

Instrument setting out terms of Easements or Profits à Prendre intended to be created or released and of Restrictions on the Use of Land or Positive Covenants intended to be created pursuant to Section 88B Conveyancing Act 1919

(Sheet 1 of 7 sheets)

Plan: Plan of Subdivision of Lot 1 in DP 1221920

Covered by Subdivision Certificate
No.

**Full name and address
of the owner of the land:** Abax Contracting Pty Limited (ACN 001 472 055)
126 Toongabbie Road,
GIRRAWEE NSW 2145

Part 1 (Creation)

Number of item shown in the intention panel on the plan	Identity of easement, profit à prendre, restriction or positive covenant to be created and referred to in the plan.	Burdened lot(s) or parcel(s):	Benefited lot(s), road(s), bodies or Prescribed Authorities:
1.	Positive Covenant	1, 2 and 3	Northern Beaches Council
2	Positive Covenant	1, 2 and 3	1, 2 and 3

Part 1A (Release)

Number of item shown in the intention panel on the plan	Identity of easement or profit à prendre to be released and referred to in the plan.	Burdened lot(s) or parcel(s):	Benefited lot(s), road(s), bodies or Prescribed Authorities:
1.	Positive Covenant	1, 2 and 3	Northern Beaches Council

Part 2 (Terms)

Terms of Positive Covenant firstly referred to in the abovementioned plan:

1. The registered proprietor(s) of the burdened lots from time to time, covenant with Northern Beaches Council in respect of the on-site stormwater detention storage basin constructed and/or installed on part of Lots 1, 2 and 3 on the plan, that they will:
 - (a) keep the on-site stormwater detention storage basin clean and free from silt, rubbish and debris;
 - (b) maintain and repair the on-site stormwater detention storage basin, at the sole expense of the registered proprietor(s) of the burdened lot(s) from time to time in accordance with the requirements of the Stormwater Management Strategy prepared by [INSERT], Ref XXXX, Issue XXX, dated XXXXX, so that it functions in a safe and efficient manner;
 - (c) for the purposes of ensuring compliance with this covenant, permit Northern Beaches Council or its authorised agents, officers and employees from time to time and upon giving
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Plan:

Plan of Subdivision of Lot 1 in DP 1221920

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No.

reasonable notice (but at any time and without notice in the case of an emergency) to enter the burdened lots to inspect the land and condition of the on-site stormwater detention storage basin on the burdened lot; and

- (d) comply with the terms of any written notice issued by Northern Beaches Council in respect of the requirements of this covenant within the time stated in the notice, to ensure the proper and efficient performance of the on-site stormwater detention storage basin on part of Lots 1, 2 and 3.
2. The responsibility and liability of the registered proprietor(s) of the burdened lots from time to time, in respect of the requirements of this covenant, including any costs and expenses, shall be apportioned as follows:

Burdened Lot	Proportion of Responsibility and Liability
1	25.75%
2	37.20%
3	37.05%
Total	100%

3. Pursuant to section 88F(3) of the *Conveyancing Act* 1919, Northern Beaches Council shall have the following additional powers:
- (a) in the event that the registered proprietor(s) of the burdened lots from time to time fail to comply with the terms of any written notice issued by Northern Beaches Council as set out above, Northern Beaches Council, with the approval of the registered proprietors of Lots 1, 2 and 3, may enter that part of Lot 1, 2 and 3 comprising the on-site stormwater detention storage basin with all necessary materials and equipment and carry out any work considered by Northern Beaches Council to be reasonable to comply with the said notice referred to above; and
- (b) Northern Beaches Council may recover from the registered proprietors of the burdened lots in a Court of competent jurisdiction:
- (i) any expense reasonably incurred by it in exercising its powers under sub-paragraph (a) above. Such expense shall include reasonable wages for employees engaged by Northern Beaches Council in effecting, supervising and administering the said work, together with costs, reasonable estimated by Northern Beaches Council, for the use of materials, machinery, tools and equipment in conjunction with the said work.
- (ii) legal costs on an indemnity basis for issue of the said notices and recovery of the said costs and expenses together with the costs, charges and expenses of

Plan:

Plan of Subdivision of Lot 1 in DP 1221920

Covered by Subdivision Certificate
No.

registration of a covenant charge pursuant to section 88F of the *Conveyancing Act* 1919 or providing any certificate required pursuant to section 88G of the *Conveyancing Act* 1919 or obtaining any injunction pursuant to section 88H of the *Conveyancing Act* 1919.

4. The covenant shall bind all persons who are of claim under the registered proprietor(s) of the burdened lots as stipulated in section 88E(5) of the *Conveyancing Act* 1919.
5. The name of the authority having the power to release, vary or modify this positive covenant referred to above is Northern Beaches Council.

Terms of Positive Covenant secondly referred to in the abovementioned plan:

1. The registered proprietor(s) of the burdened lots from time to time shall at all times and at their sole cost and expense maintain public liability insurance of not less than \$20,000,000.00 covering claims for bodily injuries to persons, death, loss or damage to property occurring on, in or about the on-site stormwater detention storage basin on the benefited lot.
2. The registered proprietor(s) of the burdened lots from time to time shall indemnify and shall hold the registered proprietor(s) of the benefited lot from time to time indemnified in relation to any claim made for bodily injuries or death to persons, loss or damage to property occurring on, in or about the on-site stormwater detention storage basin on the benefited lot and in respect of any works undertaken by the registered proprietor(s) of the burdened lots from time to time on the benefited lot.
3. The registered proprietor(s) of the burdened lots from time to time, covenant with the registered proprietor(s) of the benefited lot in respect of the on-site stormwater detention storage basin constructed and/or installed on part of Lots 1, 2 and 3 on the plan, that they will together:
 - (a) keep the on-site stormwater detention storage basin clean and free from silt, rubbish and debris;
 - (b) maintain and repair the on-site stormwater detention storage basin, at the sole expense of the registered proprietor(s) of the burdened lot(s) from time to time in accordance with the requirements of the Stormwater Management Strategy prepared by [INSERT], Ref XXXX, Issue XXX, dated XXXXX, so that it functions in a safe and efficient manner; and
 - (c) comply with the terms of any written notice issued by Northern Beaches Council in respect of the requirements of this covenant within the time stated in the notice, to ensure the proper and efficient performance of the on-site stormwater detention storage basin on part of Lots 1, 2 and 3.
4. For the purposes of ensuring compliance and observance of this covenant, the registered proprietor(s) of the benefited lot from time to time, permit the registered proprietor(s) of the

Plan:

Plan of Subdivision of Lot 1 in DP 1221920

Covered by Subdivision Certificate
No.

burdened lots and their authorised agents, employees and/or contractors from time to time, upon reasonable notice to the registered proprietor(s) of the benefited lots (other than in the case of an emergency where such notice will not be required), to enter the benefited lot to inspect the on-site stormwater detention storage basin and to undertake such works and maintenance as is necessary in a proper and workmanlike manner to ensure compliance with this covenant.

5. The registered proprietor(s) of the burdened lots from time to time must ensure that any person who accesses the benefited lot pursuant to clause 4 of this positive covenant are to be adequately insured and registered proprietor(s) of the burdened lots from time to time shall indemnify the registered proprietor(s) of the benefited lot in respect of any injury, loss, death or damage to property that may arise as a result of the registered proprietor(s) of the burden lot or their authorised agents, employees and/or contractors accessing the benefited lot and undertaking of works on the benefited lot.
6. The registered proprietor(s) of the burdened lots from time to time acknowledge that in the event that the registered proprietor(s) of the benefited lot fails to comply with their obligations under this covenant including a failure to comply with a written notice issued by Northern Beaches Council, the registered proprietor(s) of the benefited lot may, but is not obliged to, carry out the work required to be undertaken by the registered proprietor(s) of the burdened lots under this covenant.
7. The registered proprietor(s) of the benefited lot from time to time may recover from the registered proprietors of the burdened lots from time to time any expense and costs reasonably incurred by the registered proprietor(s) of the burdened lots in undertaking any works which are the responsibility of the registered proprietor(s) of the burdened lots under this covenant. Such expenses and costs shall be payable on an indemnity basis and on demand.
8. The responsibility and liability of the registered proprietor(s) of the burdened lots from time to time, in respect of the requirements of this covenant, including any costs and expenses, shall be apportioned as follows:

Burdened Lot	Proportion of Responsibility and Liability
1	25.75%
2	37.20%
3	37.05%
Total	100%

9. In the event that a dispute arises in relation to the rights and/or obligations under the terms of this covenant, the following shall apply:
 - (a) any party to this covenant claiming that a dispute exists must notify the other party or parties to the dispute in writing of the nature of the dispute (**Notice of Dispute**);

Plan:

Plan of Subdivision of Lot 1 in DP 1221920

Covered by Subdivision Certificate
No.

- (b) the parties must make a genuine attempt to resolve the dispute in good faith within ten (10) business days of receiving a Notice of Dispute.
- (c) If the dispute is not resolved within ten (10) business days of the receipt of the Notice of Dispute and the parties agree that the dispute should be resolved by an independent expert, then the parties will submit to the following procedure to resolve the dispute:
 - (i) the parties will choose and appoint an independent expert;
 - (ii) in the absence of agreement by the parties as to the independent expert within a further five (5) business days, the independent expert will be appointed on the application of either party by the president or other senior office bearer of the Institute of the Institute of Arbitrators and Mediators Australia in New South Wales.
 - (iii) the independent expert must:
 - A. have reasonable qualifications and commercial and practical experience in the area of the dispute;
 - B. have no interest or duty which conflicts or may conflict with his or her functions as an independent expert, he or she being required to fully disclose any interest or duty before his or her appointment; and
 - C. not be related to, an employee or former employee of either party;
 - (iv) the independent expert will act as an expert and not as an arbitrator and may adopted those procedures as he or she sees fit, including as to:
 - A. fixing a time and place for hearing the dispute or receiving submissions or information from the parties and any other person; and
 - B. the form of any submissions or information required by the independent expert from the parties or any other person.
 - (v) the independent expert will not be bound by the rules of evidence.
 - (vi) the independent expert will have the following powers:
 - A. to inform himself or herself independently as to all matters relevant to the dispute;
 - B. to request and receive submissions (whether oral or in writing) or other information from the parties; and

Plan:

Plan of Subdivision of Lot 1 in DP 1221920

Covered by Subdivision Certificate
No.

- C. consult with any other persons as the independent expert in his or her absolute discretion thinks fit in relation to resolving the dispute provided that any person consulted provides to the parties an undertaking to keep confidential all matters coming to the persons knowledge by reason of his or her consulting with the independent expert;
 - (vii) the parties must give the independent expert all of the information and assistance which the independent expert may reasonably require;
 - (viii) the independent expert must make a determination or finding on the issues in dispute as soon as practicable and in any event within twenty (20) business days of being appointed, or any longer period as may be agreed between the parties;
 - (ix) the independent expert's decision will be final and binding on the parties;
 - (x) the independent expert will be required to undertake to the parties to keep confidential all matters coming into the independent expert's knowledge by reason of his or her appointment, the performance of his or her duties and the exercise of his or her power; and
 - (xi) the costs of the independent expert will be borne by the parties equally or as the independent expert may otherwise determine and each party will bear its own costs relating to the expert determination and independent expert's decision.
- (d) if the dispute is not resolved within ten (10) business days of the receipt of the Notice of Dispute and the parties do not agree to resolve the dispute by independent expert, either party may refer the matter to mediation conducted by a mediator agreed between the parties within a further five (5) business days or failing agreement within that period, as appointed by the president or other senior office bearer of the Institute of the Institute of Arbitrators and Mediators Australia in New South Wales.
- (e) If mediation is to be undertaken by the parties, then the parties agree as follows:
- A. the costs of the mediator shall be borne equally between the disputing parties.
 - B. the chosen mediator shall determine the procedures for the mediation.
 - C. the chosen mediator will not have the power or authority to make any other determination in relation to the dispute.
- (f) If the parties have not resolved the dispute within ten (10) business days of the selection of a mediator, or by way of the appointment of an independent expert in accordance with this covenant, then any party may commence such legal proceedings as it thinks fit in relation to the dispute.

Plan:

Plan of Subdivision of Lot 1 in DP 1221920

Covered by Subdivision Certificate
No.

10. The registered proprietor(s) of the benefited lot from time to time shall have the power to release, vary or modify this positive covenant referred to above.

Plan:

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SIGNATURES AND SEALS

EXECUTED by **ABAX CONTRACTING PTY**)
LIMITED (ACN 001 472 055) by its duly)
authorised officers in accordance with)
section 127 of the *Corporations Act* 2001:)

Signature

Name of Signatory (PRINT)

DIRECTOR
Office Held (Office Held)

Signature

Name of Signatory (PRINT)

DIRECTOR/SECRETARY
Office Held (PRINT)

COMMONWEALTH BANK OF AUSTRALIA

Plan:

Plan of Subdivision of Lot 1 in DP 1221920

Covered by Subdivision Certificate
No.

SIGNATURES AND SEALS

EXECUTED on behalf of **NORTHERN**)
BEACHES COUNCIL by its duly authorised)
delegate pursuant to section 377 of the)
Local Government Act 1993 in the presence)
of::

Witness Signature

Signature of Authorised Delegate

Name of Witness (PRINT)

Name of Authorised Delegate (PRINT)

Witness Address

Authority Held (PRINT)