

CHAPTER 08

EASEMENTS

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8. EASEMENTS

8.1. INTRODUCTION

All easements may be granted and registered against both Crown land and fee simple land under the *Transfer of Land Act 1893* (TLA). The relevant provisions for registering easements are set out in Parts III and IVA of the TLA. The general law in respect of easements should also be taken into consideration.

Information relating to Easements registered against fee simple land is set out in Paragraphs 7.1 – 7.2.7 of the [Land Titles Registration Practice Manual](#).

All easements on Crown land that were granted under Part VIIIA of the *Land Act 1933* and were still current as at 30 March 1998 were deemed to be easements granted under the *Land Administration Act 1997* (LAA). Easements over Crown land are now created under Part 8 of the LAA but can also be created under the general law and by agreement under the same principles as the creation of easements against fee simple land.

8.2. WHAT IS AN EASEMENT?

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.”

The objective of an easement is to benefit the dominant tenement and burden the servient tenement. The dominant tenement is land which has the benefit of the easement attached to it. Conversely, the servient tenement is land which is burdened by the easement.

Under the general law, an easement without a dominant tenement cannot exist. In this State, the LAA provides that the Minister for Lands may grant and be the grantee of an easement without a dominant tenement. This type of easement is known as an easement “in gross”. Generally, easements in gross do not attach to land, but to persons, usually a Crown instrumentality or a Local Government Authority for a specific purpose.

Easements may be said to be either -

- ***express easements*** - that is, created by a deed between the grantor and the grantee, or incorporated in a Transfer of Land form; or
- ***implied easements*** - that is, created as a right of carriageway appurtenant to lots abutting the right of way and set out in a plan of subdivision (for example, under section 167A of the TLA)

Statutory easements are those created by a right given under a statute. Usually, except as modified by statute, easements are required to contain the essential characteristics of an easement at common law to enable them to be registered under the TLA. The essential characteristics of an easement are set out in Paragraph 7.1.3 of the [Land Titles Registration Practice Manual](#) and repeated here as follows:

- there must be a dominant tenement – that is, the land which enjoys the benefit of the easement;
- there must be a servient tenement – that is, 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 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.

Easements granted by the Minister under section 144 of the LAA have certain specific statutory benefits (see [Paragraph 8.3.1](#)).

8.3. TYPES OF EASEMENTS

There are various types of easements that may be granted under the LAA other than the normal types of easements set out in Paragraph 7.1.2 of the [Land Titles Registration Practice Manual](#).

Easements created over Crown land are usually express easements granted by agreement by the Minister for Lands to an easement holder, known as a grantee. However, it is possible for implied easements to be created under section 167A of the TLA where the right of way is specifically marked as such on the plan for the subdivision of Crown land deposited with the Registrar of Titles. Prior to the LAA, Section 167A did not apply to ROWs shown on subdivisions of Crown land.

The usual types of easement presented for registration over Crown land are:

- rights of carriageway;
- 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 powerlines, telephone and other cables and supporting pylons.

8.3.1. EASEMENTS OVER CROWN LAND

Subject to the *Dampier to Bunbury Pipeline Act 1997* (see [Paragraph 8.3.4.3](#)), only the Minister for Lands has the power to grant easements over Crown land for a “specified purpose” as defined under section 144(4) of the LAA, or any other purpose the Minister sees fit. Where that easement extends over Crown land the subject of an interest or a Management Order, the consent of that interest holder and the management body must be obtained.

The provisions relating to easements in Part 8 of the LAA are similar to the provisions for easements in Part VIIIA of the repealed *Land Act 1933*.

Easements for a “specified purpose” under the LAA means easements for -

- the provision of pipes, conduits, cables, transmission lines, and other services;
- the provision of any structure, plant, or equipment;
- the provision of access for carrying out of any works and the performance of any maintenance that is necessary for, or ancillary or incidental to, giving effect to any of the purposes referred to in the first two dot points above; or
- a prescribed purpose.

As at March 2008, no purpose has been prescribed.

Easements granted by the Minister for Lands under section 144 of the LAA have the following statutory benefits – such easements

- do not need to have all the legal characteristics of an easement at common law to be created under that section (section 144(2a) of the LAA);
- will subsist and run with the land through changes in tenure to that land, including transfers of the Crown interest into the freehold (section 146 of the LAA); and
- can be granted by the Minister “in gross” that is without the need for a dominant tenement (section 147 of the LAA).

Easements over Crown land can be created in a number of different ways ([Paragraph 8.4](#)).

Easements granted over land contained within a State or Crown lease are endorsed on both the lease document and registered on the CLT or QCLT.

Where an easement is required over unallocated Crown land, or over any Crown land which has not been surveyed, the easement itself must be clearly defined on a deposited plan and registered on a CLT or QCLT.

An LAA Easement cannot be granted over CALM Act Reserves for purposes inconsistent with the CALM Act. (Note however, that the LAA may be amended to enable easements to be granted over CALM Act land for any purpose).

8.3.1.1. WHO CAN GRANT EASEMENTS OVER CROWN LAND?

- The Minister for Lands has power, under the LAA to grant easements over Crown land. Where that easement crosses over Crown land the subject of an interest or a management order, the consent of that management body and any person having an interest or right to that Crown land must be obtained: section 144(1)(a) of the LAA. Easements granted by the Minister runs with the Crown land.
- The registered proprietor of conditional tenure land and the holder of an interest in Crown land acquiring the fee simple of that Crown land may create an easement under sections 148 and 149 of the LAA with the consent of the Minister for Lands.
- Persons or statutory authorities with express statutory power under a written law may grant easements over Crown land, for example, the Governor may grant easements to pipeline licensees under the *Petroleum Pipelines Act 1969*.
- In certain limited cases, easements over Crown land may be granted under other legislation and registered under the TLA. See [Paragraph 8.3.4](#).

8.3.1.2. DIFFERENT TYPES OF EASEMENTS UNDER THE LAA

There are 3 main types of statutory easements that may be granted or created under the LAA:

- Easements granted by the Minister for Lands under section 144 of the LAA;
- Public Access Easements, being easements for the public at large may be created under sections 195 and 196 of the LAA (See [Paragraph 8.3.3](#)); and
- Easements may be taken over privately owned land, pursuant to sections 168, 177 and 195 of the LAA.

Policies 8.3.1 and 8.3.3 in the Government Land Policy Manual (please note this manual is not available on this website – please contact RDL’s Lands Division, State Land Services for further information) relate to acquisition of easements under Part 9 of the LAA, and grants of easement over public works land.

8.3.1.3. HOW TO REQUEST THE MINISTER FOR LANDS TO GRANT AN EASEMENT

Any interested person can make a written request to the Minister for Lands for the granting of an easement over Crown land.

The request should be directed to the relevant Manager within RDL's State Land Services and should set out the following information:

- all particulars relating to the request including the relevant Crown land involved;
- the type of easement required, its purpose and advice as to the consents obtained from the proprietors or holders of rights over land which the easement is proposed to go through; and
- a survey plan or sketch plan identifying the location of the proposed easement.

If granted, the benefit and burden of the easement will be endorsed in the Second Schedule of a Crown title, Qualified Crown title or Certificate of title.

8.3.2. EASEMENTS GRANTED UNDER THE *LAND ACT 1933*

Before the implementation of the LAA, Part VIIIA of the *Land Act 1933* set out the provisions for the creation of easements over Crown land by the Minister for Lands. The easements could have been granted either for access by the public, or, more commonly, to provide services by the authorities (such as gas, power and water). They may have been granted over Crown land that was leased, or reserved and vested in a Local Government, or over vacant Crown land.

Easements that were granted over land contained in a Crown lease were endorsed on the registered lease document itself and on the Crown land record (if one existed). Easements that crossed a number of reserves were recorded on a Crown land record (if one existed) or on the public plan (if a Crown land record did not exist).

Where an easement was required over unallocated Crown land (in particular, Crown land that had not been surveyed) the easement itself was surveyed and recorded on the public plan.

With the introduction of the LAA on 30 March 1998, easements on Crown land are no longer granted under the *Land Act 1933*.

8.3.3. PUBLIC ACCESS EASEMENTS

The concept of this particular type of easement came about largely as a result of negotiations between the WAPC and the developers of the Mindarie Keys harbour development for the provision of statutory rights of public pedestrian/cyclist access over parts of the private land around the harbour's edge.

In that case, the developer did not want to transfer pedestrian access way reserves to the Crown. An easement was preferred, so that the developer could retain ownership of the land. No statutory provision existed at the time for the creation of such a statutory right. Hence, section 196 of the LAA was enacted.

Section 195 of the LAA was brought across from section 33A of the *Land Acquisition and Public Works Act 1902*. This section was the provision in State legislation that allowed for the creation of easements in gross over private or Crown lands, in favour of the State of Western Australia, a State instrumentality, statutory body or Local Government.

Section 196 specifically provided for the creation of a public access easement for the use and benefit of the general public. Public access easements cannot generally (see following qualification) be created over Crown land; only over alienated land by negotiated acquisition. A public access easement is a particular type of section 195 easement. Where a government agency has acquired land (under Part 9 for a public work, or otherwise) it would be possible for a local government to acquire a public access easement over that land. Where the acquired land has been revested, it may still be possible for the local government to acquire a public access easement over that land.

When creating a public access easement, the following principles should be adhered to:

- ensure that the Crown/Local Government is adequately protected against claims for damages arising out of negligence; and
- ensure that adequate provision is made for the ongoing maintenance of public access facilities.

As a matter of Government policy, Lands Division officers should ensure that:

- Where a Local Government/other agency requests a public access easement, that body must provide the Crown with an indemnity against all claims for compensation.
- The easement document must include conditions clearly stating the parties that will be responsible for the construction, maintenance and removal of any improvements within the easement.
- The easement document should also require provision for public liability insurance and indemnity to the Crown before any approval is granted.
- Land may not be taken solely for the purpose of creating a public access easement. Sole acquisition should only be negotiated by agreement.
- Long term administration and management issues associated with public access easements need to be carefully considered before proceeding to create the easement.

These easements can also be used in shopping centres and to provide greater flexibility than rights of way and pedestrian accessways created under section 20A of the PDA.

RDL Officers should refer to Policy 8.3.2 in the Government Land Policy Manual which relates to public access easements.

8.3.4. EASEMENTS GRANTED UNDER OTHER ACTS

In addition to express and implied easements as well as easement created by common law, there are other types of statutory easements that are specifically created by written law. A number of the more common types of easements handled within RDL are set out below.

8.3.4.1. PETROLEUM PIPELINES ACT 1969

The construction and installation of petroleum pipelines in Western Australia is administered by the Minister for Mines under the *Petroleum Pipelines Act 1969* (“the PP Act”). Under the PP Act, a person may, on application to the Minister for Mines, apply for a licence for the construction and operation of a pipeline. Provided the prospective licensee can obtain access to land upon which to construct, that licence is granted to a particular person subject to whatever conditions the Minister thinks fit and is specified in the licence (Section 12 of the PP Act). The licence may be renewed, varied or surrendered as to the whole or part of that pipeline. Any renewal, variation or surrender is subject to the approval of the Minister as is any transfer of the licence.

Once a licence has been granted, the licensee may agree with the owners of any land over which the pipeline is to be constructed, for the purchase or other acquisition of any right, interest or easement in or upon the land.

There are various ways that easements can be created under this Act. For example, section 16 of the PP Act empowers the Governor, on recommendation of the Minister for Lands, to grant a licensee an easement over unalienated Crown land to construct the pipeline as specified in the licensee’s licence and to operate, inspect, maintain and repair that pipeline.

A public authority as referred to under that Act may as agreed with the licensee and with the determination of the Governor, grant an easement under sections 17 and 18 of the PP Act.

Easements for the purposes of or incidental to the construction or operation of a pipeline can also be taken by the Minister administering the PP Act under Part 9 of the LAA where the Minister is satisfied that the licensee cannot acquire the easement or land by agreement with the owner: Section 19 of the PP Act.

Where an easement is acquired or taken over any land pursuant to the PP Act, an easement document with a description of the easement and a notification that it has been so taken, together with a plan showing the location of the easement over that land is sent by the licensee to the Registrar of Titles under the TLA. The Registrar will then cause a record of the notification of the easement to be endorsed in the Register (see section 19(4) of the PP Act).

Where the licence is transferred to another licensee, and registered with the Minister for Mines under section 44 of the PP Act, the Minister must notify the relevant registration authority in writing, either the Registrar of Titles or the Registrar of Deeds (section 20(5)(a) of that Act). On receipt of that notification, the Registrar shall duly record that notification on the Register that the easement has been transferred to the registered licence holder under the PP Act and, by force of that Act, the easement will then vest in the new licensee (see section 20(5)(b) of that Act).

The usual process to effect the above transfer is as follows:

- By letter the Minister responsible for the PP Act notifies the Registrar of the transfer and advises that the licensees have been asked to prepare an appropriate Notification document for lodgement with the Registrar.
- The Notification document should be prepared on a blank instrument Form B2 by either the Minister responsible for the PP Act or the licensee and signed by the Minister responsible for the PP Act.

That instrument sets out the notification of the transfer of easements showing the former licensees and the new registered holders of the licence and requests that the Registrar of Titles “records” the transfers of licences for those easements listed in that instrument against all the relevant land descriptions.

The endorsement on the relevant titles is not shown as a transfer of an easement and is not a registration for the purposes of the TLA. Instead, the endorsement is recorded and should be shown as follows:

“Notification [dealing no for notification form B2] pursuant to section 20(5) of the *Petroleum Pipelines Act 1969* the Grantees of Easement [original dealing no for petroleum pipeline easement] are now [the new transferees of the registered licence]

Lodged [date of lodgement and time of lodgement] (Dup C/T not produced).”

The recording of the notification is not registration for the purposes of the TLA, but a recording for the purposes of the PP Act. The effectiveness of the transfer of that easement is provided by the approval of the Minister responsible for the PP Act and the registration of the instrument of transfer of that licence in the Register of Licences maintained by the Department of Industry and Resources (DOIR) under section 44(10) of the PP Act. It is not effected by registration under the TLA.

As such, the duplicate titles (in the case of fee simple land) need not be produced and consent of existing encumbrances need not be obtained. The endorsement of the notification lodged by the DOIR is to be entered into the Register maintained by the Registrar of Titles without reference to existing encumbrances or even an absolute caveat.

8.3.4.2. CMS/APT (PARMELIA) EASEMENTS UNDER THE PETROLEUM PIPELINES ACT 1969

In the 1960’s easements were granted under the PP Act over freehold and Crown lands to a consortium of oil companies represented by West Australian Natural Gas Pty Limited (WANG). The consortium’s pipeline (Parmelia) and easements were sold to CMS Gas Transmissions of Australia (CMS) in 1997. The Parmelia Pipeline was then sold in 2004 to Australian Pipelines Ltd (APA), the responsible entity for the Australian Pipeline Trust (APT).

The standard easement granted by the State over Crown land to CMS under the PPA (“Standard Form Easement”) contains an indemnity clause which protects the Crown against injury arising out of the presence of the pipeline (for example, a rupture injuring or killing members of the public). This indemnity clause is more preferable to the limited form of indemnity negotiated between the pipeline owners and private landowners.

Whenever land the subject of any CMS/APT easement or any encumbrance is revested in the Crown, the easement and, in a majority of cases, any other encumbrances, must be removed before the land is revested in the Crown. While the pipeline owners or landowners, as a matter of policy did not generally accept this, the State is entitled to the same level of protection against claims for damages as is provided in the standard easement over Crown land.

As a matter of policy principles, including the following, should be considered where parties are initiating a change to land tenure affected by a CMS/APT easement:

- Parties who initiate the change in land tenure must negotiate with the pipeline owner toward

- achieving a surrender of the pipeline owner's existing easement to allow the land to be revested in the Crown;
 - replacing the easement with a **Standard Form Easement** containing the requisite indemnity clause that adequately protects the Crown against injuries arising out of the presence of the pipeline;
 - a suitable payment by the parties to pipeline owner of an adequate level of compensation for the change in tenure.
- Where the parties reach agreement and a new survey plan is required, the new easement can be created on a plan as a sole easement document. However, this process is subject to Policy in relation to recovery from the pipeline owner of market value compensation from the developer and imposition of full terms of the standard "Crown easement" document.
 - Where agreement cannot be reached, RDL will consider taking the land affected by the easement, subject to the initiating party indemnifying RDL against all costs and claims.
 - Where formal taking under Part 9 of the LAA is set in motion, the pipeline owner will be provided with an opportunity to claim compensation and a standard "Crown" easement will be offered as partial compensation under section 255 of the LAA.
 - Compensation will be assessed in accordance with Part 10 of the LAA on a case-by-case basis, where Taking under Part 9 of the LAA becomes necessary. Otherwise, compensation may be negotiated between the pipeline owner and the developer, with RDL issuing an easement when agreement has been reached.

Policy 8.2.1 in the Government Land Policy Manual (please note this manual is not available on this website – please contact RDL's Lands Division, State Land Services for further information) relates to replacement of CMS/APT easements.

8.3.4.3. DAMPIER TO BUNBURY PIPELINE ACT 1997

Easements that extend over Crown land in the Dampier to Bunbury Natural Gas Pipeline (DBNGP) corridor created under the *Dampier to Bunbury Pipeline Act 1997* ("the Act") will not be granted where it can reasonably be expected to materially interfere with the exercise of existing or future rights of the DBNGP Land Access Minister for the purpose of having, constructing or operating any pipeline for transporting gas on the DBNGP corridor.

However, reference to the Act in this chapter of the manual is necessary to clarify the effect of the rights and interests within the DBNGP corridor and the effect it has on existing easements or easements created within this corridor.

The Act, proclaimed in 1998, provides for the disposal of the gas pipeline owned by the Gas Corporation (to Epic Energy) and defines the assignment of associated rights within the DBNGP corridor created by the Act and the requirements for the management of the corridor. It also establishes the role and function of the DBNGP Land Access Minister who controls the use and access to the DBNGP corridor on behalf of the State.

The DBNGP corridor is currently an area of land, approximately 1530km long, that comprises the Dampier to Bunbury Natural Gas Pipeline. It starts from the Burrup Peninsula, near the town of Dampier and presently ends at Clifton Road, near the City of Bunbury. The DBNGP corridor also includes land for:

- twelve gas pipeline laterals including Carnarvon, Worsley, Pinjarra and several laterals to industry within the Kwinana area;

- ten compressor stations, spread at intervals approximately 140 kilometres along the main line;
- 41 meter stations;
- 157 main line valves;
- pipeline control facilities with Supervisory Control and Data Acquisition (SCADA) system and a microwave communication system;
- Cathodic protection sites; and
- defined accessways to the pipeline.

When the Western Australian Government sold the gas pipeline to Epic Energy, the State retained the management of the land. The management role is to ensure that the safety and integrity of the pipeline situated in this strategic piece of land is managed by the State and that all users of the DBNGP corridor are dealt with in a fair and equitable manner.

Easements by service authorities and any other person across the DBNGP corridor will not be accepted as they are considered to be inconsistent with the rights of the DBNGP Land Access Minister. Where any person wants to have rights over the DBNGP corridor, the DBNGP Land Access Minister may consent to the grant of such rights under section 41 of the DBNGP Act.

Land in the DBNGP corridor is noted on SmartPlan and shown endorsed in the Second Schedule of a title for the land. The endorsement is as follows:

“Portion of the land as contained in Land Administration Plan xxxx is land within the DBNGP corridor pursuant to the *Dampier to Bunbury Pipeline Act 1997*.”

8.3.4.4. PLANNING AND DEVELOPMENT ACT 2005

Easements in gross can be created on plans of subdivision of freehold land under section 167 of the PDA in favour of any of the following bodies:

- Local Government;
- Water Corporation;
- Gas Corporation; and
- Electricity Corporation.

The above easements are created at the time new titles for the land the subject of the plan are registered under the TLA. No consent are required from any mortgagee or other encumbrancer and the easements will be shown on the new titles created and registered for each of the separate lots shown on the plan of subdivision.

Where such easements are later no longer required or need to be modified, they can be amended or removed by application of the grantee to vary or extinguish the easement. See Paragraph 7.2.6 of the [Land Titles Registration Practice Manual](#).

8.3.4.5. TRANSFER OF LAND ACT 1893

Easements can also be created on plans of subdivision under Part IVA of the TLA. Under this Part, it is possible for a proprietor of land the subject of a plan, a public authority or Local

Government to create an easement even though the land burdened by the easement has the same proprietor as the land benefited by the easement.

Further information relating to the creation of easements under Part IVA of the TLA can be found in Paragraph 7.1.8 of the [Land Titles Registration Practice Manual](#).

8.3.5. SERVICE EASEMENTS OVER ROADS

Public utility services are usually provided for within and under roads in this State. Usually easements are not required as the service providers are adequately protected by their own legislation in relation to issues of access and maintenance. As a matter of principle, easements should only be registered within a road where it is considered essential for information management of significant assets.

In a majority of cases, easements for public utility services are generally created under section 167 of the PDA on the plan of subdivision of freehold land. Under certain circumstances, easement documents may be required over land that is affected by multiple services. In these cases, no easement document should be created unless all affected service agencies are incorporated in the easement document.

When easements for services are approved over portions of roads, CLTs will be created and registered to enable the easement to be shown.

As a matter of Government policy,

- where a service provider requests an easement over a road, the Minister has discretion to determine which land parcels the easement will be granted over. Easements for services within roads are not necessary where the service agency has statutory powers. The Minister may decline to grant an easement over an area of road for good planning and policy reasons.
- only one easement document will be prepared for one service provider. However, the easement document must provide that other service authorities will not be excluded from accessing the same area if they also need to install and/or maintain facilities.
- if an easement document is necessary over roads, arrangements must be made to create a deposited plan for the road to allow the registration of the easement. This will involve the Minister (through its delegate at RDL) applying for the creation and registration of separate Crown titles for each portion of the road affected by the easement.

Under the pricing policy on easements, it has been established that a consideration based on distance may be charged for pipelines. However, that payment is a one-off charge designed to cover the cost of preparing such easements. Where the pipeline conveys a commercial product, such as gas or petroleum, which generates revenue and therefore derives a profit from use of Crown land, it may also be appropriate to charge an annual rental. Considerations may also include an amount for the preparation of a plan or for the request to present a plan for the road.

Wherever revenue is to be derived from a facility contained within an easement over Crown land, provided there is a consistent and equitable application, consideration should be given to the charging of an annual rental commensurate with the income derived from that facility. This is consistent with the granting of leases over Crown land.

Where easements are proposed to be created by the Minister under the LAA in relation to highly commercial operations, careful negotiations should be carried out involving relevant RDL and other agency staff. Legal assistance may also be appropriate.

RDL Officers should refer to Policy 8.1.13 in the Government Land Policy Manual which relates to service easements over roads.

8.4. HOW TO CREATE EASEMENTS OVER CROWN LAND

8.4.1. GENERAL

To a large extent, the methods for creation of express easements over Crown land are similar to the methods for creation of easements over fee simple land. Paragraph 7.1.4 of the [Land Titles Registration Practice Manual](#) sets out the five basic methods for the creation of easements over freehold land. Four of those methods will apply to Crown land and are repeated here. Express easements over Crown land can be created as follows:

- by the registration of a Deed of Grant by the Minister for Lands under the LAA 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 form, an easement embodied in and created by that Transfer;
- In the case of subdivision of Crown land for sale under Section 74, by the approval of a deposited plan containing an easement created pursuant to section 167 of the PDA; and
- by notation on deposited plans of subdivision under Part IVA of the TLA (only where a CLT or QCLT has been or may be created for that parcel of Crown land).

The fifth method to create easements over freehold land that can be used relates to notation on survey-strata plans under section 5D of the *Strata Titles Act 1985*. Strata lots cannot be created over Crown land. The definition of land under section 3(1) of the *Strata Titles Act 1985* specifically provides that land means “land that is under the operation of the *Transfer of Land Act 1893* and held by the registered proprietor of the land in fee simple”.

Further information on the process adopted for each of the above 4 methods of creating express easements can be obtained from Paragraphs 7.1.5, 7.1.6, 7.1.7 and 7.1.8 of the [Land Titles Registration Practice Manual](#). It is important to remember to read each of these paragraphs when preparing an express easement of the types referred to above.

It is important to note that when creating easements over Crown land, there should, with the exception of easements in gross granted to a particular grantee, be a dominant and servient tenement and a different grantor and grantee. However, section 147 of the LAA allows for easements in gross over Crown land. Where all the land is in the name of the State of Western Australia and an easement is proposed to be granted across such land, such easements can be created by grant under Part 8 of the LAA, or be created under Part IVA of the TLA (by virtue of section 136H of that Act).

Except in relation to easements created by grant under Part 8 of the LAA, the consent of the Minister for Lands under section 18 of the LAA should be obtained, where applicable, to all other easements over Crown land. For further information on the requirements for the approval of the Minister for Lands, see [Chapter 2 \(Paragraph 2.9\)](#) of this manual.

While this has been set out in the Land Titles Registration Practice Manual, it is important to remember that encumbrances etc. shown in the section of the title deed titled “Limitations, Interests, Encumbrances and Notifications” must give their unqualified consent to the easement. For example, a mortgagee of the servient tenement should be asked to give an unqualified consent to the easement itself, and not to the transaction for the creation of the easement (for example, an easement required before a PAW is sold to an adjoining owner by way of a conveyance and amalgamation order). With such consent, the easement would survive the exercise of the mortgagee’s power of sale.

Absolute caveats, writs and warrants will prevent the registration of an easement. Also, a prior registered easement which contains provisions preventing the use of the land in the manner set out in the new easement will also prevent the registration of a subsequent easement unless it can be clearly established that the rights of both easements are not inconsistent with each other.

Section 65 of the TLA provides for the creation of easements under Part IVA of the TLA by way of a short form set of easement conditions. The conditions relating to short form easements are prescribed in Schedule 9A of the TLA and they can be created on a plan of subdivision using the fourth method mentioned above.

The types of short form easements that can be created under Schedule 9A are as follows:

- an easement for a right of footway
- an easement for water supply purposes
- an easement for drainage purposes
- an easement for gas supply purposes
- an easement for the transmission of electricity by overhead cable
- an easement for the transmission of electricity by underground cable
- an easement for the transmission of television signals by underground cable
- party wall rights
- an easement for eaves and gutters
- an easement for sewerage purposes
- an easement for motor vehicle parking

Where there are no other conditions other than those already set out in the conditions in Schedule 9A of the TLA, there is no requirement to lodge an instrument with the plan.

Schedule 9 of the TLA also provides for a short form for a right of carriageway that can be created under section 136C of the TLA (see section 65(2) of the TLA). An easement created under section 136C of the TLA cannot burden land outside the plan but may benefit land outside the plan.

Easements in gross under section 136C of the TLA can only be created in favour of a Local Government or a public authority, see section 136(3) of the TLA. Such easements cannot be created in favour of “private corporation” such as Alinta Gas, Water Corporation, etc.

8.4.2. EASEMENTS OVER LAND BEING SOLD IN FEE SIMPLE.

Parties acquiring the fee simple of land, for example, by conditional purchase lease under section 80 of the LAA are empowered by section 149 to grant an easement over the relevant land. The following principles apply:

- the consent of the Minister for Lands is required before an easement is granted;
- the Crown must be indemnified against claims for damages or injury arising from use of easements granted over Crown land up to the point of freehold issuing. Public liability insurance for high risk/high use situations (for example, gas pipelines within residential areas) should also be provided by the grantee;
- in the event that the freeholding lease or fee simple option is forfeited the easement also terminates. Grantees must be made aware of this provision at time of easement granting.
- Where Crown land being amalgamated with adjoining freehold is subject to an easement, the consent of any mortgagee of that freehold is required to the amalgamation (as the freehold also becomes subject to the easement).

Should the freeholding lease or fee simple option be forfeited, notice should be given to both the easement grantee and Registrar of Titles to terminate the easement. If no replacement easement is to issue, the grantee should be directed to remove any improvements. To avoid reinstatement procedures, every care should be taken to ensure no other option, other than forfeiture, is possible. Where a major facility is protected by the easement, the prospective grantee should be advised of the lack of security in the event of forfeiture. An easement under the LAA may be offered.

RDL Officers should refer to Policy 8.1.6 in the Government Land Policy Manual which relates to easements over land being sold in fee simple.

8.4.3. EASEMENTS OVER CLASS A RESERVES

Section 44 of the LAA requires that any proposal to grant an easement over a Class A reserve should be:

- advertised in a State-wide newspaper;
- no sooner than 30 days after advertisement, tabled in both Houses of Parliament.

Easements over Class A reserves should be avoided, wherever possible. Use of existing roads or other 'corridors' through such reserves is to be encouraged. Where it is necessary to grant an easement through an A Class Reserve, the easement and the services it protects should constitute minimal interference with the reserve's values and use and enjoyment by the public.

Where after careful consideration it has been agreed that an easement should be created over a Class A Reserve, the Lands Division is to arrange preparation and publication of newspaper advertisement 30 days prior to issuing or granting approval to an easement through a Class A Reserve. Notice for tabling in Parliament may be prepared at the same time. Newspaper advertisements must detail reason, purpose, extent and grantee of the proposed easement. Advertisement must also occur 30 days before action/approval to ensure that easement occurs.

State Land Services Managers of the Lands Division should ensure that any high-risk easement (for example, gas pipeline) through a Recreation or high public use reserve makes comprehensive provisions to safeguard users against danger (for example, encasing pipe in concrete) and the agreed Crown indemnity clause is used.

An LAA Easement cannot be granted over CALM Act Reserves for purposes inconsistent with the CALM Act. *(Note however, that the LAA may be amended to enable easements to be granted over CALM Act land for any purpose).*

Where a Class A reserve is the subject of conditional tenure under section 75 of the LAA, and the landowner proposes to grant an easement using his powers under section 148 of the LAA, Registration Services should not accept such easement without first ensuring that 30 days' notice of intent has been published in the newspaper and approval on behalf of the Minister has been granted after tabling in Parliament.

RDL Officers should relate to Policy 8.1.7 in the Government Land Policy Manual which relates to easements over Class A reserves

8.4.4. FINITE TERM EASEMENTS

Most easements do not have finite terms. However easements granted under Part 8 of the LAA may be given definite terms. Easements granted for facilities which will have a limited life may have finite terms. Easements granted to a person in the capacity of lessee may also be granted for a finite time. Finite terms may also be considered for services where:

- the service provider is a private corporation; or
- there is potential for the service provider to be commercialised, or
- the potential returns to the State from the subject land are high, having regard for national and international practice.

Where easements specify a term, it must be clear that when the term expires. On expiry easements must be surrendered by lodgement of a surrender document or, alternatively the Registrar of Titles has agreed to endorse the term on the titles.

Where an easement is granted over Crown land for a facility connected to a commercial operation (such as a Conveyor Belt) or where it carries a commercial product (such as a gas pipeline), an annual charge commensurate with the value of the commercial operation should be considered.

Finite Term and Annual Charge easements should, however be used sparingly for short term/high value uses. Terms may vary but finite term easements should not be granted if disposal of the relevant land in the near future is anticipated.

Where a decision is taken to grant a finite term easement, the easement agreement needs to include a clause specifically stating that no equitable rights will arise at the expiry of the easement.

RDL Officers should refer to Policy 8.1.10 in the Government Land Policy Manual which relates to finite term easements.

8.4.5. PRICING OF EASEMENTS

Managers within the Lands Division (State Land Services) are responsible for ensuring consistent application of pricing policies for easements across the State. Substantial variations from approved guidelines should be referred to senior Managers/Directors or the Minister.

Normal pricing policy requires that the consideration being charged for easements is market value, with valuations being sought from the VGO, and approved on behalf of the Minister by the relevant Manager within Lands Division (State Land Services). Costs may be debited to the easement grantee.

Under some circumstances, a nil or nominal charge may be justified, with or without document preparation, survey and registration fees being charged. Examples where this occurs can be when RDL initiates an easement where services already exist, there are no third parties to pass the charges onto, and the service provider will not be required to bear those costs. RDL will meet these costs. However, Managers within Lands Division (State Land Services) need to exercise a high level of care in this connection.

In low value rural areas, and for low value services or other uses requiring easements, Managers within Lands Division (State Land Services) may determine the easement charge without reference to the VGO where there is adequate information to indicate current market values of affected land.

Easements for community use (non-commercial) should bear a nominal charge. The valuer's valuation should be recorded as appropriate, to show the State's subsidy. However, where the easement is required for high commercial value services (for example, telecommunications, gas), valuations must be sought from the VGO (regardless of the value of the land).

Due regard for forward planning impacts and impact/benefit of easement on land value should be considered when determining charge. The valuer should be advised of costs, fees and impacts when valuations are sought.

Where land being sold is affected by an easement, the purchaser should be given an itemised account showing the components that make up the total price of the land (for accrual accounting purposes).

Where a State Agreement easement is being negotiated, RDL should consult the Department of Industry and Resources (DOIR) to ensure parties are aware of the RDL pricing policy.

A standard administration cost has been set, to cover RDL's costs in establishing the easement. This represents the minimum nominal cost for an easement (except in those cases where a nil cost is justified – see above). This was set at \$500 in 2001, and is to be reviewed annually to reflect real costs of drafting and documentation preparation.

RDL Officers should refer to Policy 8.1.9 in the Government Land Policy Manual which relates to pricing of easements

8.4.6. ANNUAL RENT EASEMENTS

Under normal circumstances, easement consideration is paid once only, up-front. However, there may be situations, which warrant an annual rent. Where a substantial commercial benefit could be gained (for example, an easement is over Crown land for components such as conveyor belts or gas pipelines that are associated with a commercial operation), an appropriate commercial rental evaluation may be sought from the Valuer General.

Where this option is chosen, provision should be made in the easement agreement to allow regular review and amendment of the rental. Provision for appeal and arbitration on rent increases may also be necessary.

RDL Officer should refer to Policy 8.1.11 in the Government Land Policy Manual which relates to annual rent easements.

8.5. REMOVAL OF CROWN EASEMENTS

An easement granted over Crown land can be removed by any of the following methods:

- by surrender;
- by Ministerial Order;
- by merger;
- by Taking Order; and
- by Order of the Registrar of Titles.

8.5.1. BY SURRENDER

The party having the benefit of an easement (the grantee of an easement under the LAA) may surrender the easement to the Crown.

The form to be used to surrender a Crown easement is a blank instrument form (B2). It is a requirement that the State Revenue Department (Stamp Duties Division) assess the surrender for duty.

Any person with an encumbrance over the dominant tenement should be asked to consent to the surrender, as he or she is losing something beneficial to his or her security.

The surrender document should be lodged with the Registrar of Titles for registration to effect the removal of the easement.

Following the surrender of an easement, there is no longer any requirement for the former owner of the dominant tenement to apply for a new certificate of title to remove the easement from the land description. Under SmartRegister, the easement is endorsed in the Second Schedule of the title for the land and will be removed for both the dominant and servient tenement by the registration of the Surrender document. Refer Paragraph 7.2.1 of the [Land Titles Registration Practice Manual](#).

8.5.2. BY MINISTERIAL ORDER

Under section 144(3), 145(1) and 150(5) of the LAA, the Minister for Lands has power in certain circumstances (set out below) to cancel easements over Crown land by Ministerial Order.

An easement may be cancelled (or varied) by Ministerial Order made under section 144(3) of the LAA, on application of the grantee and with consent of any management body or lessee of the Crown land.

- To cancel the easement under section 145(1) of the LAA, the Minister must first serve a notice in the approved form on the grantee of that easement and on the lessee or management body of that parcel of land. Under section 145 of the LAA, the Minister may cancel an easement for a number of reasons, not limited to, but including the following examples: the easement has been used for a purpose other than the purpose for which it was issued;
- the easement has been used contrary to any rights, powers or privileges pertaining to the easement;
- default has occurred in complying with any condition, or in paying any consideration, to which the easement is subject; or
- the grantee requests the Minister in writing to cancel the easement.

If the grantee does not lodge an appeal against the proposed cancellation, or if such appeal is dismissed, then the Minister may cancel the easement by Ministerial Order.

An easement may also be cancelled under section 150 of the LAA when any management body, lessee or person who has an interest or right in the Crown land over which there is an easement request in writing that the Minister for Lands cancel an easement because the easement no longer serves any purpose. The written request to the Minister for Lands, together with the relevant information relating to that request should be directed to the relevant regional Manager within Lands Division (State Land Services).

On receipt of such a request, if the Minister intends to cancel the easement, then under section 150(2) of the LAA the Minister must first serve a notice of that intention to cancel on:

- the grantee of that easement under section 144 of the LAA or the person in whose favour the easement was created; and
- any person with an interest in the dominant tenement benefiting from the easement; and
- the Registrar of Titles.

Then if the Minister for Lands is satisfied that cancellation is appropriate because the easement no longer serves any purpose, cancellation is undertaken by Ministerial Order under section 150(5) of the LAA. The Minister is required to advise every person who received a notice of the intention to cancel that the easement has been cancelled.

8.5.3. BY MERGER

At common law, when the dominant and servient tenements of that easement come into a common ownership, an easement affecting those lands is merged and extinguished. LANDGATE practice, however, provides that a merger will not be endorsed on the relevant title for the dominant and servient tenements without a request in writing made by the common owner of both pieces of land.

Such request may be written on the Transfer form itself 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 form A6 quoting both the original land and the land newly acquired by Transfer, request that the easement be merged and extinguished.

Statutory easements must be removed by the provisions of that particular Act. For example, easements created under Part IVA of the TLA can only be removed in accordance with section 136J of the TLA.

8.5.4. BY TAKING ORDER

Crown 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 and interests attached to that easement interest the subject of the Taking Order is removed on registration (unless specifically preserved). The rights of the owner of the dominant tenement will, on registration of the Taking Order, be converted for a right to compensation under Part 10 of the LAA.

8.5.5. BY ORDER OF THE REGISTRAR OF TITLES

The grantee of an easement created by Section 167 of the PDA may apply by Application (form A5), to vary or extinguish the easement.

The first panel of the Application form 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 original signed copy of the written consent of all persons with an interest in the land must be filed with the Application.

Where the Registrar is satisfied that all relevant consents have been supplied, the Registrar may order that the easement be removed from the title or varied by endorsement.

Unlike easements over freehold land, easements granted under section 144 of the LAA cannot be removed by Court order (see section 129C of the TLA).