement, 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 easement and not grant easements individually.
- (g) A lessee of a registered lease, the name of the lessee should appear at Item 1.

A grantor may, by separate easements, 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, or over part of a lease of land, or over part of a lease of a building, insert the description of the easement, e.g. 'Easement A on SP 145897'.

For an easement over the whole of a lot, or over a lease of the whole of the lot, insert only the description of the lot e.g. 'Lot 1 on SP123456'.

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 'Not applicable' must be inserted.

**Item 3****[9-4040]**

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

**Item 4****[9-4050]**

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

**Note:** For an easement in gross 'Not applicable' must be inserted.

**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 or a lessee of a freehold lease 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 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, e.g. 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 61 – Witnessing and Execution of Instruments or Documents, esp. ¶[61-3000].

¶[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. Refer to the Titles Fee Calculator available online or see the current:

- Land Title Regulation; and
- Land Regulation.

**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 61 – Witnessing and Execution of Instruments or Documents, esp. ¶[61-3000]

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

**Notes in text****[9-9050]**

Note <sup>1</sup> – This part does not apply to water allocations.

Note <sup>2</sup> – This numbered section, paragraph or statement does not apply to State land.

Note <sup>3</sup> – This numbered section, paragraph or statement does not apply to freehold land.