

### TOPIC 3: MORTGAGES

Power of sale, considering NCC and TLA s.76 and s.77(1)

Option 1- NCC

National Consumer Credit Protection Act 2009 (Cth)

Note: took effect 1 July 2010

Step 1: Does the NCC apply to the land?

#### CHECKPOINT:

##### 1. Meets mortgage definitions

- s.7(a) it secures obligations under a **credit contract** . . . ; and
- s.7(b) the mortgagor is a **natural person** or a strata corporation.

##### 2. Mortgage is providing credit

- S.5 (1)(b): the credit is provided or intended to be provided wholly or predominantly
  - (i) for **personal, domestic or household purposes**; or
  - (ii) to **purchase, renovate or improve residential property for investment** purposes; or
  - (iii) to **refinance credit** that has been provided wholly or predominantly to purchase, renovate or improve residential property for investment purposes; and
- S.5 (1)(c) a **charge** is or may be made for providing the credit; and
- S.5 (1)(d) the credit provider **provides the credit in the course of a business** of providing credit carried on in this jurisdiction or as part of or incidentally to any other business of the credit provider carried on in this jurisdiction.

##### 3. Meets the purposes of credit

- s.5(4) (a) the purpose for which **more than half of the credit is intended** to be used; or
- s.5(4) (b) if the credit is intended to be used to obtain goods or services for use for different purposes, the purpose for which the goods or services are intended to be **most used**.

Step 2: Go through presumptions

**CHECKPOINT:** NCC does not apply to following

- Short term credit (less than 62 days): s 6(1)(a)
- the maximum amount of credit fees and charges that may be imposed or provided for does not exceed 5% of the amount of credit: s 6(1)(a)
- Credit without express prior agreement: s 6(4)
- Credit for which only account charge payable: s 6(5)
- Credit for which only account charge payable- credit under a continuing credit contract if the only charge that is or may be made for providing the credit is a periodic or other fixed charge that does not vary according to the amount of credit provided: s 6(6)
- Joint credit and debit facilities
- Insurance premiums paid by instalments: s 6(8)
- Pawnbrokers: s 6(9)
- Advances by trustees of estates: s 6(10)
- Employee loans: s 6(11)
- Margin loans: s 6(12)

**CHECKPOINT:** Disregard counter argument through presumptions

1. If a party claim that a mortgage is one to which Code applies it is presumed as such s 13(1)
2. If a party claims the credit is not for a Code purpose, it is presumed as such s.13(2).

3. Cannot claim s.13(2) if the credit provider knew or had reason to believe different s.13(3)(a), or would have known if they had made reasonable enquiries about the purpose of credit s.13(3)(b).

**CHECKPOINT:** Format conditions for credit contract

**1. Format conditions:**

- Written contract signed by the debtor and the credit provider s.14(1)(a)
- Written contract signed by the credit provider and constituting an offer to the debtor that is accepted by the debtor in accordance with its terms s.14(1)(b).

**2. Pre providing information:**

- Debtor has been given a precontractual statement setting out the matters required by section 17 s.16(1)(a)
- Debtor has been given an information statement in the form required by the regulations of the debtor's statutory rights and statutory obligations s.16(1)(b).
- Statements must be given before the contract is entered into s.16(2)(a) or before the debtor makes an offer to enter into the contract s.16(2)(b).

**3. Information in contract**

- Has credit providers name- s 17(2)
- Has the amount of credit- s 17(3)
- Has annual percentage rate or rates and calculation of interest charges- s 17(4) and (5)

**CHECKPOINT:** Format conditions for mortgage contract

- s 42(1) A mortgage must be in the form of a written mortgage document that is signed by the mortgagor.
- This is sufficient if the mortgage is contained in a credit contract signed by the mortgagor s.42(2)(a) or one of the documents comprising the

mortgage document is signed by the mortgagor s.42(2)(b).

- s 42 (4) A mortgage is not enforceable unless it complies with this section.

**CHECKPOINT:** Apply formalities if necessary

- s 191(1) A provision of a contract or other instrument by which a person seeks to avoid or modify the effect of this Code is **void**.
- s 191 (2) A provision of a contract or other instrument by which a person seeks to have the debtor, mortgagor or guarantor indemnify the credit provider for any loss or liability arising under this Code is **void**.
- s 191 (3) A **credit provider that is a party to any such contract or other instrument commits an offence**.

Has the mortgagor defaulted under the NCC

**CHECKPOINT:** Apply for each relevant

**Enforcement of Credit Contract**

- Debtor must be **in default** under the credit contract – s.88(1)(a)
- Credit provider must have **given a default notice** to debtor and guarantor – s.88(1)(b)
- Default notice must allow **at least 30 days** to remedy the default – s.88(1)(b)
- **Default not remedied** within that period – s.88(1)(c)
- For **reverse mortgages**, credit provider must **speak with debtor/lawyer/attorney** or make **reasonable efforts** – s.88(1)(d)

**Enforcement of Mortgage (s.88(2))**