

Preparing and Taking Securities

1. HOW TO TAKE SECURITIES	1
Introduction	1
Unsecured lending	1
Security	1
Types of security	2
<i>Security over land – mortgages</i>	3
<i>Debentures</i>	3
Chattels and choses in action	4
Registration of charges	5
<i>Chattels Transfer Act 1924</i>	5
<i>Motor Vehicle Securities Act 1989</i>	5
2. DECIDING WHAT FORM OF SECURITY IS REQUIRED	7
Choosing the security	8
<i>Mortgage</i>	8
Debenture security	11
When to take debenture security	14
<i>Considerations involving s 92(1) Property Law Act 1952</i>	16
<i>Monies secured by a mortgage</i>	16
<i>The application of s 92 where monies are secured by a debenture</i>	18
<i>The applicability of s 92 where monies are secured by a mortgage and a debenture</i>	18
<i>Chattel security</i>	19
<i>Guarantees</i>	19
3. TRUST AND COMPANY ISSUES	20
Trusts – power to borrow and the liability of trustees	20
<i>Wording of trustee limitation clauses</i>	21
Company borrower or guarantor – borrowing powers and proper purpose	23
Major transactions	28
<i>Introduction</i>	28
<i>Section 129</i>	29
<i>Consequences of a breach of s 129</i>	30
<i>The value of a liability</i>	31
<i>Valuation of assets</i>	32
<i>Other issues</i>	33
Financial assistance	33
<i>Introduction</i>	33
<i>Procedure</i>	33
<i>Does "Purchase" include "Initial Subscription"?</i>	34
<i>Best interests of the company</i>	34
<i>Consequences of unlawful financial assistance</i>	35

Solvency issues	35
<i>Voidable transactions</i>	35
<i>Solvency test</i>	37
4. RESOLUTIONS AND EXECUTION	39
Companies	39
Types of resolutions	39
Individuals	40
Trusts	40
Partnerships	40
Execution of documents	41
5. CONFLICTS OF INTEREST	42
Guarantees, undue influence and third party liability	42
Case law	43
<i>Mouat v Clark Boyce [1993] 3 NZLR 641</i>	43
<i>ASB Bank Ltd v Wilkinson [1998] 1 NZLR and Westpac v Chang (HC, Christchurch, CP120/98, 1 December 1998)</i>	44
<i>Scandrett v Cruickshank Pryde [1999] BCL 1147</i>	45
<i>Russell McVeagh v Tower Corporation [1998]3 NZLR 641</i>	47
Independent advice	49
<i>Bank's duty to advise</i>	49
Undue influence, misrepresentation or other wrongdoing in procuring a third party to enter into the transaction as guarantor or co-borrower	54
6. SOLICITORS' CERTIFICATES AND UNDERTAKINGS	71
Standard conveyancing certifications	71
Certificate that the meaning and effect of the guarantee was explained to and understood by the guarantors	72
Other cases involving solicitors' certificates	74
Solicitors' undertakings	76
7. PRACTICAL ISSUES TO CHECK	79
All obligations securities	79
<i>Advantages of all-obligations securities</i>	79
<i>Disadvantages of all-obligations securities</i>	79
<i>Priorities</i>	80
Payment of rates	81
<i>Who is included in "... any person owning any interest, including an interest as first mortgagee, in the land ..."?</i>	81
<i>Can a mortgagee be required to pay penalties as well?</i>	82
<i>Can a lender recover rates paid out to a Local Government?</i>	82
<i>Summary</i>	83
Insurance	83
Settlement	84
8. LEGISLATION / CODE	85

Credit Contracts Act 1981	85
<i>Recent amendments</i>	85
Fair Trading Act 1986	85
Consumer Guarantees Act 1993	91
Code of Banking Practice	93
Personal Property Securities Act 1999 (the "PPSA")	95
APPENDIX 1 – COMPANIES ACT 1993 AND PROPERTY LAW ACT 1952	97
APPENDIX 2 – DIRECTOR'S CERTIFICATE	107
APPENDIX 3 – VIDEO SCRIPT	111
APPENDIX 4 – SCENARIOS RE APPLICATION OF s 92 PROPERTY LAW ACT 1952	113
APPENDIX 5 – THE APPLICATION OF s 92	115