

## Circular

Division: Land and Property Information  
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### **Practice change: Compulsory production of Certificates of Title to allow registration of second mortgages.**

The Registrar General will no longer act on requests by a second mortgagee for the Registrar General to issue a notice under s. 12(1)(a) of the *Real Property Act 1900* requiring production of the Certificate of Title by the first mortgagee to enable registration of a second mortgage. This means that second mortgages will not now be registered unless the certificate of title is produced by the first mortgagee for that purpose.

This change in practice has been implemented in response to a recent judgment in the Supreme Court of NSW by Hamilton, J in *Hypac Electronics Pty Ltd (In Liquidation) v Registrar General [2005] NSWSC 1213* (30 November 2005).

#### **What was the Registrar General's former practice?**

Formerly, when a second mortgagee could not gain agreement from the first mortgagee to produce the Certificate of Title to allow registration of a second mortgage, the second mortgagee could lodge a request for the Registrar General to exercise the power to compel production under s. 12(1)(a). If the Certificate of Title was not produced in response to a notice under s. 12(1)(a) requiring production within a period set out in the notice, the Registrar General served a notice of intended registration under s. 12A on the first mortgagee, and then registered the second mortgage after expiry of the notice period, if no court order preventing registration was lodged before that date.

#### **What was the basis for this practice?**

The basis for this practice was that the Registrar General considered that s.96(2) of the *Conveyancing Act 1919* (set out below) entitled a mortgagor to have a second mortgage registered even when the first mortgagee had not agreed to the second Mortgage.

#### **“96. Power for mortgagor to inspect title deeds**

(1) A mortgagor, as long as the mortgagor's right to redeem subsists, shall by virtue of this Act be entitled from time to time at reasonable times on the mortgagor's request, and at the mortgagor's own cost and on payment of

the mortgagee's costs and expenses in this behalf by the mortgagee, the mortgagee's solicitor or licensed conveyancer, to inspect and to be supplied with copies or abstracts of, or extracts from, the documents of title or other documents relating to the mortgaged property in the custody or power of the mortgagee.

(2) This section applies to mortgages under the *Real Property Act 1900*, and in such case the mortgagor shall be entitled to have the relevant certificate of title, or other document of title, lodged at the Office of the Registrar General, to allow of the registration of any authorised dealing by the mortgagor with the land, upon payment of the mortgagee's proper costs and expenses".

In particular the Registrar General had interpreted 'authorised dealing' in s.96(2) to mean a dealing authorised by the mortgagor, or a dealing authorised under the *Real Property Act*, rather than a dealing authorised under the first mortgage.

#### **How has the Supreme Court now interpreted s. 96(2)?**

The Supreme Court of NSW has now ruled that 'authorised dealing' ought to receive the interpretation that the dealing is "permitted or not forbidden as between the mortgagor and the mortgagee" (Paragraph 33 of the judgment). Though this case dealt with registration of a transfer rather than a second mortgage, the interpretation of s. 96(2) equally applies to a second mortgage.

#### **Will s. 96 be amended?**

The Registrar General will now investigate whether s.96 requires amendment.

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