



Overhaul of the Real Property Act and Conveyancing Act

On 6 May 2009 the Real Property and Conveyancing Legislation Amendment Bill 2009 (Bill) was passed through the New South Wales Parliament. As the name of the Bill suggests, a number of important amendments are made to the Real Property Act 1900 (NSW) and Conveyancing Act 1919 (NSW).

The main objects of the Bill are as follows:

- (a) to reaffirm the principle of indefeasibility of title as contained in section 42 of the Real Property Act
- (b) to facilitate the removal of abandoned easements
- (c) to introduce additional identification requirements to the Real Property Act in relation to mortgagees and witnesses
- (d) to limit the amounts recoverable from the Torrens Assurance Fund and the circumstances in which compensation will be available and make other miscellaneous amendments in respect of compensation, the Torrens Assurance Fund, the obligations placed on claimants and subrogation rights

- (e) to amend the Conveyancing Act to provide a further exception to the requirement that certain transactions refer to lots shown on a current plan to enable the conversion of Crown land to Torrens title as part of a Crown Title conversion project, and
- (f) to require a mortgagee or chargee, in exercising a power of sale in respect of mortgaged or charged land, to take reasonable care to ensure that the land is sold for not less than its market value.

We comment on several of these changes in the law as follows:

1. Mortgagees

1.1 Identification requirements

The identification requirements in the Bill, which will come into force when the Bill is proclaimed, are a response to the increase in fraudulent mortgages being registered. Mortgagees must now confirm the identity of the mortgagor.

A mortgagee must take "reasonable steps" to ensure that the person who executed the mortgage as mortgagor, or on whose behalf the contract was executed as mortgagor, was the same person who is or is to become the registered proprietor of the land that is security

for the mortgage debt. What constitutes “reasonable steps” will be determined by the courts on the facts of the case. At a later date the regulations may prescribe that a mortgagee is deemed to take reasonable steps if they do certain things.

Mortgagees must keep records for seven years from the date of registration of the mortgage of the steps they took to confirm the mortgagor’s identity.

The Registrar-General may require the mortgagee to answer questions in relation to the steps taken to confirm the mortgagor’s identity. The mortgagee may also be required to produce for inspection its records of the steps it took in that respect. If the mortgagee fails to do either of those things, the Registrar-General may refuse to register a mortgage if it is not yet registered. If in addition to the mortgagee’s failure the mortgage involved fraud against the registered proprietor of the land, the Registrar-General may cancel the recording of the mortgage. This also applies if the mortgagee took reasonable steps but had actual or constructive notice that the mortgagor was not the same person as the person who was or was to become the registered proprietor.

Transferees of a mortgage are required independently of the transferring mortgagee to confirm the identity of the mortgagor, to take reasonable

steps in that respect and to keep records of the steps taken. The same actions by the Registrar-General which may be taken in respect of a mortgagee (described above) may also be taken in respect of a transferee of a mortgage.

A mortgagee incurring loss from failure to comply with the identification requirements cannot claim compensation from the Torrens Assurance Fund.

1.2 Exercising power of sale

The Bill confirms the equitable obligation of mortgagees when exercising the power of sale to take reasonable care when selling the land. Specifically, the mortgagee or mortgagee’s agent must ensure the land is sold for not less than market value or, if market value is not ascertainable, for the best price reasonably obtainable.

These new requirements will come into force when the Bill is proclaimed.

2. Limits on claims against Torrens Assurance Fund

The Torrens Assurance Fund compensates people dealing with land in respect of loss arising from occurrences such as recording errors or some types of fraud. The Bill introduce new provisions, which came into force on the 13 May 2009, limiting the recovery of compensation in a number of ways:

- (a) The amount of compensation recoverable is limited to the sum of the market value of

the interest in land of which the claimant was deprived and any reasonable legal, valuation or professional costs in making the claim.

- (b) There is a cap on compensation recoverable in the case of mortgagees incurring a loss when exercising their power of sale in respect of a registered mortgage obtained by the fraud of the person purporting he was or was to become the registered proprietor. The total amount of compensation payable in those circumstances – including interest and reasonable costs – is now limited to the market value of the land less the amount secured by any other mortgage with higher priority.
- (c) The Bill provides that administrative appeals against decisions concerning claims against the Fund (eg if compensation is denied) can now only be heard in the Supreme Court. Previously, any court of competent jurisdiction was able to hear the claim.
- (d) The limitation period to bring an appeal against a decision concerning claims against the Fund is reduced from 12 months to three months.
- (e) No compensation is available in respect of loss arising from the Registrar-General recording a caveat or removing such a caveat. This is concerning as it effectively means that the Registrar-General is not liable

to pay out of the Fund for his own acts in that respect.

- (f) No compensation is now payable where loss or damage was caused by an error or miscalculation in the measurement of land, breach of trust, granting the same land twice, recording or omitting to record native title rights and interests, or errors in a certain plans. It is possible to have a situation where loss or damage may have arisen from one of the aforementioned causes as well as other causes. Previously pro rata compensation would have been payable, whereas the Bill now denies compensation entirely.

3. Changes in respect of statutes that can override what is recorded on the title

In recent times overriding statutes have caused problems for a number of people with interests in land. One of the foundational pillars of the Torrens system of title (which applies to 98% of land in New South Wales) is the conclusiveness of the Torrens register. The drafters of the Torrens legislation intended that a person wishing to know the full extent of the interests in a piece of land should be able to search the register and be assured that it mirrored the true status of the land exactly.

Over time, however, statutes have been enacted creating interests in land which do not

appear on the register and which “override” the registered interests. One effect of this is, as one judge noted, that “it is impossible to ... contemplate persons other than solicitors handling conveyancing transactions”.

The Bill now requires overriding statutory provisions to state expressly that they intend to override the Real Property Act. The Bill amends 33 existing provisions in 23 statutes to state this. These provisions took effect on 13 May 2009. In effect, it has now become much easier for Parliament to enact laws overriding registered interests in land. The number of overriding provisions will significantly increase over time. In that respect, it is arguably more important now than ever before to seek legal advice when dealing with land.

This bulletin was written by Gary Newton, a partner in the property team of Colin Biggers & Paisley. He was assisted by his clerk, Alex Ottaway. Gary Newton has just completed, as co-author, a new book on this topic of “Conveyancing and Real Property Legislation in NSW” 9th edition LexisNexis Butterworths.

If you have any questions or comments in relation to the changes to the Real Property Act or the Conveyancing Act, please do not hesitate to call Gary Newton on 8281 4652 or gdn@cbp.com.au

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