

## REAL PROPERTY (FURTHER AMENDMENT) BILL 1987

NEW SOUTH WALES



### EXPLANATORY NOTE

**(This Explanatory Note relates to this Bill as introduced into Parliament)**

The object of this Bill is to amend the Real Property Act 1900 so as—

- (a) to omit obsolete references to duplicate registered dealings;
- (b) to enable a mortgage of land under the provisions of that Act to be postponed to another such mortgage which does not relate to exactly the same land;
- (c) to require a mortgagee to notify additional persons having registered interests or interests protected by caveats before the mortgagee exercises a power of sale or applies for a foreclosure order after default by the mortgagor;
- (d) to repeal the requirement that the Registrar-General advertise the intention to issue a foreclosure order, which requirement has been shown to be ineffective;
- (e) to enable the Registrar-General to require an applicant for a foreclosure order to make a further attempt to sell the land concerned; and
- (f) to make it clear that a foreclosure order terminates certain registered interests other than those of the mortgagor.

The Bill also makes a minor amendment to that Act for the purposes of statute law revision, contains savings related to the proposed amendments and amends the Conveyancing Act 1919 in a minor respect so as to require mortgagees of "old system title" land to notify additional persons before exercising a power of sale.

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Clause 1 specifies the short title of the proposed Act.

Clause 2 provides for the commencement of amendments which will affect rights or impose additional obligations on persons on a day or days to be proclaimed by the Governor-in-Council. The amendment related to caveats will commence when the Real Property (Caveats) Amendment Act 1986 commences. All other amendments and provisions will commence on the date of assent to the proposed Act.

Clause 3 states that the Real Property Act 1900 is referred to as the Principal Act.

Clause 4 is a formal provision that gives effect to the Schedule of amendments.

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Clause 5 amends section 111 (Regulation of exercise of power of sale) of the Conveyancing Act 1919 so as to require a mortgagee or chargee to notify any other mortgagee or chargee under a mortgage or charge registered under that Act before exercising a power of sale after default under the mortgage or positive covenant concerned. The amendment parallels that proposed to be made to section 57 of the Principal Act and will apply to "old system title" land.

Clause 6 contains savings aimed at avoiding the necessity to repeat things done under provisions of the Principal Act before they are repealed and re-enacted in modified form by the proposed Act.

Schedule 1 (1)–(4) amend sections 32, 33, 36 and 38 of the Principal Act by omitting references to duplicate registered dealings so as to reflect current administrative practices at the Land Titles Office.

Schedule 1 (5) amends section 56A (Postponement of mortgages) of the Principal Act so that a mortgage may be postponed to another mortgage to the extent to which they relate to the same land or to a disposable part of the same land, even if they both also relate to other land.

Schedule 1 (6) amends section 57 (Procedure on default) of the Principal Act so as to require a mortgagee or covenant chargee under a mortgage or covenant charge to notify other registered mortgagees, chargees or covenant chargees before exercising a power of sale after default under the mortgage or positive covenant concerned. (A "covenant chargee" is a person having the benefit of a registered charge because of a default under a positive covenant.) Any caveator claiming an estate or interest under an unregistered mortgage affecting the land mortgaged or charged is also to be notified.

Schedule 1 (7) amends section 61 (Application for foreclosure order) of the Principal Act so as to require notice to be similarly given to other registered mortgagees, chargees or covenant chargees and to caveators before an application is made for a foreclosure order by a registered mortgagee or covenant chargee.

Schedule 1 (8) repeals and replaces section 62 (Order for, and effect of, foreclosure) of the Principal Act with the result that the Registrar-General will no longer have to advertise before issuing orders for foreclosure, because advertising has been found to be an ineffective practice. Instead, the Registrar-General will have the discretion to require the relevant land to be offered for sale again.

Under the proposed new section 62 it is also made clear that an order for foreclosure extinguishes rights of registered mortgagees, chargees or covenant chargees later in priority than the applicant for the order.

Schedule 1 (9) amends section 74H (Effect of caveat lodged under section 74F) of the Principal Act for the purpose of statute law revision so as to include a reference to positive covenants.

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# REAL PROPERTY (FURTHER AMENDMENT) BILL 1987

NEW SOUTH WALES



## TABLE OF PROVISIONS

1. Short title
2. Commencement
3. Principal Act
4. Amendment of Act No. 25, 1900
5. Amendment of Act No. 6, 1919
6. Savings

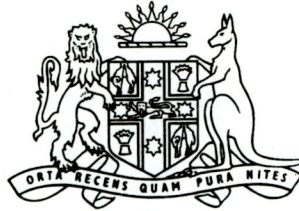
SCHEDULE 1—AMENDMENTS

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# REAL PROPERTY (FURTHER AMENDMENT) BILL 1987

NEW SOUTH WALES



No. , 1987

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## A BILL FOR

An Act to amend the Real Property Act 1900 with respect to the production of duplicate dealings, the postponement of mortgages, the exercise of powers of sale and the issue of orders for foreclosure; and for other purposes.

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*Real Property (Further Amendment) 1987*

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**The Legislature of New South Wales enacts:**

**Short title**

1. This Act may be cited as the Real Property (Further Amendment) Act 1987.

**5 Commencement**

2. (1) Except as provided by subsections (2) and (3), this Act shall commence on the date of assent to this Act.

(2) Section 5 and Schedule 1 (6)–(8), and section 4 in its application to those provisions, shall commence on a day or days to be appointed by proclamation.

(3) Schedule 1 (9), and section 4 in its application to that provision, shall commence or be deemed to have commenced on the day appointed and notified under section 2 (2) of the Real Property (Caveats) Amendment Act 1986.

**15 Principal Act**

3. The Real Property Act 1900 is referred to in this Act as the Principal Act.

**Amendment of Act No. 25, 1900**

4. The Principal Act is amended as set out in Schedule 1.

**20 Amendment of Act No. 6, 1919**

5. The Conveyancing Act 1919 is amended—

(a) by omitting from section 111 (2) (b) the word “and” where lastly occurring;

(b) by inserting after section 111 (2) (b) the following paragraph:

25 (b1) where a notice is required to be served under paragraph (b),  
a copy of that notice has been served (in the manner  
authorised by section 170) on each mortgagee or chargee (if  
any) under a mortgage or charge to which the land is subject  
30 registered in the General Register of Deeds (other than the  
mortgagee or chargee intending to exercise the power of sale);  
and

**Savings**

6. (1) A folio issued, or a requirement made, under section 32 (3) of the Principal Act before the date of assent to this Act shall be deemed to  
35 have been issued or made under that provision of that Act, as amended by  
this Act.

*Real Property (Further Amendment) 1987*

(2) A request made under section 38 (1) of the Principal Act before the date of assent to this Act shall be deemed to have been made under that provision of that Act, as amended by this Act.

(3) A mortgage postponed under section 56A (1) of the Principal Act before the date of assent to this Act shall be deemed to have been postponed under that provision of that Act, as amended by this Act.

(4) An order for foreclosure issued under section 62 (1) of the Principal Act before the commencement of Schedule 1 (8) shall be deemed to have been issued under that provision of that Act, as amended by this Act.

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**SCHEDULE 1—AMENDMENTS**

(Sec. 4)

(1) Section 32 (**Folios of the Register**)—

(a) Section 32 (3)—

Omit the subsection, insert instead:

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(3) Where a person is registered as proprietor of a lease registered under this Act, the Registrar-General may—

(a) if the Registrar-General thinks fit so to do, create a folio or folios of the Register for the estate or interest of that person in some or all of the land leased; and

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(b) for that purpose, require the deposit in the office of the Registrar-General of a plan of the land (together with copies) which shall, if the Registrar-General so requires, be a plan of survey within the meaning of the Survey Practice Regulations 1933.

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(b) Section 32 (5)—

Omit “or duplicate registered dealing”.

(2) Section 33 (**Issue of certificates of title**)—

Section 33 (1)—

Omit “or duplicate registered dealing”.

30

(3) Section 36 (**Registration of dealings**)—

Section 36 (6) (b) (ii)—

Omit “or duplicate registered dealing”.

(4) Section 38 (**Recording dealings on certificates of title etc.**)—

(a) Section 38 (1)—

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Omit the subsection, insert instead:

(1) If the Registrar-General, having delivered a certificate of title for land—

*Real Property (Further Amendment) 1987*SCHEDULE 1—AMENDMENTS—*continued*

- (a) requests its production for the purpose of registration of a dealing that relates to the land; and  
 (b) the request or a requirement under subsection (2) is not complied with,

5 the Registrar-General may refuse to register the dealing or to accept it for registration.

- (b) Section 38 (2), (3)—

Omit “or duplicate registered dealing” wherever occurring.

- (c) Section 38 (2)—

10 Omit “, as the case may be,”.

- (5) Section 56A (**Postponement of mortgages**)—

Section 56A (1), (1A), (1B)—

Omit section 56A (1), insert instead:

15 (1) If two or more mortgages registered under this Act affect the same land, the mortgage which for the time being has priority over the other or others may, by a memorandum in the approved form registered under this Act, be postponed to the other or others in so far as the whole or a disposable part of that same land is concerned.

20 (1A) The reference in subsection (1) to a disposable part of land is a reference to a lot or portion that may be disposed of without contravening section 327AA of the Local Government Act 1919.

25 (1B) Subsection (1) applies whether or not any one or more of the mortgages which affect the same land affects or affect other land.

- (6) Section 57 (**Procedure on default**)—

- (a) Section 57 (2) (b)—

Omit “and” where lastly occurring.

- (b) Section 57 (2) (b1)—

30 After section 57 (2) (b), insert:

(b1) where a notice is required to be served under paragraph (b), a copy of that notice has been served (in the manner authorised by section 170 of the Conveyancing Act 1919) on—

35 (i) each mortgagee, chargee or covenant chargee (if any) of the land mortgaged or charged under a registered mortgage, charge or covenant charge which has less priority than that of the person intending to exercise the power of sale; and



*Real Property (Further Amendment) 1987*SCHEDULE 1—AMENDMENTS—*continued*

- (ii) each caveator (if any) who claims as an unregistered mortgagee or chargee to be entitled to an estate or interest in the land mortgaged or charged; and

5 (7) Section 61 (**Application for foreclosure order**)—

Section 61 (2)—

Omit the subsection, insert instead:

(2) An application under this section shall state—

- 10 (a) that default has been made for 6 months in the payment of the principal sum or interest secured by the mortgage or covenant charge;
- 15 (b) that the land, estate or interest mortgaged or charged has been offered for sale at a public auction by a licensed auctioneer, after notice was given in accordance with section 57 to the mortgagor or covenant charger and all other persons (if any) required to be given notice under that section;
- 20 (c) that the amount of the highest bid at the sale was not sufficient to satisfy the money secured by the mortgage or covenant charge, together with expenses occasioned by the sale; and
- 25 (d) that notice in writing of the intention of the mortgagee or covenant chargee to make the application has been served on—
- (i) the mortgagor or covenant charger;
- (ii) all registered mortgagees, chargees or covenant chargees under registered mortgages, charges or covenant charges which have less priority than that of the applicant; and
- 30 (iii) each caveator (if any) who claims as an unregistered mortgagee or chargee to be entitled to an estate or interest in the land mortgaged or charged.

## (8) Section 62—

Omit the section, insert instead:

35 **Order for, and effect of, foreclosure**

62. (1) Where an application is made in accordance with section 61 for an order for foreclosure, the Registrar-General may—

- (a) issue the order to the applicant; or

SCHEDULE 1—AMENDMENTS—*continued*

(b) require the applicant to offer the land mortgaged or charged for sale and to do so in accordance with the directions of the Registrar-General.

5 (2) If the applicant is required to offer the land for sale and it is not sold or an insufficient amount is realised by the sale to satisfy the principal sum and interest due, and all expenses occasioned by the sale, the Registrar-General may issue to the applicant an order for foreclosure.

10 (3) Every order for foreclosure issued by the Registrar-General and recorded in the Register has the effect of vesting in the mortgagee or covenant chargee who applied for it all the estate and interest of the mortgagor or covenant charger in the land mentioned in the order—

15 (a) in every case, free from any right of a mortgagee, chargee or covenant chargee under a registered mortgage, charge or covenant charge which has less priority than that of the applicant; and

20 (b) in the case of mortgaged land, free from any right and equity of redemption of the mortgagor or any person claiming through or under the mortgagor.

(9) Section 74H (**Effect of caveat lodged under section 74F**)—

Section 74H (5) (m)—

Omit “or restrictions as to user”, insert instead “, restrictions on the use of land or positive covenants”.





**REAL PROPERTY (FURTHER AMENDMENT) ACT 1987**  
**No. 280**

NEW SOUTH WALES



**TABLE OF PROVISIONS**

1. Short title
2. Commencement
3. Principal Act
4. Amendment of Act No. 25, 1900
5. Amendment of Act No. 6, 1919
6. Savings

SCHEDULE 1—AMENDMENTS

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**REAL PROPERTY (FURTHER AMENDMENT) ACT 1987 No. 280**

NEW SOUTH WALES



**Act No. 280, 1987**

An Act to amend the Real Property Act 1900 with respect to the production of duplicate dealings, the postponement of mortgages, the exercise of powers of sale and the issue of orders for foreclosure; and for other purposes.  
[Assented to 16 December 1987]

*Real Property (Further Amendment) 1987*

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**The Legislature of New South Wales enacts:**

**Short title**

1. This Act may be cited as the Real Property (Further Amendment) Act 1987.

**Commencement**

2. (1) Except as provided by subsections (2) and (3), this Act shall commence on the date of assent to this Act.

(2) Section 5 and Schedule 1 (6)–(8), and section 4 in its application to those provisions, shall commence on a day or days to be appointed by proclamation.

(3) Schedule 1 (9), and section 4 in its application to that provision, shall commence or be deemed to have commenced on the day appointed and notified under section 2 (2) of the Real Property (Caveats) Amendment Act 1986.

**Principal Act**

3. The Real Property Act 1900 is referred to in this Act as the Principal Act.

**Amendment of Act No. 25, 1900**

4. The Principal Act is amended as set out in Schedule 1.

**Amendment of Act No. 6, 1919**

5. The Conveyancing Act 1919 is amended—

(a) by omitting from section 111 (2) (b) the word “and” where lastly occurring;

(b) by inserting after section 111 (2) (b) the following paragraph:

(b1) where a notice is required to be served under paragraph (b), a copy of that notice has been served (in the manner authorised by section 170) on each mortgagee or chargee (if any) under a mortgage or charge to which the land is subject registered in the General Register of Deeds (other than the mortgagee or chargee intending to exercise the power of sale); and

**Savings**

6. (1) A folio issued, or a requirement made, under section 32 (3) of the Principal Act before the date of assent to this Act shall be deemed to have been issued or made under that provision of that Act, as amended by this Act.



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(2) A request made under section 38 (1) of the Principal Act before the date of assent to this Act shall be deemed to have been made under that provision of that Act, as amended by this Act.

(3) A mortgage postponed under section 56A (1) of the Principal Act before the date of assent to this Act shall be deemed to have been postponed under that provision of that Act, as amended by this Act.

(4) An order for foreclosure issued under section 62 (1) of the Principal Act before the commencement of Schedule 1 (8) shall be deemed to have been issued under that provision of that Act, as amended by this Act.

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**SCHEDULE 1—AMENDMENTS**

(Sec. 4)

(1) **Section 32 (Folios of the Register)—**

(a) **Section 32 (3)—**

Omit the subsection, insert instead:

(3) Where a person is registered as proprietor of a lease registered under this Act, the Registrar-General may—

(a) if the Registrar-General thinks fit so to do, create a folio or folios of the Register for the estate or interest of that person in some or all of the land leased; and

(b) for that purpose, require the deposit in the office of the Registrar-General of a plan of the land (together with copies) which shall, if the Registrar-General so requires, be a plan of survey within the meaning of the Survey Practice Regulations 1933.

(b) **Section 32 (5)—**

Omit “or duplicate registered dealing”.

(2) **Section 33 (Issue of certificates of title)—**

Section 33 (1)—

Omit “or duplicate registered dealing”.

(3) **Section 36 (Registration of dealings)—**

Section 36 (6) (b) (ii)—

Omit “or duplicate registered dealing”.

(4) **Section 38 (Recording dealings on certificates of title etc.)—**

(a) **Section 38 (1)—**

Omit the subsection, insert instead:

(1) If the Registrar-General, having delivered a certificate of title for land—

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SCHEDULE 1—AMENDMENTS—*continued*

- (a) requests its production for the purpose of registration of a dealing that relates to the land; and
  - (b) the request or a requirement under subsection (2) is not complied with,
- the Registrar-General may refuse to register the dealing or to accept it for registration.
- (b) Section 38 (2), (3)—  
Omit “or duplicate registered dealing” wherever occurring.
  - (c) Section 38 (2)—  
Omit “, as the case may be,”.
- (5) Section 56A (**Postponement of mortgages**)—  
Section 56A (1), (1A), (1B)—  
Omit section 56A (1), insert instead:
- (1) If two or more mortgages registered under this Act affect the same land, the mortgage which for the time being has priority over the other or others may, by a memorandum in the approved form registered under this Act, be postponed to the other or others in so far as the whole or a disposable part of that same land is concerned.
  - (1A) The reference in subsection (1) to a disposable part of land is a reference to a lot or portion that may be disposed of without contravening section 327AA of the Local Government Act 1919.
  - (1B) Subsection (1) applies whether or not any one or more of the mortgages which affect the same land affects or affect other land.
- (6) Section 57 (**Procedure on default**)—
- (a) Section 57 (2) (b)—  
Omit “and” where lastly occurring.
  - (b) Section 57 (2) (b1)—  
After section 57 (2) (b), insert:
    - (b1) where a notice is required to be served under paragraph (b), a copy of that notice has been served (in the manner authorised by section 170 of the Conveyancing Act 1919) on—
      - (i) each mortgagee, chargee or covenant chargee (if any) of the land mortgaged or charged under a registered mortgage, charge or covenant charge which has less priority than that of the person intending to exercise the power of sale; and

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SCHEDULE 1—AMENDMENTS—*continued*

- (ii) each caveator (if any) who claims as an unregistered mortgagee or chargee to be entitled to an estate or interest in the land mortgaged or charged; and

(7) Section 61 (**Application for foreclosure order**)—

Section 61 (2)—

Omit the subsection, insert instead:

(2) An application under this section shall state—

- (a) that default has been made for 6 months in the payment of the principal sum or interest secured by the mortgage or covenant charge;
- (b) that the land, estate or interest mortgaged or charged has been offered for sale at a public auction by a licensed auctioneer, after notice was given in accordance with section 57 to the mortgagor or covenant charger and all other persons (if any) required to be given notice under that section;
- (c) that the amount of the highest bid at the sale was not sufficient to satisfy the money secured by the mortgage or covenant charge, together with expenses occasioned by the sale; and
- (d) that notice in writing of the intention of the mortgagee or covenant chargee to make the application has been served on—
  - (i) the mortgagor or covenant charger;
  - (ii) all registered mortgagees, chargees or covenant charges under registered mortgages, charges or covenant charges which have less priority than that of the applicant; and
  - (iii) each caveator (if any) who claims as an unregistered mortgagee or chargee to be entitled to an estate or interest in the land mortgaged or charged.

(8) Section 62—

Omit the section, insert instead:

**Order for, and effect of, foreclosure**

62. (1) Where an application is made in accordance with section 61 for an order for foreclosure, the Registrar-General may—

- (a) issue the order to the applicant; or

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SCHEDULE 1—AMENDMENTS—*continued*

- (b) require the applicant to offer the land mortgaged or charged for sale and to do so in accordance with the directions of the Registrar-General.
- (2) If the applicant is required to offer the land for sale and it is not sold or an insufficient amount is realised by the sale to satisfy the principal sum and interest due, and all expenses occasioned by the sale, the Registrar-General may issue to the applicant an order for foreclosure.
- (3) Every order for foreclosure issued by the Registrar-General and recorded in the Register has the effect of vesting in the mortgagee or covenant chargee who applied for it all the estate and interest of the mortgagor or covenant charger in the land mentioned in the order—
  - (a) in every case, free from any right of a mortgagee, chargee or covenant chargee under a registered mortgage, charge or covenant charge which has less priority than that of the applicant; and
  - (b) in the case of mortgaged land, free from any right and equity of redemption of the mortgagor or any person claiming through or under the mortgagor.
- (9) Section 74H (**Effect of caveat lodged under section 74F**)—  
Section 74H (5) (m)—  
Omit “or restrictions as to user”, insert instead “, restrictions on the use of land or positive covenants”.