

The mortgagee's power of sale (2nd ed)

By Clyde Croft & Jan Johansson
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The second edition of this work has been long overdue, the first edition having been published in 1980, almost 25 years ago! The authors describe the object of their work 'to provide in a convenient form an exposition of the law relating to the exercise of the power of sale by mortgagees of land.' There is abundant evidence in the work of the authors having achieved their objective.

The work adopts a method of writing that has become known as 'transactional writing', that is, the book is arranged in the same chronological order as the steps to be taken by a mortgagee when exercising a power of sale and the issues that may be encountered in that process. This method proves useful in first, recognising a relevant issue and, secondly, in providing a ready reference to the solution.

The book is not a comprehensive treatise on each of the issues that may arise in the exercise of the power of sale. Indeed, at 245 pages, it could not possibly provide such a comprehensive treatment of the issues. The work does not, however, purport to be such a treatise. It provides a concise examination of the relevant issues and, in doing so, will be of great assistance to practitioners, bankers and other persons who have an interest in the subject matter of the work.

The first two chapters of the work examine the nature of mortgages and the source of the power of sale both at general law and under statute. Chapters 3 - 5 address the conditions precedent to the exercise of a power of sale, the mortgagee's right to possession and the manner in which possession is

recovered. Chapters 6 - 8 focus on the exercise of the power of sale and the important issue of the mortgagee's duties when exercising that power. The position in both England and Australia is considered and an attempt is made to reconcile the differences in approach between the two countries to the duty. (It is a reconciliation which, in the opinion of this reviewer, is not possible to achieve on the state of the authorities in each of the countries). Importantly, the text examines the difference in standards depending upon whether the mortgagor is a corporation or a natural person and whether, in reality, there is any difference (a view shared by this reviewer).

The work culminates with a consideration of the position of the purchaser of land pursuant to a power of sale (chapter 10) and the distribution of the proceeds of sale (chapters 12 & 13). In considering the question of distribution of the proceeds of sale, the authors examine the position of caveats and the effect they may have on the exercise of the power of sale. An inference is made that a caveat must necessarily be lapsed or withdrawn before a mortgagee sale of Torrens title land can be completed. Whilst it is true, as the authors say, that there is no specific provision in either of the relevant statutes in Victoria and New South Wales providing for a lapsing of caveats on the exercise of a power of sale, the authors do not address the effect of sec 74H(5)(g) of the *Real Property Act 1900 (NSW)* which provides that a caveat does not prohibit the registration of a dealing by a mortgagee exercising a power of sale. This provision is not a lapsing provision but it does enable a mortgagee exercising a power of sale, in some circumstances, to transfer title notwithstanding the existence of a caveat.

Reviewed by Anthony Lo Surdo