



New South Wales

Real Property Amendment Act 1996 No 87

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Real Property Amendment Act 1996 No 87

Act No 87, 1996

An Act to amend the *Real Property Act 1900* with respect to the giving of notice, the recording of native title, the lapsing and cancellation of cautions on qualified titles, caveats and approved forms; and for other purposes. [Assented to 6 November 1996]

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Real Property Amendment Act 1996*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

3 Amendment of Real Property Act 1900 No 25

The *Real Property Act 1900* is amended as set out in Schedule 1.

Schedule 1 Amendments

(Section 3)

[1] Section 12 Powers of Registrar-General

Omit “, and the Registrar-General may give notice by advertisement or by personal service, whenever and to whomsoever the Registrar-General thinks proper, of the intended exercise or performance of any power, authority, duty or function conferred or imposed by this Act” from section 12 (1) (h).

[2] Section 12 (1) (h1)

Insert after section 12 (1) (h):

(h1) The Registrar-General may give notice by advertisement or by personal service, whenever and to whomever the Registrar-General thinks appropriate, of the intended exercise or performance of any power, authority, duty or function conferred or imposed by this Act. The Registrar-General may instead, if the Registrar-General considers it to be appropriate, direct another person to give notice in a manner and form approved by the Registrar-General.

[3] Section 12 (1A)

Omit “subsection (1) (h)”. Insert instead “subsection (1) (h1)”.

[4] Section 12A Power of Registrar-General to serve notice of proposed action

Omit section 12A (1). Insert instead:

(1) The Registrar-General may, before taking any action that alters the Register, give notice of the proposed action to any person that the Registrar-General considers should be notified of it.

[5] Section 12A (2) and (3)

Omit “in relation to a dealing” wherever occurring.

[6] Section 12A (2)

Omit “register the dealing” wherever occurring.
Insert instead “take the action”.

[7] Section 12A (3)

Omit “registering the dealing”.
Insert instead “taking the action”.

[8] Section 12A (3)

Omit “registration of the dealing”.
Insert instead “taking of the action”.

[9] Section 12C

Insert after section 12B:

12C Recording of native title in Register

- (1) The Registrar-General may, on evidence that appears to the Registrar-General sufficient, record in the Register approved determinations of native title made under the law of this State or of the Commonwealth and any other matters relating to native title rights and interests that the Registrar-General considers appropriate.
- (2) The information referred to in subsection (1) may be recorded in a manner and form that the Registrar-General considers appropriate.
- (3) In this section, *approved determination of native title*, *native title* and *native title rights* and interests have the same meanings as they have in the *Native Title Act 1993* of the Commonwealth.

[10] Sections 28M–28MH

Omit section 28M. Insert instead:

28M Lapsing of caution on qualified folio created after registered deed for value (section 28J (1))

- (1) This section sets out the 2 ways in which a caution recorded on a qualified folio of the Register under section 28J (1) that does not include a notation under section 28J (1A) or (1B) may lapse.
- (2) Firstly, if after the creation of the qualified folio, a person for valuable consideration and without fraud to which the person is a party becomes registered or, pursuant to section 36 (8), is deemed to have become registered, as proprietor of an estate or interest in the land comprised in the folio, the caution recorded on the folio lapses as regards the estate or interest:
 - (a) on the expiration of 6 years after the creation of the folio, or
 - (b) when the person becomes, or is deemed to have become, registered,whichever is the later.
- (3) Secondly, if immediately before the expiration of 12 years after the creation of the qualified folio, the caution affecting the folio has not lapsed as regards all estates and interests in the land comprised in the folio or been cancelled, the caution lapses on the expiration of that period.

28MA Lapsing of caution on qualified folio created after registered deed other than for value (section 28J (1A))

- (1) This section sets out the 2 ways in which a caution recorded on a qualified folio of the Register under section 28J (1) that includes a notation under section 28J (1A) but does not include a notation under section 28J (1B) may lapse.

- (2) Firstly, if after the creation of the qualified folio, a person for valuable consideration and without fraud to which the person is a party becomes registered or, pursuant to section 36 (8), is deemed to have become registered, as proprietor of an estate or interest in the land comprised in the folio, the caution recorded on the folio lapses as regards the estate or interest:
- (a) on the expiration of 6 years after the time when the person becomes, or is deemed to have become, registered, or
 - (b) at the time another person for valuable consideration and without fraud to which the other person is a party becomes, or is deemed to have become, registered as proprietor of that estate or interest,

whichever is the later.

- (3) Secondly, if
- (a) after the creation of the qualified folio, a person for valuable consideration and without fraud to which the person is a party becomes registered or, pursuant to section 36 (8), is deemed to have become registered, as proprietor of an estate or interest in the land comprised in the folio, and
 - (b) immediately before the expiration of 12 years after the person becomes, or is deemed to have become, so registered, the caution has not lapsed as regards the estate or interest or been cancelled,

the caution lapses as regards the estate or interest on the expiration of that period.

28MB Effect of lapsing of caution under section 28M or 28MA

- (1) If a caution lapses under section 28M or 28MA then, subject to subsection (2), the lapsing operates to free the land or the estate or interest in respect of which the caution lapses from any interests that affected the land at the date on which it was brought under this Act by the creation of a qualified folio of the Register.

- (2) However, the lapsing of a caution under section 28M or 28MA does not operate to defeat a subsisting interest that:
 - (a) was, immediately before the lapsing:
 - (i) recorded in the qualified folio, or
 - (ii) the subject of a caveat affecting land comprised in the qualified folio, or
 - (b) is preserved by section 42.
- (3) The provisions of this section and sections 28M (3) and 28MA (3) do not operate to defeat the estate or interest of a mortgagor in land in respect of which a Registrar-General's caveat has been recorded under section 12B (2).

28MC Application for cancellation of caution accompanied by search

- (1) This section applies in respect of a caution recorded on a qualified folio of the Register under section 28J (1) including a caution with a notation under section 28J (1A) but excluding a caution with a notation under section 28J (1B).
- (2) The registered proprietor of land comprised in a qualified folio on which a caution in respect of which this section applies is noted may, at any time, apply to the Registrar-General in the approved form for cancellation of the caution recorded in the folio.
- (3) The Registrar-General may cancel the caution if:
 - (a) the application is accompanied by an office copy of a certificate of the result of a search relating to the land under section 197 of the *Conveyancing Act 1919* and any other evidence that the Registrar-General may request, and
 - (b) the Registrar-General is satisfied that all estates and interests in the land are held free from any subsisting interests, other than those referred to in section 28MG.

- (4) For the purposes only of enabling a search to be carried out under section 197 of the *Conveyancing Act 1919* in relation to an application under this section, land comprised in a qualified folio is taken not to be land subject to the provisions of this Act.

28MD Application for cancellation of lapsed caution

- (1) The registered proprietor of land comprised in a qualified folio:
- (a) that is not affected by a notation under section 28J (1B), and
 - (b) in respect of which a caution has lapsed by the operation of section 28M or 28MA,
- may apply to the Registrar-General in the approved form for cancellation of the caution recorded in the folio.
- (2) The Registrar-General may cancel the caution if the Registrar-General is satisfied that, by virtue of section 28MB, all estates and interests in the land are held free from any subsisting interests, other than those referred to in section 28MG.

28ME Application for cancellation of caution on qualified folio created on possessory title (section 28J (1B))

- (1) This section sets out the way in which an application for cancellation of a caution recorded on a qualified folio of the Register under section 28J (1) that does not include a notation under section 28J (1A) but does include a notation under section 28J (1B) may be made.
- (2) The registered proprietor of land on which a caution in respect of which this section applies is recorded may apply to the Registrar-General in the approved form for cancellation of the caution if 12 years, running from the date on which a cause of action to recover the land comprised in the qualified title first accrued to a person, has expired.
- (3) The Registrar-General may cancel the caution to which the application relates to the extent that it affects the land if:

- (a) before the expiration of the period of 12 years referred to in subsection (2), no person has served notice of the commencement of an action to recover the land on the Registrar-General or given the Registrar-General written notice of an order made by the Supreme Court restraining the Registrar-General from cancelling the caution, and
- (b) the Registrar-General is satisfied that, by virtue of any statute of limitations, the land is held free from any subsisting interests, other than those referred to in section 28MG.

28MF Registrar-General may cancel lapsed caution

- (1) The Registrar-General may, if the Registrar-General thinks fit, cancel a caution that lapses by the operation of this Part.
- (2) In particular, the Registrar-General may, if the Registrar-General thinks fit, cancel a caution that lapses in accordance with section 28M (3).

28MG Cancellation of caution in certain cases does not defeat certain subsisting interests

The cancellation of a caution under section 28MC, 28MD, 28ME or 28MF does not operate to defeat a subsisting interest that:

- (a) was recorded in the qualified folio of the Register immediately before the cancellation, or
- (b) is preserved by section 42.

28MH Cancellation of caution on resumption or sale under Local Government Act 1993

- (1) This section applies when the Registrar-General:
 - (a) records a resumption pursuant to section 3 1A (3) (a) or (b), or
 - (b) records a transfer pursuant to section 726 of the *Local Government Act 1993*,of land comprised in a qualified folio of the Register.

- (2) On making a recording to which this section applies, the Registrar-General:
- (a) must cancel the caution recorded in the qualified folio, and
 - (b) when the certificate of title becomes available to the Registrar-General, must cancel the caution recorded on it,
- in so far as the caution relates to the land so resumed or transferred.

[11] Section 39 heading

Omit the heading. Insert instead:

39 Treatment of dealings that do not comply with requirements

[12] Section 39A heading

Omit the heading. Insert instead:

39A Treatment of certain instruments when land brought under Act

[13] Section 74F Lodgment of caveats against dealings, possessory applications and plans

Omit section 74F (6). Insert instead:

- (6) On the lodgment of a caveat under subsection (1), the Registrar-General must give notice in writing of the lodgment of the caveat to the registered proprietor of the estate or interest affected by the caveat by:
- (a) sending the notice by post to the address of the registered proprietor specified in the caveat, or
 - (b) giving the notice in such other manner, whether by advertisement or otherwise, as the Registrar-General considers appropriate,
- unless the consent of the registered proprietor is endorsed on the caveat.

[1 4] Section 74H Effect of caveat lodged under section 74F

Omit “or” from section 74H (5) (m) where secondly occurring.

[1 5] Section 74H (5) (m1) and (m2)

Insert after section 74H (5) (m):

- (m1) an easement created by a dealing if the caveat is noted on the folio for the land benefited by the easement,
- (m2) a positive covenant created pursuant to section 88BA of the *Conveyancing Act 1919* for maintenance or repair, or maintenance and repair, of land that is the site of an easement or other land that is subject to the burden of the easement (or both),

[1 6] Section 74H (5) (o)–(z)

Insert after section 74H (5) (n):

- (o) a dealing varying, releasing or cancelling an easement, the abandonment of an easement or the effect of an instrument under section 88B of the *Conveyancing Act 1919* releasing an easement, if the caveat is noted on the folio for the land burdened by the easement,
- (p) a dealing releasing or varying a covenant referred to in paragraph (m2),
- (q) a notation or an application for notation of the existence of a cross-easement for party walls created by the operation of section 88BB or 181 B of the *Conveyancing Act 1919*,
- (r) a dealing releasing or varying a restriction on the use of land,
- (s) a change in the address of a body corporate,
- (t) an application under section 74I (1) or (2) or 74J (1) for the preparation of a lapsing notice,
- (u) an application for the issue of:

- (i) a consolidated certificate of title, or
- (ii) separate certificates of title where there is more than one registered proprietor for land or for an estate or interest in land,
- (v) an application under section 12 or 136 for the exercise of the Registrar-General's power to compel the production of a certificate of title or other instrument,
- (w) an application under section 135B for the determination of a boundary by the Registrar-General,
- (x) a dealing by one or more joint tenants the sole purpose of which is to effect a severance of a joint tenancy,
- (y) a dealing by a lessor or sub-lessor recording the determination of a lease or sublease if the caveat is not recorded against the lease or sublease that is the subject of the determination, or
- (z) a dealing recording the bankruptcy of a registered proprietor.

[17] Section 74N Service of notices on caveators for purposes of Part

Omit "certified mail" wherever occurring in section 74N (1).
Insert instead "post".

[18] Section 74O

Omit the section. Insert instead:

74O Restrictions on lodgment of further caveats if earlier caveat lapses or is withdrawn

- (1) This section applies if a caveat lodged under a provision of this Part in respect of any particular estate or interest in land:
 - (a) subsequently lapses, or

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- (b) is, after an application is lodged with the Registrar-General for the preparation of a notice under section 74C (3), 74I (1) or (2) or 74J (1), withdrawn under another provision of this Part, or
- (c) is withdrawn or lapses under section 74MA, and the same caveator lodges a further caveat with the Registrar-General in respect of the same estate or interest and purporting to be based on the same facts as the first caveat.
- (2) A further caveat to which this section refers has no effect unless:
- (a) the Supreme Court has made an order giving leave for the lodgment of the further caveat and the order or an office copy of the order accompanies the further caveat when it is lodged with the Registrar-General, or
- (b) the further caveat is endorsed with the consent of the primary applicant or possessory applicant for, or the registered proprietor of, the estate or interest affected by the further caveat.

[19] Section 74P Compensation payable in certain cases

Omit “wrongfully and” from section 74P (1).

[20] Section 104 Approved forms

Omit “sealed with the Registrar-General’s seal” from section 104 (1) wherever occurring.

[21] Section 104 (2)

Omit “sealed with the seal of the Registrar-General”.
Insert instead “authenticated in accordance with subsection (3)”.

[22] Section 104 (3)

Insert after section 104 (2):

- (3) Approved forms must be sealed with the seal of the Registrar-General or authenticated in such other manner as the Registrar-General approves.

[23] Section 133 Torrens Assurance Fund not liable in certain cases

Insert at the end of the section:

- (2) No claim for compensation may be made on the Torrens Assurance Fund for any loss, damage or deprivation occasioned by, or as a result of, the recording, or the omitting to record, in the Register of an approved determination of native title or other matter relating to native title rights and interests.
- (3) Subsection (2) applies whether the loss, damage or deprivation is alleged to have been suffered by:
 - (a) a holder of native title or a claimant for native title, or
 - (b) a person deprived of land or an estate or interest in land as a result of the making of an approved determination of native title, or
 - (c) any other person.
- (4) Subsection (2) does not extend to an error made by the Registrar-General in the recording of matter in the Register (such as, for example, the recording of matter concerning native title on the wrong folio or the incorrect recording of matter on the correct folio).
- (5) In this section, *approved determination of native title*, *native title* and *native title rights and interests* have the same meanings as they have in the *Native Title Act 1993* of the Commonwealth.

[24] Section 139

Omit the section. Insert instead:

139 Rules of court and rights of appeal applicable to proceedings under Act

In the conduct of proceedings under this Act in the Supreme Court or the Land and Environment Court, the same rules of procedure and practice are to apply, and there are to be the same rights of appeal as are in force or exist for the time being in respect of ordinary proceedings in the court in which the proceedings are instituted.

[25] Schedule 3 Savings and transitional provisions

Insert at the end of clause 1

Real Property Amendment Act 1996

[26] Schedule 3, Part 3

Insert after Part 2:

Part 3 Real Property Amendment Act 1996

4 Cancellation of caution on qualified folio created on possessory title

Section 28ME, as inserted by the *Real Property Amendment Act 1996*, applies in respect of the cancellation of a caution to which that section applies whether the qualified folio on which the caution is recorded was created before or after the commencement of that section.

5 Compensation payable in respect of certain caveats

Section 74P, as amended by the *Real Property Amendment Act 1996*, does not apply in respect of a caveat lodged before the commencement of that amendment.

[Minister's second reading speech made in—
Legislative Assembly on 15 October 1996
Legislative Council on 30 October 1996]