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Update Summary

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BAALMAN AND WELLS LAND TITLES OFFICE PRACTICE

Frank Ticehurst

Currently updated by

Greg Stilianou

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UPDATE COMMENTARY

Greg Stilianou has provided new and updated commentary to the following chapters:

- Ch 1A – Recent Developments
- Ch 8 - Folios of the Register and Instruments
- Ch 15 – Primary Applications, Priority notices, Production of Documents, Profits a Prendre
- Ch 20.2 – Appendix 1

A summary of the updates in the attached files follows:

Ch 1A – Recent Development

The Recent Developments chapter is updated periodically as a ready reckoner for legal practitioners to quickly see what has changed in the law, and what content in the service has been updated.

The new content in this chapter relates to the new Lodgment Rules exception list which commenced on 24 June 2024.

Ch 8 – Folios of the Register & Instruments

Updates have been made to the “Folios of the Register” chapter to account for the commentary that arose about the significance of the folio of the Register in the NSW Court of Appeal decision in *Ausbao (286 Sussex Street) Pty Ltd v The Registrar-General of New South Wales* [2023] NSWCA 18. Of particular note are:

- Add definition of “dealing” and “instrument” from section 3 of the *Real Property Act 1900*.
- Add commentary about significance of a folio of the Register referring to descriptions of land by reference to its lot number in a registered plan.
- Add commentary about significance of a folio of the Register by reference to the indefeasibility provisions in the *Real Property Act 1900*.
- Revise existing commentary about recordings that are made in the First Schedule, Second Schedule and Notations field in a folio of the Register.

Updates have also been made to the “Instruments” chapter to include:

- instances about verifying client authority before entering a land transaction when the client is an attorney or trustee.
- Revise existing commentary to account for the new Lodgment Rules exception list which commenced on 24 June 2024.

Ch 15 – Primary Applications, Priority notices, Production of Documents, Profits a Prendre

Updates have been made to the topics in this Chapter to account for various changes in the law that have arisen over the last three years (approx.):

The updates to the “Primary Applications” chapter include:

- Observations of the NSW Court of Appeal decision in *Sidoti v Hardy* [2021] NSWCA 105 about land in a qualified title and limited title, and whether a Primary Application to bring that land under the provisions of the *Real Property Act 1900* may be made in relation to same.
- Add commentary about who can make a Primary Application, and the nature of the land which may be the subject of same, per section 14 of the *Real Property Act 1900*.
- Update existing commentary to account for the cessation of paper certificates of title and mandatory electronic lodgment.
- Add commentary about the approved form of Primary Application and the authorised manner for its lodgment.
- Add commentary about the approved form of Caveat Affecting Primary Application and the authorised manner for its lodgment.
- Add commentary about the approved form Withdrawal of Caveat Affecting Primary Application.
- Update existing commentary to account for amendments made to section 13.1 of the *Crown Land Management Act 2016*.
- Observations of the Supreme Court of NSW in *Braye v Tarnawskyj* [2019] NSWSC 277 that:
 - evidence of the payment of council rates can resolve ambiguity in an applicant’s evidence of possessory title.
 - Land that is open space is generally more difficult to secure every boundary to prevent access in a possessory title claim.
 - possession of part of the land may constitute possession of the whole.
 - Use of land may be convenient, but that alone does not detract from it also being an act of possession.
 - Use of land as a rental property can be counted as acts of possession.
- Add citation of *McFarland v Gertos* [2018] NSWSC 1629 to bolster existing commentary about possessory titles involving a rental property.
- Add commentary about the peculiar situation in *Braye v Tarnawskyj* [2019] NSWSC 277 where a possessory title claim was made to land that was an

easement site, and the evidence required by a dominant tenement to prove they are also in adverse possession of the land. Add citation to *Laris v Lin (No 2)* [2016] NSWSC 560 to bolster commentary.

The updates to the “Priority Notice” chapter relates to the cessation of paper certificates of title and mandatory electronic lodgment.

The updates to the “Production of Documents” chapter relates to:

- the cessation of paper certificates of title and mandatory electronic lodgment
- changes in administrative processes relating to the manual (face to face) production of document to the land titles office.
- Updating existing commentary about the Supreme Court of NSW making orders that affect the land Register, including:
 - commentary about judicial orders for the issue of a new folio of the Register.
 - amendments made to section 138 of the *Real Property Act 1900*.
 - Add citation to *ACN 063 346 707 Pty Ltd (formerly known as South Passage Pty Ltd) v Douglas James Marshall* [2022] NSWSC 1597 which interprets amended section 138 of the *Real Property Act 1900*.

The updates to the “Profit a Prendre” chapter include:

- Update existing commentary to account for the cessation of paper certificates of title and mandatory electronic lodgment.
- Revise commentary to account for amendments made to section 46 of the *Real Property Act 1900* to require mortgagee etc. consent to the creation of a profit a prendre.
- Revise commentary to account for amendments made to the *Duties Act 1997* which requires land dealings that result in a change in beneficial ownership in property to require a duty assessment before lodgment.
- Add new commentary about the land titles office practice about how to create, vary and release a profit a prendre.
- Add new commentary about the land titles office practice about how to create, vary and release a forestry right.

Ch 20.2 – Appendix 1 (Real Property Regulation)

Appendix 1 reproduces the *Real Property Regulation 2019* and extracts related legislative rules, including the Lodgment Rules Exception List.

A new Lodgment Rules Exception List commenced on 24 June 2024. A link to the new rules is provided so the revised rules can be published.