Dual Entitlement Titles NSW: Deed of Partition Guide

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Updating Title after a Boundary Adjustment: Dual Entitlement and Deeds of Partition in NSW

Boundary adjustments are a common way for neighbouring landowners to realign property boundaries to better reflect existing use, improve development potential or resolve historical boundary anomalies. While the physical boundaries may change, the legal ownership of the land can sometimes become more complex than originally anticipated.

One situation that may arise in New South Wales is the creation of a dual entitlement titles affecting the adjoining properties following a boundary adjustment. Although relatively uncommon, dual entitlement titles can create difficulties when owners later wish to sell, refinance, further subdivide or otherwise deal with their property.

Where the owners wish to separate their respective interests and return to conventional ownership arrangements, the process will often involve a Deed of Partition, together with the preparation and registration of the appropriate land dealings through NSW Land Registry Services.

What is a dual entitlement title?

A dual entitlement title generally arises where adjoining parcels owned by different proprietors are consolidated following a boundary adjustment or similar land transaction.

On both titles, each proprietor continues to own the portion of land formerly comprising their original lot. The Register typically records each proprietor as owning "the part formerly in" the previous title, for example

Owner A of the part formerly in Lot 1

Owner B of the part formerly in Lot 2

Importantly, the owners do not necessarily hold the whole of the new lot together as joint tenants or tenants in common. Rather, each owner continues to hold a separate interest in the part derived from their former property. This is considered ownership in severalty, rather than co ownership.

Historically, these arrangements were commonly used to facilitate boundary adjustments and development proposals without requiring each owner to transfer ownership interests to the other.

Although the term dual entitlement continues to be commonly used, NSW Land Registry Services now refers to these circumstances as multiple ownership situations.

When can a dual entitlement become a problem?

A dual entitlement may not present any immediate issues while both owners retain their respective interests.

However, complications frequently arise when one owner wishes to:

- sell their property;
- refinance with a lender;
- transfer ownership to a family member or related entity;
- undertake a further subdivision or redevelopment; or
- simplify ownership before future transactions.

Because both titles continue to reflect separate ownership interests, purchasers, lenders and conveyancers often require the ownership structure to be regularised before the transaction can proceed.

Removing the dual entitlement provides greater certainty of ownership and generally makes future dealings significantly simpler.

Why is a Deed of Partition required?

A common misconception is that the dual entitlement can simply be removed by lodging a Transfer.

In many circumstances, that is not the correct legal mechanism.

Following a boundary adjustment, the parties are effectively agreeing that each owner will become the sole proprietor of the parcel allocated to them. This is not simply a transfer of ownership but a partition of existing proprietary interests.

A Deed of Partition documents that agreement and records precisely how ownership is to be divided.

The deed becomes an important part of the overall transaction, ensuring that the legal ownership reflects the parties' agreement before registration occurs.

What does a Deed of Partition include?

Although every transaction differs, a properly prepared Deed of Partition will generally address:

- identification of the parties;
- the existing title and ownership structure;
- the history of the boundary adjustment;
- the land allocated to each proprietor;
- any balancing payment (sometimes called equality money);
- responsibility for legal costs, registration costs and government charges;
- obligations to execute and lodge the necessary documents; and
- warranties relating to ownership and authority.

The drafting should accurately reflect both the historical title position and the intended ownership following registration.

What documentation is required to remove dual entitlement?

Depending on the circumstances, the transaction may require:

- a Deed of Partition;
- Transfer documentation;
- survey plans or deposited plans (where applicable);
- mortgagee consents;
- Revenue NSW assessment documentation; and
- any additional supporting evidence required by NSW Land Registry Services.

Every transaction is different and the required documentation will depend upon the title history and ownership structure.

Are there duty consequences?

Transfer duty is an important consideration when resolving a dual entitlement title. Before registration can occur, the transaction may require assessment by Revenue NSW.

Although many owners assume that partition simply reflects existing ownership, the duties consequences are not always straightforward.

Revenue NSW may assess duty by reference to the value of the interest actually being transferred. Revenue NSW specifically notes that transfers involving dual entitlement titles may attract duty calculated on the value of property passing from one owner to another.

The assessment will generally depend on factors including:

- the value of the land;
- the ownership interests before partition;
- the ownership interests after partition; and
- whether either party provides additional consideration.

For this reason, it is important to consider duty implications before documents are executed rather than after settlement has been arranged. A formal valuation may be required to determine the value of the land in question for the purpose of assessing duty.

Are there taxation implications?

Potentially, yes.

In addition to transfer duty considerations, owners should also consider whether the transaction may have capital gains tax consequences or other taxation implications.

The outcome will depend upon the individual circumstances of the parties, including:

- whether the land is held as an investment;
- whether the property is the owner's principal place of residence;
- whether balancing payments are made; and
- the value of the respective interests.

Legal advice should therefore be obtained alongside independent accounting or taxation advice before the transaction proceeds.

Electronic lodgement and registration

Most NSW property dealings are now completed electronically through the electronic conveyancing system before registration by NSW Land Registry Services.

Once all requirements have been satisfied, including any Revenue NSW assessment, mortgagee consents and supporting documentation, the relevant dealings can be lodged for registration.

Upon registration, each proprietor will ordinarily hold title in the intended ownership structure, removing the previous dual entitlement arrangement.

Why obtaining legal advice is important

Dual entitlement matters are relatively uncommon and preparing the appropriate documentation involves considerably more than completing standard conveyancing forms.

Issues that frequently arise include:

- survey requirements;
- lender consent;
- electronic conveyancing requirements;
- Revenue NSW assessment; and
- ensuring the Deed of Partition accurately reflects the intended legal outcome.

Addressing these matters early can reduce delays and minimise the risk of registration issues later in the transaction.

Final thoughts

Where a boundary adjustment has resulted in a dual entitlement title, removing that arrangement is often an important step before future dealings with the property.

A carefully drafted Deed of Partition, together with the appropriate supporting documentation and registration through NSW Land Registry Services, can restore conventional ownership and provide greater certainty for both owners.

This article is of a general nature and should not be relied upon as legal advice. If you require further information, advice or assistance for your specific circumstances, please contact E&A Lawyers.