

Information regarding Creation of Easements by Transfer or by Order

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EASEMENTS

The law regarding easements is complex. Legal advice should be sought regarding the creation and registration of easements.

1.1 What is an Easement?

In simple terms, an easement is a right to use the land of another in a defined way.

The land with the benefit of the right is called the ‘dominant tenement’.

The land with the burden of the right is called the ‘servient tenement’.

It is also possible to create an easement without a dominant tenement ‘in gross’.

2. Creation of Easements

This information guide discusses the process of creation and registration of easements and the requirements of the Recorder of Titles (“Recorder”) regarding lodgment and registration.

Section 34A of the *Conveyancing and Law of Property Act 1884* (“CLPA”) provides that in any instrument purporting to create or evidence an easement, the words set forth in the first column of [Schedule 8](#) of the CLPA (“the short form”) shall have the same effect as if there had been inserted in lieu thereof the words appearing opposite them in the second column of that schedule (“the long form”).

If the intention is to create an easement other than one of the statutorily defined easements in Schedule 8, then a full definition of the easement must be included in the dealing. Long forms can be extended or varied, however if this is the case then the full definition of the intended easement must be set forth and included in the dealing.

Section 90A of the CLPA (which applies to land under the *Land Titles Act 1980*) (“the LTA”) makes it possible and lawful to create an easement (in favour of the Crown or of any public authority or local authority constituted by or under any Act) without a dominant tenement (“an easement in gross”).

Easements in gross are registered on the folio of the Register for the servient tenement. The procedure for creating an easement (as set out below) is otherwise identical.

2.1 Creation of Easements by Transfer

2.1.1 Applicable Law

An easement may be granted or reserved by way of a transfer between land owners pursuant to section 105(1) and (2) of the LTA.

The dominant and servient tenements must be in different ownership at the time of creation.

2.1.2 Required Form and Supporting Documents

- A Transfer form (T) which is available electronically on Tasmanian Online Land Dealings (“TOLD”);

Note: A Notice of Change to Ownership form is not required for a Transfer of Easement (but still required in Example 2 at 2.1.6 below).

- The nature and the site of the easement must be described in the ‘Estate and Interest’ panel on the Transfer;
- The dominant and servient tenements must be identified on the Transfer by reference to their Volume and Folio of the Register;
- The Transfer only needs to be executed by the Transferor and their witness;
- A plan made from actual survey (“Plan of Survey”) certified by a registered land surveyor or plan acceptable to the Recorder (see 2.1.3 Plan Requirements below). If a Plan of Survey is required, the original plan and survey notes must be lodged including the prescribed fee;
- If the land burdened by the easement is subject to a registered mortgage, lease or encumbrance the consent of the mortgagee, lessee or encumbrancee is required to be either endorsed on the Transfer or by way of a letter of consent referring to the easement.

Note: Production of the title alone is considered insufficient evidence of consent; and

- The Certificate(s) of Title (if any) for the dominant and servient tenements must be produced.

2.1.3 Plan Requirements

Either a Plan of Survey or a plan acceptable to the Recorder is required.

Where an easement is granted or reserved for a specified distance for a uniform width along an existing boundary or fixed from an existing boundary, the Recorder **may** accept a plan without the need for a Plan of Survey (see Examples 1 and 2 at 2.1.6). This is a general observation only and each plan will be considered on a case by case basis.

Where the width of the easement varies, or the easement does not follow an existing boundary, a Plan of Survey defining the site of the easement is usually required to be lodged with the Recorder, including survey notes and the prescribed fee (see section 162 of the LTA).

A copy of the Plan of Survey (to ensure the Transferor has signed a plan identical to the one lodged) or a plan acceptable to the Recorder must:

- be included on an Annexure page which can be prepared or printed from TOLD under supporting documents;
- clearly define the site of the easement intended to be granted or reserved within the boundaries of the folio of the Register of the servient tenement; and
- be clearly legible and presented in black ink on white paper.

All Annexure pages are subject to the general provisions of Regulation 13 of the *Land Titles Regulations 2012* (“the Regulations”).

Note: Advice from a registered land surveyor should be sought if required.

2.1.4 Execution Requirements

- The panels on the Transfer must be correctly completed, be executed by the Transferor and be appropriately witnessed in accordance with the requirements of the LTA and the Regulations.
- If an annexure page is required for the purposes of an execution clause only, it is only those parties to the execution clause that are required to sign. Otherwise all Transferor(s) are required to sign all annexure pages.

Note: Initials are not sufficient, and a full signature is required. See Land Titles Office (“LTO”) Circular 1/2021 for more information.

Regulation 13 of the *Land Titles Regulations 2012* should also be considered in relation to appropriate execution and witnessing. A schedule of easements executed by a company must be executed in accordance with the requirements of the *Corporations Act 2001*.

2.1.5 Fees and Duty

- The Transfer must be assessed and stamped for duty before lodgement with the LTO;
- Payment of the prescribed fee* for a Transfer is required; and
- If a Plan of Survey is required, payment of the prescribed fee* is also required.

*Current LTO fees can be located at:

<https://dpipwe.tas.gov.au/land-tasmania/land-titles-office/forms-and-fees/land-titles-office-fees>

2.1.6 Examples

The following examples can be found as separate PDF documents on the LTO website:

Example 1 - Grant of Easement using statutory short form definition and where no Plan of Survey is required.

Example 2 - Reservation of Easement (to benefit other land retained by Transferor) with a full definition of the easement (i.e. not using a statutory short form definition) and where no Plan of Survey is required.

Example 3 - Easement in gross with a full definition of the easement (i.e. not using a statutory short form definition) and with a Plan of Survey being required, with mortgagee consent endorsed on the Transfer.

Please note that the Examples are designed to provide some practical guidance and assistance regarding form. They do not represent legal advice nor do they represent that they are tailored to accommodate or represent every intended easement. Every dealing is examined on an individual basis.

2.2 Creation of Easements by a Schedule of Easements

For more information, please refer to other LTO publications regarding Creation of easements by Schedule.

2.3 Creation of Easements by Order of the Recorder

2.3.1 Applicable Law

An easement may be created by order pursuant to Section 110 of the LTA.

Note: This provision does not apply to Sealed Plans under the *Local Government (Building and Miscellaneous Provisions) Act 1993*.

2.3.2 Required Form and Supporting Documents

- An application for an order under section 110 of the LTA must be made to the Recorder on a Blank Instrument Form. A Blank Instrument Form can be obtained from the LTO;
- A plan made from actual survey (“Plan of Survey”) certified by a registered land surveyor or plan acceptable to the Recorder (see 2.3.3 Plan Requirements below). If a Plan of Survey is required, the original plan and survey notes must be lodged including the prescribed fee;
- If the land is subject to a registered mortgage, lease or encumbrance consent of the mortgagee, lessee or encumbrancee is required to be either endorsed on the dealing or by way of a letter in a form acceptable to the Recorder.

Note: Production of the title alone with endorsement of consent on the application itself is considered insufficient evidence of consent to satisfy the Recorder.

- The Certificates of Title (if any) for all land affected by the application must be produced.

2.3.3 Plan Requirements

Either a Plan of Survey or a plan acceptable to the Recorder is required.

Where an application is made for an easement for a specified distance for a uniform width along an existing boundary or fixed from an existing boundary, the Recorder **may** (if satisfied to do so in a particular situation) accept a plan without the need for a Plan of Survey (see Examples 1 and 2 referred to at 2.1.6). This is a general observation only and each plan will be considered on a case by case basis.

Where the width of the easement varies, or the easement does not follow an existing boundary, a Plan of Survey defining the site of the easement is usually required to be lodged with the Recorder including survey notes and the prescribed fee (see section 162 of the LTA).

A copy of the Plan of Survey (to ensure the applicant has signed a plan identical to the one lodged) or a plan acceptable to the Recorder must:

- be included on an Annexure page which can be prepared or printed from TOLD under supporting documents;
- clearly define the site of the easement within the boundaries of the folio of the Register of the servient tenement; and

- be clearly legible and presented in black ink on white paper.

All Annexure pages are subject to the general provisions of Regulation 13 of the *Land Titles Regulations 2012* (“the Regulations”).

Note: Advice from a registered land surveyor should be sought if required.

2.3.4 Execution Requirements

- The application must be correctly completed and be executed by the applicant(s) and appropriately witnessed in accordance with the requirements of the Act and the Regulations.
- If an annexure page is required for the purposes of an execution clause only, it is only those parties to the execution clause that are required to sign. Otherwise all applicant(s) are required to sign the annexure page(s).

Note: Initials are not sufficient and a full signature is required. See Office Circular 1/2021 for more information.

Regulation 13 of the *Land Titles Regulations 2012* should also be considered in relation to appropriate execution and witnessing. A schedule of easements executed by a company must be executed in accordance with the requirements of the *Corporations Act 2001*. **2.3.5 Fees and Duty**

- The application must be assessed and stamped for duty before lodgement with the LTO; and
- Payment of the prescribed fee* for an application is required.

*Current LTO fees can be located at:

<https://dpipwe.tas.gov.au/land-tasmania/land-titles-office/forms-and-fees/land-titles-office-fees>

Note: The Recorder may, of his or her own motion, make an order creating an easement with the consent of all persons having registered estates or interests in the land to be affected by the order (see section 110 of the LTA for more information).

3. DISCLAIMER

This publication and the Examples referred to in it have been prepared to provide practical guidance and assistance as to form and to the currently approved practices of the LTO for the lodgement and registration of easements created by transfer or order.

This publication and the associated Examples do not constitute legal advice.

The State of Tasmania and its employees do not guarantee that this publication and the Examples without flaw of any kind or that it is wholly appropriate for your particular purposes.

The State of Tasmania disclaims all liability for any error, loss or other consequence which may arise from you relying on any information in this publication or the Examples.

The State of Tasmania and the LTO take no responsibility for any transaction undertaken in reliance on the information in this publication or in the Examples. Seek professional legal advice in relation to the correct completion and lodgement of documents.

The information contained in this publication and in the Examples is the practice of the LTO at the date of publication and may be updated from time to time.

This publication is also subject to the standard Government Copyright and Disclaimer Notices.

4. QUICK LINKS

The Australasian Legal Information Institute www.austlii.edu.au

Tasmanian Legislation Online www.thelaw.tas.gov.au

Department of Primary Industries, Parks, Water and Environment www.dpipwe.tas.gov.au

The LIST (Land Information System Tasmania) www.thelist.tas.gov.au

TOLD (Tasmanian Online Land Dealings)
<https://www.thelist.tas.gov.au/told/index.html?access=public>