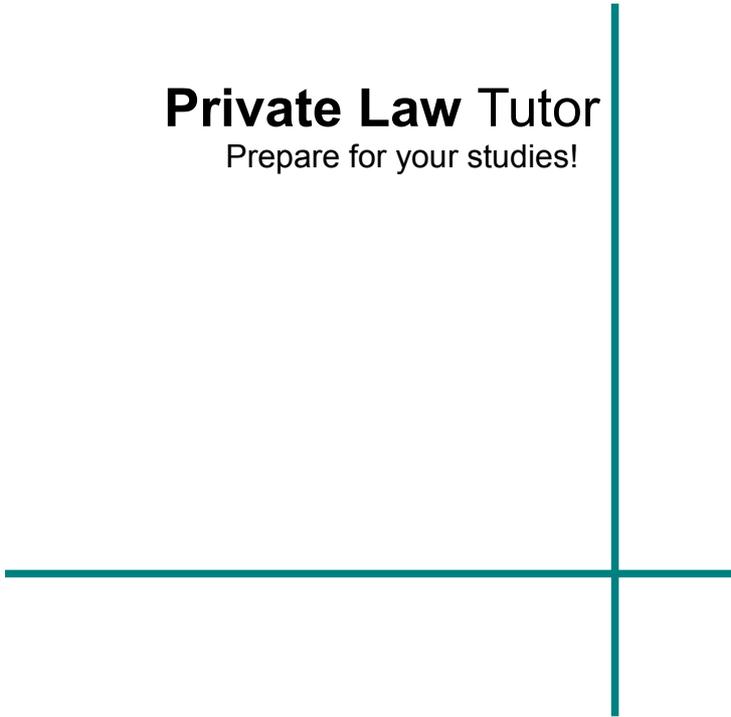


# Private Law Tutor

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Student Assessment Response

**Care should be taken when drawing upon the tutoring services provided in view of Academic Misconduct policies of your university. The work provided should be used as a guide only. It should not be used as a basis for final submission of any assessment tasks whatsoever.**

## QUESTION:

You work for the Victorian Attorney-General. She wants advice from you as to whether the rights and duties of mortgagees and mortgagors following default on secured loans should be overhauled in future law reforms.

As part of your answer, you should evaluate the justifications for current rights and duties and use relevant cases to advance your argument.

2,000 word limit.

The rights and duties of both parties offered as suggestions in this plan are a mixture of existing law which could be improved in Victoria and interstate laws which could be recommended for implementation in Victoria. You will find that, in light of the word limit, I have identified some more contentious areas of law. Therefore, not every right and duty of the mortgagor/ee has been considered.

## STRUCTURE:

- Cover page
  - Provide a cover to the work you are completing because this is a report to a Victorian Minister of Government.
  - Need only be one page with relevant heading as to the topic your paper will consider.
  - You may like to consider a submission I made to the Commonwealth Treasury as a suggested structure.<sup>1</sup>
- Introduction
  - Maximum 150 words.
  - Provide a background into how this piece of work came about -
    - Emanates in response to request for advice/brief by the A-G
    - What the purpose of your paper is
- Executive summary
  - Maximum 150 words.
  - You want to provide approximately 5-7 critical points that stand out from your paper
  - These will be drawn from your conclusion and should be in the form of recommendations as to whether any aspects of the law require amendment, or alternative, should remain as they currently exist.
  - Again, see the submission I have made available to you for a suggested outline.
- Mortgagors
  - Briefly consider and explain the position of the mortgagor in a transaction involving security
  - Rights of the mortgagor -
    - **Right to relief from default**
      - This is a law which exists in Queensland.<sup>2</sup>
      - Another law designed to protect the mortgagor where they have defaulted, but by way of the mortgage contract, have been required to

<sup>1</sup> [http://archive.treasury.gov.au/documents/1723/PDF/Vincent\\_Licciardi.pdf](http://archive.treasury.gov.au/documents/1723/PDF/Vincent_Licciardi.pdf)

<sup>2</sup> [http://www.austlii.edu.au/au/legis/qld/consol\\_act/pla1974179/s95.html](http://www.austlii.edu.au/au/legis/qld/consol_act/pla1974179/s95.html)

- make additional payments of interest and principal
  - Law states that if they make such payments, then they are relieved from the consequences of the default by the court
  - this means they must apply to the court and the court will consider the circumstances of the default and whether relief should be granted
  - this is a particularly important issue because if the court does grant relief, the 30 days required before a notice can be issued recommences
  - See more information on these provisions and how it was modeled here, at page 87.
  - See also the *National Credit Code* s89
  - Suggested that this is a strong improvement because it protects the mortgagor from defaults which cause greater financial stress
  - **No right to place a caveat on title to protect it in light of an exercise of the power of sale**
    - Caveat will generally only be sought where the contract to effect the power of sale has been entered into. Otherwise, the mortgagor would generally seek an injunction.
    - In Victoria, the position is that there is no right to restrain the mortgagee and protect the mortgagor's interest in the fee simple by way of a caveat
    - There is conjecture in Australian authority as to whether a mortgagor can place a caveat on the property the subject of the power of sale after a contract to effect the disposal of the property has occurred
    - There is authority in Victoria which says that no caveat can be applied against the fee simple by the mortgagor because there is no caveatable interest: *Swanston Mortgage Pty Ltd v Trepan Investments*
    - This is contrasted by the SCSA decision in *Stone v Leonardis* [2011] SASC 153
    - It appears Supreme Courts across Australia suggest that the fee simple and the equity of redemption are both caveatable interests
    - See further discussion on this here<sup>3</sup>
    - recommendation that the reasoning of the SCV to say that there are no caveatable interests held by a mortgagor is flawed. In particular, because of the Court's reliance on the decision in *Latec* which discussed the differences between equities and mere equities
- Mortgagees
  - Briefly consider and explain the position of the mortgagee in a transaction involving security
  - Rights and duties of the mortgagee
    - Duties of the mortgagee -
      - **Mortgagee not to call on loan if in receipt of mortgage interest**
        - This is not a law specifically in Victoria, but from NSW.<sup>4</sup>
        - Seeks to protect the mortgagor.
        - Enlivened once there has been a default.
        - Places a duty on the mortgagee not to call on the loan, where the mortgagee is in receipt of interest from any period of the loan term
        - Mortgagee can only exercise the power of sale by giving 3 months

<sup>3</sup> <http://www.mondaq.com/australia/x/157674/Contracts+Deeds/Can+a+Registered+Proprietor+Caveat+to+Protect+Against+a+Mortgagees+Wrongful+Exercise+of+the+Power+of+Sale>

<sup>4</sup> [http://www.austlii.edu.au/au/legis/nsw/consol\\_act/ca1919141/s92.html](http://www.austlii.edu.au/au/legis/nsw/consol_act/ca1919141/s92.html)

- notice of doing so.
  - Suggested that this is a positive recommendation for law reform.
- **Mortgagee to exercise power of sale in good faith and having regard to interests of the mortgagor**
  - The Victorian provision provides a “good faith test”.
  - “...other persons do not comply with the notice or demand the mortgagee or annuitant may, in **good faith and having regard to the interests of the mortgagor** grantor or other persons, sell or concur with any other person in selling the mortgaged or charged land or any part thereof, together or in lots, by public auction or by private contract...”<sup>5</sup>
  - The case of *Vasiliou* offers some insight into the Court's interpretation of the phrase “good faith and having regard to”.<sup>6</sup>
    - The “good faith” test is drawn from equity
      - There has been suggestions that the mortgagee's duty is one where they need only act “bona fide”. This would mean that they need not take reasonable steps to ensure the property was sold at market value: *Cuckmere Brick Co Ltd v Mutual Finance Ltd* at 966.
      - c.f. The Australia position that the duty of good faith does encompass taking reasonable precautions to obtain a market price: *Forsyth v Blundell* at 481
      - This means that in Victoria, the test seems to be a hybrid of an equitable and torious standard. The result is an unclear one.
  - Whereas in Queensland, the Mortgagor or their agent is required to take specific steps in exercising their power of sale. (Critically, the onus is placed upon the mortgagee to prove they did so). Specifically,
    - advertise
    - obtain reliable valuations
    - maintain the property
    - sell by auction<sup>7</sup>
  - Suggested that this is a positive recommendation for law reform, particularly to overcome some of the difficulty from *Vasiliou*
- Conclusion
  - 150 words approx
  - Provide a summary of your view and recommendations
  - This will also form part of the executive summary
  - Remember to keep in mind that this is to some extent a policy question as well as just an analysis of the law. Therefore, keep in mind why you are or are not suggesting or recommending changes.
    - The perfect example of this as a policy question is to understand what occurred in Queensland during the GFC. The Parliament moved to increase the power of the mortgagor so to protect their interests.
    - This is particularly important because the law, in my view, should seek to apply in a way where it regulates behaviour consistently irrespective of the financial climate. In my view, the focus should be on protecting mortgagors from “trigger happy” mortgagees who exercise their power of sale early.

<sup>5</sup> [http://www.austlii.edu.au/au/legis/vic/consol\\_act/tola1958160/s77.html](http://www.austlii.edu.au/au/legis/vic/consol_act/tola1958160/s77.html)

<sup>6</sup> <http://www.austlii.edu.au/au/cases/vic/VSCA/2007/113.html>, paras 60-64

<sup>7</sup> [http://www.austlii.edu.au/au/legis/qld/consol\\_act/pla1974179/s85.html](http://www.austlii.edu.au/au/legis/qld/consol_act/pla1974179/s85.html)

Suggested further reading:

- <http://www.austlii.edu.au/cgi-bin/disp.pl/au/journals/FedLawRw/1974/10.html>
- <http://www.austlii.edu.au/cgi-bin/disp.pl/au/journals/MelbULawRw/1981/19.html>
- <http://www.austlii.edu.au/cgi-bin/disp.pl/au/journals/MelbULawRw/1987/8.html>
- <http://www.austlii.edu.au/cgi-bin/disp.pl/au/journals/SydLawRw/1967/12.html>
- <http://www.austlii.edu.au/cgi-bin/disp.pl/au/journals/UWALawRw/1982/10.html>
- <http://cgw.com.au/legal-alerts/july-2009/further-perils-for-mortgagees-exercising-power-of-sale-in-queensland>
- [http://www.timdavis.com.au/Papers/Advanced\\_Property\\_Assignment.pdf](http://www.timdavis.com.au/Papers/Advanced_Property_Assignment.pdf) at 2.13.1