

Real Property and Conveyancing Legislation Amendment Act 2009 No 17

[2009-17]



New South Wales

Status Information

Currency of version

Repealed version for 14 May 2009 to 1 November 2011 (accessed 6 October 2024 at 19:18)

Legislation on this site is usually updated within 3 working days after a change to the legislation.

Provisions in force

The provisions displayed in this version of the legislation have all commenced.

Notes—

- **Repeal**

The Act was repealed by sec 30C of the [Interpretation Act 1987 No 15](#) with effect from 2.11.2011.

Authorisation

This version of the legislation is compiled and maintained in a database of legislation by the Parliamentary Counsel's Office and published on the NSW legislation website, and is certified as the form of that legislation that is correct under section 45C of the [Interpretation Act 1987](#).

File last modified 2 November 2011

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Real Property and Conveyancing Legislation Amendment Act 2009 No 17



New South Wales

An Act to amend the *Real Property Act 1900* and other legislation to make further provision with respect to indefeasibility of title, compensation, identification requirements and duties of mortgagees; and for other purposes.

1 Name of Act

This Act is the *Real Property and Conveyancing Legislation Amendment Act 2009*.

2 Commencement

- (1) This Act commences on the date of assent to this Act, except as provided by subsection (2).
- (2) The following provisions commence on a day or days to be appointed by proclamation:
 - (a) Schedule 1 [4], [6] and [7],
 - (b) Schedule 2 [4].

Schedule 1 Amendment of *Real Property Act 1900* No 25

[1]-[3] (Repealed)

[4] Section 56C

Insert after section 56B:

56C Confirmation of identity of mortgagor

- (1) **Mortgagee must confirm identity of mortgagor** Before presenting a mortgage for lodgment under this Act, the mortgagee must take reasonable steps to ensure that the person who executed the mortgage, or on whose behalf the mortgage was executed, as mortgagor is the same person who is, or is to become, the registered proprietor of the land that is security for the payment of the debt to

which the mortgage relates.

- (2) Without limiting the generality of subsection (1), the mortgagee is to be considered as having taken reasonable steps to ensure the identity of the mortgagor under subsection (1) if the mortgagee has taken the steps prescribed by the regulations.
- (3) **Record-keeping requirements** A mortgagee must keep the following for a period of 7 years from the date of registration of the mortgage under this Act (or for such other period as may be prescribed by the regulations):
 - (a) a written record of the steps taken by the mortgagee to comply with subsection (1),
 - (b) a copy of any document obtained by the mortgagee to comply with subsection (1).
- (4) **Mortgagee to answer questions and produce documents** The Registrar-General, in determining whether or not this section has been complied with, may at any time require the mortgagee:
 - (a) to answer questions in relation to the steps taken by the mortgagee to comply with subsection (1), and
 - (b) to produce for inspection any records kept under subsection (3).
- (5) If a person fails to comply with a requirement made under subsection (4), the Registrar-General may:
 - (a) in relation to a registered mortgage—make a recording in the Register, with respect to the relevant land, to that effect, and
 - (b) in relation to a mortgage that has not been registered—refuse to register, or reject, the mortgage in accordance with section 39 (1A) or refuse to make any recording or entry in the Register or take any other action in respect of the mortgage.
- (6) **Cancellation of recordings in the Register** The Registrar-General may cancel, in such manner as the Registrar-General considers appropriate, any recording in the Register with respect to a mortgage if the Registrar-General is of the opinion:
 - (a) that the execution of the mortgage involved fraud against the registered proprietor of the mortgaged land, and
 - (b) that the mortgagee:
 - (i) has failed to comply with subsection (1), or
 - (ii) 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.

- (7) Before cancelling a recording of a mortgage in the Register under subsection (6), the Registrar-General must give notice of the proposed cancellation to the mortgagee and may also give notice to any other person that the Registrar-General considers should be notified of the cancellation. Section 12A (2) and (3) apply to and with respect to a notice given under this section.
- (8) **Application to transferee of a mortgage** This section applies to the transferee of a mortgage in the same way that it applies to a mortgagee (that is, requiring the transferee of a mortgage to take reasonable steps to ensure that the person who executed the mortgage as mortgagor is the same person who is, or is about to become, the registered proprietor of the land that is security for the payment of the debt to which the mortgage relates). Accordingly, a reference in this section to:
- (a) the presentation of a mortgage includes a reference to the presentation of a transfer of mortgage, and
 - (b) the mortgagee includes a reference to the transferee of the mortgage, and
 - (c) the date of the registration of the mortgage includes a reference to the date of registration of the transfer of mortgage.

[5] (Repealed)

[6] Section 117 Certificate of correctness

Omit section 117 (1) (b). Insert instead:

- (b) a certificate (signed by each witness to the execution of the application, dealing or caveat) to the effect that:
 - (i) the witness is an eligible witness, and
 - (ii) the application, dealing or caveat was executed by the person to whose execution of the application, dealing or caveat the witness is attesting in the presence of the witness.

[7] Section 117 (4) and (5)

Insert after section 117 (3):

- (4) In this section, ***eligible witness***, in relation to the execution of an application, dealing or caveat, means a person who:

- (a) is at least 18 years of age, and
 - (b) is not a party to the application, dealing or caveat, and
 - (c) has known the person to whose execution of the application, dealing or caveat the witness is attesting for more than 12 months or has taken reasonable steps to ensure the identity of that person.
- (5) Without limiting the generality of subsection (4) (c), a witness is to be considered as having taken reasonable steps to ensure the identity of the person to whose execution of the application, dealing or caveat the witness is attesting if the person has taken the steps prescribed by the regulations.

[8]-[31] (Repealed)

Schedule 2 Amendment of [Conveyancing Act 1919 No 6](#)

[1]-[3] (Repealed)

[4] Section 111A

Insert after section 111:

111A Duties of mortgagees and chargees in respect of sale price of land

- (1) A mortgagee or chargee, in exercising a power of sale in respect of mortgaged or charged land, must take reasonable care to ensure that the land is sold for:
 - (a) if the land has an ascertainable market value when it is sold—not less than its market value, or
 - (b) in any other case—the best price that may reasonably be obtained in the circumstances.
- (2) Subsection (1) applies to an agent appointed by a mortgagee or chargee to sell the mortgaged or charged land in the same way as it applies to a mortgagee or chargee exercising a power of sale in respect of mortgaged or charged land.
- (3) Nothing in section 112 (7) or 115 (2) of this Act, or in section 58 (1) of the [Real Property Act 1900](#), affects the duty imposed by this section.
- (4) The title of the purchaser cannot be challenged on the ground that the mortgagee or chargee has committed a breach of any duty imposed by this section, but a person who suffers loss or damage as a result of the breach of the duty has a remedy in damages against the mortgagee or chargee exercising the power of sale or selling the land.
- (5) This section has effect despite any stipulation to the contrary.

- (6) Nothing in this section affects the operation of any rule of law relating to the duty of the mortgagee or chargee to account to the mortgagor or chargor.
- (7) This section applies to mortgages and charges whether made before or after the commencement of this section but only in relation to a sale arising as a consequence of a default occurring after the commencement of this section.
- (8) This section extends to mortgages and charges under the *Real Property Act 1900*.

[5] (Repealed)

Schedule 3 (Repealed)