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A CHANGING LANDSCAPE THE MORTGAGEE'S POWER OF SALE IN QUEENSLAND

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In Australia, the extent of a mortgagee's duty when exercising power of sale has long been the subject of conjecture. With the advent of global financial crisis in the latter part of 2008, there has been some concern to ensure that the interests of mortgagors are adequately protected. In Queensland, concern of this type resulted in the enactment of the *Property Law (Mortgagor Protection) Amendment Act 2008* (Qld). This article examines the impact of this amending legislation which was hastily introduced and passed by the Queensland Parliament without consultation and which introduces a level of prescription in relation to a sale under a prescribed mortgage which is without precedent elsewhere in Australia.

1.1 Introduction

With an amalgam of statutory and common law duties, great care has always been required when considering the obligations of either mortgagees or receivers when exercising power of sale. Unfortunately, the position has only become more complicated in Queensland with the enactment of the *Property Law (Mortgagor Protection) Amendment Act 2008* (Qld).

1.2 Background

As explained in the explanatory notes accompanying the amending legislation, with current global economic and financial circumstances, there were concerns about the position of mortgagors when mortgagees exercised their powers of sale. The objective of the amending legislation was to protect the interests of mortgagors by strengthening the statutory provisions relating to the duty of the mortgagee exercising power of sale to take reasonable care to ensure the property is sold at market value. Premier Anna Bligh noted that the amendments would protect struggling homeowners, from fire sales where mortgagees intentionally sold properties at below market value at prices merely sufficient to discharge the mortgagee's debt leaving the homeowner with little or no equity.¹

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¹ Queensland, *Parliamentary Debates*, Legislative Assembly, 3 December 2008, 4033 (Anna Bligh, Premier of Queensland).

The amending legislation was passed on the day of its introduction, 3 December 2008,² and received assent on 4 December 2008. There was no consultation process³ and the Bill was not amended in its passage through Parliament. The amendments commenced by proclamation on 12 December 2008.⁴

2.1 Section 85 of the *Property Law Act 1974* (Qld)

While the extent of the mortgagee's duty when exercising power of sale has long been the subject of conjecture elsewhere in Australia, the law in Queensland is clearly stated and requires the mortgagee to maintain a high standard in relation to the sale of property. Section 85 of the *Property Law Act 1974* (Qld) obliges a mortgagee exercising power of sale to take reasonable care to ensure the property is sold at market value.⁵ To this extent, s 85 resolved the debate that continued elsewhere that a mortgagee not only has a duty to act in good faith but also a duty to take reasonable care to ensure the property is sold at market value.⁶

2.2 *Property Law (Mortgagor Protection) Amendment Act 2008* (Qld)

With the passing of the *Property Law (Mortgagor Protection) Amendment Act 2008* (Qld), the operation of s 85 has been both extended and strengthened. The effect of the amendments to s 85 is to extend the duty imposed under s 85 to situations where property is sold by a receiver under a delegated power or by the mortgagee acting as attorney for the mortgagor.⁷ By way of strengthening, to satisfy the obligation to take reasonable care to ensure the property is sold at market value, s 85(1A) specifies the steps which must be taken by a mortgagee or a receiver for a 'prescribed mortgage'.⁸

Under the terms of the *Property Law Regulation 2003* (Qld), for the purposes of s 85, a mortgage is a prescribed mortgage if it is a mortgage over residential land

² The Property Law (Mortgagor Protection) Amendment Bill 2008 (Qld) was declared by the Queensland Parliament to be an 'Urgent Bill' (within the meaning of Standing Order 159) allowing the Bill to be considered immediately and 'passed with unusual expedition'.

³ As noted in the Explanatory Notes accompanying the Property Law (Mortgagor Protection) Amendment Bill 2008.

⁴ Subordinate Legislation No. 450 of 2008.

⁵ A similar statutory provision exists in the Northern Territory under s 90(1) of the *Law of Property Act 2000* (NT). Also, note the proposed s 111A of the *Conveyancing Act 1919* (NSW) which will impose a duty on a mortgagee or chargee to take reasonable care to ensure that land with an ascertainable market value is sold for not less than its market value and in other cases for the best price that may reasonably be obtained in the circumstances.

⁶ *Property Law and Practice Queensland*, Duncan and Vann, Lawbook Co at [7.2020].

⁷ Section 85, as amended, applies to mortgages whether made before or after the commencement of the amending legislation: s 352(1) *Property Law Act 1974* (Qld).

⁸ Section 85(1A) does not apply to a mortgagee or receiver if, immediately before the commencement of the amending legislation, the mortgagee was entitled to immediately exercise power of sale and was not prevented from doing so by section 84(1) of the *Property Law Act 1974* (Qld); s 352(2) *Property Law Act 1974* (Qld).

and the mortgagor's home is on the land.⁹ The regulation further provides that it does not matter that a residence is also used for a business purpose if the residence is primarily used as the mortgagor's home.

In relation to a prescribed mortgage, the steps that must be taken by a mortgagee or a receiver, unless the mortgagee or receiver has a reasonable excuse, are:

- Adequately advertise the sale;
- Obtain reliable evidence of the property's value;
- Maintain the property, including by undertaking any reasonable repairs;
- Sell the property by auction, unless it is appropriate to sell it in another way; and
- Do anything else prescribed under a regulation.¹⁰

Failure to follow the steps specified in relation to a 'prescribed mortgage' constitutes an offence with the maximum penalty being 200 penalty units.¹¹

Notwithstanding the description of the amending legislation when still a Bill as 'a very simple and straightforward bill',¹² a number of the requirements imposed by the amended legislation and the supporting regulatory definition of a 'prescribed mortgage' are likely to prove problematic. A number of these potential issues warrant separate consideration.

3.1 Receivership of an individual

Although such receiverships are not common they are certainly not unknown particularly in circumstances where there are commercial activities conducted on the mortgaged property. Prior to the enactment of the *Property Law (Mortgagor Protection) Amendment Act 2008* (Qld), it was settled law that s 85 of the *Property Law Act 1974* (Qld) had no application to a sale by a receiver¹³ and with the mortgagor being an individual the *Corporations Act 2001* (Cth) also had no application. The enactment of the *Property Law (Mortgagor Protection) Amendment Act 2008* (Qld) was intended to extend the operation of s 85 to situations where the mortgaged property of an individual was sold by a receiver.

⁹ Subordinate Legislation No. 451 of 2008 amended the *Property Law Regulation 2003* (Qld) by inserting a new s 4 being the definition of 'prescribed mortgage'.

¹⁰ At the time of writing, no further obligations had been prescribed.

¹¹ Presently \$20,000.

¹² Queensland, *Parliamentary Debates*, Legislative Assembly, 3 December 2008, 4033 (Anna Bligh, Premier of Queensland).

¹³ *Muirhead v Commonwealth Bank of Australia* (1996) 125 FLR 434, 448.

However, it is questionable whether or not the drafting of s 85(1) secures this intention. The difficulty arises from the statutory use of the words:

or a receiver acting under a power delegated to the receiver by a mortgagee

A dictionary definition of a 'delegate' is 'one delegated to act for or represent another'.¹⁴ On this basis, to fall within the statutory wording it would seem necessary for a receiver to be acting under a power whereby the receiver is acting for or representing the mortgagee. To determine whether this is the case it is necessary to consider the nature of a privately appointed receiver.

Usually, contractual provisions are included in the mortgage document between the mortgagor and mortgagee which provide that any receiver appointed by the mortgagee is the agent of the mortgagor and these provisions even extend to making the actions and defaults of the receiver the responsibility of the mortgagor. Contractual terms were developed in response to the strict obligations imposed on mortgagees in possession under the common law to account for what they should have received on sale.

In *State Bank of New South Wales v Chia*¹⁵ it was stated:

The [private] appointment of such a receiver is performed by the mortgagee, however, it is invariably the case, and is here the case, that the instrument under which the receiver is appointed provides that the receiver is the agent of the mortgagor.

To make the receiver the agent of the mortgagor is, of course, something of a contrivance. ... Yet it is a contrivance which has the effect of removing a receiver appointed out of court from those classes of persons who may be said to be fiduciaries.¹⁶

While the court calls this contractual device a contrivance, it is clear the device is effective and, as noted, provisions of this kind will almost inevitably be found in the mortgage document and the appointment of the receiver. As the mortgagor's agent, it would not be usually considered that a receiver was acting for or representing the mortgagee in the manner of a delegate, notwithstanding that the appointment is made by the mortgagee. Further, any receiver that may be appointed will exercise powers as a receiver rather than the mortgagee's delegate. Accordingly, in making reference to 'a receiver acting under a power delegated to the receiver by a mortgagee', there must be some doubt if s 85(1) achieves its desired objective.¹⁷

3.2 When is a mortgage a prescribed mortgage?

¹⁴ Macquarie Australian Dictionary.

¹⁵ [2000] 50 NSWLR 587.

¹⁶ Ibid at [868] - [869].

¹⁷ The statutory provision may have been more appropriately drafted by simply making reference to 'a receiver appointed by a mortgagee'.

Section 85(1A) applies to prescribed mortgages. Under s 4(1) of the *Property Law Regulation 2003* (Qld) a mortgage is a prescribed mortgage if it is a mortgage over residential land and the mortgagor's home is on the land. Section 4(3) goes on to provide that the home, of a mortgagor, means a residence on residential land that is occupied by the mortgagor as the mortgagor's principal place of residence. A 'residence' is in turn defined to mean a building fixed to land; designed, or approved by a local government, for human habitation by a single family unit and used for residential purposes. Section 4(3) defines 'residential land' to mean 'land, or the part of land, on which a residence is constructed, and includes the curtilage attributable to the residence if the curtilage is used for residential purposes.'

A number of observations can be made about this definition and associated provisions. The first is that the definition does not have regard to any town planning imperatives associated with the use of the land.¹⁸ In this regard, it would seem that the construction of a residence on the land is the hallmark of residential land for this particular statutory provision. Second, s 4(2)(a) makes it clear that it does not matter that a residence is also used for a business purpose provided that the residence is primarily used as the mortgagor's home. In this regard, the regulation is silent concerning the situation where the property itself, rather than the residence constructed thereon, is primarily used for a business purpose.¹⁹

The question may arise in a variety of common situations as to whether the mortgage falls within the definition. One common example is where the mortgage is over a grazing property and the mortgagor's principal place of residence is on the property. Although it may appear counter-intuitive, there would appear to be some arguments available to suggest that a mortgage over a freehold grazing property where the mortgagor's principal place of residence is on the land may be a prescribed mortgage. A contrary argument is that a prescribed mortgage should only relate to residential land (including the associated curtilage) and to the extent that mortgaged land extends significantly beyond simply the land on which a homestead is constructed and the associated curtilage it should not be viewed as a prescribed mortgage. Unfortunately, this may represent a provision which will require the judiciary to determine parliamentary intent.²⁰

¹⁸ The only reference to local government approval is contained in the definition of 'residence' where the requirement is disjunctive.

¹⁹ Interestingly, in the Explanatory Notes accompanying the Property Law (Mortgagor Protection) Amendment Bill 2008 it was foreshadowed that the definition of 'prescribed mortgage' would capture mortgages over land of a consumer credit nature. While consumer credit mortgages may be caught within the Regulatory definition, the definition is in no way limited to mortgages of this ilk.

²⁰ In much the same way that the definition of 'residential property' has proven problematic in the case of s 17 of the *Property Agents and Motor Dealers Act 2001* (Qld). See, eg, *Hedley Commercial Property Services Pty Ltd v BRCP Oasis Land Pty Ltd* [2008] QSC 261.

3.3 The Obligation to advertise, obtain valuations and sell by auction where the mortgage is a prescribed mortgage

Unless there is a reasonable excuse, s85(1A) obliges the mortgagee to adequately advertise the sale, obtain reliable evidence of the property's value and proceed to sell the property by auction, unless it is appropriate to sell it in another way.

Advertising

It is reasonably clear from the existing case law that advertising requirements may vary with the nature of the sale. In terms of the case law, it is possible to draw a distinction between a private sale and an auction context. If property is to be sold privately, the primary concern for the mortgagee is to ensure market value is obtained on the sale. Provided this occurs a failure to adequately advertise may not be important.²¹ However, s 85(1A)(1)(a) mandates that adequate advertising is to occur as a precursor to an auction. In this regard, the existing case law provides guidance because it seems clear that a mortgagee is not entitled to sell a property without advertising in the case where the sale is by public auction.²² It is important that any advertisements appear in the usual media and at those times when other real estate auctions are advertised. This would traditionally be in newspapers circulating in the area and today may well extend to advertising on the internet. It is likely more than one advertisement should appear.²³ In accordance with authority of long standing, the mortgagee will not be absolved from liability simply by appointing a real estate agent to act on its behalf.²⁴

In relation to the statutory requirement to undertake 'adequate advertising', a further issue that may arise is whether advertisement as a 'mortgagee sale' may be considered improper. Consistent with the observations of Palmer J²⁵ in *Stockl v Rigura Pty Ltd*,²⁶ the resolution of this issue may be dependent on the type of property being sold and how the words 'mortgagee sale' are employed in the advertising material.²⁷

Evidence of Value

Section 85(1A)(1)(b) imposes an obligation upon the mortgagee to obtain reliable evidence of the property's value. To satisfy this statutory obligation, it would be expected that a mortgagee would at least obtain one or more reputable

²¹ See, eg, *Vasiliou v Westpac Banking Corporation* [2007] VSCA 113, [63].

²² *Pendlebury v Colonial Mutual Life Assurance Society Ltd* (1912) 13 CLR 676, 683-685.

²³ *Commercial and General Acceptance Ltd v Nixon* (1983) 152 CLR 491, 523.

²⁴ *Ibid*, 495 (Gibbs J).

²⁵ Mason P and Ipp JA concurring.

²⁶ (2004) 12 BPR 23,151.

²⁷ *Stockl v Rigura Pty Ltd* (2004) 12 BPR 23,151, [46].

independent and current²⁸ valuations²⁹ to protect that mortgagee's position. Once again, it should be noted that this level of statutory prescription strictly exceeds the requirements imposed by law on a mortgagee. There is no principle of law which requires a mortgagee to obtain an independent valuation of a property before exercising a power of sale³⁰ but what is required is for the mortgagee to take reasonable steps to ascertain value which will depend on the circumstances of the case.³¹

Sell by Auction

The obligation to sell by auction presents a number of uncertainties. Difficult issues may arise where a mortgagee of a prescribed mortgage receives an offer to purchase the mortgaged property prior to auction, where no advertising has been done but where the offer compares well with valuations obtained. This may be further complicated in a market where clearance rates are low. Should an offer in these circumstances be accepted?

In the context of the obligation imposed on the mortgagee pursuant to s 85(1A), two issues arise for consideration. First, there is potentially a breach of the duty to adequately advertise the sale. Secondly, the statutory prescription for the mortgaged property to be sold by auction (unless it is appropriate to sell the property in another way) must be considered. Non-compliance with these prescriptions is allowed where the mortgagee 'has a reasonable excuse'.³²

Should the mortgagee elect to proceed with a full marketing program, the mortgagee would be incurring significant additional expenses in a market where auction clearance rates may indicate that no better result would be achieved at auction. By incurring additional expenses the mortgagee may be eroding any residual equity in the property at the expense of the mortgagor or subsequent mortgagees. The difficulty for the mortgagee is that a contravention of s 85(1A) without reasonable excuse constitutes an offence with the maximum penalty being \$20,000. Concern about non-compliance may mean that the mortgagee elects not to accept the offer resulting in additional expense being added to the

²⁸ As to the dangers of relying on a previous valuation, in *Sablebrook Pty Ltd v Credit Union Australia Ltd* [2008] QSC 242 the mortgagee sought to place reliance on a valuation that was over 5 months old. In that instance, Applegarth J found that the failure to obtain an up to date valuation or opinion of value from a valuer or even an estimate of market value from a real estate agent was a breach of duty because the mortgagee had no reliable information concerning the current market value of the land it proposed to sell. Although this decision was based on s 85 in its form immediately prior to the enactment of *Property Law (Mortgagor Protection) Amendment Act 2008* (Qld) the principle will only be of greater significance given the statutory obligation now cast on the mortgagee to obtain reliable evidence of a property's value.

²⁹ Mortgagees should beware of 'forced sale' valuations. *Skipton Building Society v Stott* [2001] QB 261, [25].

³⁰ *Stockl v Rigura Pty Ltd* (2004) 12 BPR 23,151, [49]. Also see *Investec Bank (Australia) Ltd v Glodale Pty Ltd* [2009] VSCA 97 [83].

³¹ *Stockl v Rigura Pty Ltd* (2004) 12 BPR 23,151, [50].

³² Unfortunately, the legislation itself provides no guidance as to the meaning of 'reasonable excuse' nor to the circumstances when it may be appropriate to sell another way.

mortgage debt with the mortgagor being worse off, the very result that the amending legislation was intended to counteract.³³

Further questions arise if a property is passed in at auction after extensive advertising because the highest bid was less than the reserve. In these circumstances is it appropriate for a mortgagee to accept a raised offer made after auction which is still less than the valuations? Section 85(1A) provides that a mortgagee must, unless the mortgagee has a reasonable excuse, sell the property by auction, unless it is appropriate to sell it in another way. A difficulty arises as the statutory wording does not expressly sanction a private sale after a property is passed in at an appropriately advertised auction. Given the realities of a falling market and associated low auction clearance rates it is perhaps unfortunate if the statutory wording suggests a need to strictly sell at auction.

Common sense would seem to indicate that these circumstances should constitute a 'reasonable excuse' for not selling at auction if that phrase is strictly construed or, alternatively, it may be argued that any sale that flows from an appropriately advertised auction will suffice provided the mortgagee can still demonstrate compliance with the mortgagee's paramount obligation being to take reasonable care to ensure the property is sold at market value. It is to be hoped that the statutory wording will be construed as a requirement to use the auction process as part of the mortgagee's paramount obligation rather than an end in itself.

Potential difficulty may also arise if the mortgaged property is in an area where there are many similar houses and the market has recently been flooded with properties of a similar kind which have not successfully sold at auction. Again, the question must arise whether there is still a requirement to sell by auction. In these circumstances arguably it would be appropriate for the mortgagee to attempt to sell the property in a way other than by auction. Once again, however, the level of statutory prescription may mean that the mortgagee feels compelled to implement an auction process despite the likely futility of this endeavour.

3.4 Obligation to repair

Section 85(1A)(1)(c) imposes an obligation upon the mortgagee, unless the mortgagee has reasonable excuse, to maintain the property, including by undertaking any reasonable repairs. Difficult issues may arise where the mortgage debt already exceeds the value of the property and the cost of the repairs will not increase its value to the same extent.³⁴ In undertaking repairs in full the mortgagee may well significantly extend the unsecured shortfall.

³³ As noted in the Explanatory Notes accompanying the Property Law (Mortgagor Protection) Amendment Bill 2008 one of the reasons for the Bill was to assist mortgagors by minimising residual debt or maximising the return of equity.

³⁴ For example, where the repairs will cost \$100,000 with a corresponding increase in value of only \$50,000 in circumstances where the debt already exceeds the value of the mortgaged property.

Unfortunately, the statutory term 'reasonable repairs' is not defined. Muir J in *Team Dynamik Racing Pty Ltd v Longhurst Racing Pty Ltd (No 2)*³⁵ considered similar issues and referred to the guidance offered by the statements of Dixon J in *Southwell v Roberts*³⁶ in relation to when a mortgagee may be able to make improvements at the cost of the mortgagor as follows:

The first consideration is the amount of the mortgage debt and the proportion which the expenditure bears to it. A mortgagee is a creditor who enjoys rights in the mortgaged premises only for the purpose of securing repayment. He ought not to be allowed under colour of protecting and effectuating his security to burden the property with a debt out of all relation to the principal sum borrowed or the mortgage moneys owing at the time.

Closely related to this consideration is the effect produced upon the mortgagor's ability to redeem. The mortgagee ought not to be allowed against the mortgagor expenditure so disproportionate to the mortgage moneys and so out of keeping with the value of the security and of the equity of redemption that the mortgagor may be hampered in redeeming the property.³⁷

While it may be suggested that the concept of reasonableness should embrace not only the cost of the repairs per se but also the value that may be added to the mortgaged property by doing the repairs, this position is by no means clear under the legislation. Perhaps the better view is that this may represent a situation where the mortgagee may be considered under the terms of the legislation to have a 'reasonable excuse' for not undertaking repairs to the extent quoted.

The situation is further complicated where a second mortgage exists. For example, if the mortgaged property has a value greater than the debt owed to the first mortgagee but the property is in a dangerous state and not capable of sale, the question arises as to the obligation of the first mortgagee to repair given this is likely to substantially reduce the second mortgagee's secured entitlements. As noted previously, the statutory term 'reasonable repairs' is not defined. Notwithstanding the element of doubt that may have been introduced with the amendments to s 85, it is suggested that prudent practice must be for a mortgagee to assume that the concept of reasonableness should embrace not only the cost of the repairs per se but also the value that may be added to the mortgaged property by doing the repairs. Where the cost of the repairs is likely to outweigh the additional value of the mortgaged property (thereby diminishing the funds available for distribution to a subsequent mortgagee) a first mortgagee will need to proceed with great caution notwithstanding the apparently clear statutory mandate in s85(1A) to maintain the mortgaged property.

3.5 Interaction between the *Property Law Act 1974 (Qld)* and the *Corporations Act 2001 (Cth)*

³⁵ [2007] QSC 232.

³⁶ (1940) 63 CLR 581, 597-598. Also, refer to *Matzner v Clyde Securities Ltd* [1975] 1 NSWLR 293, 306-308.

³⁷ [2007] QSC 232, [33].

Further difficulties may arise if inadequate attention is paid to the interaction between s 85 of the *Property Law Act 1974* (Qld) and s 420A of the *Corporations Act 2001* (Cth). As specified by s 85(8), nothing in s 85 affects the operation of a law of the Commonwealth, including, for example, s 420A of the *Corporations Act 2001* (Cth). To the extent of any inconsistency between the State and Commonwealth legislation, the Commonwealth legislation will prevail.³⁸ In at least two material respects, there are potential inconsistencies between the operations of the State and Commonwealth statutory regimes where a corporate mortgagor is involved. While these inconsistencies are not new the potential for conflict is increased as a result of the extension of the application of s 85 to receivers.

Property with or without a market value

The first inconsistency relates to the formulation of the statutory duty. Section 420A imposes a duty on a 'controller'. This term is defined to include a receiver or receiver and manager and anyone else who is in possession or control of the property of the corporation for the purpose of enforcing a charge.³⁹ The section expressly refers to receivers and receivers and managers and will as a result of the wide language used also apply to a mortgagee exercising power of sale over the property of a corporation when the mortgagee has taken possession or control of the corporation's property the subject of the mortgage.⁴⁰

The controller's duty of care in exercising power of sale is prescribed by s 420A.⁴¹ The first limb of s 420A(1) imposes an obligation on a controller to take all reasonable care to sell the property for not less than its market value. Alternatively, if the property does not have a market value, then under the second limb the controller's obligation is to take all reasonable care to achieve the best price that is reasonably obtainable.⁴² In this regard, circumstances existing at the time when the property is sold are relevant.

³⁸ *Australian Constitution* s 109.

³⁹ *Corporations Act 2001* (Cth), s 9.

⁴⁰ While there has been some debate about the application of the section to the situation where the mortgage or charge relates to a small part of the assets of the corporation, the Australian and Securities Investment Commission takes the view the section applies in such situations. See, Australian Securities and Investments Commission Regulatory Guide 106.4. Also see, *Tekinvest Pty Ltd v Lazarom* (2004) 12 BPR 23,439; *Re Lanepoint Enterprises Pty Ltd: Fraser v Australian Securities and Investments Commission* (2007) 241 ALR 252, [57].

⁴¹ There are a number of reported instances where the obligations of a mortgagee exercising power of sale over the property of a corporate mortgagor have been considered in light of the obligations imposed by s 420A of the *Corporations Act 2001* (Cth). See, eg, *Artistic Builders Pty Ltd v Elliott & Tuthill (Mortgagors) Pty Ltd* (2002) 10 BPR 19,565; *GE Capital Australia v Davis* (2002) 11BPR 20,529; *Jovanovic v Commonwealth Bank of Australia* (2004) 87 SASR 570; *Boman Irani v St George Bank Ltd* [2007] VSCA 33.

⁴² The limbs of s 420A(1) are exhaustive and mutually exclusive. *Skinner v Jeogla Pty Ltd* (2001) 37 ACSR 106, [33].

Unlike s 85 of the *Property Law Act 1974* (Qld), it can be seen that s 420A expressly distinguishes between corporate property with a market value and corporate property which has no market value.⁴³ While expert evidence may be used, the court determines whether property has a market value.⁴⁴ While there are relatively slight differences in statutory wording, the focus of both s 85 and the first limb of s 420A(1) is on market value.⁴⁵ However, only in the second limb of s 420A(1) is express provision made for corporate property that does not have a determinable market value. In that instance, the formulation of the obligation on sale is cast in different statutory language from s 85.

The potential conflict between the Queensland and Commonwealth legislation becomes apparent where the mortgaged property is a unique or iconic property, the mortgagor is a corporation and a receiver is appointed. In selling the property of the corporate mortgagor, the receiver will be bound by the obligations imposed on a 'controller' by s 420A. Further, making the assumption that the receiver is 'acting under a power delegated to the receiver by a mortgagee' the receiver may also be bound by the obligation imposed by s 85(1) of the *Property Law Act 1974* (Qld), at least to the extent that there is no inconsistency with the Commonwealth legislation. If the property is iconic and there is a wide discrepancy in valuation evidence, the second limb of s 420A(1) may well be applicable.

It can be difficult to determine whether property has a market value for the purposes of s420A.⁴⁶ As observed by Spigelman CJ:

The central difficulty in the construction of s 420A(1) is that it is premised on the basis that there is a category of property that is in fact "sold" but which has no "market value". This incongruity is enough to indicate that a very particular concept of "market value" is being employed.⁴⁷

Spigelman CJ considered that two alternative constructions of 'market value' were reasonably arguable. First, 'market value' may mean a definite value which is clearly established such as a stock exchange price for publicly listed shares or, alternatively, a value which is readily determinable based on comparable sales.⁴⁸ This analysis has been considered and subsequently applied by Dodds-Streton

⁴³ It should be noted the proposed s 111A(1) of the *Conveyancing Act 1919* (NSW) has been drafted in a similar way to s 420A (1) distinguishing between property with and without an ascertainable market value.

⁴⁴ *Florgale Uniforms Pty Ltd v Orders* (2004) 51 ACSR 699, [411].

⁴⁵ Despite the reference in s 420A(1) to 'all' reasonable care, the duty under it and s85(3) should be regarded as the same: *Fortson Pty Ltd v Commonwealth Bank of Australia* (2008) 100 SASR 162, [27]; *Investec Bank (Australia) Ltd v Glodale Pty Ltd* [2009] VSCA 97, [42]. Contrast *Jovanovic v Commonwealth Bank of Australia* (2004) 87 SASR 570, [48] where Gray J said 'Section 420A imposes no lesser duty than that contained in s 85 of the Queensland Property Law Act. Section 420A may even be said to impose a higher duty as the statutory obligation is to take all reasonable care.'

⁴⁶ *Florgale Uniforms Pty Ltd v Orders* (2004) 51 ACSR 699; *Jeogla Pty Ltd v ANZ Banking Group Ltd* (1999) 150 FLR 359, [418]; *National Transport Insurance Ltd v Smith* (2001) 40 ACSR 149, 153-154.

⁴⁷ *Skinner v Jeogla* (2001) 37 ACSR 106, [37].

⁴⁸ *Ibid* [38] – [41].

J in *Florgale Uniforms Pty Ltd v Orders*⁴⁹ in relation to industry apparel, linen, sporting apparel and corporate uniforms which:

did not have a definite value “clearly and obviously established as a market price” or a sufficiently certain “determinable value” by reference to closely comparable sales or market experience. The Florgale Group stock was very specialised and there was no evidence of comparable sales which would permit market value to be readily determined. The property indisputably had a narrow or “niche” market.⁵⁰

On the basis of this analysis, where property is unique or iconic and there are few comparable sales, it is very likely that the receiver’s obligation will be prescribed by the second limb of s 420A(1). To the extent that this statutory formulation may be seen to be at variance with the obligation that may be imposed on the receiver by s 85(1), the provisions of the *Corporations Act 2001* (Cth) will prevail.

Guarantors

The second potential area of inconsistency between the State and Commonwealth legislation relates to the possible remedies available to guarantors for a breach of the statutory obligation. Section 85(3) of the *Property Law Act 1974* (Qld) provides a person damaged by the breach of duty with a remedy in damages against the mortgagee exercising power of sale.⁵¹ The section imposes a duty of care in favour of all persons who are ‘damaged’ by the mortgagee’s failure to take reasonable care to ensure that the mortgaged property is sold at the market value. In *Higton Enterprises Pty Ltd v BFC Finance Ltd*,⁵² the court agreed that guarantors of a mortgage debt whose position is worsened by a breach of the duty imposed by s 85 may be persons ‘damaged by the breach’ in s 85(3).

Unlike s 85(3), s 420A of the *Corporations Act 2001* (Cth) does not expressly confer a right of action upon persons ‘damaged’ by the breach.⁵³ While there can be no doubt that a guarantor of the debt of a corporate mortgagor may be greatly affected by a breach of s 420A, it is unclear whether s 420A creates new rights or simply strengthens existing rights. In this regard, it seems valid to question whether s 420A was ‘merely intended to ‘control’ controllers rather than to confer rights’?⁵⁴

⁴⁹ (2004) 51 ACSR 699.

⁵⁰ *Ibid* [439].

⁵¹ Section 90(3) of the *Law of Property Act 2000* (NT) makes similar provision. Also, proposed s 111A (4) of the *Conveyancing Act 1919* (NSW) provides ‘a person who suffers loss or damage as a result of a breach of duty’ with a remedy in damages. See, WD Duncan and L Willmott, ‘The Mortgagee’s Scylla and Charybdis – That Narrow Path Between the Mortgagor and Purchaser’ (2001) 9 *APLJ* 129.

⁵² [1997] 1 Qd R 168.

⁵³ *Florgale Uniforms Pty Ltd v Orders* (2004) 51 ACSR 699 [365].

⁵⁴ WD Duncan and L Willmott, *The Law of Real Property Mortgages*, The Federation Press 2007, 269.

Bryson J in *GE Capital Australia v Davis*⁵⁵ took the view that s 420A is very different from s 85 and that because when entering into a guarantee all the guarantor does is guarantee the obligation of the corporation to a third party rather than, for example, taking an interest in the mortgaged property, the guarantor has no right to damages or any other remedy under s 420A. The legislation makes it clear what the controller has to do but is silent on the consequences when there is a failure to do so. Arguably while s 420A does not vest a new cause of action in a guarantor, what it does is to provide a new test for determining when the controller has breached its equitable duty. Bryson J opined:

[T]he section enhances the duty of the controller and the protection afforded to the corporation. This is achieved, and the apparent legislative intention is fulfilled without altering the remedies available to the corporation for breach of obligation in exercising the power of sale, and without altering the means available for obtaining remedies. Where real property subject to a mortgage has been sold and the mortgagor succeeds in establishing that there has been a sacrifice of the mortgagor's interest in the exercise of the power of sale the mortgagor's remedy is to be credited compensation when accounts are taken of the mortgage debt. Section 420A(1) alters this scheme by inserting a more stringent rule, but does not otherwise change the scheme.⁵⁶

If the guarantor is able to show a breach of duty as against the mortgagor entitling the mortgagor to a remedy under s 420A(1), the guarantor would also be entitled to a remedy but through 'an equitable defence to the claim against them, subject to the provisions of the guarantee.'⁵⁷ While the guarantor will be entitled to an equitable set-off⁵⁸ if sued by the creditor, given this approach it is unlikely there will be a right to equitable damages upon a breach of s420A.⁵⁹

Given the differences in statutory treatment, when the duties imposed by s 85 and s 420A are both breached there is the potential for confusion as to the appropriate remedy.⁶⁰ A failure to draw a distinction between the remedial operation of s 85 and s 420A only further serves to highlight the difficulties that may arise in this area of practice.

⁵⁵ (2002) 11BPR 20,529, [45].

⁵⁶ *Ibid* [53].

⁵⁷ *Ibid* [92].

⁵⁸ *Jovanovic v Commonwealth Bank of Australia* (2004) 87 SASR 570; *Fortson Pty Ltd v Commonwealth Bank of Australia* (2008) 100 SASR 162, [11].

⁵⁹ It is curious that in framing the legislation, regard was not paid to the recommendation in the Harmer Report that guarantors should have an independent right of action. See Australian Law Reform Commission Report No 45, 1988, vol 1, para 234.

⁶⁰ See, eg, *Investec Bank (Australia) Ltd v Glodale Pty Ltd* [2009] VSCA 97, [102] where the Victorian Court of Appeal considered the remedy available to the mortgagor corporation in circumstances where there was a breach of both s 85 and s 420A and whether the trial judge should have ordered an account of profits rather than damages. While it was ultimately decided that the method of calculation was the same, this decision illustrates the potential for confusion.

4 Conclusion

The level of statutory prescription imposed in Queensland upon a mortgagee or receiver in relation to a sale under a prescribed mortgage is without precedent elsewhere in Australia. As demonstrated in this article, there are many facets of the operation of the amended legislation that are likely to prove problematic in their day-to-day operation. Given this, and the significant penalty associated with failure to comply with the legislation, it may be considered unfortunate that these amendments to the Queensland legislation were introduced without the benefit of any consultation process. The aphorism 'more haste less speed' would seem apposite.