



Amendments to Queensland Mortgagee Sales

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Dear Anna and Kerry, Why Rush through Urgent Laws Affecting Mortgagee Sales Without Consultation?

It is not our intention to become political, however we feel compelled to ask why this legislation was declared urgent and rushed through Parliament with no consultation or apparent need for urgent legislation. Are we seeing Anna become another Sir Joh?

The Legislation in question is the *Property Law (Mortgagor Protection) Amendment Act 2008* introduced by the Honourable Kerry Shine on 3 December 2008, and passed by Parliament and assented to on 4 December 2008. The Preamble to the Act reads **"An Act to amend the Property Law Act 1974 for a particular purpose"**.

Is this knee jerk legislation aimed at fringe lenders?

The Premier's media release tells us the Government's motivating factors are:

- that there has been a sharp increase in the number of applications for mortgagee sales;
- they fear that the current economic crisis is squeezing household budgets to the point where many people can't pay their mortgage; and
- they want to "deliver the protection these vulnerable Queenslanders need by Christmas".

The speeches in Parliament by Government members were emotionally charged and focused on saving people's homes. There was even mention of US mortgagee practices and high default rates in Helensvale, Qld among customers of the Big 4 Banks as justification for this Act. The changes introduce Henry VIII clauses which allow regulations to be passed without parliamentary scrutiny. However Mr Shine indicated in his speech that the Act is intended to capture mortgages of a consumer nature.

Whilst at face value these arguments seem worthy of attention, the fact remains that:

- we have recently seen large reductions in interest rates which have relieved some of that "mortgage stress";
- the Act effectively covers ground that the common law already covers;
- the Consumer Credit Code already provides a more effective mechanism for consumers to delay bank sales and make sure that the banks do not sell a person's home except as a last resort;
- the industry Codes of Practice provide bank, building society and credit union customers with protection;
- both the Banking and Financial Services Ombudsman and the Credit Ombudsman provide services free to consumers and can ensure through their determinations that borrowers are not stripped of their equity; and
- Australian lending practices are poles apart from US lending practices, examples include the level of consumer protection available in Australia and the limited recourse nature of US home loans.

We are strongly of the view that this law adds little to the practices of mainstream lenders, including securitised lenders, who in this country are subject to much tighter consumer regulation than their overseas counterparts. In this regard the Act has all the feel of populist or kneejerk legislation.

What are the changes?

The law makes receivers appointed by mortgagees and mortgagees exercising powers of attorney granted as part of their security subject to the same duty to achieve market value as a mortgagee. Arguably those parties were already subject to these duties under Common Law.

The Act also requires a mortgagee or receiver to:

- (a) *adequately advertise the sale; and*
- (b) *obtain reliable evidence of the property's value; and*
- (c) *maintain the property, including by undertaking any reasonable repairs; and*
- (d) *sell the property by auction, unless it is appropriate to sell it in another way; and*
- (e) *do anything else prescribed under a regulation."*

Again most of the requirements are also requirements at law. However, with no guidance on "*reasonable repairs*", when it is "*appropriate to sell it in another way*" and what is in store under the regulations, honest lenders are left hanging in the wind. In the absence of guidance, Lenders should take care to document their decisions so that they can demonstrate that they acted reasonably in the circumstances.

Does it affect my mortgagee sale?

The Act affects all "*prescribed mortgages*" currently in the process of being enforced, unless on 4 December 2008 the Lender was entitled to sell the property and the notice requirements of the Property Law Act have been complied with. If the borrower subsequently rectifies the default, and the enforcement process re-starts, the Act will need to be complied with.

As mentioned above the Minister intends the Act to apply to mortgages of a consumer nature. It is possible "*prescribed mortgages*" may also include investment property mortgages granted by individuals.

Are the real issues being addressed?

Probably not. The biggest problem facing Lenders in today's market is the lack of liquidity, falling prices and poor lending practices which resulted in borrowers having low initial equity in a property and complacency regarding housing affordability. These problems have been exacerbated by the mis-conception that all home loans around the world are the same.

The explanatory memorandum indicated that there would be no cost to Government for this legislation. Unless the Government does not intend to enforce the legislation, they have overlooked the cost of enforcing the Act at a time when there is a large upsurge of people unable to afford their highly geared home loan and house prices are falling.

The fines of up to \$20,000 mean this is penal legislation and the prosecutor's onus of proof is "*beyond reasonable doubt*" rather than the civil onus of "*on the balance of probabilities*". In the absence of prescriptive standards as to what is reasonable, the Government would be unlikely to succeed in an action against a lender who continues to take reasonable care to achieve fair market value for a house being sold.

All this leaves you wondering whether taxpayer dollars would have been better spent if the Government funded the Queensland Ombudsman to provide services assisting "bona fide" battlers ensure they can uphold their existing rights against predatory lenders.

What does this mean to you?

If you are a borrower who has borrowed from a reputable lender, very little. The Act gives you someone else to complain to, the existing complaint processes mentioned above probably give you more effective protection.

If you are a lender, you will need to:

- document your decisions;
- continue to act reasonably; and
- review your enforcement policies and procedures regarding sale and repairs to ensure they are consistent with the Act.

If a borrower complains, you will need to demonstrate that you took reasonable care to achieve market value for the property and compliance with the repair provisions of the Act.

By Gordon Perkins