



NSW Legislative Council Hansard (Proof)

Property Legislation Amendment Bill

Extract from NSW Legislative Council Hansard and Papers Tuesday 11 October 2005 (Proof).

Second Reading

The Hon. TONY KELLY (Minister for Justice, Minister for Juvenile Justice, Minister for Emergency Services, Minister for Lands, and Minister for Rural Affairs) [8.14 p.m.]: I move:

That this bill be now read a second time.

I seek leave to have the second reading speech incorporated in *Hansard*.

Leave granted.

This Bill contains a number of amendments to the Real Property Act 1900, the Conveyancing Act 1919, the Strata Schemes (Freehold Development) Act 1973, the Strata Schemes (Leasehold Development) Act 1986 and the Local Government Act 1993.

The amendments are aimed at remedying a number of problems which have been identified in practice and are the result of an ongoing process of review of the various Acts. I will not speak in detail about all of the amendments, as some are minor changes by way of statute law revision. I will, however, outline some of the more important matters covered by the Bill.

This Bill deals with a number of technical legal matters relating to the law governing real property and conveyancing practice. An explanation of them necessarily involves some legal terminology, so I ask for some forbearance on the part of Honourable Members in this regard.

The first item in this Bill amends the Real Property Act to require that an application to remove a caution from qualified and limited title be accompanied by a survey report.

In order to explain the meaning of "qualified title" I need to firstly discuss the difference between Torrens title and Old System title.

Old System title is the system we inherited from English law. It requires a chain of deeds to prove title to the land. It is cumbersome and is not guaranteed by the State.

Torrens title is simple—a single document, called a Certificate of Title, establishes a person's entitlement to the land and is guaranteed correct by the State of NSW.

"Qualified title" was introduced in 1967 to help speed up the conversion of Old System title land to Torrens title. Think of qualified title as a 'half way house' between Old System title and full, State guaranteed Torrens title. A qualified title has a single Certificate of Title but it is not guaranteed. It contains a "caution" warning that the title may be subject to other interests not shown on the register. This caution will stay on the title for up to 12 years. Once a caution is removed, the title becomes a full, State guaranteed Torrens title.

"Limited title" is created when land is converted from Old System title, but the boundaries of the block of land have not been properly surveyed, so that the boundaries cannot be adequately defined to the satisfaction of the Registrar-General. A "limitation" can only be removed by lodgement of a deposited plan of survey. A title can be both qualified and limited.

A problem arises where a caution is removed from a qualified and limited title before the time period of 12 years has elapsed. An adjoining owner may have a right to claim part of the land by adverse possession because of the position of fences or other structures. If a caution is removed, an adjoining owner could lose any rights they may have to make a claim by adverse possession along the boundaries.

In order to protect any interest an adjoining land owner may have, the amendment contained in this Bill will require the lodgement of a survey report and an identification survey, prepared by a registered surveyor, when an application is made to remove a caution from a qualified and limited folio of the Register. The survey will show if there are any encroachments or occupations which might give an adjoining owner any rights over the land.

The next item amends the Real Property Act to permit the Registrar General to record on title a note of any licences and permits affecting associated Crown land.

The Crown Lands Act 1989 provides for the creation of licences and enclosure permits over Crown land. These rights may authorise the use or occupation of Crown land for a particular purpose, for example, cultivation or for grazing sheep and cattle, or perhaps for a jetty.

In many instances, these licences and enclosure permits are held by the owner of adjoining Torrens title freehold properties. However, when these freehold properties are sold, the related licences and permits are not always identified in the conveyancing process and an incoming owner may not be aware of their existence.

This failure to identify the Crown holding can lead to problems for both the former owner and the incoming purchaser, with the Department of Lands endeavouring to recover the rental and any arrears.

This amendment will authorise the Registrar General to make a note in the relevant folio of the Torrens register for freehold land drawing attention to any associated Crown holdings. This will ensure they are not overlooked when the freehold land is transferred.

The next item I want to highlight is an amendment to the Real Property Act and the Conveyancing Act to allow owners of land to create an easement, restriction on use or profit à prendre over their own land by use of a simple document, without the need for an expensive plan of survey.

By way of explanation, an easement is the right for the owner of one block of land to do something on another block of land. For example, a right of carriageway entitles a person to drive over someone else's land. A restriction on the use of land is a covenant by one owner to refrain from doing something on their land—for example, not to build a house of a particular material or height. A profit à prendre is a right to remove something from another block of land—for example, timber or sand.

At common law a person could not create these rights over their own land. This meant that if a person wanted to subdivide land and sell off blocks with easements, for example, then the easements had to be created each time a block was sold. This was cumbersome.

To overcome this problem, in 1964 the Conveyancing Act was amended to allow a person to create easements and restrictions over their own land, but only by registration of a deposited plan of survey. This system has proven to be very successful. It allows a subdivider to create all necessary easements, covenants or profits a prendre at once in a single document, prior to the sale of any of the blocks.

However, having a plan of survey prepared by a surveyor can be very expensive and may not be necessary in every case.

Under the proposed scheme, the Registrar General will have a discretion to allow a land owner, in a suitable case, to create an easement, restriction on use or profit à prendre by a simple document, such as a Transfer, without having to go to the expense of preparing a full plan of survey. It will be sufficient to annex to the Transfer a much simpler plan called a "compiled plan".

The new facility will provide a cheaper and simpler alternative for the creation of easements, covenants and profits a prendre. Giving the Registrar General a discretion to allow this method in suitable cases, while retaining the ability to insist on a full plan of survey where needed, will ensure that the integrity of the Torrens Register will not be compromised.

The next amendment introduces a new section 55B into the Real Property Act to allow a simpler way of dealing with common law leases recorded on a Torrens title.

If old system land is subject to a common law lease at the time the land is converted to Torrens title, the lease is recorded in the Torrens Register. However, if that lease is transferred, for example, then at present the transfer must be done by old system deed. This is usually more expensive than Torrens dealing.

This amendment will simplify the procedure and reduce conveyancing costs by allowing a common law lease to be dealt with by a simple Torrens dealing form under the Real Property Act.

The next amendments concern two minor problems with the Strata Schemes (Freehold Development) Act and Strata Schemes (Leasehold Development) Act.

The first problem is that there is presently some doubt as to whether a lease of common property in a strata scheme can be varied.

To remove this doubt section 25 of the Strata Schemes (Freehold Development) Act and section 29 of the Strata Schemes (Leasehold Development) Act will be amended to specifically allow for the variation of a lease or sublease of common property in a freehold strata scheme or a leasehold strata scheme.

The second problem is the potential for by-laws to be passed that could enable proprietors in a strata scheme to avoid their obligations under a strata management statement.

Sometimes a single building might contain more than one strata scheme—for example, one strata scheme for residences and a separate strata scheme for shops.

A strata management statement is a contract between the two strata schemes which sets out obligations regarding contributions for maintaining the building.

The bill amends section 28W (5) of the Strata Schemes (Freehold Development) Act and section 57F (5) of the Strata Schemes (Leasehold Development) Act to ensure that by-laws cannot be passed by one strata scheme which override the obligations in a strata management statement.

This Bill also amends the Local Government Act to simplify the way in which a person may transfer a parcel of land to a local Council for the purpose of dedicating it as a public reserve or drainage reserve. At present this can only be done by registration of a plan.

The Department of Lands has received representations that the law on this point should be amended, because the requirement for a plan is sometimes an unnecessary and expensive imposition on land owners and developers.

After consultation with other government agencies, this proposal has been accepted. The amendment will allow a land owner to transfer land to a local Council, for the purpose of public reserve or drainage reserve, by way of a simple Transfer or conveyance, without the need for a plan. It will provide a simple and cost effective alternative for land owners and developers.

The Bill also contains a number of minor amendments of a statute law revision nature, and I do not propose to deal with them in any detail.

Although not lengthy, this Bill contains a variety of worthwhile measures which will improve the efficiency of conveyancing and reduce costs in a number of areas.

I commend the Bill.