

Macrossan & Amiet Solicitors

news update

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S O L I C I T O R S

Sustainability in 2010: Introduction of Sustainability Declarations and Restrictions on Building Covenants

By Jodie Mason

The Building and Other Legislation Amendments Act 2009 ("the Act") commenced on the 1st of January 2010, bringing with it a number of important changes for building developers, bodies corporate and buyers and sellers of residential property.

The two main changes introduced: -

- (a) prohibit bodies corporate and developers from restricting the use of sustainable building elements and features through building covenants and body corporate statements and by-laws; and
- (b) the Sustainability Declaration as a pre-requisite to the sale of a residential property.

Building Covenants

The new building covenant provisions apply to houses, townhouses, units and attached sheds and garages. If you purchase a residential property or house and land package after the 1st January 2010, watch out for a covenant that does any of the following: -



Jodie Mason

- Prohibits particular roof colours;
- Prohibits energy efficient windows and window treatments;
- Prevents a person from occupying their residence before landscaping, fencing and driveways are completed;
- Requires a minimum number of bedrooms, bathrooms or more than one garage;
- Requires the residence to be constructed within a certain time period;
- Requires minimum roof pitches

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Borrowing through your Self Managed Superannuation Fund to purchase investment property? Here's some things you should know.

By Sarah Dennis

If you have a Self Managed Superannuation Fund (SMSF), amendments to the *Superannuation Industry (Supervision) Act 1993* in late 2007 ("the SIS Act") now allows you to borrow through your superannuation fund if certain conditions are met.

If your SMSF wants to buy a property (residential or commercial real estate) but it does not have enough funds for the full purchase, your SMSF can now make an equity contribution on the property, and amendments to the SIS Act will allow you to borrow the remainder of the funds.

Potential benefits

This arrangement can have a number of benefits for the SMSF, including:-

- The SMSF can acquire property worth more than its available funds;
- In the event of default, other assets in your SMSF will remain secure, as the Lender will not have recourse to any other assets in your SMSF;
- Any interest expenses you incur may be tax deductible by the



SMSF and potentially reduce the fund's tax liability; and

- Income that the SMSF receives from the investment property may be used to help pay off the loan.

What are the requirements under the Act?

In order to comply with the requirements of the SIS Act, the following conditions must be met:-

- The money borrowed by the Lender must be applied for the purchase of an asset, and it must be an arms-length transaction.
- The legal title to the property must be held on trust by a trustee (the Property Trustee). Property Trust Deed must be drafted correctly to ensure that there are no adverse GST, taxation or stamp duty consequences for the fund.
- It is essential that the SMSF Trustee itself is not the Property Trustee, as this will breach the requirements of the SIS Act, and will result in the SMSF being non-compliant. Further, the Property Trustee must not be the same legal entity as the trustee of the SMSF, however it may be another company owned or controlled by a member of the SMSF.
- The investment property will then be held on trust for the SMSF. This means that the SMSF acquires a beneficial interest, and then has the right to acquire the legal ownership of the property by making payments under the loan.



Sarah Dennis

- The Lender will provide funds to the SMSF on a limited recourse basis whereby the Lender's only recourse in the event of default is limited to the property, which provides the SMSF absolute protection for its other assets. In this arrangement, the SMSF charges its beneficial interest in the property to the Lender, and the Property Trustee grants a mortgage over the legal estate to the Lender.
- The SMSF will be directly entitled to all rent from the property and will make loan repayments to the Lender in the ordinary way. The SMSF can deal with the property however and whenever they like (e.g. lease, renovate, repair, sell).
- When the mortgage is paid out in full, title to the property may be transferred to the SMSF by the Property Trustee, or otherwise the Property Trustee can continue as registered proprietor.

Proceeding with caution

While borrowing through a SMSF for property has some clear benefits, it is important to be

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Borrowing through your Self Managed Superannuation Fund to purchase investment property?

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aware of the strict regulatory requirements, and the consequences for such a breach. SMSF's which do not comply with the conditions under 67(4A) of the SIS Act risk losing their complying fund status, resulting in the fund potentially being taxed as a non-complying fund at a rate of 45%. In addition, SMSF trustees may be personally liable for civil and criminal penalties in relation to any breaches of the Act.

Information for this article has been obtained from the following sources:-

1. 'Self Managed Superannuation Funds Ruling 2009/2', Australian Taxation Office, <http://law.ato.gov.au/atolaw/view.htm?locid='SFR/SMSFR20092/NAT/ATO/fp5'&PIT=99991231235958#fp5>; accessed 20 January 2010.
2. SMSF's Borrowing to Buy Property, Peter Johnson, CST

Corporate Solutions, <http://www.cst.com.au/UserFiles/File/SMSFs%20Borrowing%20to%20buy%20Property.ppt>, accessed 20 January 2010.

3. 'Self Managed Super Funds: A better way to save', Newstart Homes, <http://www.newstart.com.au/self-managed-super-funds.php>, accessed 20 January 2010.

5 things to look for when signing a Residential Lease

There are many things you must consider when renting a property in Queensland. You may have been told that the lease terms are 'standard' and there is no need to read through the lease in its entirety. Although residential tenancies are highly regulated, you should ensure that you read through the lease terms and understand them completely. There are often things that may be overlooked such as pets or parking. Understanding what your rights and obligations are will ensure a smooth transition into your new rental premises.

1. Term of the Lease

Ensure that the dates agreed by the parties are correct in the lease document. Also look at the lease to see what happens after the lease expires, many leases will roll over onto a month-to-month tenancy after the expiry date whilst some leases may not.

2. Termination

Ensure you understand what the landlord's rights are to terminate the tenancy and what your rights as tenant are to terminate. Understand the notice

requirements for terminating the lease. If for example, you choose to move out of the property, you must pay rent up until the day you move. If you are unable to find a tenant to take over the property you will be required to continue paying rent until a tenant is found. Some real estate agents have a fee for terminating a tenancy.

3. Maintenance and Repair

Understand who will be responsible for maintenance and repair of the premises. Will you be responsible for yard maintenance or will the landlord? Who will be responsible for cleaning the air conditioning unit? Often, the landlord is responsible for most maintenance and repairs, but ensure you understand your obligations.

4. Entry to the Premises

It is important to know what the landlord or agent's rights are in relation to entering the rental premises. Ensure you understand the notice required when entering a rental premises. The landlord or their agent will from time to time seek entry to the premises to carry out routine inspections.



Steven Hayles

5. Final Inspection

Prior to signing the lease you should ask that the real estate agent take you through the premises for a final inspection. A final inspection will ensure you have not overlooked any defects in the property, which may have been hidden by the current tenant's furniture or other possessions. You should also complete an entry condition report to record the state of the premises.

Lastly, ensure you look through the lease for special conditions, which may have been added by the landlord. If after you have closely read the agreement, just simply sign on the dotted line and begin packing.

Love thy neighbour... and the Easement that divides you.

By Georgina Paterson

What is an Easement?

An Easement is a right belonging to one parcel of land enabling the owner of that parcel to use the land of another either: -

- In a particular way; or
- To prevent another landowner from using his/her property in a particular way.

Easements on residential land are often created so that all parties involved have 'access' to their property; thus being appropriately described as "Access Easements".

When an Easement is created it is registered with the titles office (Department of Environment and Resource Management) so that the interest is protected. The Easement document registered will describe any restrictions that are placed on the Easement.

For example: -

You may have the right to pass and repass, and also drive cattle and other beasts over the Owner's land provided: -

(a) If the use is for residential purposes, the use is

unrestricted and is permitted at any time day or night;

- (b) If the use is in relation to cane farming during the cane harvesting season, provided the use is reasonable, the use is permitted at any time day or night;
- (c) If the use is for irrigation purposes, provided the use is reasonable, the use is permitted at any time day or night;
- (d) If the use is in relation to farming activities, the use is unrestricted during the daytime, but the use is restricted during the nighttime between 7:00pm and 7:00am unless you provide the Owner with 24 hours notice.

Key Terms

Please note the following terms: -

- *Servient* owner/land - person/land who grants the easement
- *Dominant* owner/land - person /land who gets the benefit of the easement



Georgina Paterson

Can the Owner of the Servient Tenement build a fence along the Easement?

Circumstances sometimes arise whereby the Owner of the property who has granted the Easement, for the benefit of someone else, decides they would like to build a fence along the perimeter.

And you ask us - What are MY rights?

There is no absolute right of the Owner to fence the common boundary; however, in *Dunell v Phillips* (1982) 2 BPR 9517 (SCNSW), Justice Waddell found that there is a presumption that the Servient Owner should be able to do so.

This presumption may be rebutted in appropriate circumstances, if for example the effect of the fence on the common boundary would block the right of way and make it too narrow to use.

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In *Bolgalri v Steiner School and Kindergarten* (2007) 20 VR 1, [26] Justice Neave stated the principle as follows:

Thus the owner of the servient tenement may fence the land, even though the fence limits the points at which the dominant tenement holder [You] can enter and leave his or her property from the right of way, provided that the fence does not prevent reasonable access to the property. What is reasonable is determined by reference to the language of the grant, constructed in the light of the surrounding circumstances.

Can the Servient Owner now erect gates at each end of the fence?

It is held in *Gohl v Hender* [1930] SASR 158 that the owner of the Servient tenement may erect a gate across an Easement - that is, across your right of way.

However, the obstruction caused by the gate must not constitute an actionable interference with your right of way and reasonable use and enjoyment of the Easement.

In *Gohl v Hender*, (and also in the case of *Petty v Parsons* [1914] 2 Ch 653), the gate was not held to be actionable as long as it: -

- Did not pose a 'substantial obstruction'; and
- Was left unlocked.

Justice Napier in *Gohl v Hender* at 162 - 163 said:

For the reasonable use and enjoyment of their property the plaintiffs are entitled to fence it in, and, for that purpose to maintain their gate, if in so doing there is no substantial interference with the defendants' right to pass and repass...In my view of the case, it is a natural and necessary incident to the use and enjoyment of the plaintiffs' land that it should be fenced in, and in the circumstances of the case it is not unreasonable that persons using the private road should open and close the gate - which is reasonably erected for that purposes - when they pass through the plaintiff's property.

Does the fence and/or gate cause a 'substantial obstruction' to your right of way?

The case of *Powell v Langdon* (1944) 45 SR (NSW) 136 was concerned with a right of way, 20 feet wide, that existed in favour of the plaintiff (Dominant Tenement). The defendant (Servient Tenement) constructed a gate and a wall

across the right of way, which reduced the width of the access to approximately eight (8) feet.

Justice Roper held that the gate and wall constituted a substantial interference.

However, the decision is also authority for the proposition that there is no obligation to maintain the full width of the easement. Justice Roper held that there was no obligation on the defendant to maintain the full 20 feet, and that a ten foot opening would have sufficed. Thus, the width of the right of way extends as far as is required by the reasonable needs of the Owner of the Dominant Tenement.

In Summary

The Owner of the land who grants an Easement (Servient Owner) may: -

- Erect a fence along it; and
- Can gate the ends of the fence

PROVIDED the obstruction does not constitute an actionable interference with your (Dominant Tenement) right of way and reasonable use and enjoyment of the Easement.



profiles

Andrea Green - 2010 Solicitor

Having moved around Australia as a child, I have developed what they call “itchy feet”; hence, my presence in Mackay. I would call myself a Gold Coast local, as I have lived there for the past 11 years. In December 2004 I made a last minute decision to enrol in Law school at Bond University and spent three and a half years studying. I found out two days before my 21st birthday that I had graduated, and that was the best present of all.

I am a keen traveller, and always had the plan to travel after I finished my degree. I had previously travelled to America and did a bit of Europe, South-East Asia and the French Polynesia, so I decided it was time for something more adventurous. So I went to South-East Africa, Central Africa, Egypt and Jordan. It certainly wasn't the type of holiday where you could relax, but the beautiful scenery and history, children and animals made it all worthwhile!

After taking a year off to travel, I decided to go back to school. I just completed a Graduate Diploma of

Legal Practice, Skills and Ethics at Griffith University on the Gold Coast. During this course I can honestly say that I learnt more about how to be a lawyer than I did in three and a half years of law school.

I have a love for painting and drawing, and generally doing anything involving art. I enjoy playing tennis and running. Also, for some unbeknown reason, I am a keen spectator of the World Rally Championship and like to learn about ancient civilisations.

If I didn't pursue a legal career, I would be an interior designer or photographer. I chose to do law because, for me, law provides an intellectual challenge and is ever changing. In terms of my future career aspirations, I would like to work closely in Industrial Relations law and Family law. For the moment though, I am enjoying having the opportunity to work on all types of law.

I am a firm believer that you don't really know and understand a concept until you can explain it clearly to someone else. I also know



Andrea Green

from observing and listening to the solicitors at the firm that knowledge is invaluable. I admire and can appreciate the amount of knowledge of the solicitors and secretaries at Macrossan & Amiet and know that that level of knowledge can only come from hard work and a lot of experience. I only hope that my work at Macrossan & Amiet will point me in the direction of becoming a knowledgeable and experienced solicitor.

I would like to take this opportunity to thank all the staff at Macrossan & Amiet for being patient with me asking lots of “quick” questions. I have soon realised that Mackay locals are very friendly people and I am glad to be a member of your community.

Francesco Maconi - 2010 Trainee Solicitor

Hi! My name's Francesco Maconi and I am a trainee solicitor at Macrossan & Amiet.

I am the eldest of three sons and as a child I grew up on the Gold Coast. When I was 12 years old my family and I moved to Europe, because of my father's work. This was supposed to be a temporary move, but in the end we ended up staying for a number of years.

As a teenager I went to High School in Italy. Later my family and I moved back to Queensland,

where I studied Law at Griffith University.

After graduating with honours, I decided I should leave the Gold Coast to explore the north of our State. I've always liked tropical weather and smaller towns, so moving to Mackay seemed like a great idea.

As a young solicitor I am always keen on learning something new. Macrossan & Amiet is a great place to develop professionally. The work is carried, the staff are



Francesco Maconi

helpful and the atmosphere pleasant.

I plan to have a successful future at Macrossan & Amiet.

Sustainability in 2010: Introduction of Sustainability Declarations and Restrictions on Building Covenants

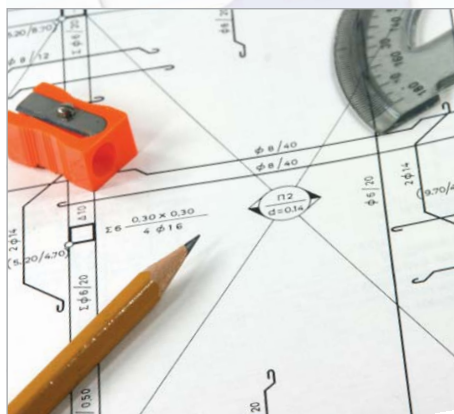
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- Requires a building to be oriented in a certain way merely to enhance the building's appearance;
- Prohibits the use of specific materials for the finish or roof (or requires rendering);
- Prohibits the installation of a solar hot water system merely to enhance the buildings external appearance.

A non-complying covenant will be invalid. Therefore if a contract is valid except for one clause requiring a minimum number of bedrooms, the non-complying bedroom covenant will be struck out and the rest of the contract will remain valid.

However, a non-complying covenant may be enforced by a seller if the seller can prove that failure to act in accordance with the non-complying covenant will result in: -

- (a) potential adverse effects on the external appearance of building; or
- (b) interference with a person's use and enjoyment of the building or another building.



Some restrictive covenants will still be enforceable, where there is a benefit to neighbours and the development in general. These include: -

- restricting a roof colour because it is too reflective and may cause a nuisance to a neighbour;
- restricting energy efficient window treatments if they have a mirror finish and are also likely to cause a nuisance to an adjacent property; and
- restricting a solar hot water system (in units and townhouses) where there is insufficient space for adjacent properties to install a system, or where the roof is unable to support the system.

Importantly, a breach of these new provisions does not give rise to a right of either party to terminate a Contract of Sale.

For more information on building covenants and your rights, go to <http://www.dip.qld.gov.au/sustainable-housing/covenants-and-body-corporate-by-laws.html>

Sustainability Declarations

As of the 1st January 2010, before a house, town house or unit is sold in Queensland, a sustainability declaration ("the Declaration") needs to be completed by the homeowner or their delegate. The Declaration is a mandatory form that covers a range of sustainable features, which the homeowner must declare whether the house has.

The penalties for failure to comply with the requirements of the Declaration are substantial, with each failure providing a maximum \$2,000 fine for individuals and \$10,000 for an agent.

The new requirement on sellers has facilitated the rapid rise of new businesses offering to prepare declarations for a seller, with prices starting at \$99.

For more information on sustainability declarations, go to <http://www.dip.qld.gov.au/sustainable-housing/sustainability-declaration.html>

last word



Kylie Davies

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Keep up to date, visit the Fisheries website.

I have been fortunate enough to be the recipient of some lovely fillets of fish in the last couple of weeks from a few close friends who have been able to get out on the water and enjoy the few days of good weather we've had recently.

Of course, hearing the brag stories and looking at the quantities of fish caught, I thought to myself "I hope they know their bag limits"...

This newsletter also coincides with the opening of the barramundi season for 2010. The season runs from 1st February 2010 to midday 1st November 2010. While checking out the Fisheries website (www.dpi.qld.gov.au) I was informed that additional closed seasons have been

imposed in the Gulf of Carpentaria and as I have a few mates who like to travel to the gulf on fishing expeditions, I will certainly be making them aware of these additional closed seasons.

While I'll gladly accept the kind donations of fillets, I would encourage everyone to visit their local tackle shop, garage or see the Fisheries website on the address listed here to make sure they are up to date with the ever-changing rules relating to bag limits, catching reef fish and sizing.

With that in mind, I'm off to cover nemo in some lemon and dill...

Until next month
Kylie.

Our February chuckle:

“You seem to have more than the average share of intelligence for a man of your background,” sneered the lawyer at a witness on the stand.

“If I wasn't under oath, I'd return the compliment,” replied the witness.

If you have any queries about any of the articles in this newsletter, please feel free to [email mac@macamiet.com.au](mailto:mac@macamiet.com.au) or [phone 4944 0333 \(Mackay\)](tel:0749440333) or [4948 4500 \(Whitsundays\)](tel:0749484500) to speak directly with the author of the article.