

CUSTOMER INFORMATION

**DOLA**

Department of LAND ADMINISTRATION

BULLETIN

**BULLETIN NO. 92
22nd OCTOBER 1997****In this issue:****DOLA'S REQUIREMENTS ON MORTGAGEE'S POWER OF SALE FOR MORTGAGES UNDER THE CONSUMER CREDIT (WESTERN AUSTRALIA) CODE****Act and Code**

The Consumer Credit (Western Australia) Act 1996 ("the Act") came into operation on 1 November 1996. Section 5 of the Act enacts the Consumer Credit (Western Australia) Code ("the Code"). The Code is contained in the Appendix to the Act.

Changes in Practice**1. Coversheet to Change**

The enactment of the Act and the Code has required a change in DOLA's practice in relation to the lodgement of mortgages and the exercise of mortgagee's powers of sale in respect of mortgages which are affected by the Act and the Code.

Customers who prepare mortgage documents, which are affected by the Act and the Code, are requested to ensure that the coversheet of the mortgage document has on it one of the following names:

1. "Consumer Mortgage"; or
2. "Credit Code Mortgage".

This will enable DOLA to distinguish Code mortgage documents from mortgages which are not affected by the Code

2. Default Notices under the Code

The effect of the Code is that, if a mortgagee wishes to exercise the powers of sale under the mortgage and the Code then, subject to item 8, the mortgagee must send to the mortgagor a default notice in the terms required by the Act

and the Code. That default notice must have a period of default of not less than 30 days.

Customers are referred to sections 80(2), (3), (4), 84 and 85 of the Code for details of what is required to be included in the default notice.

3. **Default Notices under the TLA**

Customers should be aware that the effect of the Code is that it does not exclude the requirement, under section 106 of the TLA, to send a default notice under that Act to the mortgagor. However, it is considered possible to combine both notices into the one default notice.

4. **Methods of Service of Notices**

Customers should also be aware that the service of notice provisions under the Code differ from the service of notice provisions under the TLA. Although there are some differences, there are also overlapping service requirements. Customers should seek their own legal advice as to the appropriate methods of service of notices, under the Code and the TLA, in respect of any overlapping methods of service.

It is suggested that a combined notice forwarded to a defaulting mortgagor can be served, under both the Code and the TLA, by the following methods:

1. Delivered personally to the mortgagor;
2. Sent by Registered Mail to the address of the mortgagor on the Register;
3. Registered Mail to the current address of the mortgagor; or
4. Facsimile transmission to the mortgagor, if the facsimile number has been specified in the mortgage document as an/the address for service.

5. **Notices to Joint Mortgagors**

Where there is more than one mortgagor under a mortgage, then the default notice must be sent to each mortgagor.

6. **Mortgagee Transfers**

After the notices under both the TLA and Code have expired and the default has not been remedied the power of sale arises under section 80(2) of the Code and section 108 of the TLA.

The mortgagee transfer document under the TLA, should be used. There are no changes to this document needed for Code mortgages.

7. Statutory Declaration

In addition to the mortgagee transfer, a supporting statutory declaration should also be lodged at DOLA. That statutory declaration must be made either by the lender, the lender's employee's or the lender's solicitors if they are personally acquainted with the facts.

The matters to be deposed to in the statutory declaration are similar to but different from those matters deposed to in a statutory declaration supporting a mortgagee transfer only complying with the TLA. The following is a list of all the matters which must be deposed to:

- the identity, authority and means of knowledge of the declarant;
- the particulars of the mortgage such as the dealing number and the mortgagee;
- full street address and title description of the mortgaged land;
- that a default (clearly specified in the notice or demand in writing) under the terms of the mortgage and the Code has occurred, ie:
 - default in the payment of principal or interest (or both) and the date of default; and/or
 - failure to perform or observe the mortgagor's covenants in the mortgage, setting out the default complained of and the date of default;
- that, in accordance with the terms of the mortgage, the Code and the Regulations to the Code, notice to remedy the default or demand to repay the monies secured was made on (date) and the default complained of has continued for 30 days after the service of a notice of the default;
- that the notice stated that unless the default was remedied within the time referred to above, that the mortgagee may exercise the mortgagee's power of sale;
- that the default complained of continued up to and including the date of sale. (the date of sale is defined as the date on which an unconditional and binding contract for sale came into effect);
- that in the case of an accelerator clause in the mortgage¹, the notice has stated the manner in which the mortgagor's liability is affected by the operation of the accelerator clause and the amount required to discharge the accelerated mortgage; and

¹ See section 84 (1) of the code

- that the default notice or demand in writing had been properly served in accordance with section 106 of the TLA and the Code by
(insert the specific mode of service used, as authorised under section 106 of the TLA and section 172 of the Code.)

It is not necessary to produce any other proof as to the manner in which the statutory notice is given but care should be taken to ensure that proper procedures are carried out and the evidence preserved. Where an application is made for an Order for Foreclosure, strict proof of service of notice is a necessary part of the application.

8. **Default Notice Not Required by the Code in Limited Circumstances**

The Code also provides that there are some circumstances in which a default notice is not required under the Code. These are where:

- The credit provider believes, on reasonable grounds, that the mortgage was induced by the fraud of the debtor or mortgagor.
- The credit provider has made reasonable attempts to locate the mortgagor without success.
- The Court (Commercial or Tribunal) dispenses with notice requirements.
- The credit provider believes, on reasonable grounds that:
 - (i) the mortgagor has removed or disposed of the mortgaged goods under a mortgage related to the credit contract;
 - (ii) the mortgagor intends to remove or dispose of the mortgaged goods without the credit provider's permission; or
 - (iii) urgent action is required to protect the mortgaged property.²

NB: The above requirements for a statutory declaration in relation to mortgaged goods would only apply to mortgages over land if that mortgage secures the advance to purchase the goods.

9. **Additional Matters to be Deposed to in Statutory Declaration Where Default Notice Not Required under the Code**

The circumstances described in Item 8 will be rare but do not remove the need to issue notices under the TLA. Where item 8 circumstances are relied on, DOLA will require the declarant to depose to the following, in addition to the matters required for notices issued under the TLA:

² See section 80 (4) of the code

- In the case of fraud:
 - a) all the circumstances surrounding the fraud; and
 - b) annexing a report from the police indicating that the mortgagor has been fraudulent or a submission based on case law that supports the position that the mortgagor has been fraudulent within the meaning of the Code.

- In the case of an inability to locate the mortgagor:
 - a) all the attempts that have been made to locate the mortgagor which should, as a minimum, include attendance at the mortgagor's last known address both during and after business hours, letters sent by registered mail and receipts showing non receipt; and
 - b) notes of telephone calls over a period of one month after the default of the mortgagor.

- In the case of a Court dispensation:
 - a) the terms of the order, annexing a service copy of the order; and
 - b) a submission as to the effect of the order

- In the case of removal or disposal of the mortgaged goods under a land mortgage which secures the money advanced under the credit contract:
 - a) the full circumstances surrounding the removal or disposal of the mortgaged goods;
 - b) permission of the credit provider not being obtained by the mortgagor; and
 - c) a statement that the mortgage secures advances made under the credit contract in respect of the goods sought to be removed or disposed.

- In the case of the mortgagor's intention to remove or dispose of the mortgaged goods, without the credit provider's permission:
 - a) the full circumstances of the mortgagee credit provider's belief that the mortgagor intends to remove mortgaged goods;
 - b) permission of the mortgagee credit provider has not and would not be given to such an action; and

- c) a statement that the mortgage secures advances made under the credit contract in respect of the goods intended to be removed or disposed.

In the case where urgent action is required to protect the mortgaged property, the full circumstances surrounding the need for urgent action to be taken. It must be a substantial urgent need.



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