

Agreement in Principle

Mr DONALD PAGE (Ballina) [10.00 a.m.]: I move:

That this bill be now agreed to in principle.

This bill will amend the Conveyancing Act 1919 to impose a higher duty of care than currently exists for mortgagees and chargees in New South Wales with regard to the sale of real estate property. The object of the bill is to amend the Conveyancing Act 1919 to impose a duty on mortgagees and chargees when exercising a power of sale in respect of a mortgaged or charged property to take all reasonable care to ensure that the property is sold for not less than its market value. The intention of the legislation is to increase the duty of care of financiers when they take possession of the assets of a defaulting borrower.

There is a difference between the Federal and State law regarding the duty of care for financiers concerning the disposal of assets when they become mortgagee in possession. In New South Wales case law the only requirement is that a selling mortgagee act with good faith and not wilfully or recklessly. This relatively low duty of care can have the effect of sacrificing the mortgagor's interests when the property is sold. However, under Federal Corporations Law, when exercising a power of sale in respect of property, the selling mortgagee must take all reasonable care to sell the property at not less than its market value or otherwise the best price that is obtainable in view of the circumstances in which the property is being sold. The temptation for financiers in New South Wales is to sell the assets with a view to ensuring their own debt is covered with little regard to any remaining equity held by the borrower.

The history of this legislation goes back to 2000 when I introduced similar legislation to that being introduced today. The New South Wales Government's response to my legislation then was to take it seriously. A detailed discussion paper was issued on my bill and interested parties were invited to comment. Subsequently, the Government approached me with suggested amendments based on feedback from relevant stakeholders. I agreed with the Government's amendments because they strengthened the legislation. I agreed to those amendments in the Legislative Assembly on 19 September 2002. After passing in this Chamber, notice was given to introduce the amended legislation in the Legislative Council. However, the legislation never passed that place because of prorogation of the Parliament for the 2003 election. Even though the legislation had the support of both the Opposition and the Government, it never became law. That is why I have introduced it again in its amended form.

I believe that this legislation is timely because I can foresee many borrowers getting into trouble because of large mortgages and rising interest rates. Their equity must be protected if their property is to be sold up by banks or other financiers. This legislation will give them more protection than they have under New South Wales case law. Common ways for financiers or mortgagees not to fulfil their duty of care include failing to advertise the property at all or failing to advertise for a sufficient period, incorrectly describing the size of the property, failing to pursue prospective buyers interested in purchasing the property at a higher price and generally failing to promote the property to obtain the best possible price.

Queensland and Northern Territory legislation adopts the approach that I am introducing today. Under common law the decision as to the timing of the sale is entirely within a mortgagee's discretion. Mortgagees can choose when to sell the property and it cannot be alleged against them that they would have obtained a higher price had they sold sooner or delayed the sale. This legislation is not intended to change that position. The use of the words "when it is sold" in proposed subsection (1) after "market value" is intended to make it clear that the mortgagee's duty is to take care to obtain the market value of the land at the time it is sold, whenever that may be.

Proposed section 111A provides that in exercising a power of sale in respect of mortgaged or charged property a mortgagee or chargee must take all reasonable care to sell the land for not less than its market value when it is sold. That is the central principle of the bill. Proposed section 111A also provides that the title of the purchaser is not impeachable on the grounds that the mortgagee or chargee has committed a breach of any duty imposed by this section, but a person damnified by the breach of duty has a remedy in damages against the mortgagee or chargee exercising the power of sale.

Proposed section 111A also states that an agreement or stipulation is void to the extent that it purports to relieve, or might have the effect of relieving, a mortgagee or chargee from a duty imposed by this section. Nothing in proposed section 111A affects the operation of any rule of law relating to the duty of the mortgagee or chargee to account to the mortgagor or charger. Proposed section 111A applies to mortgages and charges whether made before or after the commencement of this section, but only to a sale in the exercise of a power arising upon or in consequence of a default occurring after the commencement in this section. In other words, this legislation is not retrospective.

Finally, proposed subsection (7) makes it clear that this section applies to mortgages and charges under the Real Property Act 1900. In summary, this legislation is designed to increase the duty of care of mortgagees and chargees from merely acting in good faith and not acting wilfully or recklessly to the higher duty of care as prescribed by the Federal Corporations Law. Under this legislation, when exercising a power of sale in respect of mortgaged or charged property, a mortgagee or chargee must take all reasonable care to ensure that the property is sold for not less than its market value. In practice, this will mean that the failure to advertise the property properly or for a sufficient period will mean that the mortgagee's duty of care has not been met.

I thank Mr Peter Jackson from Jackson Smith Solicitors for drawing my attention to the weakness in the New South Wales situation in 2000. He also provided case studies and circumstances in which mortgagors have been disadvantaged by the relatively low duty of care that prevails in New South Wales compared with the Federal jurisdiction, where litigation has often ensued. I thank him for his valued input. I believe that this legislation is morally and legally the correct approach to take in relation to a mortgagee or chargee's duty of care. I also acknowledge former Minister Kim Yeadon's intelligent response to my legislation when it was first introduced. He put out a discussion paper, received community and stakeholder feedback and then suggested amendments to the original bill, which was subsequently passed by this House with the agreement of both the Government and the Opposition. Unfortunately, it was never enacted because of the prorogation of the Parliament in 2003.

This is good legislation, supported in the past by both sides of Parliament. It is important that it be passed because many people have very big mortgages, and a small interest rate rise is potentially catastrophic. If financiers sell up those people, it is incumbent upon those financiers to ensure that they exercise a duty of care in the sale of that property so that the mortgagee's equity interest—which could be substantial—is protected.

An example is a property worth, say, \$1 million with a \$500,000 mortgage. The way the law operates in New South Wales means that the only requirement of the financier is to act in good faith and not wilfully or recklessly. This means, effectively, that provided the financier gets his or her \$500,000, potentially they can sacrifice the equity held by the property owner prior to default. It is important that we protect homeowners. Given the history of this legislation, which was supported by the Government in a slightly amended form, together with strong support from The Nationals and the Liberal Party, I commend this bill to the House and ask members to support it.