

Agreement in Principle

Mr BARRY COLLIER (Miranda—Parliamentary Secretary) [12.59 p.m.]: I move:

That this bill be now agreed to in principle.

The Real Property and Conveyancing Legislation Amendment Bill 2009 makes a number of significant reforms in the area of land law that will protect the Torrens Assurance Fund from unreasonable claims, combat identity fraud, streamline procedures for removal of abandoned easements and impose a duty on mortgagees when exercising a power of sale. The amendments, which are the result of the Government's ongoing and continuous review of the Real Property Act and the Conveyancing Act, are aimed at ensuring the community's continued confidence in the Torrens system of land title registration. New South Wales has a world-class system of land title registration known as the Torrens system, which is embodied in the Real Property Act 1900. Most privately owned land in New South Wales is held under the Torrens system, the object of which is to provide certainty of title.

This is achieved through provision of the Torrens Register, which records current title ownership and other interests affecting land. All land recorded in the register is guaranteed by the State Government as to its accuracy and completeness of title. A person who has an interest recorded in the register can rest assured that, subject to a few exceptions, the interest cannot be defeated by another unregistered interest nor can the person's title be set aside because of some defect in the history of the title prior to the registration of the interest. This is known as the principle of indefeasibility and is the cornerstone of the Torrens system.

The Real Property Act, like any other Act, is subject to partial or total repeal by later legislation. Such legislation, often quite unconnected to the Real Property Act, can impose statutory exceptions onto a registered proprietor's otherwise indefeasible title. As a result the register can be misleading, for although the Real Property Act purports to make the register conclusive, the registered title may in fact be subject to interests that are not required to be disclosed on the register. In some instances this is inevitable. A person's interest in land is, after all, a private right that must defer to the public interest. There are occasions when certain statutory interests must take priority over private interests recorded on the register. An example is land tax. Section 47 of the Land Tax Management Act 1956 imposes a statutory first charge on the land that has priority over all other encumbrances until the land tax is paid.

In an attempt to limit and clarify the extent of the statutory exceptions the bill proposes to amend section 42—the key section of the Real Property Act—which establishes the features of indefeasibility. The amendment provides that section 42 is to prevail over any inconsistent provision of any other Act or law unless the inconsistent provision provides otherwise. During preparation of the bill the Department of Lands undertook a review of New South Wales legislation to identify any existing provisions that could potentially impact on the principle of indefeasibility. An amendment is to be made to those Acts that are intended to create unrecorded statutory interests in land to confirm that the provisions of the identified Act will override section 42 of the Real Property Act 1900. Around 20 Acts have been identified as requiring amendment. These Acts, which include the Land Tax Management Act and the Local Government Act, are set out in schedule 3 to the bill. This amendment is necessary to protect the Torrens system of land title and the billions of dollars of land transactions that occur every year in reliance upon the security of the Torrens system.

I will now move on to the most significant amendment that this bill proposes to make to the Real Property Act, and that is the section that deals with mortgages. As members of the House may be aware, identity fraud is one of the fastest-growing crimes in Australia and costs the Australian community billions of dollars every year. Protecting the community from identity fraud is an important task that we take seriously. The department has been involved in an increasing number of claims for compensation relating to mortgage fraud involving what appears to be a lack of due diligence by some lenders in verifying the identity of borrowers. While the Torrens Assurance Fund may be available to compensate innocent landowners who are the victims of a fraudulent mortgage, it is preferable if the fraudulent mortgage can be avoided in the first place. The mortgagee, who is dealing directly with the fraudster, has the best opportunity to prevent a fraud. The amendments this bill proposes are intended to encourage due diligence in mortgagees' loan approval practices.

The majority of cases of fraudulent mortgages in which the Registrar-General has been involved are with those mortgages that are commonly known as low-doc loans. These loans are usually offered by lenders of last resort who lend at excessively high interest rates. Usually these types of loans are not covered by the consumer credit code and in many cases the lender has not performed due diligence. Disturbingly, it appears that the value of the property to be used as security for the loan is usually the only qualifying requirement for a low-doc loan to be granted. The nature of these loans I have described presents a perfect opportunity for fraudsters to perpetrate their crime; the department has many examples of claims of compensation based on these types of loans.

For example, a few years ago the department was involved in a claim for compensation made by elderly

property owners whose title was encumbered by registration of a mortgage they did not sign and knew nothing about. The son of the property owners, together with an accomplice, obtained a loan of \$750,000 at upwards of 12.5 per cent interest per month, pretended to be the owners of the property and purported to give a mortgage over it as security for this loan. The lender appears to have done little or nothing to confirm that the borrowers were the persons recorded in the freehold land register as the owners of the then unencumbered property and to verify that the borrowers were able to service the loan. It appeared that the value of the property alone—more than \$1 million—was enough to satisfy the grant of the loan.

Soon the borrowers defaulted on the loan and it was only when the mortgagee came to exercise its power of sale that the true owners found out that a mortgage was registered on their title. The fraudsters were apprehended and sent to jail, but in the end the Torrens Assurance Fund had to compensate not only the owners but also other parties that were affected by the fraud. This included paying the lender's legal costs. This claim resulted in payment of in excess \$2 million from the Torrens Assurance Fund. As this example indicates, there is clearly potential for our State to be liable for payment of large amounts of compensation for fraud. Questionable lending practices or wilful disregard of matters that might raise doubts in a prudent person's mind unfortunately do not currently disentitle a lender from recovering its loss under the Real Property Act 1900.

This bill proposes to amend the Real Property Act 1900 to require mortgagees, that is the lenders, to take reasonable steps to confirm the identity of the mortgagor, that is the borrowers, 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 may cancel any recording in the register with respect to the mortgage. The reasonable standard required to be taken by mortgagees for identification under the proposed amendments will be established by the guideline to be known as the Registrar-General's Directions. In most cases the reasonable standard will, at minimum, be the equivalent to the 100-point check that is common to financial institutions.

The Registrar-General's Directions is intended to be available on the department's website. It will also be necessary for the mortgagee to 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 the mortgagee has complied with their obligation to verify the identity of the borrower. If a mortgagee refuses to comply with a request of this nature the Registrar-General will have the power to either put 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 borrower or, if the mortgage has not yet been registered, refuse to accept the mortgage for lodgement.

Further, the Registrar-General will have the power to cancel any recording of a mortgage if the mortgagee has failed to comply with the Registrar-General's request to answer questions or provide documentation and the Registrar-General considers that the mortgage is fraudulent. The Registrar-General will notify the mortgagee of its intended action before it cancels the recording, as well as anyone who the Registrar-General thinks appropriate. A mortgagee whose mortgage has been cancelled under these provisions will not have any recourse to compensation from the Torrens Assurance Fund. In addition, the bill proposes to amend the Real Property Act 1900 to give power to the Registrar-General to rectify the register where a person has been deprived of an estate or interest in land as a result of fraud.

The principle of indefeasibility is the lynchpin of the Torrens system. These amendments will prevent unscrupulous lenders from relying on, and benefiting from, the very feature of the Torrens system, which is intended to provide security of title for people holding property interests in New South Wales. The Government can assure the community that this amendment should have little or no impact on lenders who already undertake reasonable due diligence measures as part of their normal lending practice. In order to further limit the opportunity for identity fraud to occur, the bill places stricter obligations on persons acting as a witness in signing documents relating to land. The attesting witness plays an important part in the prevention of fraud in property dealings and should take care in providing what is essentially a reference as to the identity of the party.

A witness who falsely or negligently certifies the identity of a party to a dealing to the Registrar-General 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. In a recent case in which the Registrar-General was involved a Justice of the Peace attested to both the mortgage and a statutory declaration by impostors posing as the landowners of a property. The witness neither knew the signatories nor made any effort to check their identity, relying solely on an introduction at the time she was asked to attest their signatures. It turned out that the person who made the introduction was the perpetrator of the fraud and the persons introduced as the landowners were impostors. Unfortunately, the true landowners, who had no knowledge of the fraudulent transaction, became victims of a property fraud that resulted in a mortgage being recorded against their land. The court found that the witness had not given a false certificate under section 117 of the Act, as she had no reason to suspect the introduction by a person whom she did know.

In order to limit the opportunities for identity fraud it is proposed to clarify the obligation on attesting witnesses to specifically provide that a person who witnesses an instrument executed by an individual either must have known the person for at least 12 months or taken reasonable steps to identify the person signing. The

reasonable steps will be the same steps that mortgagees will require to identify mortgagors, as I have previously explained. The Registrar-General may refuse to register any dealing that does not bear a certificate by the attesting witness or where in the circumstances it appears that the certificate is false. The bill also proposes to amend the Real Property Act 1900 to address the issue of excessively high interest rates that are applied to some of the low-doc loans that have subsequently been shown to be fraudulent. As I said previously, the department has noted some of the exorbitant interest rates, some in the vicinity of 20 per cent and at times upwards of 60 per cent.

Cases of mortgage fraud usually result in default in payment since the fraudsters never have any intention of repaying the loan. At this time the lender who has now registered his mortgage wishes to exercise his right to sell the property to recover the money owing. However, this money includes interest at rates well above the standard interest rate, and since there has been no fraud by the mortgagee this interest is indefeasible. The usual consequence of this is that the Torrens Assurance Fund is liable to pay the principal and the interest.

In this regard the bill proposes to amend the Real Property Act 1900 to limit the amount of compensation, in particular the interest and costs component of a claim payable by the Torrens Assurance Fund in respect of a mortgage obtained by fraud. The limit will be 2 per cent above the interest rate charged on most loans by reputable lenders in Australia. This amendment will benefit the landowner who is a victim of the fraud and who wants to retain ownership of the property, in most cases because it is the family residence. The mortgagee will not be able to recover interest at exorbitant rates by exercising its power of sale, and the landowner will be able to negotiate with the mortgagee to obtain a discharge of the mortgage in exchange for the amount of compensation to which he or she is entitled.

I briefly touched upon the Torrens Assurance Fund when explaining compensation. The Torrens Assurance Fund has always been an integral part of the Torrens system. The purpose of the fund is to compensate persons who, without any fault on their part, have been deprived of their property. The bill proposes a number of amendments to the Real Property Act 1900 with regard to the Torrens Assurance Fund by excluding certain claims. As members will see, these amendments will strengthen the Fund and allow it to operate as it was intended. The first of these amendments the bill seeks to make to the Real Property Act 1900 is to provide that any claim for compensation is limited to the market value of the land plus any legal valuation or other professional costs. There have been instances where a claim for compensation by a developer included future economic loss, insurance costs and depreciation costs of cars. The amendments contained in the bill make it very clear that these types of claims are not claimable under the Torrens Assurance Fund.

In this regard the bill also proposes to amend the Real Property Act 1900 to make it clear that compensation payable from the Torrens Assurance Fund does not extend to compensation for personal injury. There have been instances where a claimant has sought compensation for nervous shock and emotional stress, again items that are not compensable under the Torrens Assurance Fund. The bill also proposes to amend the Real Property Act 1900 to make it clear that proceedings for compensation for loss or damage 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, which is currently the case, and 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. The amendment seeks to address the situation where a claimant sought to double its chances of recovering compensation against the State of New South Wales and perhaps to side-step the many provisions of the Real Property Act that were not to its advantage by the additional claim against the State.

The bill will also introduce amendments to the Real Property Act 1900 regarding information brokers. An information broker is a person who has entered into an agreement with the Registrar-General to make information in the register available to the public. Given that the State guarantees interests recorded in the register, any information from the register that is inaccurate or false can entitle a person to a compensation claim if loss or damage occurs as a result of error in the register. It is important that any information in the register is reported accurately. To this end the bill adds a provision to the Real Property Act 1900 to make it clear 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.

The bill proposes to amend the Real Property Act 1900 to provide that compensation is not payable 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 him or her by the power of attorney. The Act already expressly excludes liability for acts by trustees, and further to this the bill adds a provision in the Real Property Act 1900 to the effect. This amendment is intended to protect the Torrens Assurance Fund from claims against victims of unscrupulous attorneys who abuse their position and act outside their powers and the best interests of the principal. Compensation for loss or damage in land through the actions of an attorney should be taken in the appropriate manner that is provided for under the Powers of Attorney Act 2003, that is, in either the Supreme Court or the Guardianship Tribunal.

The bill also proposes to amend the Real Property Act 1900 to provide that no compensation is payable 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. As the State guarantees recordings in the register, it is important that where a doubt is

raised concerning the validity or authenticity of any transaction with land or a genuine fear exists that land may be the subject of an unauthorised transaction, the Registrar-General has a means of preserving the register in its current form while any doubts are resolved. The bill also proposes to amend the Real Property Act 1900 to provide that no compensation is payable 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. The amendment also provides that no compensation is payable where the loss or damage arises from the improper exercise of a power of sale and where the loss or damage arises from the operation of section 129 of the Corporations Act 2001 of the Commonwealth.

In addition to the amendments designed to protect the Torrens Assurance Fund the bill proposes to amend the Real Property Act 1900 with regard to the obligations of a person making a claim for compensation for loss or damage. Currently a claim for compensation may be made on an administrative basis and it is intended to resolve claims without the need for the parties to go to court, thereby saving time and costs. To better this object the claimant is required to cooperate fully with the Registrar-General and provide sufficient information so as to allow the Registrar-General to assess the validity of the claim and to make an informed offer of compensation.

In many cases the obligation placed on claimants by the Act has not been sufficient to ensure compliance to allow the claim to be dealt with expeditiously. Therefore the bill proposes to amend the Real Property Act 1900 to provide that the person making a claim must provide information to the Registrar-General that he may require to enable the assessment of all aspects of the claim. A person making a claim may be required by the Registrar-General to verify any information he or she has given by way of statutory declaration. The Registrar-General will have the power to refuse a person's claim of compensation if this requirement is not met after a period of notice, being two months.

The bill proposes to amend the Real Property Act 1900 to provide that penalties may be imposed by the Supreme Court on the claimant if court proceedings are commenced by the claimant following a refusal of the administrative claim by the Registrar-General. This is designed to ensure compliance with the Registrar-General's request to the person making a claim to provide information and not to sidestep the administrative claim process. These penalties will also apply in instances where a claimant fails to cooperate 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).

The bill also proposes to amend the Real Property Act 1900 to make it clear that court proceedings for the recovery of compensation from the Torrens Assurance Fund may only be commenced if the 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 three months of the date of the determination, rather than the current time period of 12 months.

The bill proposes to make amendments to the Real Property Act 1900 regarding the Registrar-General's right of subrogation. It is proposed to amend the Act to make it clear that the Registrar-General may also claim against any person against whom the compensated person would have a claim in relation to the loss and not just persons who caused or contributed to the fraud. This includes, for example, claims in negligence, claims pursuant to any contractual indemnity and claims on insurance. The bill will amend the Act to allow the Registrar-General to recover any payment of compensation from a claimant who has received a further payment on account of the compensable loss from another source. This provision ensures that a person who has suffered loss does not double-dip and receives only what he or she is entitled to.

The last of the amendments that this bill proposes to make to claims for compensation are claims relating to easements. In general terms an easement may be described as a right belonging to a parcel of land for the owner of that parcel to use a parcel of land owned by someone else. A common example of easements is for drainage, sewerage and transmission lines. I spoke previously about the indefeasibility of title and that the interests recorded on a person's title are conclusive. There are exceptions. Easements are one of the exceptions to indefeasibility and always have been. As a result, the Torrens Assurance Fund has been subject to claims for compensation for loss because the register did not disclose the existence of an easement affecting a person's title.

The bill proposes to amend the Real Property Act 1900 to provide that the Torrens Assurance Fund is not liable for easements that are not recorded in the register, unless the easement is not recorded due to an error caused by the Registrar-General. The error of the Registrar-General in not recording an easement in the register, however, 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. The bill proposes to amend the Real Property Act 1900 to bar any claims for compensation relating to abandoned easements in situations where the person making the claim had notice that the Registrar-General intended to cancel a recording of the easement and did not lodge a caveat to prevent the easement from being cancelled.

Under the Act an easement is considered abandoned where it has not been used for at least 20 years. The amendments proposed by the bill are not designed to make a claim of compensation on the Torrens Assurance

Fund more difficult; on the contrary these new measures will ensure that the Torrens Assurance Fund is available to those persons who have legitimately, through no fault of their own, been deprived of land due to the workings of the Torrens system. The proposed amendments will protect and benefit landowners in New South Wales in the ways I have explained, and will also minimise the State's exposure to claims for compensation that are not within the spirit for which the fund was designed.

I move to the amendments to the Conveyancing Act 1919, another important piece of legislation affecting land in New South Wales. This Act deals with the general law of property, and simplifies and improves the practice of conveyancing. The first of these amendments that the bill proposes to make is to the Conveyancing Act 1919 to clarify the standard of care owed by a mortgagee who exercises its power of sale over real estate. When a borrower defaults under a mortgage the lender can step in and sell the mortgaged property in an effort to recover the money owed. There is a concern in the community that lenders do not always take steps to achieve the highest possible sale price. Rather the temptation exists for lenders to look after their own interests and sell the property at a price that merely ensures that their debt is covered but which may be below market price.

The bill therefore proposes to impose a duty of care on mortgagees and chargees when exercising a power of sale in respect of mortgaged or charged land, requiring the mortgagee to take all reasonable care to ensure that the property is sold for not less than its market value at the time of the sale. The proposed amendment will be similar to a provision in the Commonwealth Corporations Act, which requires that where property of a corporation is sold by a controller—defined to include a mortgagee—the controller must take all reasonable care to sell the property for not less than the market price.

The bill proposes to amend the section of the Conveyancing Act 1919 that deals with abandoned easements. As I have previously explained, easements that have not been used for at least 20 years may be considered abandoned. Under section 49 of the Real Property Act 1900 a person may apply to have an easement removed from the register if it can be proven that the easement is abandoned. As it has proven almost impossible to establish abandonment according to the complex rules that apply at common law, this provision provides a simplified statutory basis for abandonment of easements. As such the provision allows a practical means of removing from the register notifications of easements that are no longer relevant to the land.

However should someone dispute an application to the Registrar-General for abandonment of easement, the issue will be dealt with by the Supreme Court under section 89 of the Conveyancing Act 1919 and not section 49 of the Real Property Act 1900. In the small number of cases that have been litigated under section 89 of the Conveyancing Act 1919 it has become apparent that there is a conflict between section 49 of the Real Property Act and section 89 of the Conveyancing Act 1919. In adjudicating on a disputed application for abandonment of easement, the Supreme Court under section 89 of the Conveyancing Act 1919 applies the common law rules of abandonment that require an applicant to establish that the owner of the easement intended to abandon the easement.

The difficulties in supplying such evidence to the court make it almost impossible for an applicant seeking abandonment to succeed. This difficulty was part of the reason for the introduction of the objective test of 20 years non-use that is applied in section 49. Accordingly it is also proposed to remove the inconsistency between the two sections by providing that the court may apply the same criteria as that applied by the Registrar-General under section 49 of the Real Property Act. This may be achieved by providing in section 89 of the Conveyancing Act 1900 that where an application is made to the court for an order extinguishing an easement, abandonment may be inferred if the court is satisfied that the easement has not been used for at least 20 years.

Finally, the bill makes some amendments by way of statute law revision. It clarifies various points concerning the Torrens Assurance Fund and also replaces some outdated references to the Legal Profession Act 1987, and repeals the Land Agents Act 1927. Although lengthy, the bill contains a variety of provisions that are long overdue and are designed to make land administration more effective and less expensive. I commend the bill to the House.