



THOMSON REUTERS

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Land Titling Law and Practice in NSW

Stilianou

Preliminary

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FRAMEWORK

[4.10] When a Mortgagor defaults in their repayment of moneys owing under a Mortgage to a Mortgagee, the Mortgagee can sell the land secured by the Mortgage to recoup the debt owing to the Mortgagee from the Mortgagor. The Mortgagee can do this in a number of ways. The three most common contexts are through:

1. The statutory power of sale contained in the *Real Property Act 1900* (NSW) for Torrens title Mortgages and the *Conveyancing Act 1919* (NSW) for Old System Mortgages;
2. The power to appoint a Receiver contained in the *Conveyancing Act 1919*, who in turn may sell the land; and

3. The power to sell the land as the Mortgagor's Attorney based on a Power of Attorney contained in the registered Mortgage, and in reliance on the *Powers of Attorney Act 2003* (NSW).

Much depends on the way in which the Mortgagee elects to sell the mortgaged land. Given that different statutory rules and powers are at play in each of the transactions, it is that context (namely, the way in which the Mortgagee sells the secured land consequent on default) which will determine not only the requirements the LPI will have to consider to enable Registration, but also the effects of Registration of the Mortgagee's transfer and the effects that it may have on other interests that are recorded in the Register, such as other Mortgages, Charges and Caveats.

The common thread in each of these Mortgagee sales contexts is the Mortgagor's default. Whether the fact of the Mortgagor's default needs to be proved to a person dealing with the Mortgagee, or to the LPI, needs to be understood by lawyers prior to settlement to facilitate Registration and to avoid Requisition. This, together with knowledge of how Registration of the Mortgagee's transfer will affect other interests that are recorded in the Register, will give lawyers and their clients more confidence in dealing with Mortgagee sales transactions.

This chapter will examine:

- The approved forms available from the LPI that may be used to give effect to a Mortgagee's intention to sell land secured by a Mortgage after default has occurred.
- The Mortgage transaction.
- The primary differences between the operation of Old System Mortgages and Mortgages registered under the *Real Property Act 1900*.
- The definition of "default" that gives rise to a power of sale, and the procedure to be followed by the Mortgagee consequent on default, found in the *Real Property Act 1900* and the *Conveyancing Act 1919*.
- LPI's requirements with respect to:
 - a Transfer by Mortgagee Under Power of Sale (which are equally applicable to a Transfer by Chargee Under Power of Sale);
 - a Transfer by an appointed Receiver; and
 - a Transfer by an appointed Attorney,

with a focus on aspects of the approved form that are peculiar to each transaction, whether evidence of the Mortgagor's default is required, and the effects of Registration.

- The special rules in the *Real Property Act 1900* that apply to Caveats — how Caveats may affect the registrability of the Mortgagee's transfer and any other dealings that may be lodged with it.

A Transfer by a Mortgagee exercising a power of sale conjures up negative connotations. Not least because the process involves a Mortgagor who has defaulted in their repayments to a Mortgagee under a Mortgage. The Mortgagee is literally *selling the house from underneath the Mortgagor*. Negative connotations also arise because of the potential for a disgruntled or resistant Mortgagor, rightly or wrongly, to deliberately undermine a Mortgagee's legitimate attempts to sell the land secured by the Mortgage.

It is also this same context (of a Mortgagor in financial difficulty) which gives rise to a unique set of problems that lawyers might encounter when investigating the Torrens Register. It is common to find that when Mortgagors are in financial difficulty, borrowing from other lenders or family and friends results in second Mortgages or Charges being registered that affect the land, or Caveats being lodged and recorded to protect those lenders' unregistered equitable Mortgages or Charges. Those challenges are specifically covered in this chapter.

It is the role of the lawyer to ensure that any potential problems that may arise are mitigated or dealt with expeditiously. It is important for lawyers to not only understand the legislative framework for the context in which the Mortgagee's sale is being exercised, but also the content of the folio of the Register for the parcel of land being sold by the Mortgagee, which may contain other registered interests or recorded Caveats that may operate as a barrier to Registration.

LPI DEALING FORMS

[4.20] There are a number of options available to a Mortgagee to sell a Mortgagor's parcel of land after default has occurred, so as to realise the land secured by the Mortgage and pay out the Mortgagor's debt. This chapter will examine three contexts in which that can occur. The LPI have two approved forms that are available to give effect to the Mortgagee's sale transaction, whether that be pursuant to the power of sale contained in the *Real Property Act 1900* (NSW), pursuant to a Power of Attorney instrument contained in the Mortgage and the *Powers of Attorney Act 2003* (NSW), or pursuant to a power to appoint a Receiver of the land contained in the *Conveyancing Act 1919* (NSW). It is the Mortgagee that selects the context in which it will realise the security and sell the land, and the proposed Contract for Sale of Land will identify which way the Mortgagee has chosen, by reference to the way the Vendor is described on the contract.

The LPI-approved forms are:

- Transfer by Mortgagee Under Power of Sale (form 01TP). There is also a Transfer by Chargee Under Power of Sale (form 01CT) which may be used when the power of sale is exercised through a registered Charge.
- Transfer (form 01T).

The approved forms appear in Appendix A, together with information on how to locate the accompanying explanatory material.

The Registration of either of the dealing forms will achieve the same objective as recording a purchaser from the Mortgagee as the Registered Proprietor of the land, but that is where the similarities end. However, other aspects of the two forms — such as the LPI's requirements to enable Registration and the effects of Registration of the Mortgagee's transfer on other interests (for example, other Mortgages and Charges) that are recorded in the Torrens Register — will differ depending on the context within which the Mortgagee sale takes place. This is because there are different statutory rules and powers that apply to each of the contexts. There are also special rules that apply to the prohibitive effects of a Caveat and how they affect the Mortgagee's transfer.

It is therefore essential that lawyers for both the Mortgagee and purchaser know, prior to settlement, what interests are recorded in the folio of the Torrens Register for the land being sold by the Mortgagee. This is to facilitate Registration

and to avoid Requisition, having regard to the context within which the Mortgagee sale is taking place and the relevant statutory rules and powers that apply.

INTRODUCTION TO THE MORTGAGE TRANSACTION

[4.30] In an ideal world, a moneylender should be able to rely on a borrower's promise to repay the money lent. However, a mere promise to repay money borrowed does not offer the same incentive to repay as the threat of having one's assets sold in order to satisfy the debt.

The business of money-lending, whether you are the borrower or the lender, is one of balancing risk. The borrower wants to ensure the terms and conditions surrounding the lending transaction are fairly balanced with respect to fees, charges, interest and time for repayment, so that they may be certain that any repayments made will reduce the principle amount owing and not get eroded by hidden fees and charges. To calculate that risk borrowers compare the lending products of banks, credit unions and other financial institutions before selecting the right product for them.

The lender, on the other hand, wants to ensure that the person it lends money to through its lending products is capable of repaying the whole amount in a timely fashion. To calculate that risk there is an assessment of, amongst many other variables, a borrower's income, ability to repay, any savings history, the amount requested to be borrowed and the value of any security offered.

To reduce the risk of non-repayment, a money-lender's usual practice is to require a form of security over an asset which can be realised (that is, sold) to satisfy and discharge the debt in the event of default in repayment by the borrower. In the context of borrowing money for the purpose of purchasing land, the security is usually in the form of a Mortgage of the land.

Section 3 of the *Real Property Act 1900* (NSW) provides the following definitions:

"Mortgage" — Any charge on land (other than a covenant charge) created merely for securing the payment of a debt.

"Mortgagor" — The proprietor of land or of any estate or interest in land pledged as security for the payment of a debt.

"Mortgagee" — The proprietor of a Mortgage.

In addition to having a registered Mortgage, the Mortgagee will generally be the custodian of the certificate of title for the land that is secured by a Mortgage. This is common practice as it restricts the Mortgagor from dealing with the land without reference to the Mortgagee. Not only does it ensure that the land is not disposed of without the knowledge of the Mortgagee, in circumstances of default under the Mortgage, having possession of the certificate of title will facilitate any remedy of the Mortgagee to sell the land secured by the Mortgage. Having possession of the certificate of title signifies that party's right to deal with the land.

When a Mortgagor has defaulted in their obligations under a Mortgage, the Mortgagee can sell the land secured by the Mortgage to recoup the debt owing from the Mortgagor. The most common context in which this is done is through

the exercise of a statutory right to a power of sale. The Mortgagee's power of sale is contained within sections 57 and 58 of the *Real Property Act 1900*. Section 59 of the *Real Property Act 1900* authorises the Registrar-General to register any transfer of land by a Mortgagee in exercise of a power of sale.

The Mortgagee may use an alternative means to sell the land secured by the Mortgage, other than through the statutory power of sale. The Mortgagee may rely on the Mortgagor's default to invoke a power of appointment to sell the land secured by the Mortgage. The two most common forms of appointment are the appointment of a third party as a Receiver of the land pursuant to section 115 of the *Conveyancing Act 1919* (NSW), and the appointment of the Mortgagee as the Attorney of the Mortgagor through a Power of Attorney, contained within the registered Mortgage, and pursuant to sections 9 and 52 of the *Powers of Attorney Act 2003* (NSW).

Although the powers of appointment are not as common as a Mortgagee exercising their power of sale, it is important to understand how these three transactions are different from one another, and how these differences have an effect on the requirements of the LPI and the prerequisites to Registration. Registration of the Mortgagee's transfer, depending on the context in which the Mortgagee realises the mortgaged land, may have an effect on other interests (Mortgages, Charges, Caveats) that are recorded in the Register. It is therefore equally important to understand the consequences, if any, that Registration of the respective transfers by the Mortgagee has on those other interests, when acting for a client in a Mortgage sale transaction.

MORTGAGES OF TORRENS TITLE LAND AND OLD SYSTEM LAND

[4.40] A Mortgage of Old System land operates as a transfer of the land to the Mortgagee, whereupon the Mortgagee becomes the Registered Proprietor of the mortgaged land. If default occurs, and provided the procedure consequent on default contained in the *Conveyancing Act 1919* (NSW) is validly followed (see [4.150]–[4.170]), the Mortgagee can exercise a power of sale and transfer the land to a purchaser. The Mortgagor of Old System land has a right to redeem the land in equity if the Mortgagee seeks to improperly exercise a power of sale, or if the Mortgagor fails to reconvey the land to the Mortgagor by way of discharge of the Mortgage.

Given that the Mortgagee of Old System land is the Registered Proprietor of the land, any transfer by the Mortgagee consequent on default takes the form of a Deed of Conveyance, where the named Transferor is the Mortgagee. As Registered Proprietor, the Mortgagee is attributed with the benefit of having the fee simple of the land vested in it.

The situation is different for Mortgages registered under the Torrens system. For Torrens title land, a registered Mortgage in the folio of the Register for the land operates as a Charge on the land to secure the repayment of moneys owing under the Mortgage, that is, it operates as a security for the debt. Section 3 of the *Real Property Act 1900* (NSW) defines "Mortgage" as being any Charge on land (other than a covenant Charge) created merely for securing the payment of a debt. Section 57(1) of the *Real Property Act 1900* gives further clarity to this distinction

between the operation of Mortgages of Old System land and Torrens title land, as it states that a Mortgage under the *Real Property Act 1900* has effect as security, but does not operate as a transfer of the land mortgaged.

Therefore, unlike Mortgages of Old System land, a Mortgage of Torrens title land does not become the Registered Proprietor, and, if default occurs, the Mortgagee cannot transfer the fee simple because the fee simple is not vested in the Mortgagee. This distinction is reflected in the LPI-approved form of transfer by a Mortgagee in exercise of a power of sale (Transfer by Mortgagee Under Power of Sale – form 01TP) where the Transferor is described as the Mortgagee, with a separate panel to describe the name of the Registered Proprietor in whom the fee simple is vested. The prescribed text on that form provides the context of the transaction, that is, that the Mortgagee is transferring the fee simple from the Mortgagor/Registered Proprietor pursuant to its power of sale.

CONTEXT 1: POWER OF SALE

[4.50] Section 111(1) of the *Conveyancing Act 1919* (NSW) provides that where the land secured by a Mortgage is Torrens title land, the provisions that apply to a Mortgagee's power of sale are contained in, and governed by, sections 57, 58, 58A and 59 of the *Real Property Act 1900* (NSW). The provisions that apply to a Mortgagee's power of sale for a Mortgage of Old System land are contained in sections 109, 110, 111 and 112 of the *Conveyancing Act 1919*. The definition of default, and the procedure to be followed by the Mortgagee consequent on default, for Torrens title Mortgages and Old System Mortgages, are discussed at [4.60] and [4.140], respectively.

For a discussion on the additional powers of Mortgagees contained in section 110 of the *Conveyancing Act 1919* refer to Baalman & Wells at [365.200]. If you are interested in reading commentary to case law relating to who may purchase from a Mortgagee exercising a power of sale — specifically when the form of transfer from the Mortgagee gives rise to a question as to whether the transaction is in good faith — refer to Baalman & Wells at [365.300] and Woodman & Nettle at [59.80].

Torrens Title Mortgages

[4.60] Sections 57, 58, 58A and 59 of the *Real Property Act 1900* (NSW) regulate the Mortgagee's power of sale for Mortgages of Torrens title land. When a Mortgagor of Torrens title land defaults in their repayment of moneys owing under a Mortgage to a Mortgagee, the registered Mortgagee can sell the land secured by the Mortgage pursuant to a statutory power of sale so as to recoup the debt owing from the Mortgagor to the Mortgagee. Only the registered Mortgagee can exercise the power of sale: see Baalman & Wells at [365.250].

Default

[4.70] The key event that triggers the statutory right to a power of sale is default by the Mortgagor. The event of default which gives rise to a statutory power of sale in the *Real Property Act 1900* (NSW) has two limbs: (1) a failure by the Mortgagor to comply with specified contractual obligations contained in the

Mortgage; and (2) non-compliance by the Mortgagor in remedying the failure after being duly served with a Notice of Default. It is only when facts exist that satisfy each of those two limbs that a Mortgagee will be authorised and empowered to exercise the statutory power of sale under the *Real Property Act 1900*.

The first limb requires a defaulting action on the part of the Mortgagor in the observance of an obligation contained in the Mortgage. The types of defaulting actions are specified in section 57(2)(a) of the *Real Property Act 1900*, namely that there has been default in one of the following:

1. the observance of a covenant, agreement or condition expressed or implied in the Mortgage; or
2. the payment, in accordance with the terms of the Mortgage, of the principal, interest or other money the payment of which is secured by the Mortgage; or
3. the payment, in accordance with the terms of the Mortgage, of any part of that principal, interest or other money.

If the first limb is satisfied, then the Mortgagee may serve a written Notice of Default to the Mortgagor which requires the Mortgagor to remedy the default, failing which the Mortgagee will exercise a power of sale. The form of Notice of Default must comply with section 57(3) of the *Real Property Act 1900*, which requires it to contain the following information:

1. The Notice of Default must specify that it is a notice pursuant to section 57(2)(b) of the *Real Property Act 1900*: section 57(3)(a) of the *Real Property Act 1900*.
2. A requirement for the Mortgagor, as appropriate to the case, to either:
 - a. Observe the covenant, agreement or condition in respect of the observance of which the Mortgagor has defaulted: section 57(3)(b)(i) of the *Real Property Act 1900*; or
 - b. Pay the principal, interest or other money in respect of which the Mortgagor made default: section 57(3)(b)(ii) of the *Real Property Act 1900*.
3. If costs and expenses relating to the preparation and service of the Notice of Default are to be demanded, the notice must specify that reasonable costs and expenses are required to be paid. The notice must also specify the amount required to be paid: section 57(3)(c) of the *Real Property Act 1900*.
4. A notification to the Mortgagor that, unless the requirements of the notice are complied with within a period of one month after the Notice of Default was served on the Mortgagor, the Mortgagee proposes to exercise a power of sale in respect of the mortgaged land: section 57(3)(d) of the *Real Property Act 1900*.

If you would like to read more about the Notice of Default, and in particular how the courts have upheld the sufficiency and validity of a Notice of Default that does not strictly comply with section 57(3) of the *Real Property Act 1900*, see Woodman & Nettle at [59.60].

Service of Notice of Default

[4.80] The Notice of Default must be served on the Mortgagor and, if there are other Mortgages or Charges that are registered in the folio of the Torrens Register for the land subsequent to the Mortgage through which the power of sale is being exercised, the Notice of Default must also be served on the Mortgagee and chargee of the other registered Mortgages and Charges, if applicable: section 57(2)(b) and (2)(b1)(i) of the *Real Property Act 1900* (NSW). The Notice of Default must also be served on each Caveator who claims to be an unregistered Mortgagee or unregistered chargee: section 57(2)(b1)(ii) of the *Real Property Act 1900*.

The Notice of Default must be served in a manner authorised by section 170 of the *Conveyancing Act 1919* (NSW), which deems service to be sufficient:

- “if delivered personally”: section 170(1)(a);
- “if left at or sent by post to the last known residential or business address in or out of New South Wales of the person to be served”: section 170(1)(b);
- “in the case of a mortgagor in possession or a lessee, if left at or sent by post to any occupied house or building comprised in the mortgage or lease”: section 170(1)(b1);
- “in the case of a mining lease, if left at or sent by post to the office of the mine”: section 170(1)(b2);
- “if delivered to the facilities of a document exchange of which the person on whom it is to be served is a member”: section 170(1)(c);
- “in such manner as the Court may direct”: section 170(1)(d).

Consequences of Failure to Comply with Notice of Default

[4.90] If the Mortgagor fails to comply with the Notice of Default and remedy the breach within the time specified, the Mortgagee may take steps to gain possession of the land so as to exercise a power of sale. Any Mortgagee who is authorised to exercise such a power of sale is empowered by section 58(1) of the *Real Property Act 1900* (NSW) to transfer the land.

Purchasing from a Mortgagee

[4.100] Purchasers from Mortgagees are protected. Any purchaser from a registered Mortgagee of Torrens title land is not obliged to inquire whether the fact of any default that gave rise to the Mortgagee’s power of sale exists. That is, the purchaser need not supervise the conduct of the Mortgagee sale. The purchaser is not obliged to inquire whether the fact of default has occurred, nor whether any Notice of Default has been made, or served: section 58(2) of the *Real Property Act 1900* (NSW). Nor is the purchaser required to ensure the proper application of the purchase money in the manner prescribed by section 58(3) of the *Real Property Act 1900*: see also Woodman & Nettle at [59.120] and [59.130].

Duties of a Mortgagee

[4.110] The case law relating to the duties owed by a Mortgagee to the Mortgagor when exercising a power of sale is analysed in detail in Woodman & Nettle at [59.100]. There have been two lines of authority that have found favour with the

courts, one resembling a negligence-style test of reasonable care, the second being a question of whether the Mortgagee's actions were in good faith. Austin Jin *Carver v Westpac Banking Corporation* [2002] NSWSC 431 has attempted to reconcile the two lines of authority. However, these authorities will be influenced by section 111A of the *Conveyancing Act 1919* (NSW) which commenced on 1 November 2011. That section will require Mortgagees to exercise reasonable care when exercising a power of sale, at least in so far as sale price is concerned.

Best Practice for Lawyers

[4.120] Although purchasers from Mortgagees have statutory protection, a prudent purchaser, or a lawyer operating under best practice procedures, would be wise to request confirmation of the facts that give rise to the power of sale. Doing this means the lawyer can provide advice, or insights, into the likelihood of whether a Mortgagor has grounds to contest the Mortgagee sale, which would delay any settlement of the transaction, be costly, and unnecessarily embroil a purchaser in a dispute, all of which could be avoided if simple inquiries were made for the purchaser as a matter of course. To the extent that the Mortgagee's contract for the sale of land does not provide the detail, a purchaser's lawyer could request confirmation of:

- The nature of the breach under the Mortgage.
- When the section 57(2)(b) Notice of Default was served. (A copy of the Notice could also be obtained at this time.)
- The Mortgagor's failure to comply with the Notice of Default.

Registration of a Transfer by Mortgagee Under Power of Sale

[4.130] With respect to Registration of the transfer from the Mortgagee to the purchaser in the Torrens Register, the LPI does not require evidence of the facts that gave rise to the power of sale being exercised. Although Torrens title land carries with it the State guarantee of title, as there is no obligation on purchasers to inquire whether any of the facts that gave rise to the Mortgagee's power of sale exist (subject to best practice procedures), the conclusion that flows from this is that the LPI does not then require the purchaser to establish that default has so occurred. Such a scenario would be inconsistent with the intention of section 58(2) of the *Real Property Act 1900* (NSW).

In fact, the Registrar-General is directed in section 59 of the *Real Property Act 1900* to register a transfer by a Mortgagee in exercise of a power of sale, and section 59 sets out the consequences of such a Registration: see Baalman & Wells at [365.200]. The land the subject of the Mortgagee's power of sale vests from the Mortgagor to the Transferee, free of any liability on account of the Mortgage the subject of the power of sale, and free of *any* Mortgage, Charge or covenant Charge registered subsequent to said Mortgage. The interest acquired by the purchaser on Registration of the transfer is indefeasible: section 42 of the *Real Property Act 1900*.

The content of this section is equally applicable to chargees exercising a power of sale using the Transfer by Chargee Under Power of Sale (form 01CT).

Old System Mortgages

[4.140] There are corresponding provisions in sections 109, 110, 111 and 112 of the *Conveyancing Act 1919* (NSW) which regulate the Mortgagee's power of sale for

Mortgages of Old System land. When a Mortgagor of Old System land defaults in their repayment of moneys owing under a Mortgage to a Mortgagee, the Mortgagee can sell the land secured by the Mortgage pursuant to a statutory power of sale so as to recoup the debt owing from the Mortgagor. Like Torrens title Mortgages, the key event that triggers the statutory right to a power of sale is default by the Mortgagor.

Default

[4.150] The event of default which gives rise to a statutory power of sale in the *Conveyancing Act 1919* (NSW) has two limbs: (1) a failure by the Mortgagor to comply with specified contractual obligations contained in the Mortgage; and (2) non-compliance by the Mortgagor in remedying the failure after being duly served with a Notice of Default. It is only when there exist facts that satisfy each of those two limbs that a Mortgagee will be authorised and empowered to exercise the statutory power of sale under the *Conveyancing Act 1919*.

The first limb requires a defaulting action on the part of the Mortgagor in the observance of a covenant contained in the Mortgage. The types of defaulting actions are specified in section 111(2)(a) of the *Conveyancing Act 1919*, namely that there has been default in one of the following:

1. "the observance of a covenant, agreement or condition expressed or implied in the mortgage": section 111(2)(a)(i) of the *Conveyancing Act 1919*; or
2. "the payment, in accordance with the terms of the mortgage, of the principal, interest or other money the payment of which is secured by the mortgage": section 111(2)(a)(ii) of the *Conveyancing Act 1919*; or
3. "the payment, in accordance with the terms of the mortgage, of any part of that principal, interest or other money": section 111(2)(a)(iii) of the *Conveyancing Act 1919*.

If the first limb is satisfied, then the Mortgagee may serve a written Notice of Default to the Mortgagor which requires the Mortgagor to remedy the default, failing which the Mortgagee will exercise a power of sale. The form of Notice of Default must comply with section 111(3) of the *Conveyancing Act 1919*, which requires it to contain the following information:

1. The Notice of Default must specify that it is a notice pursuant to section 111(2)(b) of the *Conveyancing Act 1919*: section 111(3)(a) of the *Conveyancing Act 1919*.
2. A requirement for the Mortgagor, as appropriate to the case, to either:
 - a. Observe the covenant, agreement or condition in respect of which the Mortgagor has defaulted: section 111(3)(b)(i) of the *Conveyancing Act 1919*; or
 - b. Pay the principal, interest or other money in respect of which the Mortgagor made default: section 111(3)(b)(ii) of the *Conveyancing Act 1919*.
3. If costs and expenses relating to the preparation and service of the Notice of Default are to be demanded, the notice must specify that reasonable costs and expenses are required to be paid. The notice must also specify the amount required to be paid: section 111(3)(c) of the *Conveyancing Act 1919*.

4. A notification to the Mortgagor that, unless the requirements of the notice are complied with within a period of one month after the Notice of Default was served on the Mortgagor, the Mortgagee proposes to exercise a power of sale in respect of the mortgaged land: section 111(3)(d) of the *Conveyancing Act 1919*.

Service of Notice of Default

[4.160] The Notice of Default must be served on the Mortgagor and, if there are other Mortgages or Charges registered in the General Register of Deeds that relate to the subject land, irrespective of priority, the Notice of Default must also be served on the Mortgagee and chargee of the other Mortgage and Charge, if applicable: section 111(2)(b) and (b1) of the *Conveyancing Act 1919* (NSW).

The Notice of Default must be served in a manner authorised by section 170 of the *Conveyancing Act 1919*, which deems service to be sufficient:

- “if delivered personally”: section 170(1)(a);
- “if left at or sent by post to the last known residential or business address in or out of New South Wales of the person to be served”: section 170(1)(b);
- “in the case of a mortgagor in possession or a lessee, if left at or sent by post to any occupied house or building comprised in the mortgage or lease”: section 170(1)(b1);
- “in the case of a mining lease, if left at or sent by post to the office of the mine”: section 170(1)(b2);
- “if delivered to the facilities of a document exchange of which the person on whom it is to be served is a member”: section 170(1)(c);
- “in such manner as the Court may direct”: section 170(1)(d).

Consequences of Failure to Comply with Notice of Default

[4.170] If the Mortgagor fails to comply with the Notice of Default and remedy the breach within the time specified, the Mortgagee may take steps to gain possession of the land so as to exercise its power of sale. Any Mortgagee who exercises such a power of sale is empowered by section 112(1) of the *Conveyancing Act 1919* (NSW) to convey the land by deed.

Purchasing from a Mortgagee

[4.180] Purchasers from Mortgagees are protected. Any purchaser from a Mortgagee of Old System land is not obliged at any stage of the conveyance transaction to inquire whether any of the facts that gave rise to the Mortgagee’s power of sale exist. That is, the purchaser need not supervise the conduct of the Mortgagee sale, and does not need to satisfy himself or herself as to whether a breach under the Mortgage occurred, whether there was non-compliance by the Mortgagor after being duly served with a valid Notice of Default, or whether the power was properly and regularly exercised. The interest acquired by the purchaser is not impeachable, notwithstanding that the power of sale was unauthorised, improper or irregular, leaving any person who has suffered damage as a result of the unauthorised, improper or irregular sale with a remedy in damages against the Mortgagee: section 112(3)(a) and (b) of the *Conveyancing Act 1919* (NSW).

Registration of the Deed of Conveyance

[4.190] With respect to Registration of the Deed of Conveyance from the Mortgagee to the purchaser in the General Register of Deeds, the LPI does not require evidence of the facts that gave rise to the power of sale. Although Old System land does not carry with it the State guarantee of title, this is not the reason why evidence of default is not called for. As there is no obligation on purchasers to inquire whether any of the facts that gave rise to the Mortgagee's power of sale exist, the conclusion that flows from this is that the Registrar-General does not then require the purchaser to establish that default has so occurred. Such a scenario would be inconsistent with section 112(3)(a) of the *Conveyancing Act 1919* (NSW).

CONTEXT 2: APPOINTMENT OF RECEIVER

[4.200] A Mortgagee may appoint a Receiver to manage the land when the Mortgagor defaults in their repayment of moneys owing to the Mortgagee under a Mortgage. This context is likely to occur when the land secured by the Mortgage is income-producing property, whereby the Receiver is authorised to manage the land in an attempt to maintain the Mortgagee's security by applying income, rents and profits derived from the land to the credit of the Mortgagee.

The pertinent point to note is that the various sources of the Receiver's power to sell the mortgaged land will have different influences on the way in which the Receiver is to give effect to the sale of the Mortgagor's land, whether that be as agent for the Mortgagor or the Mortgagee, the manner of execution by the Receiver on the LPI form, and the LPI form that is to be used.

Advantages in Appointing Receivers

[4.210] The advantages to a Mortgagee appointing a Receiver are threefold. First, a Mortgagee can obtain the benefits associated with being a Mortgagee in possession, by receiving the rents and profits of the land, without having to be in possession of the land, and without the duties and responsibilities that the role carries: see section 60 of the *Real Property Act 1900* (NSW); Woodman & Nettle at [64.120]; and Peter Butt, *Land Law* (5th ed, Thomson Reuters, 2010) at [18 118].

Secondly, a Mortgagee can appoint a Receiver to the land when the Mortgagor has defaulted in the observance of any covenant contained in the Mortgage, whereas for the Mortgagee to take possession, the Mortgagor must default in paying the principal or interest: see section 115A(1) of the *Conveyancing Act 1919* (NSW) and section 60 of the *Real Property Act 1900*.

Thirdly, unless the instrument of appointment states otherwise, the Receiver is deemed to be the agent of the Mortgagor, even though the Receiver is appointed by the Mortgagee and is acting in the Mortgagee's best interests: section 115(2) of the *Conveyancing Act 1919*.