Episode 47: Summary

HEARSAY
The legal podcast

Episode name: Show me the Money! Navigating Debt and Credit
Guest(s): Geoff Sutherland

What area(s) of law does this episode consider?	Corporate, finance and banking law
Why is this topic relevant?	If your client's company wants to make a large acquisition, embark on an ambitious new project, or grow aggressively, chances are it won't be able to do it with the cash it has in the bank account and will need an injection of capital. While Australian companies have had higher debt-to-equity ratios than their US counterparts for some time since the Global Financial Crisis, the COVID-19 pandemic has led to interest rates plummeting to historical lows, while real property values remain high meaning debt financing is more accessible than ever for Australian companies.
What legislation is considered in this episode?	*Corporations Act 2001* (Cth) *Electronic Transactions Act 1999* (Cth) *The Treasury Laws Amendments (2021 Measures No. 1) Act 2021* (Cth)
What are the main points?	● Globalisation and the deregulation of the Australian banking and finance industry opened up Australia to a world of foreign investment and the culture of foreign financial markets. The global scope and scale of the Australian banking and finance sector resulted in the need for more highly specialised banking and finance lawyers to navigate and mediate the relationships between businesses and banks. ● When developing a legal strategy to act for corporate borrowers, a lawyer should adapt their approach not only to the individual borrower but to the type of lender, whether that is a Big Four bank, a syndicate, a non-bank lender or a specialist financer. ● Lawyers need to carefully interpret finance documents and determine which arrangements are best suited to their clients - that includes reviewing clauses that might seem like standard-form terms which are either non-negotiable or not worth negotiating. 'Boilerplate' clauses like governing law - especially in transactions involving foreign parties - can have important consequences for the enforcement of a loan or the resolution of a dispute.
What are the practical takeaways?	● Work out what your client's "must haves" are, which they will not negotiate on. Concessions can then be made around other less important terms in order to preserve your client's core interests. ● While every clause in the finance documents is worth reviewing - even the boilerplates - pay particularly close attention to the clauses dealing with termination and the cancellation of the facility (also called 'acceleration'), as these will have the greatest consequence in the event of a default.

- It’s important to plan and prepare for the worst case scenario - an event of default - in good times and bad. It’s extremely difficult to salvage the commercial relationship if a bank loses trust in the management of a business as a result of an event of default or an unremedied breach, so negotiate for as much notice as possible before a breach of the agreement carries consequences - as this will help the client either salvage their relationship with the current lender, or repay the loan by refinancing with a new lender, before a formal default makes either of those things extremely difficult.

- Build materiality - a threshold of how serious a breach or event must be - and reasonableness - an objective limitation on the exercise of a discretionary right or power - into your finance documents, to protect your client from capricious enforcement of those documents.