

LAND TRANSFER AMENDMENT BILL

EXPLANATORY NOTE

This Bill amends the Land Transfer Act 1952.

Clause 2: Section 33 of the principal Act requires the Registrar to keep a register book in which are to be bound duplicates of all grants of land and certificates of title to land within his district. This clause re-enacts that section in an amended form, and omits the requirement that the register is to be in the form of a book. It is intended to introduce gradually a new system of keeping the register in which the duplicates of grants and of certificates of title will be filed in numerical order in special filing cabinets.

Clause 3: The purpose of this clause is to provide a simplified method for the creation of easements shown on a plan of subdivision, as an alternative to the existing method by which easements are granted or reserved by memorandum of transfer, often involving the preparation of lengthy and complicated documents. This clause replaces the existing sections 90 and 90A with new sections 90 to 90F.

Section 90 re-enacts without change the existing section 90 relating to transfers of land and the creation of easements and *profits à prendre* by memorandum of transfer, with the exception of the provision requiring the consent of a mortgagee to the creation of an easement or profit over mortgaged land, which now appears in the new section 90B.

Section 90A provides an alternative method of creating intended easements shown on a deposited plan of survey, except easements in gross and easements of light or air. The section provides that the registered proprietor of the land may register an easement certificate in form T in the Second Schedule to the principal Act specifying all or any of the easements in the manner required in the form.

The easement certificate will not of itself create the easements referred to in the certificate, but, subject to the provisions of the new section 90C, acts as the source from which every easement which is intended to serve or affect any allotment on the plan will come into being on the registration of any instrument transferring, leasing, or otherwise disposing of the fee simple of the allotment.

Section 90B re-enacts provisions appearing in the present section 90 (1) of the principal Act that an easement or *profit à prendre* created in respect of mortgaged land will not be binding on the mortgagee except with his consent, and extends those provisions to cases where the easements are created by the operation of the new *section 90A*.

Section 90C contains provisions that an intended easement specified in any registered easement certificate as serving or affecting any allotment may be negatived in whole or in part in the instrument of disposition of that allotment, unless the creation of the easement is a condition upon which the subdivision was approved under the Municipal Corporations Act 1954 or the Land Subdivision in Counties Act 1946.

The section also provides for the cancellation and replacement of an easement certificate when a later plan of subdivision of the land is deposited. This will not apply to any easement already created by the disposition of any allotment on the earlier plan before the registration of the easement certificate relating to the later plan.

Section 90D specifies the rights and powers that are to be implied in easements of right of way, of right to convey water, of right to drain water, or of right to drain sewage, except so far as they are varied or negatived in the easement certificate or in the instrument creating the easement. These provisions, which appear in the new Seventh Schedule to the principal Act set out in the *Third* Schedule to the Bill, will apply whether the easement is created by transfer under *section 90* or by the operation of *section 90A*, and will avoid the necessity in many cases of setting out these rights in full in the easement certificate or instrument unless the parties wish other provisions to apply.

Section 90E re-enacts the provisions of the existing section 90A of the principal Act by which easements and *profits à prendre* may be varied by memorandum of variation, and extends them to apply in the case of easements created by transfer under *section 90* or by the operation of *section 90A*. The section also contains a new provision that a memorandum of variation extending or renewing an easement or profit must be registered before the expiry of the then current term of the easement or profit.

Section 90F is intended to make it clear that where the dominant tenement or any easement or *profit à prendre* is mortgaged the easement or profit may not be surrendered without the consent of the mortgagee.

Clause 4 provides for amendments which are consequential on the provisions of the new *sections 90 to 90F* in *clause 3*. They include the insertion in the Second Schedule to the principal Act of a form of easement certificate, and the new Seventh Schedule to the principal Act setting out the rights and powers implied in certain kinds of easements.

Clause 5 empowers the Supreme Court, when making an order under section 132 of the principal Act giving its sanction to the transfer of or other dealing with land the title to which is endorsed "No survivorship", to order the removal of those words from the instrument of title.

Hon. Mr Hanan

LAND TRANSFER AMENDMENT

ANALYSIS

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A BILL INTITULED

An Act to amend the Land Transfer Act 1952

BE IT ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:

1. Short Title—This Act may be cited as the Land Transfer Amendment Act 1961, and shall be read together with and deemed part of the Land Transfer Act 1952* (hereinafter referred to as the principal Act).

*1957, Reprint, Vol. 7, p. 615
Amendments: 1958, No. 75; 1959, No. 29; 1960, No. 69

2. Registrar to keep register—(1) The principal Act is hereby amended by repealing section 33, and substituting the following section:

“33. (1) Each Registrar shall keep a register, whether in the form of a book or otherwise, and shall bind up or include therein a duplicate of every grant of land and of every certificate of title to land within his district, and each such duplicate grant or certificate of title shall constitute a separate folium of the register, and the Registrar shall record thereon the particulars of all instruments, dealings, and other matters by this Act required to be registered affecting the land included under each such grant or certificate of title. 5 10

“(2) The provisions of this Act or of any other Act or of any regulation, rule, bylaw, order, or other enactment, or of any deed, instrument, or other document whatsoever relating to the register book under the principal Act or to any grant or certificate of title bound in the register or in the register book or to any volume of the register or of the register book shall, in any case where the register or any part thereof is kept otherwise than in the form of a book, be read subject to such modifications as may be necessary, having regard to the form in which the register or part thereof is kept.” 15 20

3. New sections as to transfers, easements, and profits à prendre substituted—The principal Act is hereby further amended by repealing sections 90 and 90A (as inserted by subsection (1) of section 3 of the Land Transfer Amendment Act 1959), and substituting the following sections: 25

“**90. Transfer by registered proprietor**—(1) When land under this Act or any estate or interest therein is intended to be transferred, or any right of way or other easement or any profit à prendre is intended to be created, the registered proprietor may execute for the purpose of registration a memorandum of transfer in form B in the Second Schedule to this Act, which memorandum shall for description of the land intended to be dealt with refer to the proper folium of the register, with such further description as may be necessary, and shall contain a precise statement of the estate or interest intended to be transferred or created. 30 35

“(2) The Registrar may, at his discretion, dispense with the requirements of this section as to the mode of description of the land, estate, or interest intended to be dealt with, if he is satisfied that the description given is sufficient to identify that land, estate, or interest.

“90A. Creation of easements shown on deposited plan—

(1) Without limiting the provisions of section 90 hereof, any intended easements (not being easements in gross or easements of access of light or air) which are shown on a plan of survey deposited for the purposes of this Act after the commencement of this section may also be created under the following provisions of this section.

“(2) In any such case, the registered proprietor of the land intended to be subject to the easements, or, where that land is Crown land, the Commissioner of Crown Lands for the land district in which the land is situated, may execute for the purpose of registration an easement certificate in form T in the Second Schedule to this Act specifying all or any of those easements in such manner as the form prescribes.

“(3) No such easements may be specified in any easement certificate in respect of any allotment on the plan which has been transferred, leased, or otherwise disposed of before the registration of the easement certificate, unless by the instrument of disposition of that allotment all the allotments on the plan intended to be affected by those easements have been so transferred, leased, or otherwise disposed of to the same proprietor.

“(4) On registration of the easement certificate,—

“(a) The Registrar shall enter particulars of that certificate and of the easements specified therein on the register and on all relevant instruments of title:

“(b) Where the land is land of the Crown in respect of which no certificate of title is in existence, the Registrar shall constitute the easement certificate a separate folium of the register.

“(5) Every easement specified in any registered easement certificate shall be deemed to be created, so far as it is intended to affect or serve any allotment referred to in the certificate, immediately upon the registration of any instrument of transfer, lease, or other disposition of the fee simple of that allotment, except to the extent (if any) to which it is negated in that instrument:

“Provided that, in the case of a disposition to the same proprietor of two or more allotments referred to in the easement certificate as being dependent one upon another of them for any easement, the registration of the instrument of that disposition shall not create any such easement as 5
between the allotments so disposed of.

“(6) Any easement created by the operation of this section over any land for the purpose of being annexed to or used and enjoyed together with other land shall, as from the date of its creation, be deemed to be included in the grant of or certificate of title to that other land as appurtenant thereto, and where necessary the Registrar shall make an appropriate entry of that fact on that grant or certificate of title. 10

“(7) Where any easement is created by the operation of this section, the registered proprietor of the servient tenement shall be deemed to be the grantor thereof and the registered proprietor of the dominant tenement shall be deemed to be the grantee thereof. 15

“(8) Every easement certificate registered under this section shall be deemed— 20

“(a) For the purposes of paragraph (a) of section 351E of the Municipal Corporations Act 1954 (as inserted by subsection (1) of section 28 of the Municipal Corporations Amendment Act 1959), to be an instrument by which every easement specified therein is granted or reserved: 25

“(b) For the purposes of paragraph (a) of subsection (3) of section 9A of the Land Subdivision in Counties Act 1946 (as inserted by subsection (1) of section 10 of the Land Subdivision in Counties Amendment Act 1953), to be an instrument by which every right of way or drainage easement specified therein is granted or reserved. 30

“90B. Easements and *profits à prendre* not binding on mortgagee without consent—No easement or *profit à prendre* 35
created by transfer under section 90 hereof or pursuant to the provisions of section 90A hereof in respect of any mortgaged land shall be binding on the mortgagee, except so far as he has consented thereto.

“90c. **Negating of easements in easement certificates, and cancellation of certificates**—(1) Any intended easement specified in any registered easement certificate in respect of any allotment may be negated in whole or in part in the instrument of disposition of that allotment, except where—

5 “(a) That easement has already been created by the previous operation of section 90A hereof and is still in existence; or

10 “(b) The creation of the easement is a condition on which the subdivision has been approved pursuant to paragraph (f) of subsection (1) of section 351A of the Municipal Corporations Act 1954 (as enacted by subsection (1) of section 28 of the Municipal Corporations Amendment Act 1959) or to subsection (4) of section 3 of the Land Subdivision in Counties Act 1946.

15 “(2) Any such instrument of disposition negating any intended easement in respect of any allotment shall, when registered, operate as a cancellation, in relation to that allotment, of the easement certificate to the extent to which the easement is so negated.

20 “(3) Where any intended easements specified in any registered easement certificate are superseded, replaced, or redefined on a plan of subdivision later deposited and a fresh easement certificate is registered in respect of the intended easements shown on the later plan, the former easement certificate shall thereupon be deemed to be cancelled to the extent that the easements specified are so superseded, replaced, or redefined, except in relation to any allotments that have

25 already been disposed of.

30 “(4) Where any easement has been created by the operation of section 90A hereof, any subsequent determination or extinguishment thereof shall, when entered on the register, operate as a cancellation of the easement certificate to the extent that the easement is so determined or extinguished:

35 “Provided that the expiration or determination of a lease shall not operate as a cancellation of the easement certificate as aforesaid.

40 “(5) On the cancellation or partial cancellation of an easement certificate under the provisions of this section, the Registrar shall make an entry of that fact on the register, on the easement certificate, and on all relevant instruments of title, and section 90A hereof shall cease to operate in respect of that certificate so far as it is so cancelled.

“90D. Rights and powers implied in certain easements—

(1) On the registration of any instrument having the effect of creating any easement of right of way, of right to convey water, of right to drain water, or of right to drain sewage over any land, the grantee thereunder shall have the respective rights and powers set out in the Seventh Schedule to this Act, except so far as they may have been varied or negatived in the easement certificate in any case where the easement is intended to be created under section 90A hereof, or in the instrument creating the easement in any other case. 5 10

“(2) Any rights and powers in addition to or in substitution for any of those set out in the Seventh Schedule to this Act, and any terms, covenants, conditions, or restrictions attaching to any easement may be set out in the easement certificate or, where the easement is created otherwise than under section 90A hereof, in the instrument creating the easement. 15

“(3) Any rights, powers, terms, covenants, conditions or restrictions specified in subsection (2) of this section and any variation or negativing of rights and powers pursuant to subsection (1) of this section in respect of any easement shall become binding on the parties on the creation of that easement. 20

“(4) The provisions of this section shall be in addition to and not in derogation of the provisions of subsection (4) of section 26, subsection (3) of section 27, and subsection (3) of section 28 of the Housing Act 1955. 25

“90E. Variation of easements and profits—(1) Any term, covenant, or condition of any easement or *profit à prendre* registered or created under this Act may be varied, negatived, or added to by a memorandum of variation in form S in the Second Schedule to this Act, executed by the registered proprietor of the servient tenement and by the registered proprietor of the dominant tenement or, in the case of an easement or *profit à prendre* in gross, by the registered proprietor of the servient tenement and by the registered proprietor of the easement or *profit à prendre*, and registered before the expiry of the then current term of the easement or *profit à prendre*. 30 35

“(2) The memorandum may be registered in like manner as the instrument creating the easement or *profit à prendre*. 40

“(3) On the registration of a memorandum of variation under this section, the Registrar shall notify it on the register and on any relevant instruments of title.

“(4) If the dominant tenement or servient tenement or easement or *profit à prendre* is subject to any mortgage, the easement or *profit à prendre* shall not be varied by a memorandum of variation under this section without the consent in
5 writing of the mortgagee.

“(5) The consent of the mortgagee to the variation shall render the memorandum of variation binding on him and on all persons who may subsequently derive from him any
10 interest in the servient tenement or dominant tenement or easement or *profit à prendre*.

“90F. Consent of mortgagee required to surrender of easement or *profit à prendre*—If any easement or *profit à prendre* or the dominant tenement thereof is subject to any mortgage, the easement or *profit à prendre* shall not be surrendered with-
15 out the consent of the mortgagee.”

4. Consequential amendments—(1) The principal Act is hereby further amended—

(a) By omitting from subsection (1) of section 245 the words “Seventh Schedule”, and substituting the
20 words “Eighth Schedule”:

(b) By adding to the Second Schedule (as amended by subsection (2) of section 3 of the Land Transfer Amendment Act 1959) form T set out in the First
Schedule to this Act:

(c) By inserting, after the Sixth Schedule, the Seventh
25 Schedule set out in the Second Schedule to this Act:

(d) By omitting from the heading to the Seventh Schedule the word “Seventh”, and substituting the word
30 “Eighth”.

(2) Section 3 of the Land Transfer Amendment Act 1959 is hereby amended by repealing subsection (1).

5. Court may order removal of “No survivorship” entry on register—Section 133 of the principal Act is hereby
35 amended by inserting in subsection (2), after the words “existing proprietor or proprietors”, the words “and may order the removal of the words ‘No survivorship’ from the grant, certificate of title, or other instrument evidencing the title of the registered proprietors”.

SCHEDULES

Section 4 (1) (b)

FIRST SCHEDULE

Section 90A (2)

"FORM T

EASEMENT CERTIFICATE

(IMPORTANT: Registration of this certificate does not of itself create any of the easements specified herein)

I, A.B., being the registered proprietor of the land described in the Schedule hereto hereby certify that the easements specified in that Schedule, the servient tenements in relation to which are shown on a plan of survey deposited in the Land Registry Office at _____ on the _____ day of _____ 19____ under number _____, are the easements which it is intended shall be created by the operation of section 90A of the Land Transfer Act 1952.

SCHEDULE

Deposited Plan Number:

Nature of Easement (e.g., Right of Way, etc.)	Servient Tenement		Dominant Tenement Allotment Number(s)	Title Reference
	Allotment Number	Colour, or Other Means of Identification, of Part Subject to Easement		

FIRST SCHEDULE—continued

1. Rights and powers:

[State whether any rights or powers set out here are in addition to or in substitution for those set out in the Seventh Schedule to the Land Transfer Act 1952.]

2. Terms, conditions, covenants, or restrictions in respect of any of the above easements:"

SECOND SCHEDULE Section 4 (1) (c)

“SEVENTH SCHEDULE Section 90D

RIGHTS AND POWERS OF GRANTEES IMPLIED IN CERTAIN EASEMENTS

“1. RIGHT OF WAY

The full, free, uninterrupted, and unrestricted right, liberty, and privilege for the grantee, his servants, tenants, agents, workmen, licensees, and invitees (in common with the grantor, his tenants, and any other person lawfully entitled so to do) from time to time and at all times by day and by night to go pass and repass, with or without horses and domestic animals of any kind and with or without carriages, vehicles, motor vehicles, machinery, and implements of any kind, over and along the land over which the right of way is granted or created.

“2. RIGHT TO CONVEY WATER

The full, free, uninterrupted, and unrestricted right, liberty, and privilege for the grantee and his tenants (in common with the grantor, his tenants, and any other person lawfully entitled so to do) from time to time and at all times to take, convey, and lead water in a free and unimpeded flow (except when the flow is halted for any reasonable period necessary for essential repairs) and in any quantity, consistent with the rights of other persons having the same or similar rights, from the source of supply or point of entry, as the case may be, and following the stipulated course (where a course is stipulated) across the land over which the easement is granted or created, together with the additional rights incidental thereto set out in clause 5 of this Schedule.

“3. RIGHT TO DRAIN WATER

The full, free, uninterrupted, and unrestricted right, liberty, and privilege for the grantee and his tenants (in common with the grantor, his tenants, and any other person lawfully entitled so to do) from time to time and at all times to drain and discharge water (whether rain, tempest, spring, soakage, or seepage water) in any quantities along the stipulated course (where a course is stipulated) across the land over which the easement is granted or created, together with the additional rights incidental thereto set out in clause 5 of this Schedule (or, where open drains are provided for, similar rights in regard to those drains, with the necessary modifications as are provided for in respect of pipe lines in the additional rights so set out).

SECOND SCHEDULE—*continued*

"4. RIGHT TO DRAIN SEWAGE

The full, free, uninterrupted, and unrestricted right, liberty, and privilege for the grantee and his tenants (in common with the grantor, his tenants, and any other person lawfully entitled so to do) from time to time and at all times to drain, discharge, or convey sewage and other waste material and fluid in any quantities along the stipulated course (where a course is stipulated) across the land over which the easement is granted or created, together with the additional rights incidental thereto set out in clause 5 of this Schedule.

"5. ADDITIONAL RIGHTS ATTACHING TO EASEMENTS OF RIGHT TO CONVEY WATER AND OF RIGHT TO DRAIN WATER AND OF RIGHT TO DRAIN SEWAGE

The full, free, uninterrupted, and unrestricted right, liberty, and privilege for the grantee and his tenants (in common with the grantor, his tenants, and any other person lawfully entitled so to do) for the purposes of the easement concerned—

- (a) To use any line of pipes already laid on the stipulated course or any pipe or pipes in replacement or in substitution for all or any of those pipes:
- (b) Where no such line of pipes exists, to lay, place, and maintain, or to have laid, placed, and maintained, a line of pipes of a sufficient internal diameter and of suitable material for the purpose under or over the surface (as the parties decide) of the land over which the easement is granted or created and along the line defined for the purpose where such a line has been so defined:
- (c) In order to construct or maintain the efficiency of any such pipe line, the full, free, uninterrupted, and unrestricted right, liberty, and privilege for the grantee, his tenants, servants, agents, and workmen, with any tools, implements, machinery, vehicles, or equipment of whatsoever nature necessary for the purpose, to enter upon the land over which the easement is granted or created (or, where only the position of the pipe line is defined in the easement, upon such part of the land of the grantor and by such route as is reasonable in the circumstances) and to remain there for any reasonable time for the purpose of laying, inspecting, cleansing, repairing, maintaining, and renewing the pipe line or any part thereof and of opening up the soil of that land to such extent as may be necessary and reasonable in that regard, subject to the condition that as little disturbance as possible is caused to the surface of the land of the grantor and that the surface is restored as nearly as possible to its original condition and any other damage done by reason of the aforesaid operations is repaired."