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Put and Call Options in 5 minutes

This information memorandum is limited to conveyancing transactions in New South Wales.

IMPORTANT

One of the few legal issues that **cannot be remedied** is not exercising an option in time. It must always be remembered that the option period is **finite** and **time of the essence**. Accordingly, if a **purchaser** in relation to a call option or a **vendor** in relation to a put option **fails** to exercise their option on or before the expiration of the option period, the option **expires.** The option **must be exercised** as required under the **particular deed** of option.

CALL OPTIONS

A **call option** gives a purchaser (also called the grantee) the right, but not the obligation, to buy a specific property at a **predetermined price** within a specified period of time referred to as the **option period**.

During the option period the vendor (also called the grantor) is **precluded** from selling the property to anyone other than the purchaser but it is possible to sell the property to another party conditional upon the purchaser not exercising the call option. However, this is not a common occurrence. Of course, any such sale cannot be completed until after the expiration of the option period.

The terms of the call option are set out in an **option deed,** which document must comply with the provisions of the ***Conveyancing Act 1919*** (“Act”). The Act requires a **valid contract** for the sale of the property and **must be** attached to the option deed. The Act also provides that in relation to residential property the purchaser has a cooling off period unless the provisions of Division 9 of the Act are complied with and a S66ZF certificate given at or before the granting of the option. There are other requirements of the Act, particularly in respect of residential property, such a minimum option period of 3 months.

The option deed will include:

- the way in which the option is to be exercised;
- whether the purchaser can assign its rights to a nominee;
- any additional rights the purchaser has during the option period e.g. to obtain development consent in respect of its intended requirements for the property, access to the property to prepare plans etc.;
- how the option fee is to be dealt with;
- any additional obligations of the vendor e.g. to obtain development consent; and
- any other agreements between the parties.

The purchaser pays the vendor a fee, called the **option fee,** in consideration of the vendor granting the call option to the purchaser. In the event the purchaser decides to exercise the call option and buy the property the option fee is usually (but not always) **credited** to the purchase price. If the purchaser does not exercise the call option the option fee is **forfeited** to the vendor.

This article is for educational, demonstrative and illustrative purposes only. This article is not a substitute for legal, financial, accounting, property or other advice. We strongly recommend (before entering into any transaction in which you are investing time, money or any other resource) that you ask as many questions as possible and obtain independent legal and financial advice.

On the **exercise** of a call option the contract attached to the option deed comes into effect. **Stamp duty** is **not payable** on an option deed in respect of a call option. Stamp duty is of course **payable** on the contract when it comes into effect.

Most call options are **transferable** i.e. the purchaser may assign its rights in the property to another party or **nominee** on the same terms as contained in the option deed. In those circumstances the purchaser may sell the option to a third party at a premium. Stamp Duty is **not payable** on an assignment of a call option from the purchaser to a third party even if the purchaser makes a profit on that transfer. An assignment of an option to a third party is effected by a **simple deed**. The **original purchaser** simply nominates the assignee as the purchaser under the option in place of themselves.

Advantages of a call option:

- **Delay stamp** duty on a long term contract or a contract that is **conditional** on development consent or Foreign Investment Review Board approval etc.
- Allows a purchaser to obtain development consent or investigate **other situations** that would add value to the property without the obligation to buy.
- If the call option **is transferable** it allows the purchaser to **sell the option** without incurring **stamp duty** or the vendor being aware of the profit.

Disadvantages of a call option:

- The vendor is **not assured** of a sale unless and until the purchaser **exercises** its option.

PUT OPTIONS

A **put option** is granted in the same way as a call option. In respect of a put option the purchaser is the grantor and the vendor the grantee. All of the matters discussed regarding a call option (including the advantages) apply to a put option. **Except that** a put option gives **the vendor** the right (but not the obligation) to require a purchaser to acquire a property on the terms of the option deed and contract attached to the option deed. Therefore a put option is as **effective** for a vendor as a contract with the **added advantage** that the vendor has the right to decide not to exercise the put option, thus alleviating the disadvantage of a call option.

If the purchaser **is a corporation** the put option should provide for a **personal guarantee**. Further, on the granting of the put option the purchaser should provide **security** in the amount of the deposit under the contract. Of course, the amount depends on the amount of the deposit **negotiated** by the parties.

To **protect** the interests of the vendor the **grantor** (purchaser) of the put option should be an entity with **sufficient resources** to purchase the property if the vendor **puts** them. It is not as important for the purchaser of the call option **to be of substance** because it is **not obligated** to complete the purchase.

PUT AND CALL OPTIONS

These, as the name suggests are a **combination** of a put option and a call option usually in the same document and in respect of the same parties.

Contact us at CLS Legal at info@clslegal.com.au for further information, to discuss the sale of a property by way of a Put and Call Option or if you have any questions about the contents of this document.