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Your Reference: Recognition of Loan Deed
Enquiries: Adj Professor, Dr Brett Davies
Direct Telephone: 1800 141 612
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Wednesday, 24 March 2021

Zoe Wong
10 Stirling Street
Nedlands WA 6009
Australia

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Adj Professor, Dr Brett Davies – Partner

Dear Lender,

Deed of Recognition of a Loan

Thank you for instructing us to prepare the attached Deed of Recognition of a Loan.

How to print your document

When you are satisfied that the document is according to your instructions please:

1. Download the PDF (Don't print directly from the browser.)
2. Print the PDF Printer settings: A4 paper
100% scale (turn off 'fit to page')
3. Print single sided (NOT duplex).
4. Once signed keep this covering letter with the document.
(However, do not staple the covering letter to the document)

Steps to sign your *Deed of Recognition of a Loan*

1. The Lender hands the unsigned *Deed of Recognition of a Loan* to the Borrower.
2. The Borrower signs first.
3. If there are Guarantors then, they sign next.
4. You, as the Lender, are last to sign the deed.
5. Each person gets a copy of the fully signed deed. (Also email it to all parties, as this is evidence that all parties received a copy.)

Loans 'expire' every 6 years

There is a risk that over time a loan stops working. In Australia, each State and Territory has a Statute of Limitation. Unsecured loans go 'stale' or 'expire' if no repayments are paid or none are demanded. This is 6-years (3-years in the Northern Territory).

The limitation periods for each State and Territory for unsecured loans are:

- **Australian Capital Territory:** 6 years
- **New South Wales:** 6 years
- **Queensland:** 6 years
- **South Australia:** 6 years
- **Tasmania:** 6 years
- **Victoria:** 6 years
- **Western Australia:** 6 years
- **Northern Territory:** 3 years

For all jurisdictions (except the Northern Territory) a loan agreement is 'barred' after 6 years under the Statute of Limitations. Make sure the Borrower signs the *Deed of Recognition of a Loan* before the 6-year period expires to start the 6-year period again.

For the Northern Territory have the Borrower sign the *Deed of Recognition of a Loan* before the 3-year period to start the 3-year period again.

What is a "Statute of Limitation"?

Statute-barred debts are debts to which a statutory limitation period has expired. Each jurisdiction in Australia has enacted legislation that sets limitation periods for different types of debts and other legal liabilities. Once the debt is statute barred it is then unenforceable. The Lender can no longer claim back the money from the Borrower.

The rationales underpinning limitation regimes were set out by McHugh J in *Brisbane South Regional Health Authority v Taylor*:

The effect of delay on the quality of justice is no doubt one of the most important influences motivating a legislature to enact limitation periods for commencing actions. But it is not the only one. Courts and commentators have perceived four broad rationales for the enactment of limitation periods.

First, as time goes by, relevant evidence is likely to be lost.

Second, it is oppressive, even "cruel", to a defendant to allow an action to be brought long after the circumstances which gave rise to it have passed.

Third, people should be able to arrange their affairs and utilise their resources on the basis that claims can no longer be made against them. ...

The final rationale for limitation periods is that the public interest requires that disputes be settled as quickly as possible.

While the relevant state or territory legislation for limitation periods is in many respects similar, there are some material differences.

When does the limitation period start?

Time starts to run from the date on which the right of action starts. While it is not always straightforward, a right of action usually starts when a debt becomes due, either because the contract requires payment by that date or because the debtor defaults on regular instalment payment obligations set out in Loan Agreement.

The date on which a right of action accrues is unaffected by the existence of procedural limitations on exercise of that right. For example, the requirement under the *Consumer Credit Code* that a section 80 default notice be provided, and that the 30-day period of the notice has expired without the default having been remedied before the creditor can begin enforcement action, does not alter the fact that the right of action has accrued on the date of default: *Equuscorp Pty Ltd v Rigert & Anor* [2003] VSC 343.

How to restart the limitation period? How do I 'freshen up' the Loan Agreement?

Time may be re-started, if the Borrower acknowledges the debt in writing via a **Deed of Recognition of a Loan**.

Deed of Recognition of a Loan

The Deed of Recognition of a Loan giving the right of action:

'a notional birthday and on that day, like the phoenix of fable, it rises again in renewed youth—and also like the phoenix, it is still itself.

Busch v Stevens [1963] 1 QB 1, Lawton J at 6

To have the effect of re-setting the clock, the Deed of Recognition of Loan is:

- made by the Borrower (or a properly authorised agent of the Borrower)
- be written and signed; and
- constitute a clear acknowledgment that the debt exists and is unpaid.

Whether a document constitutes sufficient acknowledgment of the debt to re-start time is decided on a case-by-case basis. However, a written offer to pay part or all of a debt under protest (or a request for information that implicitly acknowledges the existence of the transaction) may not in themselves constitute a valid acknowledgement.

Best witnesses to the Deed of Recognition?

The witnesses to the *Deed of Recognition of a Loan* are:

1. not involved in the transaction in any way
2. not related to any of the parties (no spouses or relations)

3. over the age of 18 years
4. of sound mind

The best person to use as a witness is a 'stranger', someone like a neighbour, accountant or financial planner.

What about pre-Division 7A Loans? Keep the old section 108 loans?

Did your company lend you some money before 1997? Is it still deemed a 'protected' section 108 loan by the ATO? Has the Limitation period deemed that the loan is no longer enforceable by the company? If yes, then it may no longer be a section 108 loan. To protect any old section 108 loans that are still valid and operational then you need to restart the 6 year period via this Acknowledgement of Loan Agreement.

Can you freshen up a pre-Division 7A Loan?

This Acknowledgement of Debt restarts the Statute of Limitation clock for the old section 108 loans. This is provided that they are not statute-barred already. It is important to keep your loan a "complying section 108" loan at all times.

The Statement of Recognition stops the Statute of Limitation from destroying your Section 108 loan. But only if your old section 108 was not statute-barred already.

Does the Deed of Recognition of a Loan fix up other problems with the Loan?

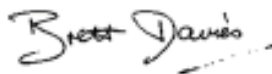
The *Deed of Recognition of a Loan* only restarts the Statute of Limitation period. It stops your loan from expiring under the State of Limitation.

If your loan has problems, is faulty or there are other issues then you need to have the Loan professionally reviewed.

I confirm that we have not reviewed any loan documents with you.

This now concludes the matter. Thank you for your instructions.

Yours sincerely,



Adj Professor, Dr Brett Davies, CTA, AIAMA, BJuris, LLB, LLM, MBA, SJD
National Taxation Partner
LEGAL CONSOLIDATED BARRISTERS & SOLICITOR

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Adj Professor, Dr Brett Davies - Partner



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Deed of Recognition of a Loan

This Deed of Recognition of a Loan is between:

Zoe Wong
10 Stirling Street, Nedlands WA 6009, Australia

(Lender)

and

Hong Nominees Pty Ltd, ACN 298 791 103
12 Stanlake Avenue, Footscray VIC 3011, Australia
Trustee for the Hong Family Trust Trust

(Borrower)

and

Jerry Hong
20 Swinden Place, Downer ACT 2602, Australia

(Guarantor)

The parties agree as follows:

1 Background

- 1.1 The Lender has entered into Loans with the Borrower.
- 1.2 Without affecting any of the conditions and terms of any of the Loans, the Borrower is confining that the Loans are still outstanding and enforceable.
- 1.3 This Deed of Recognition of a Loan seeks to confirm the indebtedness to ensure that the Loans do not become statute barred under any laws or acts including any Statutes of Limitations.
- 1.4 By providing this Deed of Recognition of a Loan, the Borrower is providing evidence (by admission) of the indebtedness.

2 Dictionary

2.1 These words mean:

- 2.1.1 **Borrower** includes executors, administrators, personal representatives, successors and assigns of the Borrower
 - 2.1.2 **Deed** this deed with annexures, if any
 - 2.1.3 **Lender** includes executors, administrators, personal representatives, successors and assigns of the Lender
 - 2.1.4 **Loans** all loans between the Borrower and Lender, or if a specific loan or loans are attached to this Deed (as evidenced by a balance sheet, loan agreement, statement or a list) then only those attached loans
- 2.2 If the Borrower comprises two or more persons, the terms on their part bind and are observed and performed by them jointly and each of them severally, and may be enforced against any one or any two or more of them.
 - 2.3 Headings are for convenience only and do not affect interpretation.

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Dr Brett Davies

Partner

Legal Consolidated Barristers & Solicitors

- 2.4 A reference to a 'person' includes a reference to: individual; body corporate (wherever incorporated); body politic; association of persons (whether incorporated or unincorporated) partnership; trust; person in the capacity as a trustee; person in the capacity as the personal representative of a deceased estate and superannuation fund.
- 2.5 The plural includes the singular and vice versa and a reference to any person includes every other gender.
- 2.6 A reference to this Deed includes a reference to any amendment, now or hereafter made, supplemental deed or replacement from time to time.
- 2.7 A reference to any party to this Deed includes successors or permitted assigns.
- 2.8 A reference to laws in this Deed refers to those laws as amended or modified from time to time consistent with the overall purpose of the Deed and does not lead to any inconsistency.
- 2.9 A reference to any statute, or any subordinate legislation or instrument made under that statute, includes any statutes, subordinate legislation or instruments amending, modifying, re-writing, re-enacting or replacing them and a reference to a statute includes any subordinate legislation and instruments made under that statute.

Loan Agreements usually stop working after 6 years. This is because there have been no repayments during that time. You can restart the 6 year period with a Recognition of Loan Deed.

3 Acknowledgement

Without affecting or altering the terms and conditions of any such Loans, the Borrower acknowledges and warrants that the Borrower is indebted to the Lender for the Loans and that such Loans are still outstanding. Further, all parties acknowledge the continued existence of the Loans.

4 No Amalgamation or Consolidation

Nothing in this Deed suggests or has the effect of merging, amalgamating or consolidating any of the Loans.

5 Where Borrower acting as trustee

When the Borrower is acting in the capacity of trustee, then the Borrower also warrants that the Borrower has the power in the capacity as trustee to sign the Deed.

6 What are the other Terms of the Deed

6.1 Not to Prejudice Other Securities

This Deed does not extinguish, merge, prejudice or affect any other security that the Lender may at any time hold.

6.2 Where the Borrower is a Company

Where the Borrower is a company all current and future directors agree to be bound by the Deed.

6.3 Notice Demand or Consent

- 6.3.1 any communication under the Deed is in writing and signed by the party giving it or via email. Except as otherwise provided the communication may be delivered or sent by registered post or via email.

6.3.2 communications by post are deemed received 48 hours after posting and immediately if sent by email.

6.4 Effect of Waiver

No consent or waiver by the Lender under this Deed releases the Borrower from any part of the Loan.

6.5 Proper Law

The Deed is governed and construed according to the laws of the jurisdiction in which the Lender resides in, as evidenced by the Lender's address. Each party irrevocably submits unconditionally to that jurisdiction and agrees that it is competent to hear appeals for any legal action, suit or proceeding arising out of this Deed.

6.6 Effect of Signing

This Deed is binding upon each person who has signed it notwithstanding that:

- 6.6.1 another party has failed to sign it;
- 6.6.2 part of the Deed is avoidable or unenforceable; or
- 6.6.3 the whole or part of the Deed is avoidable or unenforceable as to any party.

6.7 Severability

If any part of the Deed becomes void or unenforceable then only that part is severed from this Deed. All parts that are not void remain in full force and remain unaffected by the severance.

To reset the clock, the Deed of Recognition of Loan is:

- *made by the Borrower (or a properly authorised agent of the Borrower)*
- *in written and signed;*
- *and states a clear acknowledgment that the debt exists and is unpaid.*

7 GUARANTOR

The Guarantor warrants, consents and agrees to the Deed.

SIGNED AS A DEED on the day of 20

EXECUTED for and on behalf of
Hong Nominees Pty Ltd
ACN 298 791 103
by authority of its Directors in
accordance with section 127 of the
Corporations Act 2001 (Cth)

The Borrower acknowledges the warning to have this Deed explained by an independent lawyer. The Borrower by signing below declares and warrants to the Lender an understanding of the Deed. The Borrower acknowledges that Legal Consolidated acts only for the Lender.

The witnesses to the Deed of Recognition of a Loan are:

- 1. not involved in the transaction in any way*
- 2. not related to any of the parties (no spouses or relations)*
- 3. over the age of 18 years*
- 4. of sound mind*

Signature of Director or Secretary

Signature of Director

SIGNED, SEALED AND DELIVERED by
Zoe Wong

Zoe Wong

(Signature of Witness)

(Name of Witness)

SIGNED, SEALED AND DELIVERED by

Jerry Hong, as Guarantor:

The Guarantor acknowledges the warning to have this Deed explained by an independent lawyer. The Guarantor by signing below declares and warrants to the Lender an understanding of the nature of this Deed. The Guarantor acknowledges that Legal Consolidated acts only for the Lender.

Jerry Hong

(Signature of witness)

(Name of witness)

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