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### Funding for property transactions

The Firm has always had access to Funds for property transactions.

Nicholas O'Donohue & Co has a direct relationship with Australian Securities Limited and also has links with brokers and bankers. The Firm has expertise in acting for both mortgagees and mortgagors.

### The Impact of the economic downturn on Retail Tenants

The drop in consumer spending has caused significant pressure on tenants in meeting their obligations. Although the Government stimulus measures are helping some retail tenants through a difficult period, others have been hit hard by the down-turn.

While Landlords have a legally binding and enforceable lease they may have no alternative but to renegotiate the rental terms in an effort to retain the tenant. This is a better choice than having empty premises and suing a tenant who is already bordering on insolvency.

In this economy Landlords should monitor their tenant's business, the vacancy levels and market rents in the area and consider their tenant's request for a rent reduction, if warranted.

A good relationship between the Landlord and tenant is a win-win situation. A tenant who is in a severe financial problem may have his affairs administered by an Administrator/Receiver or by a Liquidator. The appointment has different consequences :-

#### Administration or Receivership

Where possible, the Administrator/Receiver will continue the tenant's business with a view to achieving a sale. The Administrator or Receiver will be liable for rent until the Lease is disclaimed and effectively terminated.

#### Liquidation

Where a Liquidator is appointed and remains in occupation, the Landlord will rank in priority after secured creditors for any rent payments.



As the tenant's debt for rent is unsecured the Landlord should act decisively and have the premises back in the rental market, to mitigate any losses.

#### Deceptive practice outlawed

Vendors and purchasers are warned that they must not enter into misleading and deceptive contracts aimed at misrepresenting the market value of the property.

Sometimes the Parties will increase the written contract price to deceive the financier into believing that the contract price is genuine and to deceive the valuer into accepting that the increased contract price is the market value.

The case of Commonwealth Bank of Australia v Hilellis (2009 NSWDC 9) held that the whole agreement between vendor and purchaser was a contrivance to deceive the financier and that the vendor and purchaser had engaged in misleading conduct against the bank in breach of s.52 of the Trade Practices Act.



The vendor and purchaser were liable for damages to the value of the shortfall in the sale price.

Vendors and purchasers are cautioned against any last minute discounts that may impact on the security of the lender whether or not such discounts may have been innocently made.

#### Conveyancing: a busy season & new form of Contract

The buying and selling of real estate is humming along with the aid of stamp duty savings for off-the-plan purchases and the well publicised stimulus package measures for first home buyers.

The new form of Contract released in 2008 is now well established in conveyancing practice, and from all appearances it is a success. Parties to Conveyancing transactions should ensure that transactions are in the new format.

#### Finance: Family Loans

It is a fact that the younger generation have problems obtaining the purchase price for their first property in these days of high residential property prices. Some parents provide family loans to assist their children in this regard.



Documentation should always be prepared to provide an accurate record of such a transaction. This is important for Estate planning, parity between other children and to avoid risk of unwanted claims.

## Developers: off-the-plan

The law does not stand still and we have been asked to review Contracts for off-the-plan sales that do not comply with the legislation or heed the recent case law which has raised some nasty surprises for developers. In these cases buyers have had success in terminating their off-the-plan Contracts.



Many Contracts specify a longer period for registration of the plan of subdivision than the statutory 18 months. Justice Bongiorno recently found that if there is a variation to the 'sunset clause', or end date, for the registration of a plan, it must be fixed and not open-ended. A vendor cannot extend the registration period after the Contracts have been signed. Any condition permitting a variation at the vendor's discretion will be invalid; (*Clifford & Anor v Solid Investments Australia Pty Ltd* [2009] VSC 223).

It is an ideal time for developers to review their off-the-plan Contracts to ensure they will pass the closest scrutiny.

### Conveyancing: FHOG – New Key Dates Alert!

First home buyers continue to benefit from Government grants and bonuses. In short, a first home buyer can expect a minimum of \$16,000 with a possible maximum to \$36,500 – depending on the type of property, location and date of the contract.

In summary:

- (a) The State Bonus has been extended until 30 June 2010.
- (b) The FHOG of \$7,000 remains ongoing, however the Bonus amount has altered:
  - a. An established home decreases from \$3,000 to \$2,000;
  - b. A new home in Melbourne increases from \$5,000 to \$11,000;
  - c. A new home in regional Victoria increases from \$8,000 to \$15,500.
- (c) The cap on the value of homes entitled to receive this Bonus has increased from \$500,000 to \$600,000.
- (d) The Federal first home owners Boost will continue until the end of the year; however will halve from 30 September. Currently a first home owner is entitled to an additional \$7,000 for the purchase of an established home and \$14,000 for a new home.

There is little doubt these grants have had their intended effect as a stimulus for the economy and, as we can see from recent news reports, there has been a marked increase in sales.

### Developers: Urban Growth Boundary

No legislation has been tabled as yet! Amazing, considering the Government's proposal is for this new land tax grab to work retrospectively and capture transactions involving Urban Growth Land from 2 December 2008.



The Firm has provided submissions to the Growth Areas Authority (GAA) and the Minister for Planning on this 'infrastructure contribution' as well as providing assistance to the Law Institute for their submissions.

In short:

- The tax will be charged at \$80,000 per hectare on land brought into the Urban Growth Zone from 2005 and \$95,000 per hectare on land brought in from 1 January 2009;
- Transactions entered into from 2 December 2008 involving land already within the Zone at that time will attract the tax.
- Transactions that will trigger the tax are sales, subdivisions and the issue of building permits for major building works.

Please contact us if you are within the affected areas. We will have further updates once legislation is tabled. Who knows when that will be!

### Mortgages: The Unfair Lender

Our legal firm is a leader in mortgage practice.

In a recent case, the Firm was concerned at the way a lender had treated a borrower in the mortgagee sale of the family home. Whilst the mortgagee has the right to sell the property of a mortgagor who is in default, the mortgagee must exercise good faith having regard to the interests of the mortgagor. This requirement makes good common sense and it is also set out in detail in the legislation.

The property of the mortgagor was sold by the mortgagee in August 2001. It was our opinion that the mortgagee had deliberately and recklessly sold the mortgagor's property in disregard for the family's right to retain their home. The action came before the Supreme Court in April 2009. The Judge agreed with our assessment that the action of the mortgagee in this case was "harsh, unreasonable and unnecessary" and found that the mortgagee had not acted in good faith.

The case (reported as *Nolan v MBF Investments*) is an important illustration of Mortgage Law and was reported in *The Age Business Day* on 26 June 2009.

### Stamp Duty: Organise to Minimise

You must know the law, know your rights and know how to prepare and submit documentation if you want to take advantage of tax minimisation.

We had been asked to prepare a Transfer of Land, on the advice of an Accountant, to give his clients a more tax effective and Superannuation efficient structure. The Accountant had factored in stamp duty of \$110,000 on the Transfer which was correct on the value of the land. We reviewed the documents and the structure; we also prepared Declarations and made submissions to the SRO to have the transaction exempted from duty.

As a result of the submission and the document preparation, the transfer was marked exempt from Duty, thus saving our clients \$110,000 which their accountant told them they would have to pay. There must be many instances when people pay Duty because they do not know the Law and do not know how to properly prepare documents and make submissions.

### Conveyancing: Deposit bond protection

Contracts which provide for deposit bonds or guarantees should clearly state that any proceeds must be paid to the vendor's solicitors or agent to be held on trust and cannot in any circumstances be received by the vendor.

Recently, an off the plan contract was found to be voidable at the option of the purchaser because of an 'uncertain' clause requiring the proceeds of the deposit bond must be paid to the solicitors or agent to be held on trust: *Everest Project Developments Pty Ltd v Mendoza & Ors* [2008] VSC 366.

In contracts where deposit bonds have been paid, Vendors should verify that there has been compliance with the requirements of the Sale of Land Act whilst Purchasers should determine whether they may be able to walk away from the contract.

### Property People: links from the UK

Yvonne Lye was a lawyer in the UK working on property transactions. Yvonne worked in a law firm in Wales for 5 years before coming to Australia with her two young daughters to join our Property department in December 2007.

Brendan Parnell joined our Property department in January 2009. Brendan spent more than 6 years in England, also working on property transactions, before returning to Melbourne with his family and joining our Firm as a Property Lawyer.

Nicholas O'Donohue & Co has a history of staff longevity. Clients will recall Miss Edna Britt who was employed in our Conveyancing department for more than 63 years, so we hope Brendan and Yvonne will stay with the Firm for some time to come.



**Nicholas O'Donohue and Co.**  
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