

22 July 2020

Our ref: WD BFC

Review team – Local Government Reforms
Department of Local Government, Racing and Multicultural Affairs

By email: [REDACTED]

Dear Review team

Policy position paper – Sale or acquisition of land for overdue rates

Thank you for the opportunity to provide feedback on the *"Policy position paper – Sale or acquisition of land for overdue rates"* (**Position Paper**). The Queensland Law Society (QLS) appreciates being consulted on these important reforms.

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

As noted in the Position Paper, QLS has previously raised concerns with the process for the sale of land for overdue rates. QLS is pleased that reforms are proposed, but as outlined below, reiterates its existing concerns about some of the proposals.

This response has been compiled by the QLS Banking & Financial Services Law Committee, whose members have substantial expertise in relation to both the exercise of a power of sale by mortgagees and local governments exercising the power of sale under the *Local Government Regulation 2012 (LGR)* and *City of Brisbane Regulation 2012 (COBR)*.

Executive Summary

1. QLS supports the proposals in the Position Paper that:
 - a. all land must first be offered for sale by auction, and if unsuccessful may be sold by private sale to any person, not just the highest bidder at the auction,
 - b. the requirement that the land is deemed to be sold to the Local Government if it does not sell at auction or following any subsequent sale is removed;
 - c. if the land fails to sell at auction or by private contract within twelve (12) months after the local government gives the notice of intention to sell, the sale of land process must end;

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- d. the legislation be amended to provide that a local government may commence fresh procedures to sell the same land at any time after the previous procedures have ended.
2. QLS considers the legislation should be amended to include an obligation on the local government to:
 - a. Take reasonable steps to obtain a sale price equivalent to market value of the property; and
 - b. Take possession of the property prior to exercising the power of sale.
3. QLS is concerned that without reform, there is a two tiered system operating, with local governments following one process and mortgagees being required to follow another, more robust process.
4. An owner who is not in the position to pay their rates is likely to be an owner who is suffering extreme economic stress. In the current economic climate following the pandemic, it may be that there will be an increase in owners unable to pay their rates. A local government which exercises these powers of sale is compulsorily depriving the owner of a significant asset in a time of economic stress. It is entirely appropriate to require a local government to take all reasonable steps to obtain market value for the property. This approach is consistent with a local government exercising its compulsory acquisition powers under the *Acquisition of Land Act 1967 (ALA)* and is also consistent with the obligations on mortgagees under the *Property Law Act 1974 (PLA)*.
5. If the decision is made not to include the reforms in paragraph 2 above, QLS recommends that consideration be given to including a specific power of entry in the legislation (similar to existing powers under Part 2, Division 1, Subdivision 3 of the *Local Government Act 2009 (LGA)*) under which an authorised officer of the local government may, after giving appropriate notice to the owner and any occupiers, enter the property for the purposes of:
 - a. undertaking a property valuation, accompanied by a qualified valuer; and
 - b. inspecting the property with prospective purchasers so that purchasers can properly determine their view of the value of the property prior to auction and any subsequent negotiations to purchase the property.
6. QLS also recommends that consideration be given to a fair and transparent process to be followed by all local governments when rates are overdue, which would require the local government to demonstrate reasonable attempts to engage with the owner:
 - c. in relation to the overdue rates - well before the rates are overdue for 3 years. We suggest that first contact should be at the point the rates are overdue for 1 year; and
 - d. after the notice of intention to sell the land is issued, to ensure the owner has adequate opportunity to enter into negotiations with the local government to pay the rates.

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Setting the reserve price

Section 143(1) of the LGR provides that the local government must set a reserve price for the auction that is at least:

- (a) the **market value of the land**; or
- (b) the higher of the following:
 - (i) the amount of overdue rates or charges on the land;
 - (ii) the **value of the land**.

(Our emphasis added)

Under the LGR:

- “**market value**” is defined to include a reference to the market value of the land and any improvements on the land; and
- a written report about the market value of land from a valuer registered under the *Valuers Registration Act 1992* who is not an employee of the local government is evidence of the market value of the land.

However, the “**value of the land**” referred to in section 143(1)(b)(ii) of the LGR is the “*unimproved value of the land*” (as defined in the *Land Valuation Act 2010*).

The current drafting merely requires the reserve price to be at least one or other of the “**market value**” or the “**value of the land**” (ie, the unimproved value of the land).

QLS is concerned that the current “reserve price” process and the other procedures in this subdivision may encourage local governments to undertake ‘quick fire sales’ of property at a price which will enable them to expeditiously recover rates owed, without sufficient consideration of the interests of stakeholders including the property owner and mortgagee.

In our members’ experience, the effect of section 143(b)(ii) of the LGR is that the local government can sell land at significant discounts to market value because it need only obtain the ‘unimproved value of the land’. Similar provisions appear in the COBR (see section 135 *Conduct of auction* and section 65 *What is the value of land*).

The ability to sell at lower than market value undermines the interests of home owners and creditors and may lead to economic loss.

An owner who is not in the position to pay their rates is likely to be an owner who is suffering extreme economic stress. In the current economic climate following the pandemic, it may be that there will be an increase in owners unable to pay their rates.

A local government which exercises these powers of sale is compulsorily depriving the owner of a significant asset in a time of economic stress.

If a local government was to exercise compulsory acquisition powers under the *Acquisition of Land Act 1967*, it is abundantly clear that the local government will be obliged to pay compensation which reflects an assessment of the market value of the land (see Part 4 of the *Acquisition of Land Act 1967*) plus severance costs, injurious affection and costs attributable to disturbance.

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Recommendation:

QLS maintains its concerns that the current drafting of section 143 of the LGR (and equivalent in the COBR) permits a local government to set a reserve price based on the **unimproved** value of the land, which could be significantly less than the **market value** of the land.

QLS recommends that as a matter of fairness to the owner, the regulations must be amended to require an obligation to take reasonable steps to attempt to obtain **market value** for the land when selling for overdue rates.

This is the standard which applies to local governments exercising a similar power under the ALA and which also applies to mortgagees under the PLA.

Aligning the LGR with the PLA will also allow the understanding of such provisions to be informed by existing law developed around the obligations of mortgagees exercising a power of sale.

As the concept of “**market value**” is specifically dealt with in the LGR, as discussed above, this provides further protection to land owners by requiring an independent valuer’s assessment of the market value.

Negotiating with purchasers after an auction

A further concern is that when the land fails to sell at auction, the auction process in the LGR allows the land to be sold at lower than the reserve value, by permitting the local government to enter into a contract to sell the land, provided that the price for the land is more than the highest bid for the land at the auction.

We again reiterate our concerns with the current ability to set a reserve price well below market value; this concern would be addressed if there was an obligation to take reasonable steps to obtain market value, including in negotiations post-auction.

As noted earlier, QLS supports the proposed amendment to remove the capacity for the local government to negotiate only with the highest bidder at the auction for a price more than the highest bid.

In practice when a mortgagee takes a property to auction they will have regard to one or more valuations of the property to set the reserve price and will allow the property to pass in if the bidding does not get to the reserve price.

The ability to negotiate with any party after an unsuccessful auction is important. In our experience, some bidders are not willing to bid at auction and post-auction, agents often approach potential buyers who have made pre-auction offers.

Ability for local government to purchase the land, subject to certain protections

QLS supports the removal of the requirement that the land is deemed to be sold to the local government if it does not sell at auction or following any subsequent sale.

However, there may be some circumstances where the local authority might wish to purchase the property at the appropriate reserve price after an unsuccessful sales campaign. Perhaps

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consideration could be given to incorporating an express right for the local government to purchase the property at market value subject to appropriate protections for the land owner with respect to the value and any other higher offers that might have been made.

We would expect that in the vast majority of circumstances, the testing of the market at auction will give the local authority comfort of market value as long as there has been a reasonable marketing campaign.

The ability of the local government to ultimately purchase the land (at market value) may also be required if no other purchaser can be found.

If, after a reasonable market campaign, the reserve price (set by reference to market value) cannot be achieved the assumption would be that the reserve price did not reflect true market value and the highest bid or offer during that process reflects market value.

The important point is that the local authority has followed the appropriate process to ensure that the market value is achieved.

Whether to require local government to take possession of property prior to sale

We make the following general comments on this issue:

- Our practitioners consider it market practice and consistent with statutory obligations for a mortgagee exercising power of sale to obtain a full written valuation as part of its enforcement process.
- We would also expect that in most cases a mortgagee would need to be in possession of the property to obtain market value on the sale.
- Our committee members were not aware of any mortgagee sales without the mortgagee first obtaining possession.
- QLS is concerned that without reform, there is a two tiered system operating, with local governments following one process and mortgagees being required to follow another, more robust process.
- Selling land without a valuer and purchaser undertaking a proper inspection will result in a speculative purchase price.
- The issue of obtaining a proper valuation is an element of the much broader need for an improved process that requires proper repossession of the property before the local government exercises the power of sale.
- In order to ensure that a proper valuation is obtained and purchasers are able to undertake inspections, QLS supports the introduction of a process by which the local government obtains possession of the land prior to offering the land for sale. This will mean the local government can offer vacant possession as part of the sale. It reflects the process which mortgagees must follow and is the most appropriate method to protect the interests of the registered proprietor, potential buyers and other interest holders, including mortgagees and caveators, for the reasons outlined below.

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QLS considers that the ability to take possession of the property ensures that the local government can undertake a full valuation of the property prior to the sale.

Otherwise, the council will need to undertake a "kerbside" or "desktop" valuation of the property, which may not ultimately reflect market value.

A further complication is that potential buyers are not able to inspect the property prior to sale.

We have outlined below our members' experiences with mortgagees exercising power of sale, which provides the context for our recommendation that the legislation should be amended to include an obligation on the local government to:

- a. Take reasonable steps to obtain a sale price equivalent to market value of the property; and
- b. Take possession of the property prior to exercising the power of sale.

Valuation and marketing by mortgagees

A mortgagee is required to exercise care and act in good faith when selling a property. The exact scope of this duty varies between States:

1. In Victoria, a mortgagee is required to have regard to the interests of the mortgagor (*Property Law Act 1958* (Vic) s 77(1)).
2. In NSW and Queensland, a mortgagee must exercise reasonable care when exercising its power of sale (*Conveyancing Act 1898* (NSW) s 111A; *Property Law Act 1974* (Qld) s 85(1) (**PLA**)).
3. The *Corporations Act 2001* (Cth) applies more broadly and requires mortgagees to exercise reasonable care to obtain market value for the land or otherwise, the best price that is reasonably obtainable (*Corporations Act 2001* (Cth) s 420A). This provision, with its reference to "market value" and "best price reasonably obtainable", will generally require the mortgagee to justify the sale price with independent valuations of the property (*Jeogla Pty Ltd v ANZ*).

In Queensland, if the mortgage is a prescribed mortgage, the mortgagee must obtain reliable evidence of the property's value (*PLA* s 85(1A)(b)).

In obtaining a fair price or market value, the court has held that it is important to obtain a proper and expert valuation of the property, especially if sold by private sale and not auction, and to ensure the valuation is current (*Sablebrook P/L v Credit Union Australia Ltd* [2008] QSC 242). In that case, the mortgagee's failure to obtain an expert valuation resulted in a breach of the statute and liability to the mortgagor.

The Australian Financial Complaints Authority has also suggested that a mortgagee should get at least one sworn valuation from an independent registered valuer that gives an expert opinion about the property's market value.

Experience in practice

From a practical perspective, the experience of our practitioners who regularly act in mortgagee sale matters is that in nearly every mortgagee sale, the sale process does not commence until the mortgagee has obtained vacant possession of the property.

In some cases, particularly for commercial premises, the property may be sold subject to an existing lease but the mortgagee may take possession by stepping into the shoes of the landlord in those circumstances.

The valuations usually contain photos and descriptions of the property which indicate that the property has been properly inspected, although there may be exceptions for properties which are dangerous to enter, for example, where the house has been substantially damaged by fire.

Immediately following obtaining vacant possession, the mortgagee usually commissions a valuation by a licensed valuer.

Marketing of the property and preparation of a contract of sale for the marketing agent usually do not commence until a written valuation is provided. The contract may need to contain provisions dealing with any unusual aspects of the property that might be noted in the valuation (even though sales are usually made on an 'as is, where is' basis).

There are sometimes circumstances when a second valuation might be obtained. This might be because there has been a change in circumstance (e.g. completion of building rectification works to repair damage to the property), the valuation is based on an incorrect assumption or where there is some other reason to doubt an initial valuation.

QLS notes that the valuation is only part of the process. A mortgagee must also test the market as well.

Usually a mortgagee would test the market by a proper marketing process often culminating in an auction (although a tender process may also be used). Properties that are put to auction are not necessarily sold at auction, with a reserve price being set having regard to the valuation.

If the market is properly tested then the mortgagee would not necessarily hold out for the valuation amount. However in some cases, testing of the market may mean a higher price is actually achieved. In this sense the marketing process is critical and while obtaining the valuation is useful for that process, it is not sufficient on its own.

Possession

In our members' experience, for all of the mortgagee sales in which they have been involved, the mortgagee has entered into possession in one way or another.

Selling a property without first having obtained possession is likely to have an adverse impact on the process for a couple of reasons (setting aside any considerations about the efficacy of the valuation) including:

- an inability for potential buyers to inspect the property prior to purchase will mean that the buyers might reasonably be expected to factor in a discount for uncertainty; and

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- the inability to provide vacant possession to the buyer will also impact on the value. The presence of a former occupant (perhaps an owner but maybe also a tenant or squatter) is a risk that would be also factored into the price by the buyer.

In both cases, it seems likely that many potential buyers would not be willing to make any kind of offer (even at a discount).

If a buyer with an appetite for risk is willing to offer to purchase without an inspection, the price would then tend to discount or dismiss the value of improvements to the land and restrict the pool of purchasers available to those with a distinct appetite for risk.

Such a speculative sale is directly contrary to the purpose of increasing protection for the consumer owner and other creditors who would, if any other creditor was taking action, expect to benefit from a properly valued and marketed sale.

Other creditors who may miss out will include businesses in the local community, who may be adversely impacted by missing out on payment if an owner is displaced out of the community due to a repossession and where the sale proceeds are not the best obtainable.

The issue of obtaining a proper valuation is an element of the much broader need for an improved process in local government sales that requires proper repossession of the property before the local government exercises the power of sale.

Proposed option: statutory right of entry for valuation and inspection purposes

If the recommendation to introduce a process for obtaining possession is not adopted, QLS recommends that consideration be given to a statutory right of entry to obtain a proper valuation and also possibly to allow potential purchasers to inspect the property.

Our preference is for the local government to take possession of the property. Any other alternative is an incomplete solution. A statutory right of entry and a right to inspect might allow a limited right for potential purchasers to inspect the property, but would not allow for repairs to prepare the property for sale and more fundamentally, the local government will not be in a position to give a purchaser vacant possession of the property.

Ultimately, by exercising the power of sale, the local government will deprive the owner (and any occupier) of possession the property.

In order to protect the interests of potential buyers, it seems reasonable the local government be required first to obtain possession of the property before exercising this power of sale.

Although it will deprive the owner/occupier of possession of the property at an earlier stage, it has the benefit of increasing the potential market value / reserve price by facilitating a proper valuation, enabling purchaser inspections and ensuring the availability of vacant possession on sale.

It also means that the local government will be able to carry out repairs and otherwise prepare the property for sale.

It seems appropriate that the burden of obtaining vacant possession is with the local government, with the benefit of statutory powers, rather than the potential purchaser. For a purchaser, the prospect of buying a property and then obtaining vacant possession will likely

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be daunting and will reduce the price the purchaser is willing to pay when faced with the cost and delay of obtaining vacant possession.

Mortgagees regularly obtain possession of the property prior to sale and there are also private service providers who can carry out sale processes for local governments who might prefer to outsource such a process.

This process is consistent with the mortgagee sale process and is the most appropriate method to protect the interests of the registered proprietor, potential buyers and other interest holders, including mortgagees and caveators, for the reasons outlined above.

QLS acknowledges that the exercise of a statutory power of entry to conduct a valuation and to take potential purchasers through for inspections may be a suitable compromise.

There are statutory precedents for such a power, including in the LGA itself.

Such a process would address the following concerns:

- a local government could undertake a proper valuation with a valuer, including taking photographs; and
- prospective purchasers could inspect the property, which reduces the risk of the prospective purchaser making discounted offers due to the risk of not having seen the property before bidding or making an offer.

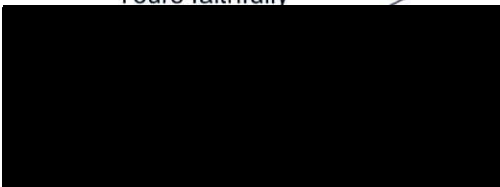
Transparent process for engaging with owners

QLS also recommends that consideration be given to a fair and transparent process to be followed by all local governments when rates are overdue, which would require the local government to demonstrate reasonable attempts to engage with the owner:

- in relation to the overdue rates - well before the rates are overdue for 3 years. We suggest that first contact should be at the point the rates are overdue for 1 year; and
- after the notice of intention to sell the land is issued, to ensure the owner has adequate opportunity to enter into negotiations with the local government to pay the rates.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on (07) 3842 5930.

Yours faithfully



Luke Murphy
President