THE EFFECT OF THE CREDIT ACT ON REGULATED AND UNREGULATED MORTGAGES

SIMON BEGG

Corrs Pavey Whiting & Byrne
Solicitors, Victoria

Under the Credit Act 1984 (Victoria) sub-section 5(1) "Mortgage" is defined as follows:

> "'Mortgage' means an instrument or transaction by or under which a security interest is reserved, created or otherwise arises."

This definition refers to the expression "security interest". This latter expression is also defined by the same Sub-Section as follows:

> "'Security interest' means an interest or power -
>
> (a) reserved in or over an interest in goods or other property; or
> (b) created or otherwise arising in or over an interest in goods or other property under a mortgage, charge, lien, pledge, trust or power -
>
> by way of security for the payment of a debt or other pecuniary obligation or the performance of any other obligation but does not include an interest or a power reserved, created or otherwise arising under a lease of goods or under a hire-purchase agreement within the meaning of the Hire-Purchase Act 1959."

As can be seen a distinction is drawn between the rights of the mortgagee in respect of property (security interest) and the instrument or transaction which gives rise to those rights (mortgage). It is clear that neither expression is limited in terms of the kind of property which is the subject matter of the security rights nor by reference to any conventional classification of securities into mortgages, charges, pledges or liens.

For most purposes of the legislation it is a sub-species of mortgage, namely, "regulated mortgage" which matters. By sub-section 5(1) "regulated mortgage" means a mortgage to which Part IV applies.

Part IV is headed "Regulated Mortgages".

Section 89 (the first section of Part IV) provides:

> "Application of Part
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> In this Part, a reference to a mortgage is a reference to a mortgage given by a person other than a body corporate to the extent that it secures the payment of a debt or other pecuniary obligation, or the performance of any other obligation, under a regulated contract."

Before turning to the contents of Part IV and to other provisions of the Credit Act concerned specifically with regulated mortgages, it is worth noting that the expression "mortgage" is relevant in certain other provisions of the Act. For example, in sub-section 30(2) which is concerned with whether a loan contract is a regulated loan contract, it is provided in substance that if there is a mortgage relating to a commercial vehicle or farm machinery which has been or is agreed to be entered into to secure payment of a debt or the performance of an obligation under a loan contract that loan contract is a regulated loan contract regardless of the limits which normally apply, namely, the amount financed not exceeding $20,000 and the annual percentage rate not exceeding 14%. Thus a loan to a farmer on the security of his farm machinery or a loan to a road haulier on the security of his truck is a regulated loan contract.

Part IV contains a number of requirements of or in respect of regulated mortgages.

Section 90 renders void a provision in a regulated mortgage which purports to secure payment or performance of an obligation under the regulated contract to which it relates in excess of the payment or performance required by the contract or permitted by the Act. As it is clear that a regulated mortgage may secure more than one regulated contract and may also secure amounts due under an unregulated contract, it is not readily apparent exactly what impact section 90 has.

Section 91 provides:

> "Mortgage of goods to be in writing
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> (1) Subject to sub-section (2), a mortgagee shall not enter into a mortgage that is not in writing if the property the subject of the mortgage is or includes goods.
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> Penalty: 10 penalty units.
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> (2) Sub-section (1) is not contravened if -
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> (a) the mortgage was entered into by the acceptance of an offer in writing signed by the mortgagor to the mortgagee to enter into the mortgage;
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> (b) the mortgage arose pursuant to an agreement in writing or an agreement made by the acceptance of

an offer in writing signed by the mortgagor to the mortgagee; or

(c) the mortgagee lawfully had possession of the goods that are subject to the mortgage before the mortgage was entered into otherwise than by reason only of being the supplier of the goods."

Breach not only entails a sanction of ten penalty units but civil consequences of loss of credit charge under section 42 or section 67 (subject to the operation of section 88).

It is important to note that para 91(2)(a) makes it clear that if the mortgagor makes an offer to give the mortgage there is no necessity for the mortgagee to sign. Furthermore, para 91(2)(b) makes it clear that if the mortgagor makes an offer in writing to enter into an agreement with the mortgagee and pursuant to that agreement a mortgage arises, there need be no signature of either mortgagor or mortgagee to the mortgage. Thus a mortgage which arises in the manner contemplated by Roberts v IAC Finance (1967) VR 231 would not infringe section 91 yet may escape stamp duty.

Section 91 requires that the credit provider shall within 14 days after a regulated mortgage is entered into give the debtor a copy of the mortgage.

Section 93 limits enforcement expenses in respect of a regulated mortgage to reasonable amounts reasonably incurred or expended by the mortgagee in the exercise of his rights. The mortgagee commits an offence if he includes in the mortgage a provision which would entitle him to more by way of expenses. Disputes as to enforcement expenses can be resolved by the Tribunal under sub-section 93(3).

By sub-section 94(1) a provision in a regulated mortgage to the effect that the mortgagee or a person acting on his behalf is authorised to enter upon premises for the purpose of taking possession of goods subject to the mortgage otherwise than in accordance with an order of the court or is relieved from liability for such entry is void. Inclusion of such a provision is an offence. There is nothing to prevent the mortgage authorising entry upon premises for the purpose of serving notices or inspecting the goods nor is there anything to prevent repossession in the street.

By section 95 a mortgagee under a regulated mortgage shall not enter or authorise a person on his behalf to enter nor shall a person so authorised enter premises for the purpose of repossessing otherwise than pursuant to a Court Order. This prohibition does not apply where the mortgagor was aware of the provisions of section 95 and, before entry was made, gave his consent to the entry for the purpose of repossession. As the onus of establishing consent is on the person who makes the entry and a document signed by the mortgagor that he was aware of the provisions of section 95 and gave his consent, is not of itself evidence of awareness and consent, it is unlikely that a mortgagee could ever safely enter upon premises for the purpose of repossession without a Court Order.

A question arises in respect of each of sections 93, 94 and 95 whether, if a regulated mortgage secures amounts owing under regulated contracts and also under unregulated contracts, these provisions need be complied with in respect of the unregulated contracts or to the extent that the mortgage secures the unregulated contracts. In this regard section 89 makes it clear that a mortgage is a regulated mortgage only to the extent that it secures payment of a debt or other pecuniary obligation or the performance of any other obligation under a regulated contract. It is therefore possible to avoid the impact of sections 93, 94 and 95 if the actions which would otherwise be prohibited by those provisions can be seen as applicable only to debts or other pecuniary obligations under unregulated contracts. That is much easier said than done. Normally, if a mortgage is enforced the proceeds deriving from enforcement are applied to all moneys secured and if such moneys are owing under both regulated and unregulated contracts sections 93, 94 and 95 would in effect apply to both. If it were desired to improve the mortgagee's freedom of action it will be necessary either to provide for application of collections first to the regulated contracts and then for the freedom of action to arise after that or, alternatively, the moneys collected by action which would otherwise infringe sections 94 or 95 would have to be applied only in satisfaction of the amounts due under the unregulated contracts.

By section 96 a mortgagor may be required to state where the goods are and by section 97 a court may, on the application of the mortgagor or the mortgagee, determine a time and place at which goods, the subject of a regulated mortgage, may be delivered by the mortgagor to the mortgagee.

Section 98 provides that a provision in a regulated mortgage to the effect that the mortgagor charges all his property or assets without specifying them is void. This does not apply to the assets of a business carried on by the mortgagor.

Section 99 restricts a regulated mortgage from giving security over future property, ie property that is to be or may be acquired by the mortgagor after the mortgage is entered into. A future property clause is void except in respect of property to be acquired with credit under the regulated contract or with respect to property described or identified in the mortgage or with respect to additions or accessories to property already subject to the mortgage or with respect to business assets.

In the case of a continuing credit contract (ie a contract like Bank Card) the prohibition goes further than section 99. Section 100 provides that neither a regulated continuing credit contract nor a regulated mortgage may provide that goods supplied from time to time under a regulated continuing credit contract is subject to the mortgage. It is permissible to take security over specified goods in respect of a debt under a regulated continuing contract.

Section 101 makes it an offence for any person by sale or attempted sale etc of property subject to a regulated mortgage or by removal of any part of the property that is goods or by any other means to defraud or attempt to defraud the mortgagee.

Section 102 follows the lines of a provision in the Hire Purchase Act whereby a mortgagor is not permitted to assign or dispose of property subject to a regulated mortgage without the consent of the mortgagee but that consent is not unreasonably to be withheld. The mortgagee is able to insist on a personal covenant from the assignee and the payment of costs and duties etc. In the event of dispute the debtor mortgagor may refer the matter to the Director of Consumer Affairs who may in turn apply to the Tribunal for a determination that consent has been unreasonably withheld.

Part V is also relevant to regulated mortgages. In the first place section 106 gives the mortgagor under a regulated mortgage a right to require the mortgagee to sell goods that are subject to the mortgage. This right however does not arise where the mortgage also secures a debt or obligation arising otherwise than in relation to a regulated contract. The ability of the mortgagor to compel enforcement is an innovation of the Credit Act.

Section 107(2) restricts a mortgagee in the institution of proceedings in respect of a matter arising under a regulated mortgage or in the exercise of a right under a regulated mortgage. In substance the debtor under the regulated contract to which the mortgage relates must be in default under the contract, the mortgagee must serve a default notice in accordance with sub-section 107(3) and the default notice must not have been complied with in accordance with sub-section 107(4).

There are detailed requirements of a default notice including the statement of the default and the giving of one month's notice (at least) to rectify the default. The notice must also contain the prescribed information.

It is important to note that sub-section 107(5) provides that where a mortgage secures payment of a debt or other pecuniary obligation or the performance of any other obligation under a regulated contract and secures payment of other moneys or the performance of any other obligations, sub-section (2) (which embodies the constraint on enforcement) does not apply to or in respect of the institution of proceedings or the exercise or purported exercise of a right under the mortgage arising otherwise than by reason of a default of the debtor under the regulated contract. In short, if a regulated mortgage also secures moneys owing under an unregulated contract and the ground of enforcement can be established by reference to the unregulated contract, there is no constraint on enforcement contained in section 107 and the moneys recovered in the enforcement proceedings can be applied both to the regulated as well as to the unregulated contract. However, a mortgagee under such a mortgage would still be constrained by sections 93, 94 and 95 subject only to the qualifications referred to earlier.

Section 108 provides:

> "Where a credit provider or a mortgagee serves a notice referred to in section 107 on a debtor in relation to a regulated contract or on a mortgagor in relation to a regulated mortgage, and the notice is complied with in accordance with section 107(4), the credit provider or mortgagee shall not, in relation to the default specified in the notice, institute proceedings or exercise or purport to exercise a right under the contract or mortgage or under a contract of guarantee that relates to the contract.
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> Penalty: 20 penalty units."

It is to be observed that if a regulated mortgage also secures moneys due under an unregulated contract and the ground for enforcement arises otherwise than under the regulated contract and the mortgagee does not serve the notice referred to in section 107 (which as stated above he is not required to do) there is no constraint in section 108.

Section 110 provides:

> "(1) A mortgagee shall not, except with the consent of a Tribunal, take possession (otherwise than under section 106) of goods subject to a regulated mortgage or otherwise exercise his powers under such a mortgage in relation to property other than land if the outstanding balance of the amount financed under the contract to which the mortgage relates is less than one-quarter of the total amount financed.
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> Penalty: 20 penalty units.
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> (2) Sub-section (1) does not apply where the mortgagee believes on reasonable grounds that the mortgagor has removed, concealed or damaged the property or attempted to remove, conceal, damage, sell, dispose of or part with possession of the property.
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> (3) The onus of proving that, by reason of sub-section (2), sub-section (1) does not apply, is on the mortgagee."

This provision does not apply to restrain enforcement of a mortgage over land but does apply to a regulated mortgage of other property. Where a regulated mortgage secures moneys due under regulated contracts and also moneys due under unregulated contracts, the provisions of section 89 have to be borne in mind and it is to be noted that the mortgage is not a regulated mortgage to the extent it secures payment of a debt or other pecuniary obligation under an unregulated contract. In consequence, provided that the relevant enforcement can be related to the unregulated contract the constraint in section 110 does not apply. As a drafting matter, preserving such freedom of action is not necessarily easy.

Section 111 enables a court on application of the mortgagee under a regulated mortgage upon being satisfied that the mortgagee is entitled to possession and that the mortgagor has without just cause refused or failed to deliver the goods after service of a notice under section 107, order the mortgagor or other person in possession of the goods to deliver the goods to the mortgagee at or before a time specified in the Order at a place so specified.

By section 112 where a mortgagee does take possession of goods subject to a regulated mortgage (otherwise than under section 106) he shall not without the consent in writing of the mortgagor (given without inducement by the mortgagee) or the authority of the court, sell or dispose of or part with possession of the goods or any part of them until the expiration of 21 days after service of a notice in the prescribed form. This is equivalent to the Hire Purchase 4th Schedule notice. In addition, where the mortgagor or the Director of Consumer Affairs has made application to a court in relation to the taking of possession of the goods by the mortgagee or where the Director has referred to a Tribunal an application by the mortgagor for a variation under sub-section 74(3) for a postponement under sub-section 116(4) the mortgagee shall not sell or otherwise dispose of or part with possession of the goods until the matter has been disposed of or contrary to an order which disposes of the matter.

Sub-section 112(2) provides that a mortgagee who otherwise than pursuant to section 106 takes possession of goods subject to a regulated mortgage shall, if the mortgagor requires him to do so by notice in writing and before the mortgagee sells or otherwise disposes of or parts with possession of the goods, offer the goods for sale to a person introduced by the mortgagor for the amount specified in the sub-section 112(1) notice or if the mortgagee thinks that the goods are worth more, for the greater amount. This obligation, however, is subject to section 114 which requires a mortgagee to exercise a power of sale as soon after he becomes entitled to exercise it as is reasonable and practicable in the circumstances and so as to receive the best price reasonably obtainable. Where this standard is not met the mortgagee is liable to the mortgagor for the amount he ought to have got less the amount owing under prior mortgages, unregulated debts secured by the relevant regulated mortgage, amounts due under regulated contracts secured by the regulated mortgage, enforcement expenses and amounts due under subsequent mortgages of which the vendor mortgagee has notice.

One is tempted to wonder whether, in the case of a mortgage, it was ever necessary to give a mortgagor a right to recover moneys from the mortgagee or to do more than simply require the mortgagee to account for the amount he ought to have got in enforcement of the security had he acted in conformity with the requirements of sub-section 114(1). The risk inherent in specifying in detail the matters which are specified in the sub-sections of section 114 which follow sub-section 114(1) is that the draftsman will be found to have overlooked something.

Section 113 provides that where a mortgagee has taken possession of goods the subject of a regulated mortgage the mortgagor may redeem the goods by discharging his obligations under the mortgage at any time before foreclosure or sale by payment or tender of the amounts payable under and secured by the mortgage or, (if less), the net balance due within the meaning of section 103 in respect of amounts due under regulated contracts which are secured by the mortgage and debts due under unregulated contracts.

Apart from a right to redeem sub-section 113(3) provides that where a mortgagee has taken possession of goods the subject of a regulated mortgage and at any time before foreclosure or sale by the mortgagee the mortgagor rectifies defaults under regulated contracts, pays enforcement expenses and pays other amounts which would have fallen due up to the time of payment and also pays amounts that were secured under unregulated contracts, the mortgagee shall forthwith return the goods to the mortgagor. By sub-section 113(4) in compliance with section 113(3) regulated contracts carry on as if the mortgagee's right to take possession of the goods had not arisen and had not been exercised.

Section 115 enables farmers to seek a moratorium of enforcement under a regulated mortgage and section 116 enables any debtor or mortgagor under a regulated contract or mortgage to seek to negotiate a postponement of the institution of proceedings or the exercise of the relevant rights. The operation of each of these respective sections is predicated upon the mortgagee having given to the mortgagor notice under section 107 of the mortgagee's intention to exercise a right under the mortgage. It therefore follows that if the mortgage relates to unregulated contracts as well as regulated contracts and if the ground for enforcement is not a default under the regulated contract, neither section 115 nor section 116 is applicable. On the other hand section 74 provides for a variation of a debtor's commitments where, by reason of illness, unemployment or other reasonable cause the debtor is unable reasonably to discharge his obligations under a regulated contract. In this case, however, the right to apply for a variation is not predicated on the service of a section 107 notice. In any case section 74 does not apply to regulated mortgages as such. The somewhat curious result arrived at in sections 115 and 116 must be attributed to drafting technique rather than any apparent policy objective. Time does not admit of dealing with the detail of applications for a moratorium under section 115 or a postponement of the exercise of rights under section 116.

Part VI is also concerned with regulated mortgages. Sub-section 117(1) provides that a person shall not in or in relation to an offer to enter into a regulated contract or a regulated mortgage make a representation that is false or misleading. Under section 118 where under a regulated mortgage it is the duty of the mortgagor to keep the goods the subject of the mortgage in his possession or control at a particular place or not to remove the goods from a particular place, the court may vary the place. Section 119 prohibits a regulated mortgage providing for an assignment of salary, wages or benefits under a superannuation scheme in payment of or as security for the payment of a debt or other pecuniary obligation under a regulated contract or mortgage.

Section 120 prohibits the taking of a bill of exchange or promissory note as security for an amount payable by a debtor or mortgagor under a regulated contract or mortgage unless the face of the bill or note bears the prescribed notice and the notice complies with section 151. The constraints in sections 119 and 120 apply to a regulated mortgage which also secures amounts due under an unregulated contract (contra sections 115 and 116) unless in the mortgage any assignment of wages etc or any non-complying bill of exchange or promissory note taken as security pertains only to amounts due under the unregulated contracts - see section 89.

Part VII imposes constraints upon a mortgagee under a regulated mortgage in respect of requirements of the debtor that he insure. This paper does not deal with the nature of these constraints. Part IX also applies to regulated mortgages. This deals with the re-opening of contracts which are unconscionable, harsh or oppressive.

Section 150 imposes a requirement that an assignment of rights under a will etc as security be executed in the presence of a prescribed person and be certified as provided in sub-section 150(2). This provision parallels a similar provision in Hire Purchase legislation.

Section 150A sets a maximum interest rate of 48% and any mortgage given to a credit provider in relation to a credit contract is unenforceable where the rate exceeds 48%. This provision applies to any mortgage and any credit contract and not just to a regulated mortgage and a regulated credit contract. There are, however, certain exclusions from the definition of "credit contract" which derive from the definition of "credit" and also the component parts of "credit contract" namely "loan contract", "credit sale contract" and "continuing credit contract". Thus transactions with corporations by credit providers otherwise than in the course of a business and certain credit provided to business is excluded from the limitation.

By section 150B a mortgage relating to a regulated contract in respect of which the annual percentage rate exceeds 30 per centum is void in so far as it relates to that contract.

The provisions of sections 151 (Legibility of Documents), 152 (Restrictions on forms of Documents), 153 (Approval of forms of Documents) and 154 (Offences for issuing illegible Documents etc) all would apply to regulated mortgages.

Sub-sections 13(1) and 13(2) respectively deem certain hirings of goods with an option to purchase and hirings of goods with an understanding of expectation about purchase to be credit sale contracts. By para 13(3)(f) a mortgage containing the prescribed terms and conditions shall be deemed to have been entered into in writing between the person to whom the goods are hired and the supplier as security for the payment to the supplier of the amount payable to him by the person to whom the goods are hired under the contract. In cases where such a mortgage arises it would seem that it is a regulated mortgage as defined.