

AUGUST 2020

Important changes to liens and equitable mortgages

Key points:

- The NSW Government has recently approved the cancellation of all Certificates of Title (CTs) as part of the evolution of electronic conveyancing. It is expected that legislation to make this change will be introduced into Parliament later in the year and CTs will be cancelled in around mid-2021.
- For solicitors, conveyancers and lenders, any lien held over CTs as a form of security for payment of costs may become invalid and ineffective after the legislative amendments commence.
- Those affected by the changes should begin to pursue other methods of securing payment.



Cancellation of Certificates of Title

The NSW Government has recently approved the cancellation of all Certificates of Title (CTs) as part of the evolution of electronic conveyancing. It is expected that legislation to make this change will be introduced into Parliament later in the year and CTs will be cancelled in around mid-2021. When this happens CTs will cease to be an instrument under the law and will no longer be evidence of indefeasible title.

In the meantime, solicitors, conveyancers and lenders are advised to consider alternative arrangements to obtain security for their costs or debts.

Alternative Methods of Securing Payment

Solicitors and conveyancers

A lien over CTs is typically used by the legal profession to secure their costs for legal work performed. What it does is restrict the ability of the registered proprietor or others, such as a trustee in a bankruptcy, from freely dealing with the property if the solicitor's or conveyancer's costs have not been paid. When CTs are cancelled, this method of securing payment of costs will no longer be available or effective.

Solicitors and conveyancers should begin to adopt other methods of securing payment of outstanding costs by their clients. They may choose to hold a lien over other papers, files, documents and deeds that belong to the client and that the solicitor or conveyancer received while representing them. A solicitor may also place a condition in their cost agreement that enables a charge to be created for the repayment of costs. A solicitor may also hold a lien over money held on trust on behalf of a client, but only up to an amount which covers the solicitor's costs.



Lenders

It is a common practice by smaller cash loan providers to not register their mortgages on the Torrens Register when providing a loan to a customer. Instead, these lenders hold a lien over the customer's CT to secure the repayment of the loan. When CTs are cancelled, this method of securing payment will no longer be available or effective.

Lenders that currently adopt the practice of holding a lien over CTs should begin to consider adopting other methods of securing payment of debts. Alternative arrangements could include holding a lien over other documents or assets held by the customer to secure the repayment of the loan. Those that have a contractual right or entitlement under the finance agreement to register a mortgage should consider doing so. Lenders are encouraged to seek legal advice as to their alternative options.

More information

- Read the Cancellation of certificates of title [Position paper and Discussion paper](#)
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