

# Dollars and Sense

Legal and valuation issues for the finance industry

July 2009



## Consumer credit

Proposed new licensing regime for credit providers



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## Unfair contract terms legislation to become law in 2010



*“The unfair contract terms will only apply to ‘Consumer Contracts’ ”*

The Trade Practices Amendment (Australian Consumer Law) Bill 2009 was introduced into parliament on 24 June 2009. This Bill provides for a single national consumer law known as the Australian Consumer Law.

It is intended that the unfair contract terms provisions in the Bill commence operation by 1 January 2010.

It will apply to all sectors including financial services and credit. It will not apply to existing contracts unless they are renewed or varied after the commencement of the legislation.

Under the proposed legislation an unfair contract term in a standard form “consumer contract” will be void if the contract is a financial product or for the supply or possible supply of a financial service.

The unfair contract terms will only apply to “Consumer Contracts”. Consumer Contracts are contracts:

- for the supply of goods or services, or a sale or grant of an interest in land;
- to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption.

For financial products, at least one of the parties to the contract must fall within this class in order for it to be a Consumer Contract.

The test as to whether a term in a standard form Consumer Contract is unfair is whether:

- it would cause significant imbalance in the parties’ rights and obligations arising under the contract; and
- the term is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the supply.

Terms that might be unfair contract terms under the new legislation, some of which will have significant impact when applied to credit agreements, are as follows:

- clauses which permit a supplier to unilaterally vary the terms of a contract. However, such clauses will not be banned where they are reasonably necessary to protect the legitimate business interests of the party advantaged by the term. The consultation draft also states that the provisions are not intended to allow customers to challenge interest rate variations on the basis that they are unfair;
- clauses that prevent a consumer from cancelling a contract;

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## Unfair contract terms legislation to become law in 2010

*“It will not apply to existing contracts unless they are renewed or varied after the commencement of the legislation”*

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- clauses that require payment of fees when the service is not provided;
- clauses that only let the supplier decide whether or not to renew a contract;
- clauses that penalise only the consumer for breaches of the terms of a contract or for termination of a contract;
- clauses that permit the supplier to change the price of the goods or services contracted for without allowing the consumer to terminate a contract;
- clauses that permit the supplier to unilaterally determine whether a breach of a contract has occurred or to interpret the contract’s meaning;
- clauses that allow the supplier to assign a contract without the consumer’s consent. It should be noted that the consultation paper specifically states that it is not intended that this should impact on the ability to securitise loans.

There are certain terms which are to be specifically excluded from the unfair terms test. These are terms which:

- concern the main subject matter of a standard form contract;
- set the upfront price payable; or
- are a term required or expressly permitted in other legislation.

The unfair contract provisions will ban the use of some unfair contract terms which will be contained in the

regulations to the legislation once enacted. These may include:

- terms that deny the validity of pre- or post- contractual representations;
- terms that state the written document contains the entire agreement between the parties;
- terms under which consumers acknowledge that they have read or understood the contract;
- flat/fixed early termination fees and those requiring the paying out of the contract (the rationale for this is that early termination fees should be a genuine pre-estimate of loss and not a penalty); and
- terms that restrict the lender’s ability to cover more than reasonable enforcement costs, reasonably incurred.

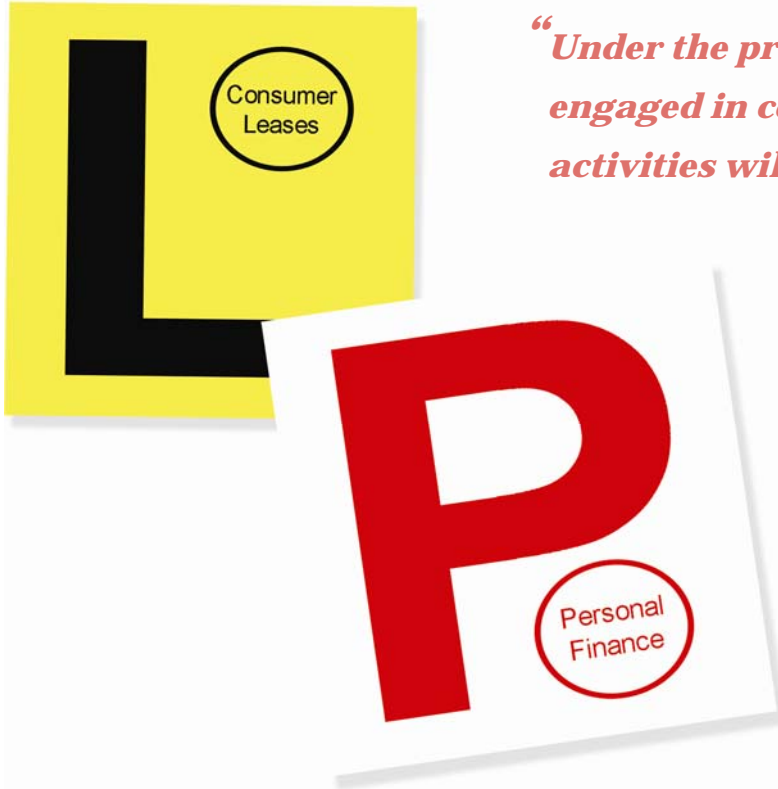
The implications for consumer lenders if this legislation is enacted include:

- the need to review all loan and security documents;
- the need to review early termination fees and pricing structures; and
- restrictions on powers to vary agreements without the consent of the borrower. ■

*Nancy Bramley-Moore is a partner of Makinson & d’Apice.*



## New Australian Credit Licence regime



***“Under the proposed regime, all persons engaged in consumer credit or leasing activities will require a licence”***

The National Consumer Credit Protection Bill 2009 was released on 30 April 2009. If passed as law, all finance brokers, lenders, mortgage managers and other intermediaries will need to be registered with ASIC by 1 January 2010 and apply for a licence by 30 June 2010 if they wish to continue to engage in consumer credit lending or leasing activities. From 1 July 2011 all persons engaged in consumer credit or leasing activities will require a licence.

### What sort of credit activities require a licence?

Anyone who does any of the following things will require a licence:

- providing, arranging or procuring of finance (where a charge is made for the finance) for a natural person or strata

- corporation wholly or predominantly for personal domestic or household purposes or to purchase, renovate or improve the value of residential investment property;
- providing, arranging or procuring any consumer leases (where a charge is made for the hiring of the goods and the charge plus any other amount payable under the lease exceeds the cash price of the goods) to a natural person or strata corporation where the goods are hired wholly or predominantly for personal, domestic or household purposes;
- otherwise performing obligations or exercising rights in relation to any of the above types of credit.

This includes credit providers, finance brokers, intermediaries, securitisation trustees, mortgage managers or aggregators as well as lenders with closed books. It also includes anyone who receives any of the above rights by transfer or assignment.

### What do you need to do if you require a licence?



#### How and when to register

All persons required to be licensed must be registered by ASIC between 1 December 2009 and 1 January 2010.

To do this applicants must lodge an application with ASIC in an approved form.

The applicant can be a natural person or a body corporate, a trustee or a partnership.

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## New Australian Credit Licence regime

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The form will require applicants to confirm that they are a member of an external dispute resolution scheme and that this is a scheme that has been approved by ASIC. The schemes are listed on the ASIC website and are updated from time to time. They include:

- Financial Ombudsman Service;
- Credit Ombudsman Service.

The fees and charges payable to belong to these schemes are variable.

### Can registration be refused?

Registration will only be refused if:

- the person has been banned or disqualified from engaging in credit activities under a state or territory law or under the *Corporations Act 2001*;
- where the person was previously registered and had their registration cancelled;
- the person is insolvent; or
- the person is disqualified from managing corporations under the *Corporations Act 2001* or the person has been convicted of serious fraud within 10 years of the application having been made.



### How to apply and when

Once registered, persons undertaking credit activities have six months to apply for a licence between 1 January 2010 and 30 June 2010.

If a person did not apply and become registered between 1 November 2009 and

31 December 2009, that person is prohibited from engaging in credit activities until such time as he or she obtains a licence.

If a person became registered during the registration period he or she can continue to engage in credit activities until 1 July 2011 as long as their licence application is lodged before 30 June 2010.

To apply for a licence a person must lodge an application electronically with ASIC.

### What criteria will ASIC apply?

ASIC must grant the licence if the application is made in the approved form and the following requirements are satisfied:

- ASIC has no reason to believe that the applicant is likely to breach licence obligations imposed on the licensee. Relevant factors would include history of the applicant that exhibits a reluctance to comply with state or territory credit legislation prior to applying for the licence or conduct of the applicant that shows deliberation and planning in wilfully disregarding the law.
- ASIC has no reason to believe that the applicant is not a fit and proper person to engage in credit activities. This may cover situations where ASIC found that the applicant:
  - lacked appropriate knowledge, skills, judgment or character;
  - had been subject to adverse findings in relevant criminal or civil proceedings reflecting their character; or



- breached fiduciary obligations in a way which demonstrated that they were not a fit and proper person.

A streamlined procedure for applying for licences will be established for ADIs. It is also expected that holders of class “A” or “B” licences under the *Finance Brokers Control Act 1975 (WA)* will also be allowed to be streamlined.

In considering an application ASIC is specifically directed to consider the following matters:

- whether a registration or licence of the person has ever been suspended or cancelled;
- whether a banning order has ever been made;
- whether the person has ever been insolvent;
- any criminal conviction of the person;
- whether the person has ever been disqualified from managing corporations.

Where the applicant is a natural person ASIC needs to consider that person. Where the applicant is a body corporate ASIC needs to consider every director, secretary or senior manager who performs duties in relation for a licence and where the application is a partnership or

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**“The holder of an Australian Credit Licence must comply with numerous obligations and must adhere to responsible lending obligations”**

## New Australian Credit Licence regime

*(Continued from page 4)*

trustee every partner or trustee who performs duties in relation to the licence.

The list of matters is not exhaustive and ASIC may take into account other matters it considers relevant including the past business practice of the applicant.



### Persons who engage in credit activities must be licensed

From 1 July 2011 a person may not engage in credit activities unless they have an Australian Credit Licence. It is expected that by that time that there will no longer be any need for transitional arrangements.

### What does the holder of a licence have to do to comply with licence obligations?

Once licensed, the holder of an Australian Credit Licence must comply with numerous obligations including:

- comply with credit legislation;
- to have and maintain the competence to engage in credit activities authorised by the licence;
- to ensure that its representatives are adequately trained and are competent to engage in credit activities authorised by the licence;
- to have an internal dispute resolution procedure that complies with the standards or requirements made or approved by ASIC;
- the licensee must be a member of an approved external dispute resolution scheme;
- the licensee must have compensation arrangements for loss or damage as a result of breaches of its obligations;
- the licensee must have adequate arrangements and systems in place to ensure compliance with its obligations;
- except where the licensee is a body regulated by APRA the licensee must

have adequate resources to engage in credit activities and have adequate risk management systems.

### Responsible lending

The National Consumer Credit Protection Bill also contains responsible lending obligations which will be required to be adhered to by the holders of Australian Credit Licences. These include:

- the obligation to provide a credit guide containing information about the licensee and its obligations;
- give a binding quote and disclosure document which discloses up front all fees and charges to be paid and also what commissions will be received; and
- the obligation to assess whether a particular credit contract is unsuitable for a particular consumer.

It should be noted that the National Consumer Protection Bill has not yet been passed as law. Comments in response to the Bill from the community and stakeholders were due on 22 May 2009 and as a result the details of the Bill may be refined before it is passed. The Bill was introduced into Parliament on 25 June 2009. ■

*Nancy Bramley-Moore is a partner of Makinson & d'Apice.*

# Fixed and floating charge to be a thing of the past

## Personal Property Securities Bill 2008

The Federal Government in cooperation with the State and Territory Governments is in the process of undertaking a comprehensive reform of all of Australia's Federal, State and Territory personal properties securities legislation.

At present, personal property securities are dealt with on a piecemeal basis by the *Corporations Act 2001* and around 70 other items of separate legislation in various States. For example, fixed and floating charges over companies are registered on the ASIC register and governed by provisions of the

*Corporations Act 2001*. There are also numerous state based registers for various types of security such as sugarcane and dried fruit!

The intention of the legislation is to replace the current laws and provide one system for registration of personal property securities. Once enacted, lenders will no longer take fixed and floating charges or bills of sale but instead, will take Security Interests under the new proposed federal *Personal Property Securities Act*. In addition, there will be a single national online personal properties securities register.

The Personal Property Securities Bill when enacted will apply to all property (other than land) whether held by individuals or corporate entities. It will include cars, machinery, crops, livestock and rights such as shares, intellectual property and contractual rights.

It will exclude land or buildings and fixtures which are legally treated as forming part of the land. It will also exclude water rights. The Bill will also exclude a right granted by a Commonwealth, State or Territory law that is stated by that law not to be personal property. Securities lending such as that which took



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## Fixed and floating charge to be a thing of the past

*(Continued from page 6)*

place in the Opes Prime transactions is also expressly excluded from the proposed legislation.

A draft Bill has been prepared, the latest version of which was referred to the Senate Standing Committee on Legal and Constitutional Affairs for inquiry and report on 13 November 2008.

The Bill is modelled on similar legislation in New Zealand and Canada. There are a number of new concepts and themes in the Bill and it is first necessary to understand the key concepts to be able to understand the security regime.

The key concepts are as follows:

### Security Interest

Any transaction or agreement that secures payment or performance of an obligation. A security interest could include:

- a fixed charge, a floating charge or a fixed and floating charge;
- an assignment;
- a hire purchase agreement;
- an equipment lease;
- a chattel mortgage;
- a retention of title agreement; or
- a conditional sale agreement.

### Collateral

Collateral is personal property that is subject to a Security Interest. For example if a fixed charge was granted over shares under the proposed legislation, the shares will be known as "Collateral".

### Attachment and Perfection

Attachment is what needs to happen to a Security Interest to enable it to be enforced between the parties. For example if a lender took a fixed and floating charge from a borrower "Attachment" would need to have

occurred for the lender to be able to enforce it against the borrower.

Attachment is the actual creation of an enforceable Security Interest. Attachment occurs when the grantor of the security has an interest in the property or the power to transfer rights in the property and value is given by the secured party for the Security Interest or the grantor does an act by which the Security Interest is created. For example, the execution of security documents can cause "Attachment" to occur if at the time the documents were executed the grantor had an interest in the property. Otherwise, with after acquired property, Attachment may only occur when the property is acquired notwithstanding that the secured documents were executed previously. Once Attachment had occurred as noted above, a secured party could enforce the Security Interest against the grantor.

Perfection is what needs to happen to a Security Interest to enable the secured party to enforce the Security Interest against third parties such as liquidators and to give it priority over other subsequent Security Interests created over the same property. Perfection will occur if Attachment has occurred and one of the following things also occurs:

- the secured party has possession of the collateral; or
- the Security Interest is registered.

A Security Interest must be attached to be perfected and then further steps required under the legislation to perfect it, such as registration must occur.

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**“Attachment is what needs to happen to a Security Interest to enable it to be enforced between the parties”**



## Fixed and floating charge to be a thing of the past

*(Continued from page 7)*

### Registration

A national online register of Security Interests will be established. All of the current registrations of security interests such as fixed and floating charges on the ASIC register, bills of sale registered in the various state based registers and REVs registrations will be transferred on to the new register.

There will be a large number of current security interests that are not registered as at the date of enactment of the legislation. The reason for this is that under current law it is simply not possible or required that these security interests be registered. Examples of these are bills of sale over certain property located in some states such as Victoria and Western Australia or property generally which is the subject of an equipment lease or a retention of title (romalpa) clause. Holders of these interests will have 24 months in which to register these on the new register. In some cases it will simply not be worth registering; for example, in the case of an equipment lease with only 12 months to run. In other cases a financier will want to register the interest to preserve its priority against other security holders or a liquidator.

If the New Zealand model is replicated here, the registration fee will be nominal, ie, around \$5.00 per interest.

Registration of a Security Interest over non-commercial Collateral will be effective for 7 years and registration of a Security Interest



**“A national  
online register  
of Security  
Interests will  
be established”**

over commercial Collateral will be effective for 25 years. Afterwards, to remain effective the registration would need to be renewed.

Except in particular circumstances, defects in registration will not render the Security Interest void. However, it will affect its priority over other Security Interests.

### Priority

The draft Bill contains rules for priority of Security Interests.

The general rule is that perfected Security Interests will have priority over unperfected Security Interests and that the priority of perfected Security Interests will be governed by the date of perfection. For example in the case of two competing registered Security Interests, the first registered Security

Interest would take priority over the other.

There are special rules in relation to Security Interests where the security holder has provided the purchase money for the Collateral. These are called Purchase Money Security Interests or PMSIs. These have super priority.

### Implications for financiers

Once the final form of the Bill is known, financiers will need to get ready for the enactment of the legislation. This will include review of the following things:

- existing documentation with a view to updating it in the context of the new legislation;
- unregistered security interests currently held such as hire purchase agreements, equipment leases, retention of title (romalpa) clauses and planning for registration of these; and
- policies and procedures for new securities going forward.

### Current status of Bill

The Senate Standing Committee on Legal and Constitutional Affairs gave reported recommendations on the draft bill on 19 March 2009. The committee made 11 recommendations including that the commencement date be extended by 12 months to at least May 2011. The recommendations are very general and will be implemented in the next draft of the Bill. Once this is available, our firm will issue further commentary. ■

*Nancy Bramley-Moore is a partner of Makinson & d'Apice.*

*“You should always focus on strategy, timing, location, type of development and market, and finance structure”*



## The pitfalls and considerations for property development

During my last 25 year career as a property valuer, I have come across many developers who believe that residential/commercial development will make a quick dollar.

As a valuer we are called upon by the lenders and developers to assess the viability of such projects. I have received many briefs, with many of the projects being shelved. If developers had fully researched and understood the correct procedures, the development could have been successfully built with a profit made.

No development should be commenced without understanding areas such as, law, finance, building and project management, town planning issues, understanding of feasibilities, the tax laws, company structures and marketing.

People usually develop property with the aim of profiting from significant capital gains (which is the difference between the initial purchase price and selling price in the sale of an asset, minus costs resulting in the actual profit). It is best to start small, learn from your experiences without losing any funds. This means starting in the residential arena is safer than venturing into the commercial or industrial development.

Compared to other investments such as shares, property development can generally offer a number of entrepreneurial businesses opportunities.

Just by using your own labour and limited capital input you can simply, by improving or renovating existing buildings or rezoning and

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## The pitfalls and considerations for property development

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subdividing land. Many larger developers started with small scale residential renovation developments.

Despite the positive aspects of the property developments, there are always risks involved. Generally the stakes are high, but if caution is not taken you could lose not only your own capital but also some of your assets (not to mention the loss of sleep and peace of mind).

### Risks

Risks that may be encountered are outlined:

#### Incorrect purchases

You can always face the risk of either paying too much for a property or buying in the wrong area.

Correct market analysis and information should be obtained via a professional and not be influenced by overzealous real estate agents.

This can be reduced by better negotiating skills and market research.

#### Risk of business failure

Property development is no exception of running the risk of failure.

This may occur as a result of bad management, decline in the local economy and change in consumer tastes or bad timing.

Good management, planning and research will reduce any failure of businesses.

#### Reduced liquidity

Property sometimes cannot be easily traded; it takes time to plan

and market before there is a transfer of consideration.

There is always the possibility of being forced to hold a property for a while when the market is down. (This is sometimes referred to as "land banking").

#### Market specificity

New type of development may work in specific city or country areas but fail in others.

It may take time for a particular planning concept to be accepted by a new market.

By the time interest in a new concept is shown the developer may have lost considerable funds.

Thorough research and planning for local markets is needed to help reduce this risk.

#### Laws and regulations changes

The changes to new building laws and codes may impact on increased costs for developers. If these changes are not taken into account when costing it may reduce profit margins.

Careful attention should be paid to political and social changes so that plans can be made to cope with these.

#### Holding periods

Most buyers or developments do so with borrowed funds or buy conditional upon the sale of an existing property.

This means that it could take considerable time before properties are settled and in the interim, the developer is left holding the property and paying interest on borrowed money.

The holding period would cost a developer a considerable amount of funds if only half of the development is sold.

Allowing for this factor in your feasibility, having good negotiation skills and a good agent, will assist to alleviate any losses occurred during a holding period.

Property development is not a simple business and nor is it for the fainthearted. There are no shortcuts and there is a plethora of knowledge to be gained and information gathered before one should venture on a development project.

However, if you work hard at it you will reap the financial rewards.

#### Timing, timing, timing

Whilst most real estate experts say the important fact is to remember "Position, Position, Position". In the property development field it is more critical to remember "Timing, Timing, Timing".

Following a well planned timeline and building phase, along with the economic trends will result in good profits.



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## The pitfalls and considerations for property development

*(Continued from page 10)*

Most developments have failed because they have not been timed to correspond with the economic cycle and the developers have introduced their product at a time of oversupply – demand has waned causing a drop in prices and developments suffer severe financial losses.

### Types of professional consultants

The complexity of development will determine the number of consultants required on your team. At times, consultants will focus on one set of tasks or a single team member may handle several duties. Below are consultants, who may be involved in a development projects.

#### Lawyers, solicitors, barristers

- Drafting legal documents, including property contracts and lease agreements.
- Assist in objections and legal disputes.

#### Accountant

- Assessment for tax structures.
- Ownership structures.
- GST and capital gain advice.

#### Project Manager

*(generally used on larger projects)*

- Preparation of overall development and investment strategy.
- Appointment and management of consultants where necessary.
- Supervision and preparation of feasibility studies.
- Procurement of finance for the projects.
- Monitoring of construction for the development.
- Supervision of marketing of the development.
- Depending on the level of service required the project managers, fees are charged as a percentage of the development or on a time basis. This role is sometime the key to making and breaking a project, a lot

rests on the project manager to see that the project is completed on time.

#### Builder

- Construction of the project, utilising the services of the consultants and supervision of the trades involved, to deliver the project on time.
- Assist in design and decision making of proper building methods and selection of good quality materials and fixtures and fittings.
- It is important that the developer has a good relationship so that communications lines are always on the same page to get the project completed as planned.

#### Architect

- Professional design and consultants.
- Recommendation of other professional consultants.
- Preparation of working drawings, specifications and tender documents.
- Onsite supervision.

#### Quantity surveyor

- Preliminary cost estimates and feasibility studies including cash flows.
- Production of bill of qualities and cost control including verification of progress payments during construction.

#### Town planner

- Preparation of initial development approval.
- Application and documentation for any rezoning.
- Resolving any town planning issues.

#### Engineers

- Design, drawings and specification of structural elements to the project.
- Budget costing for structural work.
- Valuation reporting on structural stability of the project.
- Onsite supervision.

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**“The complexity of development will determine the number of consultants required”**



## The pitfalls and considerations for property development



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### Land surveyor

- Conducting of set out and identification surveys.
- Drawing of strata and linear plans.

### Real estate agent

- The sale and marketing of the development.
- Provide marketing advice on present and future prices.
- Leasing of any remaining property.

### Property valuer

- Providing current market value and end values of the property for financial lending purposes, using feasibility programs for calculating profit and risk, internal rates of return, allowing bankers to make their lending decisions.
- Current market value for any taxation purposes.
- Providing feasibility of the project for financial institutions.

### Financial broker/banker

- Provide feasibility to best lender for obtaining project finance.
- Assessment to the best interest rates available.

### Requirements for construction valuations

Over the span of my career, I have formulated the following checklist in regards to information, which will be required for valuers for the preparation of a valuation for construction finance. This assists in providing accurate information as "garbage in gives garbage out"

- Formal Letter of Instruction to engage services.
- If required for mortgage, details of mortgagee to be provided.
- Copy of Construction Certificate.
- Copy of Contract for purchase.
- If land is held at 1 July 2000, copy of valuation.
- Will the margin scheme be used?
- Draft, Strata Plan or Linen Plan or Subdivision plan.
- Development Approval, including full working drawings.
- Schedule of areas (square metre of living, balcony and garages).
- Schedule of Finishes and inclusions.
- Confirmation of whether an environmental audit has been undertaken in relation to the site. If yes, provide the recommendations and cost to rectify.
- Builders tenders or cost estimates, including builders profit or quantity surveyor's report.
- Professional fees (architect, engineer, landscape, civil engineer, etc).
- Section 94 and 73 fees and other council fees.
- Land holding costs – water rates, council rates and land tax.
- Construction phase (ie months).

- Estimated selling prices – if available.
- Agent's commission and advertising costs.
- Any other relevant information which an applicant believes will assist in providing a valuation.

You should always focus on:

- Your best strategy
- Timing
- Location
- Type of development and market
- Correct finance structure. ■

**DTZ**

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## Impacts for mortgagees of recent legislative changes in NSW

The Real Property and Conveyancing Legislation Amendment Bill 2009 has significant consequences for mortgagees

The Real Property and Conveyancing Legislation Amendment Bill 2009 (NSW) was passed through the NSW Parliament on 6 May 2009. The Bill amended the *Real Property Act* 1900 (NSW) and the *Conveyancing Act* 1919 (NSW), along with other legislation, with important consequences for mortgagees, namely in the following areas:

### Identification requirements

The *Real Property Act* 1900 (NSW) now requires mortgagees to take reasonable steps to confirm the identity of mortgagors before presenting a mortgage for lodgement and registration. The reasonable steps may be prescribed at a later date by the regulations to the Act. The Registrar General can require a mortgagee to answer questions in relation to the steps taken to identify the mortgagor. If the mortgagee fails to comply with this requirement, the Registrar General may cancel any recording

*“Enforceability of a mortgage can now be affected by a mortgagee’s failure to properly confirm the identity of mortgagors”*



in the Register with respect to the mortgage. Most mortgagees already do 100-point checks. The difference is that now failure to do so properly will affect enforceability of the mortgage.

The *Real Property Act* 1900 (NSW) now requires witnesses of documents relating to land including mortgages to be at least 18 years of age and to have known the person to whose execution of the document they are attesting for more than 12 months or have taken reasonable steps to identify the person, such as the 100-point check system.

These amendments are similar to changes to property law which occurred in Queensland several years ago. Mortgagees and their legal advisors must ensure that they record identification procedures and properly record the steps taken by witnessing officers.

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## Impacts for mortgagees of recent legislative changes in NSW



(Continued from page 13)

### Power of sale

The *Corporations Act* 2001 already contains a requirement that a mortgagee must, when exercising a power of sale, take care to sell for not less than market value or otherwise the best price reasonably attainable. However, this only applies to property of a corporation. There are also statutory requirements to sell for market value in Queensland and for the best price reasonably attainable in Victoria.

The *Conveyancing Act* 1919 (NSW) has now been amended to impose a duty of care on mortgagees and chargees in NSW exercising a power of sale to take all reasonable care to ensure that the security property is sold for not less than its market value at the time of sale, or if the land does not have an ascertainable market value, the best price that may be reasonably obtained in the circumstances.

### Torrens Assurance Fund

The *Real Property Act* 1900 currently allows people who suffer loss to be compensated for damage in relation to certain matters. For mortgagees this is particularly relevant as this included mortgage fraud in some circumstances.

The *Real Property Act* 1900 (NSW) has been amended to limit the amounts which are recoverable from the Torrens Assurance Fund and the circumstances in which compensation will be available. Whereas previously a claim for compensation may have included future economic loss, insurance costs, depreciation costs and even personal injury caused by emotional distress, the new amendments provide that any claim for compensation is limited to the market value of the land plus any legal, valuation or other professional fees. There are also limits on the interest and costs component of the claim in the case of mortgage fraud.

*“There are now limits on the amounts which are recoverable from the Torrens Assurance Fund and the circumstances in which compensation will be available”*

### Indefeasibility

Indefeasibility is the principle whereby a person is assured that (apart from some exceptions), dealings (including mortgages, leases or transfers) once registered on title to a property will defeat dealings registered afterwards or unregistered dealings.

The amendment of section 42 of the *Real Property Act* 1900 (NSW) reaffirms that the principle of indefeasibility of title prevails over any other inconsistent Act or law unless the inconsistent provision specifically provides otherwise. ■

*Nancy Bramley-Moore is a partner of Makinson & d'Apice and Anna Sayyadi is a solicitor at Makinson & d'Apice.*

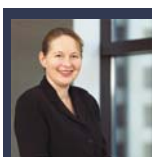
# Dollars and Sense

Legal and valuation issues for the finance industry

July 2009

Makinson & d'Apice provides professional legal services for Australian and International clients including corporations, financial institutions, small businesses, non-profit bodies and personal clients. We provide prompt, authoritative, appropriate and cost-effective legal services and have done since 1859. An unrivalled reputation of integrity and experience, combined with the latest technology and research facilities is why Makinson & d'Apice is Sydney's member firm of the LAWorld International Legal Network.

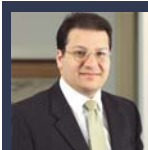
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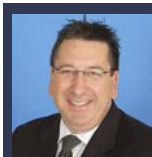
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DTZ provides valuation, appraisal and due diligence advice to a wide range of clients. From large institutions, banks and corporates through to private individuals, clients select DTZ because of its market presence and dynamic approach to valuation services. Its groundbreaking methodologies have been recognised by both clients and industry analysts alike as providing new and vital understanding of what drives value.



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## Back issues

All issues of our Finance newsletters are available online at [www.makdap.com.au](http://www.makdap.com.au). Articles in the last two issues include:

### May 2008

- Prepare for take off – Finance Broking Bill 2007
- Powers of attorney – are they safe for lenders to rely on?
- Some relief for lenders on the subject of asset lending

### August 2006

- Anti-Money Laundering and Counter-Terrorism Financing Bill 2005
- The risk of asset lending and failing to obtain disclosure of the purpose of a loan
- Failure to check identity can affect enforceability of mortgages in Queensland
- A new way of financing moveable assets in New South Wales

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