



ISSUES RELATING TO FINANCE

AUSTRALIA (NEW SOUTH WALES)

Clayton Utz

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1. **What instruments are used to create a lien on real estate to secure an indebtedness (e.g., a mortgage or deed of trust)?**

Typically a Mortgage is the instrument used to secure a loan against real estate. Under the Real Property Act 1900 mortgages are registered on title although, strictly speaking, the mortgagee acquires a "charge" not an "estate" upon registration. Nevertheless, it is still the most commonly used and effective way to secure a debt over real estate.

2. **Describe [national] [state] [territorial] [provincial] or local mortgage recording or other similar taxes payable on making a loan secured by real estate or perfecting a lien on real property.**

There are two elements or stages to the taxation on mortgages before they can be registered on title. Firstly, mortgage duty is payable on the Mortgage itself before it will be accepted for registration. Secondly, a registration fee must be paid to Land and Property Information NSW in order for the Mortgage to be lodged and successfully registered on title.

3. **Describe manner in which a lien secured by real property is foreclosed.**

In terms of a registered mortgage, the procedure is prescribed by the Real Property Act 1900 (NSW). If the mortgagor has defaulted in paying principal or interest for six (6) months, the mortgagee may apply to the Registrar-General for an order for foreclosure.

The application must state that the required default has been made, that the land has been offered for sale by auction and that notice of the application has been served on the

mortgagor, all registered mortgagees under any mortgages which have less priority than the applicant's and on any caveators who claim to be unregistered mortgagees. The Registrar-General may then issue the foreclosure order, or the Registrar-General may require the applying mortgagee to offer the land for sale as a first step and then issue the order only upon the unsuccessful sale of the land. An auction will be considered unsuccessful if the land fails to be sold or the amount offered is insufficient to satisfy the outstanding debt and expenses incurred of the sale.

4. Describe any significant costs of or impediments to foreclosing a lien on real property.

The key costs involved in foreclosing a mortgage would involve complying with the notice requirements under the Real Property Act 1900 (NSW) and the costs of offering the property for sale by auction. The key impediment to foreclosing a mortgage would be the fact that the mortgagor's right to redeem subsists right up until the time the Registrar-General makes a foreclosure order and it is recorded in the Register. Furthermore, in some cases a foreclosure order, despite being recorded in the Register, can be re-opened by a Court.

5. What is the customary time period for foreclosing a lien on real property?

Firstly, the mortgagor must be in default of its principal or interest payments for six (6) months and the mortgagee must have exercised its power of sale, which in itself allows the mortgagor one (1) month to repay the monies before the mortgagee can exercise the power. Secondly, time to market and sell the property at auction need to be taken into account. This process, including the six (6) months for default in paying rent, serving the appropriate notices on the mortgagor and offering the property for sale by auction could take the best part of a year.

6. Are there [national] [state] [territorial] [provincial] or other local governmental permissions, approvals or licenses required for foreign banks or other foreign lenders to make real estate loans secured by real property? If so, please describe.

No. The Foreign Acquisitions and Takeovers Act 1975 (Cth) provides an exception to the requirements of the Act for taking or enforcing a security over an interest in Australian real estate. Therefore, a foreign bank is not required to make an application to the Foreign Investment Review Board in order to make a loan secured by Australian real estate.

7. What legal limits are imposed on the amount of interest which may be charged on a loan secured by real property?

A provision in a Mortgage which requires the repayment of a very high rate of interest is not unenforceable merely because the rate of interest is very high. A mortgagor could only seek the assistance of a Court exercising equitable jurisdiction if the interest rate charged was excessive or oppressive in all the circumstances and as a result was unconscionable.

8. Describe any laws that restrict the ability to make a borrower or guarantor personally liable for indebtedness secured by real property.

When a mortgagee makes an application for foreclosure the Conveyancing Act 1919 (NSW) prescribes certain consequences which follow the order for foreclosure being made. These include, inter alia, that the right of the mortgagee to sue to recover the mortgage monies from the mortgagor, and any guarantor, is extinguished.

