

Butterworths Corporation Law Bulletin

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Contents of this issue

Para

Article

Creditor and lender shadow director exposures in corporate restructure.....	[350]
The Real Property and Conveyancing Legislation Amendment Act 2009 (NSW)	[351]

Recent cases

Retirement of CEO and MD from office — benefits payable on retirement and approval for same — <i>Dr Nair v Arturus Capital Ltd</i>	[352]
Defendant disqualified from managing corporations for 10 years and penalised \$80,000 — <i>ASIC v Soust (No 2)</i>	[353]
Proper purpose for appointment of administrators under s 436 CA — <i>Londish v Sheahan</i>	[354]
Creditors' schemes of arrangement — release of third parties and appeal from decision of chairperson of meeting of creditors — <i>Bacnet Pty Limited v Lift Capital Partners Pty Limited (in liquidation)</i>	[355]
Application for default judgment against directors for insolvent trading dismissed — <i>Wily v King</i>	[356]
Scheme of arrangement approved — <i>Re Seven Network Ltd (No 3)</i>	[357]

[351] The Real Property and Conveyancing Legislation Amendment Act 2009 (NSW)

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1 Introduction

The Real Property and Conveyancing Legislation Amendment Act 2009 (NSW) (Act) introduced a number of reforms to the Real Property Act 1900 (NSW) (RPA) and the Conveyancing Act 1919 (NSW) (CA). Most important among these proposals are:

- identification requirements for mortgagors and witnesses; and
- imposing a duty of care on mortgagees and chargees when exercising powers of sale on mortgages obtained from individuals

There are also a number of more minor reforms, which are briefly summarised below.

2 Identification of mortgagors

The most significant amendment is the requirement placed on mortgagees to identify mortgagors before a mortgage is lodged for registration. The rationale behind this amendment is to attempt to prevent increasing occurrences of mortgage fraud induced by identity theft.

2.1 Identification requirements

Section 56C of the RPA requires mortgagees to take “reasonable steps” to confirm the identity of the mortgagor before presenting a mortgage for lodgement and registration. If the mortgagee fails to comply with the requirement to confirm the identity of the mortgagor *and* the execution of the mortgage involved fraud against the registered proprietor of the mortgaged land, the Registrar General of the Department of Lands (Registrar General) may cancel any recording in the register with respect to the mortgage.

What is meant by “reasonable steps” is not defined by the Act as it will be outlined by the Real Property Regulations, of which there is no draft yet available. In the Agreement in Principle on the Act read before Parliament on 25 March 2009, it was stated that “reasonable steps” would include, as a minimum:

- undertaking a 100 point check of the mortgagor;

- maintaining a written record of the steps taken to comply with this requirement; and

keeping a copy of any documents provided by the mortgagor to prove their identity for seven years after the mortgage is registered.

2.2 Record keeping requirements

In addition to the identification requirements, the Registrar General may require the mortgagee to answer questions and produce documents to determine whether the mortgagee has complied with their obligation to verify the identity of the mortgagor. Failure to do this may result in the Registrar General:

- cancelling the registration of the mortgage;
- refusing to accept the mortgage for lodgement; or
- putting a notation on the title to alert anyone dealing with the property that the mortgagee has not complied with the requirement to verify the identity of the mortgagor.

Moreover, where a mortgage has been cancelled, the mortgagee will not have any recourse to compensation from the Torrens Assurance Fund.

In addition, where a person has been deprived of an estate or interest in land as a result of fraud, the Registrar General may rectify the register, thereby inhibiting a mortgagee’s ability to rely on indefeasibility of title when attempting to enforce a mortgage where the mortgagee has failed to comply with these new identification requirements.

2.3 Obligations of witnesses

A witness who falsely or negligently certifies the identity of a party to a mortgage may be held accountable both to the Registrar General and to the landowner where loss occurs as a result of a fraudulent or negligent certification.

The Act proposes that a person who witnesses an instrument executed by an individual must:

- be over 18 years of age;
- not be a party to the transaction; and
- either:
 - have known the person for at least 12 months; or
 - have taken “reasonable steps” to identify the person signing the mortgage.

The “reasonable steps” required are the same obligations that mortgagees will be required to take to identify mortgagors. The Registrar General may refuse to register any mortgage that does not bear a certificate by the attesting witness or where in the circumstances it appears that the certificate is false.

3 Duty of care on mortgagees and chargees when exercising powers of sale on mortgages

The Act, as amended, states that in exercising its power of sale, unless there is a reasonable excuse, a mortgagee should:

- adequately advertise the sale;
- obtain reliable evidence of the property’s value;
- maintain the property, including by undertaking any reasonable repairs; and
- sell the property by auction, unless it is appropriate to sell it in another way.

Recent cases have also provided guidance as to what mortgagees and chargees should do to comply with s 420A of the CA, including:

- obtain a recent independent valuation of the property and expert advice as to the method of sale (that is, auction, tender, private sale or another appropriate method); and

test the market by advertising the property for an appropriate timeframe so the property is brought to the attention of prospective purchasers and interest and competition between prospective purchasers is stimulated.

4 Additional proposed changes

The Act also introduces a number of less significant changes to the RPA and the CA including:

- limiting the amount of compensation to a mortgagee (where a fraud has occurred) to two per cent above the interest rate

charged on most loans by reputable lenders in Australia. This is to limit the liability of the Torrens Assurance Fund for the principal and interest due on a mortgage obtained by fraud (only if the new identification requirements have been satisfied). This is specifically aimed at “low-doc loans” which typically charge excessively high interest rates;

- limiting any claim to compensation from the Torrens Assurance Fund to the market value of the land plus any legal valuation or other professional costs. This is specifically aimed at preventing claims, typically by developers, for future economic loss as well as claims for personal injury (such as nervous shock and emotional stress);
- limiting any proceedings for compensation for loss or damage suffered as a result of the operation of the RPA to the Supreme Court. Such proceedings may only be taken against the person whose acts or omissions have given rise to the loss or damage claimed in the proceedings *or* the Registrar General. This is to prevent a claimant seeking to double its chances of recovery;
- prohibiting compensation from the Torrens Assurance Fund in respect of loss or damage that is a consequence of any fraudulent, wilful or negligent act or omission by any information broker — an information broker being a person who has entered into an agreement with the Registrar General to make information on the register available to the public;
- prohibiting compensation from the Torrens Assurance Fund where the loss or damage arises from the execution of an instrument by an attorney, under a power of attorney, acting contrary to or outside the authority conferred on them by the power of attorney. Such proceedings for compensation should be pursued under the Powers of Attorney Act 2003 (NSW);
- prohibiting compensation from the Torrens Assurance Fund where the loss or damage arises from the recording of a Registrar General’s caveat or the removal of such a caveat by the Registrar General;
- prohibiting compensation from the Torrens Assurance Fund where the loss

- or damage is the result of an easement not being recorded in the register — except where the easement is not recorded in the register due to an error on the part of the Registrar General; and
- prohibiting compensation from the Torrens Assurance Fund where loss or damages arises from the improper

exercise of a power of sale and where the loss or damage arises from the operation of s 129 of the Corporations Act 2001 (Cth) (assumptions that can be made when the mortgagor is a company).