

Farewell 2021!

2021 has proved to be just as challenging a year as 2020 with the impacts of COVID-19 felt by many across the country. 2022 brings with it many unknowns as Australia opens up internally and internationally. Despite these unknowns, business must go on and we are here to work with you to achieve your outcomes.

Gadens wishes you and your families a safe and happy Christmas, with the hope that for those of you who have been separated by COVID-19 you are able to spend the festive season together.

Christmas 2021 volumes at key milestones

With Christmas just around the corner and moratoriums in place until early January 2022, progression of current matters will, in general, stagnate until the New Year. The Eastern seaboard of Australia dominates with the highest percentage of current matters. NSW not unexpectedly accounts for 28.1% of the current volume, with the vast majority of those matters with either unexpired notices (22.1%) or with expired notices but no proceedings commenced (47.8%). Across the nation, the highest percentage of current matters sit at the ready for originating proceedings to be filed suggesting customers have responded to notices.

With the booming property market, most properties in possession are under contract, with very few properties in possession where there is no contract. As Australians' freedom to travel returns, with potentially less readily available cash, the strong sale performance currently being witnessed may change by the end of 2022, with the property market expected to come off the boil.

Northern Territory*

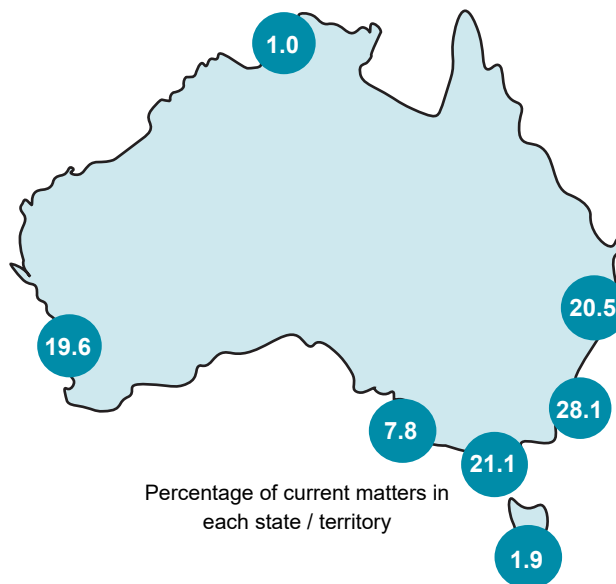
Notices sent but not yet expired	24.1
Notices expired but OP not filed	34.5
OP filed but not served	6.9
OP filed and served	10.3
Judgement entered (no warrant)	3.4
Warrant issued	3.4
In possession (no contract)	3.4
In possession (under contract)	13.8

Western Australia*

Notices sent but not yet expired	20.8
Notices expired but OP not filed	43.3
OP filed but not served	12.4
OP filed and served	10.1
Judgement entered (no warrant)	1.0
Warrant issued	2.3
In possession (no contract)	1.2
In possession (under contract)	8.9

South Australia*

Notices sent but not yet expired	20.1
Notices expired but OP not filed	44.1
OP filed but not served	14.4
OP filed and served	10.0
Judgement entered (no warrant)	0.9
Warrant issued	4.8
In possession (no contract)	2.2
In possession (under contract)	3.5



Tasmania*

Notices sent but not yet expired	7.3
Notices expired but OP not filed	43.6
OP filed but not served	20.0
OP filed and served	23.6
Judgement entered (no warrant)	0.0
Warrant issued	3.6
In possession (no contract)	0.0
In possession (under contract)	1.8

*As a percentage of total state / territory volume

Queensland*

Notices sent but not yet expired	20.8
Notices expired but OP not filed	43.0
OP filed but not served	13.9
OP filed and served	8.9
Judgement entered (no warrant)	0.5
Warrant issued	3.2
In possession (no contract)	0.7
In possession (under contract)	9.0

New South Wales*

Notices sent but not yet expired	22.1
Notices expired but OP not filed	47.8
OP filed but not served	14.4
OP filed and served	8.9
Judgement entered (no warrant)	1.9
Warrant issued	1.1
In possession (no contract)	0.2
In possession (under contract)	3.6

Victoria*

Notices sent but not yet expired	19.0
Notices expired but OP not filed	46.3
OP filed but not served	16.7
OP filed and served	9.8
Judgement entered (no warrant)	2.0
Warrant issued	3.4
In possession (no contract)	0.0
In possession (under contract)	2.8

If you'd like to know more about your own portfolio's key performance metrics [click here](#).

Client Alert – Hardship assistance demand declines as Australia opens up

In a recent Australian Banking Association (**ABA**) media release, it has been identified that the demand for hardship assistance has declined as Australia opens up post COVID-19. As Australia emerges from lockdowns across the country the ABA has released new data showing a decline in demand for hardship assistance after a peak in early August. Almost 69,000 customers have received hardship assistance since 8 July this year, including more than 27,000 home loan deferrals and more than 4,000 business loan deferrals. Comparatively, this is just 12,000 more hardship assistance approvals November, the smallest increase since the banking industry announced a second COVID-19 package of assistance in July this year.

Financial Difficulty Guideline released 29 October 2021

In light of the COVID-19 experience, the ABA recently reviewed the industry guidance for banks' programs that are aimed at supporting customers in financial difficulty and on 29 October 2021 released a new *Financial Difficulty Guideline* for all ABA member banks.

The guideline promotes best practice across the industry, which includes a framework for banks that balances the need for consistent, standardised access to financial difficulty assistance with the need for flexibility when responding to customers' unique personal and financial circumstances.

While some banks have already begun to implement practices within the guideline, banks across the industry will roll these out over the next 12 months.

A new initiative included in the industry guideline is the option of a savings buffer for customers in financial difficulty. A savings buffer allows a person on a payment plan to have a small amount of funds set aside by the bank for unexpected expenses or emergency bills. By the end of 2023, all banks will consider providing the option of a savings buffer to customers when calculating financial hardship repayment plans.

The guideline addresses the following:

What is financial difficulty?

How to ensure good governance of financial difficulty programs:

- the financial hardship process;
- identify customers in financial difficulty or hardship;
- potential indicators or signs of when a customer maybe in financial difficulty or hardship; and
- how banks confirm the financial hardship arrangement.

Good industry practice:

- how banks will respond to financial difficulty and how they may be able to help including communicating in a clear and timely manner to enable customers to make informed decisions about their options; and
- to work with customers to agree hardship arrangements that are sustainable, realistic and aim to allow the customers to resolve the financial difficulty with the bank.

What happens if banks do not agree to provide a financial hardship arrangement under the NCC

Simple deferrals and reductions

Informal arrangements

The Financial Difficulty Guideline can be viewed [here](#).

Please feel free to contact [Fidelis McGarrigan](#) (Adelaide), [Susan Forrest](#) (Brisbane) or [Sean Huggins](#) (Melbourne) for any assistance with the Guideline.

Witnessing of Affidavits – Change to legislation in South Australia

As Australia starts to open up, the South Australian Government passed the *COVID-19 Emergency Response (Section 16) (Affidavits) Variation Regulations 2021 (Regulations)*, on 14 October 2021 that allow affidavits only to be witnessed remotely over audio-visual link (**AVL**), until the relevant part of the regulation is revoked.

The Regulations require the remote meeting between the authorised affidavit-taker and the deponent of an affidavit by AVL to be conducted so that both parties:

- are visible to each other; and
- can hear each other;

while the deponent swears or affirms the contents of the affidavit and signs the affidavit.

In addition, to the above the authorised person must:

- observe the deponent signing in wet ink (not by use of an electronic signature or typing their name as is allowed in other jurisdictions) the affidavit in real time;
- attest or otherwise confirm that the affidavit was sworn or affirmed by the deponent, and the deponent's signature on the affidavit was witnessed, by signing the affidavit (or a copy);
- be reasonably satisfied that the affidavit they sign is the same affidavit (or a copy) that was sworn / affirmed and signed by the deponent; and
- endorse the affidavit (or a copy) with a statement specifying:
 - the method used to witness the swearing or affirming and signing of the affidavit by the deponent; and
 - that the requirements of these Regulations were complied with in relation to the taking of the affidavit.

The Regulations allow for the deponent to send the signed affidavit electronically to the witness, who should then sign and endorse the affidavit as soon as practicable after the AVL was held to witness the signing of the affidavit.

The South Australian Attorney will give consideration in the future as to whether this change will be extended to other documents that require witnessing and made permanent.

Whilst the change is welcome it is not without some uncertainty as it has been suggested that the Regulation can only be used where both the deponent and the witness are in South Australia. For more information on these changes, please contact [Fidelis McGarrigan](#) (Adelaide).



FAQ – Mortgagee in possession – what is the liability to pay council rates?

In our most recent edition of Gadens Connect, we commented that the liability of a mortgagee to pay council rates, owners corporation fees (body corporate fees) or land tax notices largely depended on the location of the property. Following is a summary of the position across Australia in respect of council rates. In our up coming editions we will summarise the position in respect of owners' corporation fees (body corporate fees) and land tax notices.

Victoria	In Victoria, sections 156 and 175 of the <i>Local Government Act 1989</i> (Vic) effectively provides that the mortgagee is liable to pay council rates but only if the owner cannot be found and the mortgagee is in possession of the security property.
Queensland	In Queensland once a mortgagee enters into possession it has a statutory obligation arising under the <i>Local Government Act 2009</i> (Qld) to pay council rates. This means that the mortgagee may become liable to pay rates and charges which were incurred prior to the date it entered into possession, whether it be through a redirection of rent or obtaining physical possession. From a practical perspective there will be an adjustment to the purchase price at settlement of the sale of the security property by the mortgagee such that all outstanding rates and charges owing to the Council are paid up to and including the day of settlement. If rates remain unpaid for a period of at least three years, the Council then has the power to sell and can commence its own action by issuing a notice of intention to sell the security property. If Council sells for unpaid rates the mortgagee's interest is removed from the title on transfer by Council, often with the mortgagee receiving nothing or very little from the Council sale, with the residual debt being unsecured.
New South Wales	In New South Wales the owner, which includes a mortgagee in possession, is liable to pay council rates under section 560 of the <i>Local Government Act 1993</i> (NSW). Pursuant to section 713 of the <i>Local Government Act 1993</i> (NSW), a council can exercise its own power of sale if the rates for the security property remain unpaid for more than five years from the date they become payable.
South Australia	In South Australia the position is governed by sections 4 and 178 of the <i>Local Government Act 1999</i> (SA). A mortgagee is liable to pay council rates in South Australia, but only if it is a mortgagee in possession of the security property. However, pursuant to section 184 of the <i>Local Government Act 1999</i> (SA), a council can exercise its own power of sale if the rates for the security property have been in arrears for more than three years.
Western Australia	In Western Australia a mortgagee is only liable to pay council rates if it is in possession of the security property.
Tasmania	In Tasmania a mortgagee is not liable to pay council rate notices. The <i>Local Government Act 1999</i> (Tas) defines an owner as a person whose name appears as the owner on a valuation prepared under the <i>Valuation of Land Act 2001</i> (Tas).
Australian Capital Territory	Sections 3 and 16 of the <i>Rates Act 2004</i> (ACT) govern the situation in the ACT. A mortgagee is of the security property is liable to pay council rates.
Northern Territory	In the Northern Territory sections 3, 150 and 151 of the <i>Local Government Act</i> (NT) governs the situation. A mortgagee is jointly and severally with the owner of the property liable to pay council rates notices under section 150(1) of the <i>Local Government Act</i> (NT). Notification of mortgagee in possession at commencement of a matter is required. The mortgagee, as vendor, is liable to pay the council rates up to and including the date for completion of the sale of the security.

If you have any queries or concerns regarding payment of council and water rates, owners corporation fees (body corporate fees) or land tax notices please contact any of the following Partners, [Malcolm Watson](#) (Melbourne), [James Roland](#) (Sydney), [Fidelis McGarrigan](#) (Adelaide), or [Susan Forrest](#) (Brisbane).

Queensland smoke alarm changes from 1 January 2022

Phase two of Queensland's three phase implementation of mandatory smoke alarm requirements commences on 1 January 2022.

You may recall that in 2017, new smoke alarm legislation was introduced in Queensland. The third and final stage will be rolled out 10 years after it first commenced, with all existing and new houses, townhouses and units (dwellings) to be compliant by 1 January 2027.

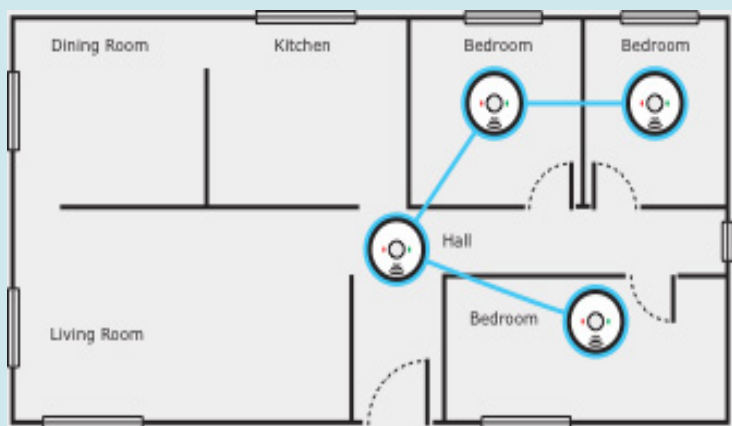
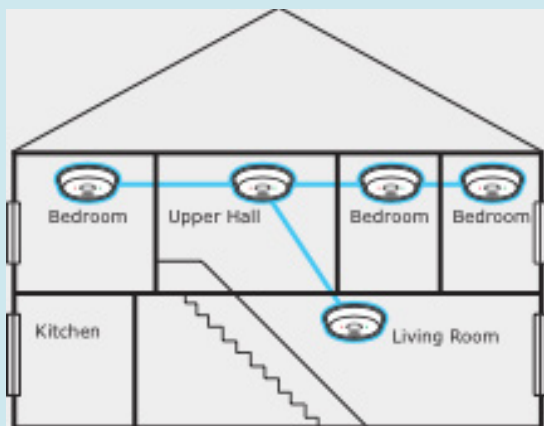
What do the 1 January 2022 changes mean for mortgagees?

In 2017 when the legislation first commenced, mortgagees were required when selling dwellings, to, amongst other things:

- replace smoke alarms manufactured more than 10 years ago or that were not working when tested; and
- when replacing smoke alarms, installing photoelectric alarms and complying with Australian Standard 3786–2014.

From 1 January 2022 it will no longer be sufficient to just replace smoke alarms when mortgagees are selling a property because they were manufactured more than 10 years ago or no longer work. A mortgagee when selling a dwelling on and from 1 January 2022, must ensure smoke alarms meet the following requirements (even if the dwelling has working smoke alarms):

1. be photoelectric, hardwired or have a 10 year tamperproof battery powered;
2. all smoke alarms that are required by legislation must be Australian Standard 3786–2014 compliant smoke alarms;
3. all be interconnected, so they activate together; and
4. be installed in all bedrooms, in hallways that connect bedrooms with the rest of the dwelling, and on every level of the dwelling. Where there is no bedroom on a level, a smoke alarm must be installed in the most likely path of travel to exit the building.



These criteria must be met before the dwelling can be sold.

The new requirements will not only add to the costs but may see delays in having properties being ready to be marketed.

Non compliance carries the risk of significant penalties, and in the event of fire, potential limitations on insurance indemnity.

Should you have any questions please do not hesitate to contact either [Susan Forrest](#) or [Barbara-Ann Sim](#).

Staff Update – Lavan welcomes top litigation & dispute resolution talent

Lavan, an independent law firm in Perth that operates in association with Gadens, has recently welcome a number of new members to its Litigation and Dispute Resolution Team. They include Special Counsels Millie Richmond-Scott and Kristy Yeoh, Senior Associate Mihali Palassis, Associate James Barrett, and one of Western Australia's most respected commercial litigators, Kevin Stewart (independent contractor). For more information, click [here](#).

Key contacts

To stay in the know, keep an eye out for our quarterly updates, and make sure you share them with your team and business partners. For other great content you can also visit: www.gadens.com/latest-insights, and if there is anything in particular you would like to see in future editions of Gadens Connect, please contact one of our regional legal experts.

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