



REGISTERING A CAVEAT OR A MORTGAGE ON A PROPERTY AS SECURITY FOR A LOAN

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This article addresses ways a Borrower can use their property as security for a private loan, and how the Lender can lodge their interest in the property. The two main methods are placing a Caveat or registering a Mortgage on the property. These methods are discussed particularly in light of the transition from paper transactions to electronic conveyancing in New South Wales.



A. INTRODUCTION

A common form of security for a loan given by a Lender is lodging an interest in the property owned by the Borrower. This protects the Lender in that it ensures that if the loan is not repaid, the Lender has an interest in the property owned by the Borrower which is noted on the Torrens Title Register. Generally, either a Caveat or a Mortgage can be lodged at the NSW Land Registry Services (LRS), and this interest will need to be removed before the property is sold to a new owner. Additionally, a Lender can sell the security property to meet the debt owed if necessary.

B. CAVEAT

Caveats are lodged to protect the Lender's interest in the land. When the Caveat is lodged and registered, a Borrower would require the Caveator's (Lender's) consent to lodge further dealings (eg a lease) on the land.

It is much simpler to lodge and register a Caveat on a title compared to lodging and registering a Mortgage. However, a Mortgage is generally more secure and easily enforceable if the Borrower defaults on the loan.

Accordingly, Caveats may be a more appropriate option for short term loans (eg 12 months) or if the loan amount is not substantial. Caveats may also be easily withdrawn after the loan is fully repaid.

The Borrower's official consent is not required for the Lender to lodge a Caveat at the NSW Land Registry Services (LRS). The Lender would simply need sufficient 'caveatable interest' to lodge a Caveat – generally, if a loan agreement has been entered into and the Borrower has given documentary approval to the Lender for a Caveat to be lodged then this would be adequate.

C. MORTGAGE

When borrowing money from a bank or a large company, the Lender would usually want a Mortgage to be registered on the property (eg for a home loan).

For private loans, Lenders may still opt to register a Mortgage for greater assurance of their interest in the property. If a property already has a Mortgage, Lenders can still register a second Mortgage on the property



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- however, the first Mortgage will take priority and be paid off before the second Mortgage.

D. DEFAULTING ON A LOAN

If you are unable to repay your loan, the Lender can sell the property secured to cover the debt. The Lender would first provide notice to the Borrower and allow a chance to repay the debt by way of a Letter of Demand. If the Lender has provided sufficient notice and the Borrower still does not pay, the Lender can seek a court order to enter the property and take possession of it. The Borrower can try to stop this by filing a Defence.

E. CONCLUSION

As a Lender, it is important to use the appropriate method to note your interest in a property where the Borrower has agreed to provide the property as security. A Borrower must be careful when using their property as security to ensure that their ownership of the property is not compromised.

For more information on related matters, you may wish to read the following articles:

1. ***Caveats***: Caveats registered with the New South Wales Land Registry Services protect the caveator's interest in the property. The LRS allows prospective purchasers to check whether any third parties have a legal interest on the property they wish to buy.

2. ***e-Conveyancing***: An electronic system of conveyancing started to operate in Australia in early 2015. This article sets out the key concepts of electronic conveyancing and what this new system will mean for you.

Comasters is able to advise Lenders and Borrowers on using a property as security and lodging the appropriate documents with the NSW Land Registry Services.

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