THE LAW SOCIETY
OF NEW SOUTH WALES

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16 January 2015

Mr Michael James
Chair of the Property Law Reform Alliance
c/o Level 1,
11 Barrack Street,
Sydney NSW 2000

By email: RFarrell@liv.asn.au

Dear Mr James,

Revised Draft Uniform Torrens Title Act

The Property Law Committee ("Committee") of the Law Society of New South Wales appreciates the opportunity to review the revised Draft Uniform Torrens Title Act ("Draft Act") issued on 10 October 2014.

The Committee strongly supports the Property Law Reform Alliance ("PRLA") initiative in developing a Uniform Torrens Title Act and envisages clear benefits from such an initiative. It also supports the PRLA's plans to liaise with the Commonwealth Government in relation to undertaking a cost-benefit analysis.

As you are aware the Committee made an extensive submission dated 26 February 2013 on the earlier version of the Draft Act. The Committee reviewed the current Draft Act having regard to its prior submission, particularly in the areas of leases, easements, covenants, caveats, priority notices and the powers of the Registrar General.

The Committee notes the best practice guiding principle underpinning the development of the Draft Act and has concentrated on raising only those matters that in its view are of considerable importance.

1. Leases

The Committee is pleased that s 57 has not been amended in this version, such that the requirement to register a lease where the term of a lease (including any option to renew, whether or not exercised) exceeds three years remains. The Committee notes that this reflects majority practice amongst the jurisdictions and s 42(1)(d) of the *Real Property Act 1900* (NSW).

The Committee opposes a less robust approach to the requirement for third party consents to be recorded in the register, such as those of the registered mortgagee in relation to a lease. The Committee's preferred approach is to remove the possibility of registration of a lease or variation of lease without mortgagee consent, especially having regard to the consequences of not having obtained prior mortgagee consent under s 60(2), that is, the registered mortgagee is not bound by the lease or variation of lease.

If s 60(1) is to remain as drafted, allowing the registration of a lease or variation of lease without proof of mortgagee consent, then in the Committee's view, it is in the interests of all parties to be able to have that consent recorded on the register whenever it is obtained. On that basis it requests that ss 60(2) and (3) should be amended to permit consent by endorsement by the mortgagee before *or after* registration.

In relation to ss 66(4) and (5), in the Committee's view the payment of rent by a tenant is recognised as a fundamental obligation of the lease and is often expressed as an essential term. A period of 30 days appears to be too lengthy a time frame before termination action can be taken with respect to such a fundamental obligation. This section could be utilised and perhaps abused by tenants to delay payments of rent for weeks at time before a termination event is triggered. On that basis the Committee requests that s 66 (5) be amended to allow the period of 30 days to be shortened by the express provisions of the lease, in accordance with current leasing practice.

Section 67 deals with the registration of a disclaimer of a lease under the law relating to bankruptcy, including liquidation of companies. In the Committee's view, the brevity of the proposed s 67 does not adequately address the complexity of the issues involved. Important issues that should be added to this section include: the effect of registering a disclaimer (especially the notice requirement), whether the lease remains on the title, the process for the removal of the lease from the title if the surrender provisions do not apply and the manner in which the rights of the person claiming an interest in the lease, such as a mortgagee, are protected.

2. Easements and covenants

The Committee considers that registered mortgagees and lessees of the benefited land should be required to consent to a variation of an easement, unless in the case of the lessee and in the opinion of the Registrar, a lessee does not receive a benefit from the easement. On that basis the Committee agrees with the approach taken in s 103 of the Draft Act.

However the Committee notes that its earlier comments in relation to s 103(2)(c), which restricts a variation of an easement to "change a party" have not been addressed. It remains unclear to the Committee as to whether the reference to a "party" is intended to refer to a party having the benefit of an easement in gross (and if so, this should be expressly stated) or to the owner of the benefited or benefited land (and if so, this should refer to a change in the burdened or benefited land rather than a "party").

The Committee notes that its concerns about covenants being enforceable for 20 years after registration in s 117 have not been addressed. As drafted, a covenant ceases to be enforceable 20 years after registration although its enforceability may be extended by lodgment of an instrument of extension "before the covenant ceases to be enforceable". There is no limit on the length of time for which the covenant can be extended. This means that the day after a covenant is registered, the owner of the benefited land could lodge an extension of the covenant which would make the covenant enforceable for a further specified period or indefinitely. The Committee does not believe that s 117 in its current form is workable. The Committee acknowledges Lands Victoria's concern about covenants presently recorded which are already 20 years old; there must be, at the least, some transitional provision. Overall, the Committee's view is that the Registrar should be entitled to remove the recording of a covenant on satisfactory evidence that it is no longer of any effect, which aligns with the approach taken in s 115.

3. Caveats

Section 162(3)(e)(ii) enables an owner's caveat to prevent the registration of a transfer by a mortgagee exercising power of sale. In the Committee's view it does not sit well with s 82(3) which states:

> Registration of the instrument of transfer [by the mortgagee under power of sale] is not prevented by a caveat, **if the caveat relates to an interest over which the mortgage has priority**. (emphasis added)

In *Jensen v Bank of Queensland* [2011] NSWCA 71, the NSW Court of Appeal considered the way in which a caveat could be framed to prevent the registration of a transfer under power of sale (in that way negating s 74H(5)(g) of the *Real Property Act 1900* (NSW)):

> In those cases where a caveat is expressed specifically to prohibit dealings by a mortgagee, I think it generally must be appropriate to state the manner in which the estate or interest is derived from the mortgagee (Hodgson JA at [24]).

In that case, the caveators, including the registered proprietor, were found to be unable to show an interest with priority over, or derived from, the mortgagee.

Section 162(3)(e)(ii) might appear to promote the interest of the registered owner to a position not presently recognised in Torrens title law. It is noted that a NSW registered owner who wishes to restrain a mortgagee's exercise of power of sale must, at present, either commence injunctive proceedings, or lodge a caveat amended to include a prohibition on registration of a transfer under power of sale, then await a lapsing notice or application under s 74MA of the *Real Property Act 1900* (NSW) and face the *Jensen* argument. Section 162(3)(e)(ii) may simply remove the need to modify the form of caveat. However, its interaction with s 82(3) and the application of the principles enunciated in cases such as *Jensen* requires further consideration.

In relation to ss 164(1) and (2), the definition of "caveatee" includes parties (other than the registered owner) having an interest in the land. Section 164(2) enables a "caveatee" to apply for lapsing of the caveat, unless one of the exceptions in s 164(1) applies. In the Committee's view, as s 164(1)(b) is presently drafted, a *registered owner's* consent to a caveat would appear to prevent the holder of another registered interest in the land from applying for the lapsing of the caveat.

Section 159(2)(e) recognises that a caveat may be lodged to prevent dealings affecting a registered interest rather than the fee simple. The consent of the registered owner to the lodgment of such a caveat is arguably irrelevant and should not prevent the holder of the registered interest from applying for the lapsing of the caveat. A caveat against the fee simple lodged with the consent of the registered owner should not prevent a party such as a mortgagee from applying for the lapsing of the caveat, either as the holder of a registered interest, or before registration, as a party having an interest in the land (paragraph (ii) of the definition of caveatee), as presently permitted under s 74I of the *Real Property Act 1900* (NSW).

The exemption in ss 164(1)(b) might be clearer if expressed as follows:

> (b) the consent of:
>
> (i) the registered owner, in the case of an application under subsection (2) by the registered owner, or
>
> (ii) the holder of a registered interest, in the case of an application under subsection (2) by the holder that registered interest,
>
> is deposited when the caveat is lodged;

In relation to s 164, in light of the experience of the NSW Registrar General in *Castle Constructions v Sahab* [2013] HCA 11, where the processes involved in the service of notice under s 12A of the *Real Property Act 1900* (NSW) came under considerable scrutiny, serious questions remain about the appropriateness (and willingness) of the Registrar General at least in NSW to be involved in the service of lapsing notices.

Under the present law and practice in NSW, the mere service of a lapsing notice does not result in the lapsing of the subject caveat. Evidence of service must be lodged within 28 days of the lapsing notice being issued by the Registrar General, failing which the application is rejected. Once evidence of service is lodged, the application cannot be withdrawn and the only way the operation of the caveat can be extended (even with the agreement of the applicant) is for the caveator to commence proceedings.

Where negotiations with the caveator are anticipated, as a matter of tactics and in the interests of avoiding the unnecessary commencement of proceedings by the caveator, the applicant may refrain from lodging its evidence of service until negotiations are exhausted. A settlement may be reached such that the applicant is content for its lapsing application to be rejected and the caveat remain in place.

As presently framed, ss 164(3) and (4) would compel the caveator *in every case* to commence proceedings for extension of the operation of the caveat, even where agreement had been reached with the applicant to allow the caveat to remain.

It is submitted by the Committee that this outcome is both unsuited to the practical and commercial imperatives driving both caveator and lapsing notice applicant in the majority of cases. It may also place an inappropriate burden on the resources of the Court not presently experienced.

The Committee continues to oppose s 164(4) in its present form. It is not the commencement of proceedings but the filing with the Registrar General of a court order (admittedly an interim one) which stays the lapsing of the caveat. The applicant for interim relief must still satisfy the Court as to an arguable case and the balance of convenience, and provide a meaningful undertaking as to damages. Each of these elements are independently important factors to be found before the caveat's operation should be extended.

The registered proprietor or other caveatee should not be put at risk of damages (e.g., through delay in completing a transaction, or in losing a sale), or the cost of commencing its own proceedings for an urgent removal order, if the caveator cannot muster sufficient evidence to satisfy the Court, even on an *ex parte* basis, that each of these elements are made out. While interim applications are certainly dealt with promptly, a hearing on the merits (including final relief to vindicate the interest claimed in the caveat) may take months; longer than a caveatee should be expected to wait if the caveator could not establish the necessary elements on an interim application.

In the Committee's view, it also appears that Note 156 is incorrect as to NSW.

4. Priority Notices

The Committee supports a 60 day priority notice as provided by s 177. Since the Committee's last submission, the Real Property Further Amendment (Electronic Conveyancing) Bill 2014 was introduced into the NSW Parliament, but has not yet been passed. That Bill contained provisions allowing for an application to be made to the Registrar General for an extension of the period of a priority notice by a single additional period of 30 days. The Committee suggests that a similar provision is appropriate for inclusion in the Draft Act.

5. Powers of the Registrar General

The Committee suggests that s 216 should be amended to provide that written notice be given to registered proprietors and other affected persons. Mere public notice of the request will not ensure that those parties who ought to be made aware of the request will actually be notified.

In the Committee's view the Draft Act should be amended to provide for a right of appeal to the Supreme Court by a person affected by an inquiry conducted by the Registrar pursuant to s 222, having regard to the powers exercisable by the Registrar following the inquiry as enumerated in s 227.

The Committee looks forward to continuing its involvement in consultation regarding the Draft Act. Please contact Gabrielle Lea, Policy Lawyer, Property Law Committee if you have any questions regarding this letter via email: gabrielle.lea@lawsociety.com.au or on (02) 9926 0375.

Yours sincerely,

John Eades
President