

## Property & development

The *Real Property and Conveyancing Legislation Amendment Act 2009 (NSW)* (Amendment Act) came into effect on 13 May 2009.

In summary, the Amendment Act has the effect of the following:

- amends section 42 of the *Real Property Act* to confirm the principle of indefeasibility and introduces Schedule 3 that lists 23 statutory exceptions to indefeasibility;
- imposes obligations on mortgagees and chargees to take reasonable steps to confirm the identity of the person who executes the mortgage;
- requires witnesses to dealings of NSW property to have known the person executing the document for more than 12 months or take reasonable steps to confirm the identity of the person;
- imposes a duty on mortgagees and chargees to exercise reasonable care to ensure that when exercising power of sale, the land is sold for the best reasonable price;
- gives the Supreme Court the right to extinguish an easement if it is satisfied it has been abandoned; and
- limits the amount of compensation payable from the Torrens Assurance Fund and makes other amendments to fund recovery procedures.

### Concept of infeasibility and the Torrens Title Register

The Amendment Act confirms the principle of indefeasibility by introducing a new section 42(3) into the *Real Property Act*, which states that indefeasibility of title prevails over any inconsistent provision of any other statute or law unless the inconsistent provision or law expressly provides that it is to have effect despite anything contained in section 42.

The Amendment Act has also introduced a new Schedule 3 that lists the statutory exceptions to indefeasibility. Among the 23 statutes listed are the *Land Tax Management Act 1956 (NSW)* and the *Local Government Act 1993 (NSW)*. In each statute, the Amendment Act inserts a new clause expressly stating that the interest created under the statute operates despite indefeasibility of title embodied in section 42 of the *Real Property Act*. The purpose of this is to clarify the statutory exceptions to indefeasibility.

### Identity fraud

In response to an increasing number of claims for compensation relating to mortgage fraud, the Amendment Act introduces a new section 56C into the *Real Property Act*. This section requires the mortgagee to take reasonable steps to ensure that the person who executes the mortgage or on whose behalf the mortgage is executed is the same person who is or is to become the

registered proprietor of the mortgaged land before the mortgagee presents the mortgage for lodgement and registration. If the mortgagee fails to meet this standard of care and the execution of the mortgage involves fraud against the registered proprietor of the mortgaged land, the Registrar General may cancel the recording.

### Witnesses to dealings

As a consequence of the Amendment Act, witnesses to dealings of NSW land either must take reasonable steps to confirm the identity of the person executing these documents or must have known the person for more than 12 months. If the witness fails to comply with these sections, the Registrar General may reject, refuse to accept or to take any action in relation to the application, dealing or caveat.

### Mortgagees' duty of care in the power of sale

The Amendment Act requires a mortgagee or chargee, in exercising a power of sale, to take reasonable care to ensure that the mortgaged or charged land is not sold for less than its market value or is sold for the best price that may be reasonably obtained in the circumstances if the land does not have an ascertainable market value. The agents of the mortgagee or chargee are also bound by this duty of care.

This amendment seeks to address the concern that lenders may sell the mortgaged land below the market price as long as the debt owed to the lender is recovered.

### Abandoned easements

The *Conveyancing Act 1919 (NSW)* has been amended to give the Supreme Court the same rights as the Registrar General's under the *Real Property Act* to remove an easement recorded on Torrens Title land if the easement has been abandoned. An easement is deemed to be abandoned if it has not been used for at least 20 years.

### Limits on compensation from the Torrens Assurance Fund

A person is entitled to claim compensation from the Torrens Assurance Fund if loss or damage occurs as a result of an error in the Torrens Title Register. The Amendment Act introduces a limit on compensation payable to the market value of the land plus any legal valuation or other professional costs. It prohibits payments for certain damage or loss incurred in respect of a fraudulent, wilful or negligent act or omission of any information broker (being a person who makes information in the register available to the public). It also amends the Court and Administrative proceedings for the recovery of compensation from the Torrens Assurance Fund in order to save time and cost.



## Contacts

If you would like further details about the information contained in this bulletin or assistance with any property-related issues, please contact:

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