

# Property Law (Mortgagor Protection) Amendment Bill 2008

## Explanatory Notes

### Objective of the Bill

The objective of the Bill is to protect the interests of mortgagors whose properties are sold by mortgagees by strengthening the provisions relating to the duty of the mortgagee to take reasonable care to ensure the property is sold at market value.

### Reasons for the Bill

In the current global economic and financial circumstances, there are concerns about the position of mortgagors when mortgagees exercise their powers of sale. Strengthening laws that promote care being exercised to sell the mortgaged property at market value can assist the mortgagor by minimising residual debt or maximising the return of equity.

### Achievement of the Objective

The Bill amends section 85 of the *Property Law Act 1974*:

- to extend the duty of the mortgagee exercising power of sale to take reasonable care to ensure that the property is sold at market value to situations where property is sold by a receiver under a delegated power or by the mortgagee as attorney for the mortgagor;
- to specify steps which the mortgagee for a “prescribed mortgage” must follow to satisfy that duty; and
- to create an offence for a mortgagee under a “prescribed mortgage” for failing to follow the stated steps.

### Estimated Cost for Government Implementation

The proposals for amendment to the *Property Law Act 1974* have no cost implications for Government.

## **Consistency with Fundamental Legislative Principles**

The proposed amendment to insert new subsection (1A) in section 85 of the *Property Law Act 1974* provides for the mortgagee's duty to include taking stated actions and "to do anything else prescribed under a regulation". This provision (a "Henry VIII clause") may be argued to not have sufficient regard to the institution of Parliament. However, the provision is considered to be justified where it is limited to the specification of procedural steps that a mortgagee might take in satisfying the duty to take reasonable care to ensure that the mortgaged property is sold at market value.

The proposed amendment to insert new subsection (10) in section 85 of the *Property Law Act 1974* provides for the definition of "prescribed mortgage" as "a mortgage of a kind prescribed under a regulation". This definition is relevant to the application of steps included in a mortgagee's duty to take reasonable care to ensure that property is sold at market value. This provision (a "Henry VIII clause") may be argued to not have sufficient regard to the institution of Parliament. The definition is intended to capture mortgages over land of a consumer credit nature. This regulation-making power will allow the provision to respond to emerging concepts as to the scope of consumer credit.

## **Consultation**

There has been no consultation on the proposed amendments.

## **Notes on Provisions**

Clause 1 provides for the short title of the Act

Clause 2 provides for the commencement of the Act.

Clause 3 provides that the Act amends the *Property Law Act 1974*.

Clause 4 amends section 85 of the *Property Law Act 1974*:

- to extend the duty of mortgagees exercising powers of sale to take reasonable care to ensure that property is sold at market value in

situations where property is sold by a receiver under a delegated power or by the mortgagee as attorney for the mortgagor;

- to specify steps which the mortgagee for a “prescribed mortgage” must follow to satisfy that duty; and
- to create an offence for a mortgagee under a “prescribed mortgage” for failing to follow the stated steps.

Clause 5 is a minor amendment consequential upon the amendments in clause 4.

Clause 6 inserts new Part 21 of the *Property Law Act 1974*. The Part includes a transitional provision for the amendments to section 85 to apply to mortgages whether made before or after commencement. It provides for section 85(1A), as inserted by clause 4, not to apply to a mortgagee or receiver if, immediately before the commencement, the mortgagee was entitled to exercise the power of sale and was not prevented from doing so by section 84(1) of the *Property Act 1974*.