

## Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

### Overview of Bill

The objects of this Bill are as follows:

- (a) to reaffirm the principle of indefeasibility of title as contained in section 42 of the Real Property Act 1900,
- (b) to facilitate the removal of abandoned easements,
- (c) to introduce additional identification requirements to the Real Property Act 1900 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 1919 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,

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- (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,
- (g) to make provision in relation to other miscellaneous matters.

### Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on the date of assent with the exception of specified provisions that commence on a day or days to be appointed by proclamation.

#### Schedule 1 Amendment of Real Property Act 1900

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##### Amendments relating to indefeasibility of title

Schedule 1 [2] reaffirms the principle of indefeasibility of title by providing that section 42 (Estate of registered proprietor paramount) prevails over any inconsistent provision of any other Act or law unless the inconsistent provision expressly provides that it is to have effect despite anything contained in section 42.

(Schedule 3 contains consequential amendments to ensure that certain provisions (including provisions that create charges on land and other interests) have effect despite section 42 of the Real Property Act 1900).

##### Amendments relating to compensation and the Torrens Assurance Fund

Schedule 1 [8] provides that proceedings for compensation for loss or damage arising in specified circumstances and suffered as a result of the operation of the Real Property Act 1900 are to be commenced in the Supreme Court (rather than any court of competent jurisdiction). Schedule 1 [9] makes it clear that 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 as nominal defendant. Schedule 1 [10] provides that such proceedings based on the abandonment of an easement do not lie against the Registrar-General where the person alleging loss from that abandonment (or any previous registered proprietor of the land benefited by that easement) was aware that the Registrar-General intended to cancel a recording in the Register relating to the easement and had omitted to lodge a caveat forbidding the grant of the application or had allowed such a caveat to lapse.

Schedule 1 [12] provides that compensation is not payable 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. Schedule 1 [15] inserts a definition of information broker (being a person who has entered into an agreement with the Registrar-General to make information in the Register available).

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Schedule 1 [14] provides that compensation is not payable from the Torrens Assurance Fund:

(a) where the loss or damage arises from the person's failure, as mortgagee or transferee of a mortgage, to comply with proposed section 56C or from the cancellation of a recording with respect to a mortgage in accordance with proposed section 56C (6), or

(b) 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, or

(c) 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 of, the authority conferred on him or her by the power of attorney, or

(d) 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 of the Registrar-General), or

(e) where the loss or damage arises from the improper exercise of a power of sale, or

(f) where the loss or damage arises from the operation of section 129 of the Corporations Act 2001 of the Commonwealth.

In relation to paragraph (d), Schedule 1 [15] makes it clear that an error of the Registrar-General does not extend to a failure to make searches or inquiries as to the existence of any easement in relation to the creation of a qualified folio of the Register.

Schedule 1 [15] also makes it clear that compensation payable from the Torrens Assurance Fund does not extend to compensation for personal injury.

Schedule 1 [16] introduces a limit on the amount of compensation payable from the Torrens Assurance Fund. Proposed section 129A provides that the total compensation payable as a result of a person being deprived of land, or any estate or interest in land, is limited to the market value of the land plus any legal, valuation or other professional costs. Proposed section 129B further limits the amount of compensation (in particular, the interest and costs components of a claim) recoverable in respect of a mortgage obtained by fraud.

Schedule 1 [17] makes it clear that the Registrar-General may require information verified by statutory declaration from the claimant in assessing a claim for compensation.

Schedule 1 [18] provides that the information that the Registrar-General may require to enable the assessment of the validity of a claim, the assessment of compensable loss and to make an informed offer of compensation, includes details of any potential claims that the claimant may have against other parties to which the Registrar-General may be subrogated and details of any proceedings relating to the circumstances which gave rise to the claim.

Schedule 1 [19] provides that the Registrar-General may refuse a claim for compensation on the ground that a claimant has failed to comply with a request to

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provide information or take specified action if the request was made by notice in writing and at least 2 months have elapsed since the notice was given to the claimant.

Schedule 1 [24] provides that, unless the court otherwise orders, specified costs and interest penalties will be imposed on a claimant if court proceedings are commenced by the claimant following such refusal.

Schedule 1 [21] makes it clear that court proceedings for the recovery of compensation from the Torrens Assurance Fund may only be commenced if administrative proceedings have been commenced and determined or by leave of the court or with the consent of the Registrar-General. If court proceedings are commenced following the determination of administrative proceedings, the court proceedings must be commenced within 3 months of the date of the determination (rather than the current time period of 12 months). Schedule 1 [22] makes a consequential amendment.

Schedule 1 [24] requires a claimant to co-operate fully with the Registrar-General where court proceedings are commenced by the claimant with the leave of the court or the consent of the Registrar-General under section 132 (2). If a claimant fails to comply with this requirement, specified costs and interest penalties will be imposed on the claimant unless the court orders otherwise.

Section 133 currently provides that a professional indemnity insurer cannot be subrogated to any other person in respect of that other person's right to claim compensation from the Torrens Assurance Fund in relation to compensable loss.

Schedule 1 [25] extends this provision to apply in respect of all insurers. Schedule 1 [11] inserts a definition of insurer.

Schedule 1 [26] removes the current restrictions on the Registrar-General's entitlement to be subrogated to the claimant in respect of the claimant's rights and remedies in relation to a compensable loss if administrative proceedings or court proceedings are commenced in relation to that loss.

Schedule 1 [28] provides for the repayment of certain amounts to the Torrens Assurance Fund where a person has received compensation from the Fund in relation to a compensable loss and then receives a further payment on account of that compensable loss from another source.

Amendments relating to identity requirements

Schedule 1 [4] inserts proposed section 56C into the Real Property Act 1900.

Proposed section 56C requires mortgagees to take reasonable steps to confirm the identity of the mortgagor before presenting a mortgage for lodgment.

The mortgagee must keep a written record of the steps taken to comply with this requirement and a copy of any associated documents. The Registrar-General may require the mortgagee to answer questions and produce documents in determining whether or not the mortgagee has complied with this section.

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 may cancel any recording in the Register with respect to the mortgage. This power to cancel a recording extends

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to circumstances where the requirement to take reasonable steps to confirm the identity of the mortgagor may have been complied with but the mortgagee had actual or constructive notice that the mortgagor was not the same person as the person who was, or was about to become, the registered proprietor of the land that is security for the payment of the debt to which the mortgage relates.

The proposed section also applies to the transferee of a mortgage in the same way that it applies to a mortgagee.

Schedule 1 [6] and [7] amend the provision that requires a certificate of correctness to be provided with an application, dealing or caveat so that the witness to the execution of such a document must be at least 18 years of age and must have known

the person to whose execution of the document the witness is attesting for more than 12 months (or, alternatively, have taken reasonable steps to ensure the identity of that person). At present, the provision only requires the witness to be personally acquainted with, or satisfied as to the identity of, the person executing the document. Schedule 1 [6] and [7] also provide that the witness must not be a party to the application, dealing or caveat.

#### Miscellaneous amendments

Schedule 1 [1] makes provision for the Registrar-General to provide information and guidance with respect to certain matters (to be known as the Registrar-General's Directions).

Schedule 1 [3] provides for the Registrar-General to serve a notice of intention to cancel a recording relating to an easement on any person the Registrar-General considers appropriate in circumstances where the instrument creating the easement does not allow the identification of the land benefited by the easement. Currently, such a notice is required to be served on a person having a registered estate or interest in land benefited by the easement in all circumstances. This amendment will allow the cancellation of easements created before the enactment of the Conveyancing Act 1919 that do not properly identify the land benefited by the easement. Schedule 1 [3] also provides for service of such a notice by advertisement if the Registrar-General considers it appropriate and the easement is unlikely to be of real benefit to the land benefited by the easement.

Schedule 1 [5] makes provision with respect to the execution of instruments in accordance with sections 127–129 of the Corporations Act 2001 of the Commonwealth.

Schedule 1 [29] empowers the Registrar-General, in relation to the settlement of a claim in accordance with section 135, to rectify the Register (including by registering a person as the proprietor of land) where a person has been deprived of land, or an estate or interest in land, as a result of fraud and the current registered proprietor acquired the estate or interest in land through fraud.

Schedule 1 [13], [20], [23] and [27] make statute law revision amendments.

Schedule 1 [30] enables regulations of a savings and transitional nature to be made as a consequence of the enactment of the proposed Act.

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Schedule 1 [31] inserts provisions of a savings and transitional nature.

Schedule 2 Amendment of Conveyancing Act 1919

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Section 23F of the Conveyancing Act 1919 allows the Registrar-General to refuse to register the conveyance or transfer of part of an existing lot (and certain other transactions relating to existing lots) unless the land to which the transaction relates is shown on a current plan and the boundaries of each part into which the land is divided as a result of the transaction follow the boundaries of an existing lot.

Section 23G sets out a number of exceptions to section 23F. Schedule 2 [1] makes provision for a further exception in relation to a transaction, initiated by the Crown, that redefines a boundary of Crown land that was brought under the provisions of the Real Property Act 1900 on the application of the Registrar-General under section 13D of that Act. This amendment will enable the conversion of Crown land to Torrens title as part of a Crown Title conversion project.

Schedule 2 [2] provides that an easement may be treated as abandoned (for the purposes of allowing the Court to modify or extinguish the easement under section 89 on the application of any person interested in the relevant land) if the Court is satisfied that the easement has not been used for at least 20 years before the application under section 89 is made. Schedule 2 [3] makes it clear that an order

under section 89 is binding on persons who are benefited or burdened by the easement, profit à prendre, restriction or obligation.

Schedule 2 [4] requires a mortgagee or chargee of land to take reasonable care in exercising a power of sale in respect of mortgaged or charged land. In particular, the mortgagee or chargee must ensure that the land is sold for not less than its market value (or the best price that may reasonably be obtained if the land does not have an ascertainable market value).

Schedule 2 [5] enables regulations of a savings and transitional nature to be made as a consequence of the enactment of the proposed Act.