

Real Property Amendment (Compensation) Act 2000

The Real Property Amendment (Compensation) Act 2000 (the Act) commenced, with one minor exception, on 15 September 2000. Schedule 1 Item 11, which relates to amendments to section 117 of the *Real Property Act 1900* concerning attesting witnesses, commenced on 1 July 2001.

The purpose of the Act is to modernise and simplify the compensation scheme established under the Real Property Act. The Act clarifies the rights of parties and provides a clear framework for the making and determination of claims by an administrative process. This assists in the efficient determination of claims on the Torrens Assurance Fund (TAF) and benefits claimants by expediting the settlement of claims.

Background

The TAF underwrites the State guarantee of land titles in New South Wales under the Torrens title system. The object of the Torrens system is to provide certainty of title to land. The State guarantees the validity of the title of persons who become registered as the proprietor of land without fraud on their own part. Title to the land, or an interest in land, is guaranteed although registration was obtained by an otherwise invalid instrument.

Under common law (or old system) title, a landowner may recover his or her land by legal action against a current owner who acquired the land through a forged or fraudulent instrument. In contrast, the ownership of a person who has been registered as a proprietor under the Torrens system cannot be disturbed unless he or she was a party to the fraud. Under Torrens title, the right of a defrauded owner to recover the land is converted to a right to compensation

The difference is that under the old system the owner recovers the land and the innocent purchaser forfeits the purchase price while under the Torrens system the innocent purchaser retains the land and the former

owner is compensated financially. The amendments do not change the underlying principles that have governed the TAF since its establishment.

Part 13 – Civil Rights and Remedies

Prior to the amendments the provisions relating to the payment of compensation were contained in Part 14 of the Real Property Act. Part 14 also contained provisions relating to the civil rights and remedies that are available to persons who are deprived of land and provisions relating to the judicial review of the actions of the Registrar General.

The Real Property Amendment (Compensation) Act repeals and replaces Part 14, dividing its subject matter into new Parts 13 and 14. Part 13 deals with civil rights and remedies and with judicial review, and Part 14 now deals only with the TAF. In the process, many provisions of the Act that are not the subject of substantive amendments have been restated in a clearer style.

Part 14 – The Torrens Assurance Fund

The new Part 14 is divided into a number of Divisions. Division 1 defines some relevant terms used in the legislation and Division 2 deals with compensation generally. Division 3 deals with administrative claims, Division 4 sets out provisions relating to court proceedings and Division 5 provides for some miscellaneous matters.

Compensation

Section 129 clearly sets out when compensation is to be payable from the Torrens Assurance Fund and the exceptions to that liability.

The new section 129(1) covers all of the causes of action that were contained in the repealed sections. Accordingly, compensation may be claimed for any

loss or damage suffered by a person as a result of the operation of the Real Property Act in respect of any land where the loss or damage arises from:

- (a) any act or omission of the Registrar General; or
- (b) the registration of some other person as proprietor of the land, or
- (c) any error, misdescription or omission in the Register, or
- (d) the land having been brought under the provisions of the Real Property Act, or
- (e) the person having been deprived of the land, or of any estate or interest in the land, as a consequence of fraud, or
- (f) an error or omission in an official search.

Exceptions to Liability

Section 129(2) sets out the exceptions to the TAF's liability to pay compensation. For the most part, these exceptions are the same as presently exist, either in the Real Property Act, or under common law.

The exceptions provided in the new sections 129(2)(b), (2)(f), (2)(g) and 2(h) are carried forward from the existing legislation.

However, there are a number of new provisions that will help to clarify the liability of the TAF.

Contributory negligence

Section 129(2)(a) provides that the TAF is not liable to pay compensation to the extent that the loss is a consequence of any act or omission of the claimant. This provision allows any contributory negligence of a claimant to be considered when determining the liability of the TAF.

The provision acknowledges the fact that claimants can, by their own actions or inactivity, be responsible for any loss they may suffer.

Solicitors, Licensed Conveyancers and Real Estate Agents

Compensation is not payable to the extent to which the loss or damage is a consequence of any fraudulent, wilful or negligent act or omission by any solicitor, licensed conveyancer or real estate agent, and is compensable under an indemnity given by a professional indemnity insurer.

Mitigation of Damages

Section 129(2)(c) provides that the TAF is not liable to pay compensation to the extent that the loss is a consequence of a failure by the claimant to mitigate, or lessen, any loss. Accordingly, a claimant is required to take all reasonable

and prudent steps to mitigate a loss for which compensation is payable.

Offset of benefits

Section 129(2)(d) allows any benefit that the claimant may have received that is related to the cause of the claim to be taken into account in assessing compensation. Such a benefit may result in a number of different ways. For example, where part of the proceeds of a fraudulent mortgage have been applied to pay out an earlier genuine mortgage.

Where such a benefit is established, any compensation paid from the TAF may be discounted by the amount of any benefit the claimant has received.

Errors in the Measurement of Land

The exception provided in the new section 129 (2)(e) relates to errors or miscalculations in the "measurement" of land. In other words, it relates to errors in the dimensions or areas of parcels of land.

For most purchasers of residential land, the area of the parcel they wish to buy is unimportant; they purchase the property that they decide meets their needs and identify it by its address and the fencing that indicates the boundaries with neighbouring parcels. The decision to buy is based on what they see when inspecting the property and is a subjective choice. For the most part, the actual measurement of the area of the block is only a minor consideration.

But for those purchasers of residential or commercial properties who are concerned about areas, a check can be made as part of the identification survey process or they can have a surveyor calculate the area of the property from existing plans, as a check on the accuracy of the stated area. In the case of a rural property, a surveyor may be engaged to calculate the area from the plans relating to the property.

Administrative claims

Part 14 Division 3 introduces an administrative process for the resolution of claims against the Registrar General.

Section 132 provides that a person cannot initiate proceedings in court to claim against the TAF unless they have first made an administrative claim. To ensure that this requirement does not operate to disadvantage the claimant, especially in circumstances where litigation may be necessary against other parties, the Registrar General may consent to a person initiating court

proceedings without making or completing an administrative claim, or the Court itself may give leave to do so.

Administrative claims are to be made on an approved form. A claim is to be lodged on Form 00 TAF – Claim for Compensation from the Torrens Assurance Fund. Also, instructions for completion, Form 00 TAF2, are available to assist claimants in completing the claim form.

The Registrar General is empowered to deal with all claims on the TAF administratively, but will need the consent of the Minister before offering compensation of more than \$100,000.

Section 131(2) provides that a person who has suffered compensable loss may lodge a claim for compensation with the Registrar General within 6 years after the act or omission giving rise to the loss or, if the loss arose on a later date, within 6 years after that later date.

To facilitate the administrative resolution of claims, section 131(6) provides that claimants are required to cooperate fully with the Registrar General and must supply the Registrar General with sufficient information to ensure that the Registrar General is able to assess the validity of the claim and the amount of any compensation that may be payable.

If a claimant does not comply with any reasonable request by the Registrar General for information the administrative claim will not be determined and the claimant will not be able to take court proceedings to pursue the claim, except by leave of the Court or with the consent of the Registrar General.

Court Proceedings

When a person takes court proceedings to claim compensation from the TAF, they are to be taken against the Registrar General as nominal defendant. Such proceedings cannot be commenced before an administrative claim has been made and determined, and cannot be made more than 12 months after the administrative claim has been determined, except by leave of the court or with the consent of the Registrar General.

Subrogation

The Registrar General is subrogated to a claimant's rights and remedies against any person against whom the claimant has a claim. This means that the Registrar General can claim against any other person that the

claimant is able to sue. The Registrar General may also exercise any rights of subrogation from the time a claim is made and may join any person as a co-defendant, if of the opinion that there may be a claim against that person arising from the right of subrogation.

Settlement of claims

Section 135 continues the Registrar General's power to settle claims and now specifically authorises the Registrar General to participate in mediation or other dispute resolution processes in order to settle a claim.

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