ISSUE 2 // June 2014

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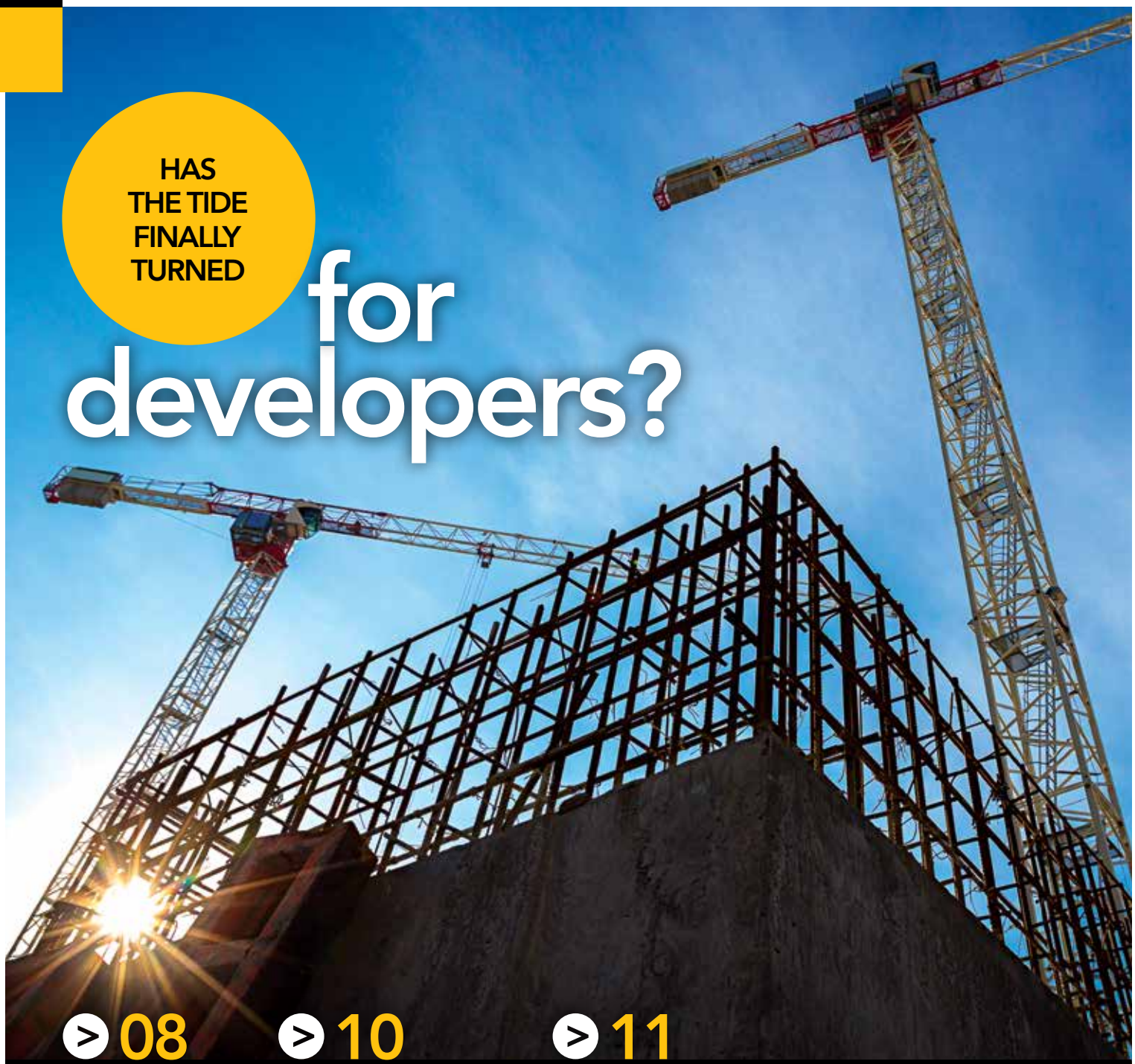


HAS THE TIDE FINALLY TURNED for developers?

> 08

EMPLOYMENT //
HAVE YOU MISSED SOME IMPORTANT EMPLOYMENT LAW NEWS?

> 10

BUILDING & CONSTRUCTION //
AVOIDING ADJUDICATION PITFALLS WITH CONSTRUCTION CONTRACTS

> 11

ESTATE PLANNING //
WHERE THERE'S A WILL, THERE'S A WAY (OF AVOIDING ESTATE DISPUTES)

Clarke Kann LAWYERS

Welcome

to the June 2014 edition of **CK MOMENTUM**, our regular newsletter for business owners and corporate executives.

In this edition, we look at some important issues for those involved with the development, sale and purchase of property and those involved in building and construction contracts. We also have an update about employment law issues for business owners and look at the steps you can take to prevent your family from disputing the contents of your Will.

Our aim is for **CK MOMENTUM** to help keep you up to date with pertinent developments that may affect you or your business. With offices in Brisbane and Sydney, our expertise covers commercial & corporate transactions, employment & IR, financial services, litigation, risk management and insolvency, property transactions and resources projects across a range of industries.

I hope you find this edition of **CK MOMENTUM** informative.

John Toigo //
MANAGING PARTNER

in this issue

03 PROPERTY // CAN INFORMAL PROPERTY TRANSACTION ARRANGEMENTS BE BINDING?

04 SNAPSHOT //

06 FINANCIAL SERVICES // HAS THE TIDE FINALLY TURNED FOR DEVELOPERS?

08 EMPLOYMENT // HAVE YOU MISSED SOME IMPORTANT EMPLOYMENT LAW NEWS?

10 BUILDING & CONSTRUCTION // AVOIDING ADJUDICATION PITFALLS WITH CONSTRUCTION CONTRACTS

11 ESTATE PLANNING // WHERE THERE'S A WILL, THERE'S A WAY (OF AVOIDING ESTATE DISPUTES)

CAN INFORMAL PROPERTY TRANSACTION ARRANGEMENTS BE BINDING?

Due to the commercial imperatives of property dealings, parties may try to 'lock' in an agreement by signing letters of offer or heads of agreement. In a strong competitive property market, contracts may also be signed and exchanged via email. Property & Projects Partner, Bernard Tan, looks at whether these informal arrangements are binding on the parties?

While each case will depend on its circumstances, there are a number of 'rules of thumb' that property developers and investors should keep in mind when trying to secure a transaction under a 'pre-contract' arrangement:

DON'T ASSUME THAT INFORMAL AGREEMENTS ARE BINDING EVEN IF THEY SAY THEY ARE: There is a presumption by the Courts that such informal arrangements are not binding. They will often not comply with specific State-based property law requirements such as mandatory disclosure, which may give rise to rescission rights. If you wish to lock in a deal, then don't count on your informal arrangement to be legally binding.

IF YOUR AGREEMENT CONTAINS: the words 'subject to formal contract', then the court is likely to find the agreement is not binding.

DOES THE AGREEMENT CONTAIN ALL MATERIAL TERMS? For pre-contract arrangements to be binding, not only must the parties state their intention that they are binding, but they must contain all essential terms of the agreement including the correct names of the parties, the property description, price, settlement date and any special conditions.

HAS A DEPOSIT BEEN PAID? For an agreement to be binding, it is likely that a deposit will be required to be paid.

IT'S BETTER TO SIGN AND EXCHANGE CONTRACTS PERSONALLY: While emails allow parties to enter into contracts almost instantaneously, there is no substitute for signing contracts in person. Problems have arisen when emails have not been received, parts of documents have gone missing or are not identical or when only execution pages have been sent (not complete contracts).

EXCHANGING CONTRACTS VIA EMAIL: When it is not possible for parties to meet in person, electronic transactions legislation introduced in each of the States have made it possible for business to be carried out electronically. When emailing documents, the parties should state in their document that contract exchange and communications may be effected electronically. Importantly, electronic exchange of the whole contract should be made.

EXCLUSIVE DEALING: If you wish to enter into a binding agreement before finalising a formal contract, then you should consider entering into an exclusive dealing arrangement. These arrangements do not have to comply with statutory requirements for the sale of property but require the parties to deal exclusively with one another during an agreed period. A breach of the agreement can give rise to damages claims.

Finally, documents should correctly reflect the intention of the parties, particularly whether they intend to be bound or not. If parties wish to be bound, then they should ensure that the documents are correctly drafted. If essential terms have not yet been agreed, then parties should consider other binding arrangements such as an exclusive dealing arrangement. CK

Bernard Tan //
PARTNER,
PROPERTY & PROJECTS
EMAIL

Bullet proofing your business

BREAKFAST SEMINAR

Please join us for breakfast in July, when we will be looking at some important aspects of risk management for business owners. Corporate & Commercial Partner, Peter Karcher will talk about the importance of protecting your intellectual property such as your business name, brand and trade marks, and some simple steps that you should follow. Financial Services Partner, Miles Anderson, will explain what every business owner needs to know about PPSA with some real world examples of pitfalls to avoid.

The seminar will be held on Thursday, 24 July in Sydney and Tuesday, 29 July 2014 in Brisbane. Our April 2014 'Bullet Proofing Your Business' breakfast seminar was oversubscribed in Brisbane and Sydney, so get in quick if you would like to attend.

FOR FURTHER DETAILS CLICK HERE

Australia-Taiwan Business Council

In April 2014, Managing Partner John Toigo hosted a boardroom lunch on behalf of the Australia Taiwan Business Council (ATBC) for Brisbane's Lord Mayor, Graham Quirk, Taiwan business leaders and members of the National Executive Committee of the ATBC. The purpose of the lunch was to exchange ideas and explore ways to best promote business opportunities not only in Brisbane but South East Queensland and Australia. Brisbane shares a sister city relationship with Kaoshiung city in Taiwan. Kaoshiung is Taiwan's second largest city, Taiwan's major industrial city and the country's main seaport.

In 2013, Taiwan was Australia's 7th largest export market. It is Australia's 5th largest market for black coal, our 4th largest market for Iron ore, and a major agribusiness customer that sources nearly 50% of all its beef from Australia.

For over 30 years, the ATBC has and continues to play a strong role in promoting commerce between Australia and Taiwan. Unlike other bilateral business associations, the ATBC occupies a unique position: in the absence of formal diplomatic relations between Australia and Taiwan, the ATBC acts as a bridge and a channel of communication between the two countries. Not only does the ATBC possess a deep understanding of Taiwan's economy, business culture and laws, it also understands the subtleties and complexities of Taiwan's relationship with mainland China and of the Australian government's 'one China policy'.

Over the last 20 years, ClarkeKann has built Australia's pre-eminent Taiwanese practice focussed particularly on major Taiwanese corporates investing in Australia. Our practice has developed on the back of significant investment from Taiwan into Australia, including the largest ever single

investment in Australia in 2013 with the US$1.15 billion investment by Formosa Plastics Group to establish the Iron Bridge (iron ore) Joint Venture with Fortescue Metals Group, which we highlighted in the last issue of **CK MOMENTUM**.

IN RECOGNITION OF OUR ROLE WITH TAIWAN, JOHN TOIGO, WHO LEADS OUR TAIWAN PRACTICE, RECENTLY ACCEPTED AN INVITATION FROM THE ATBC TO JOIN ITS NATIONAL EXECUTIVE.

CK expands its Sydney litigation team

Mark Secivanovic has joined us as a Partner in the Litigation & Insolvency team. Mark is an accredited specialist in commercial litigation and will sit on the NSW Specialist Accreditation Advisory Committee from 1 June 2014. He has a wealth of experience in complex District, Supreme and Federal Court litigation and has a particular interest in consumer protection litigation, and mortgage and identity fraud. Mark is also heavily involved in alternate dispute resolution, achieving practical and commercial outcomes for his clients.

Joining Mark from his previous practice is Feda Dabbagh, who has been appointed as an Associate in the Litigation & Insolvency team. Feda has experience in a range of significant commercial disputes and proceedings in both the Supreme and Federal Courts including in the areas of contract and trade practices law, bankruptcy, and mortgage fraud. Prior to joining ClarkeKann, Feda worked at Clifford Chance in London assisting with a significant commission inquiry.

Sale of off-the-plan lots to be simplified

The Queensland Government has introduced further amendments to property legislation, specifically for the sale of off-the-plan lots, which will be of significant benefit to property developers. It is likely to be a few months before the changes come into effect.

FOR FURTHER DETAILS AND TO VIEW AN ARTICLE BY PROPERTY & PROJECTS ASSOCIATE, KATIE GOULD

CLICK HERE

Property Occupations Act 2014 replaces PAMDA in Qld

The development and real estate industries have welcomed the passing of the Property Occupations Act 2014 by the Qld Parliament on 7 May 2014. The Act will regulate property occupations and transactions, and is one of four Acts that will provide for the repeal and split of the Property Agents and Motor Dealers Act 2000 (Qld).

FOR FURTHER DETAILS AND TO VIEW AN ARTICLE BY PROPERTY & PROJECTS PARTNER, PAUL O'DEA

CLICK HERE

CK Agribusiness Group beefs up

AUSTRALIA'S NATIONAL BEEF EXPO – BEEF AUSTRALIA 2015 – WILL BE HELD IN ROCKHAMPTON FROM 4 TO 9 MAY 2015.

Beef Australia is held every 3 years and is the supreme industry event for the beef industry in Australia with some 85,000 visitors anticipated to attend the event.

The CK Agribusiness Group is heavily involved with Beef Australia 2015. Apart from providing legal assistance to the event, CK Agribusiness will conduct a stand to field inquiries and will conduct seminars for the benefit of those attending.

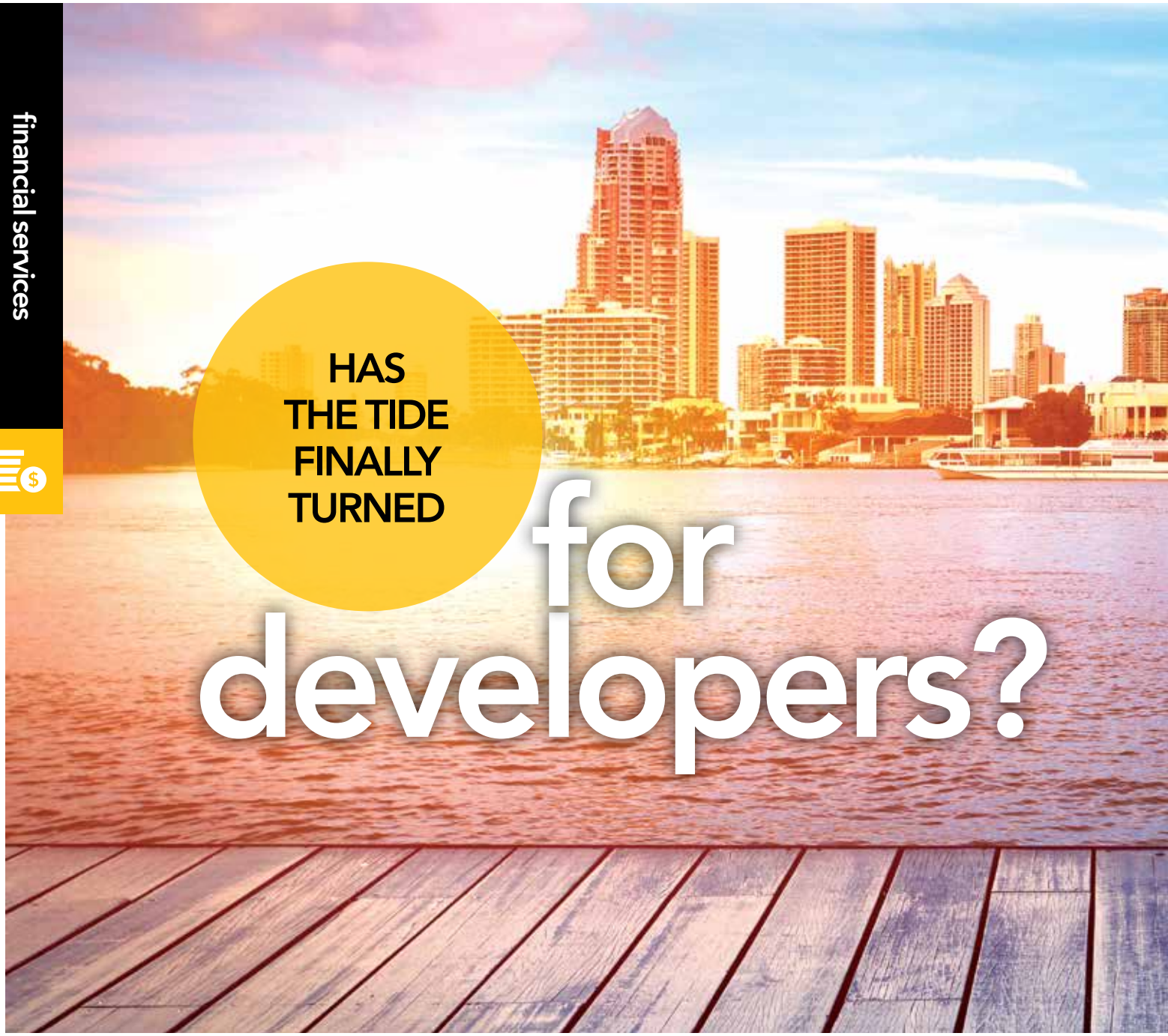
The beef industry has been under considerable challenge nationally with widespread drought, less than satisfactory prices and uncertainty regarding the live export market following the intervention by the previous federal government. The CK Agribusiness group is very enthusiastic about its participation in Beef Australia 2015 and looks forward to meeting with beef producers and others involved in the industry in the lead up to and at the event.

PPSA

SOME SENSIBLE CHANGES ON THE WAY

Hire businesses will be much relieved to hear that there is a Bill before parliament removing the requirement to register agreements relating to the hire of motor vehicles that are for more than 90 days. If the Bill is passed, registration will only be required if the hire period is more than 1 year. Also, there have been some amendments to the definition of motor vehicle which means that from 1 July 2014 some heavy equipment will no longer have to be registered as motor vehicles.

IF YOU THINK THESE CHANGES WILL AFFECT YOU, THEN PLEASE CONTACT US AS YOU MAY NEED TO UPDATE YOUR TERMS AND CONDITIONS AND YOUR REGISTRATION PROCEDURES.



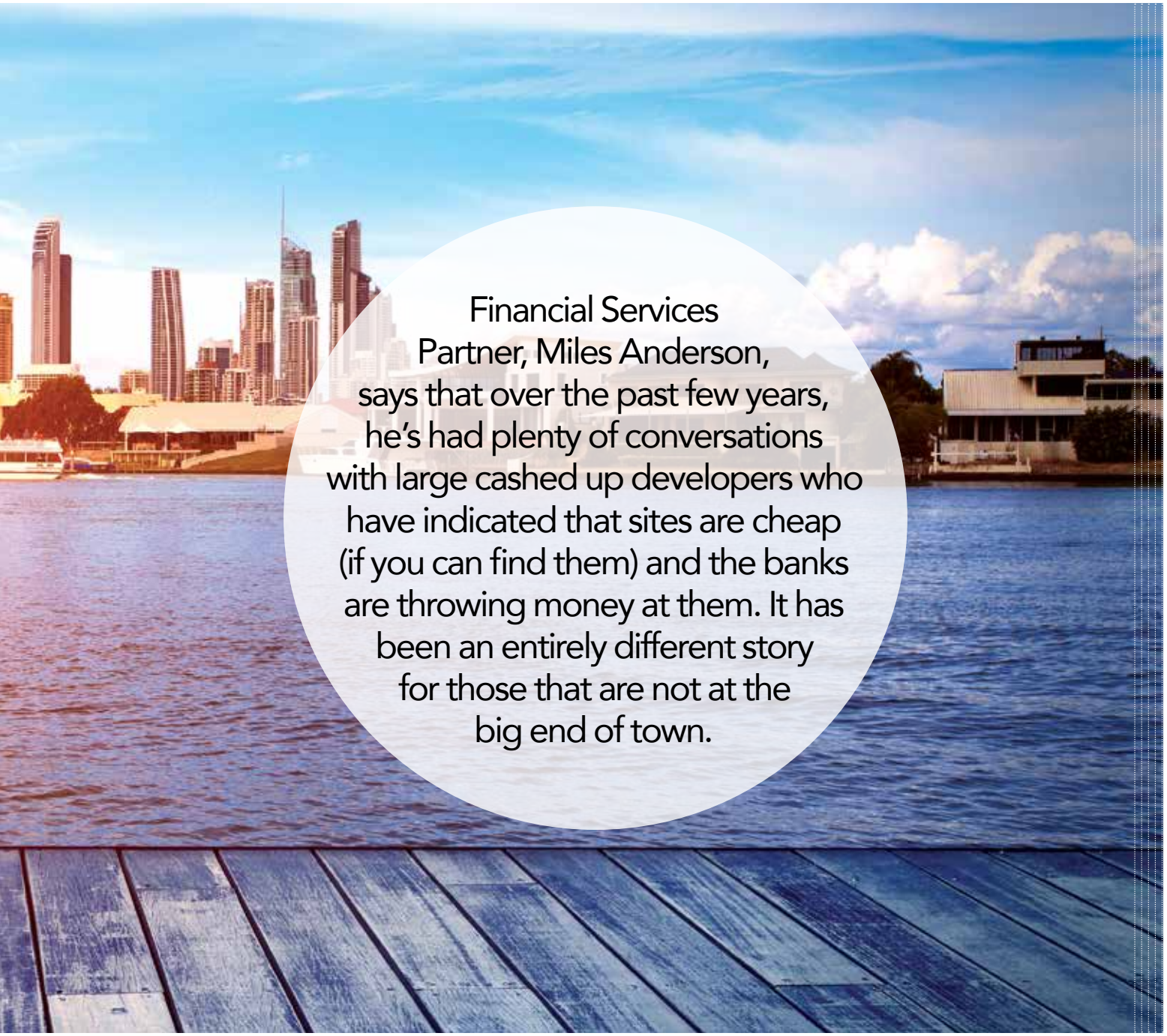
HAS THE TIDE FINALLY TURNED for developers?

PRIOR TO THE GFC, THERE WERE PLENTY OF OPTIONS AVAILABLE FOR RAISING CAPITAL TO GET DEVELOPMENT PROJECTS OFF THE GROUND. WITH THE ONSET OF THE GFC, MOST PLAYERS IN THIS SPACE RETREATED BACK OVERSEAS, WENT MISSING IN ACTION OR WENT BUST. THIS LEFT DEVELOPERS STARVED OF RISK CAPITAL. AS A RESULT, A LOT OF GOOD PROJECTS DIDN'T TAKE OFF.

The good news is that alternative funding options are back. We are seeing a lot more instructions involving mezzanine finance and preferred equity deals. These instructions are coming form existing clients that have come back into the market and from new entrants. Family (ie private) funds and institutional funds are now active. Major banks are also becoming more aggressive in their lending policies.

The supply of development stock is improving. Banks and fund managers who have been sitting on distressed assets (particularly greenfield sites and partly completed developments) are now actively attempting to exit their positions. They are being more realistic in their price expectations and, as well as going to market on single assets, are affecting portfolio sales of their bad loans. These portfolio sales are providing great opportunities for developers. With the pain of the write off having been taken by the original funder, coupled with an increased appetite for risk on the part of new funders, developers are doing deals either on outright purchases or structured arrangements with the new funder.

Things haven't quite gone back to the way they were pre GFC. Funders are being more careful in the projects they will fund. Due diligence on projects has to stack up. Funders at all levels are also employing property experts to assess deals and provide ongoing monitoring



Financial Services Partner, Miles Anderson, says that over the past few years, he's had plenty of conversations with large cashed up developers who have indicated that sites are cheap (if you can find them) and the banks are throwing money at them. It has been an entirely different story for those that are not at the big end of town.

of projects in addition to their usual credit processes.

Given our current low interest rate environment, mezzanine funders are also looking at different ways of achieving their desired return. Mezzanine funding rates of 25%+ are being replaced with coupon rates of 15%-18% plus profit share.

Another influence on the structures being set up is the attitude of primary funders. First tier lenders are imposing onerous conditions on any consent they give to mezzanine funding, with some banks outright refusing to consent to any security being granted to a mezzanine funder. This has led to transactions having to be structured such that the mezzanine funder takes an unsecured or equity position. Without security, the risk profile for the deal changes and consequently so does the return a mezzanine funder will require. Given the very different attitudes among first tier lenders as to how risk capital is raised, it has become imperative that developers consider a funder's policies on risk capital and their blended cost of funds before selecting a primary funder.

While it is premature to say we are back in a sustained growth cycle, the shoots are definitely there. The rules have changed a bit, and like the footy, we will have to wait and see whether the rule changes are good for the game. CK

Miles Anderson //

PARTNER, FINANCIAL SERVICES

EMAIL

HAVE YOU MISSED SOME IMPORTANT EMPLOYMENT LAW NEWS?

Employment and Industrial Relations Lawyer, Laura Gercken, gives an overview of some major changes to employment law in the past year that business owners should note.

IMPLIED DUTY OF MUTUAL TRUST AND CONFIDENCE

In 2013, the Federal Court said that in every Australian employment contract, there is an implied term of mutual trust and confidence, unless it has been expressly excluded in the employment contract. The scope of the implied term will depend on the nature of the employment relationship.

The case involved an employee of the Commonwealth Bank who had been employed as an Executive Manager for approximately 23 years. In 2009, the employee was made redundant. The Commonwealth Bank had a policy dealing with redundancy which it did not follow. This policy was not incorporated into the employment contract.

The Court decided that by failing to follow the policy, the Commonwealth Bank breached the implied term of mutual trust and confidence not to act in a manner that was likely to destroy or seriously damage the relationship, without a proper cause for doing so. The decision has created controversy as the ramifications for employers are onerous.

The Commonwealth Bank has appealed to the High Court and we will provide an update when the decision is handed down.

CHANGES TO FAIR WORK ACT

BULLYING: The Fair Work Commission's new jurisdiction to deal with workers who feel they have been bullied commenced on 1 January 2014. The Commission may make an order to stop bullying if a worker has been subject to repeated unreasonable behaviour which creates a risk to health and safety. The term 'worker' includes volunteers, students gaining work experience and contractors.

FOR FURTHER INFORMATION ON THIS TOPIC, CLICK HERE.

CHANGING ROSTERS: Employers must also now consult with employees in relation to changes to their regular roster or ordinary hours of work. An employer must:

- Provide the employee with the information about the change;
- Allow the employee to provide their view on the change; and
- Consider the employee's view and the impact of the change.

UNFAIR DISMISSAL: General protections and unlawful dismissal claims may now be arbitrated by the Fair Work Commission. Previously, if a conciliation conference failed, the next step for an aggrieved employee was to initiate court proceedings. Now, the employee (if the employer agrees) can have the dispute arbitrated by the Commission, which can make an order that the parties must follow.

WHEN CARER'S LEAVE MAY BE TAKEN

In late 2013, the Fair Work Commission provided clarity about when carer's leave may be taken in a case involving a woman and her husband who were both fly-in fly-out employees of the employer. They were on the same roster and were required to work 7 days at a time. During a school holiday, they had arranged for a friend to look after their son. Four days before the woman was due to fly out, the friend suffered a family emergency and was no longer able to care for the son. As a result, the woman was required to remain at home with her son and claimed carer's leave for doing so.

The employer refused to provide the woman with carer's leave, because the circumstances were not those of an 'unexpected emergency affecting the family member', as required by the employment contract and the National Employment Standards, because the emergency affected the friend, not the child. In addition, the woman had four days before flying out to arrange alternative care for her son.

THE COMMISSION FOUND THAT:

- the term 'unexpected emergency affecting the member' was broad enough to cover an emergency affecting the proposed caretaker because it was the child who was left without care
- the woman had taken all reasonable steps to find alternative care, and
- she had since changed her shift pattern so that she and her husband were no longer on the same shifts to avoid the same situation arising in the future. This showed her bona fides.

The Commission noted that the circumstances of other cases may differ but in the current case, the woman was entitled to carer's leave. CK

Laura Gercken //
EMPLOYMENT & INDUSTRIAL RELATIONS LAWYER
EMAIL

AVOIDING ADJUDICATION WITH CONSTRUCTION CO

Litigation & Insolvency Partner, Tim Crumpton, looks at the importance of having the terms of a construction contract clearly set out and agreed between the parties, preferably in writing.

The security of payments legislation in the various States and Territories is designed to ensure those carrying out construction work receive progress payments as quickly as possible for goods and services they provide. The legislation achieves that aim by having an adjudication process within a short timeframe, thereby avoiding lengthy Court processes. However, the legislation does not extinguish a party's other legal rights, including the right to recover or 'claw back' part or all of a progress claim. Indeed, the legislation specifically provides for the final rights and liabilities of parties to be reserved for determination in subsequent court proceedings.

CONTRACT OR OTHER ARRANGEMENT

A fundamental requirement to engage the jurisdiction of the security of payment legislation is that there exists between the parties a 'construction contract'. This term is defined as a 'contract or other arrangement' under which one party undertakes to carry out construction work, or to supply related goods and services, for another party. It can be written, verbal or a combination of both.

THE IMPORTANCE OF HAVING A LEGALLY BINDING CONSTRUCTION CONTRACT

Having a construction contract that is in clear and agreed terms is not only fundamental to invoke the jurisdiction under the security of payments legislation, but it will also reduce the possibility of a dispute which may lead to costly Court litigation.

Recently, an architectural firm undertook extensive design work on a project for a multinational company. The firm provided a fee schedule on commencement and asserted it was accepted orally. However, the fee schedule was not countersigned by the multinational. When the decision was made not to proceed with the project, the firm issued a payment claim on its understanding that the fee schedule had been verbally accepted. The multinational denied the existence of a contract or arrangement on the basis that the firm had agreed to undertake design work on the condition it would not render any fees until it was appointed as the architect to the project.

Although the claim by the firm was settled, had a security of payments claim instituted by the firm resulted in an order for payment of its claim (in excess of $1 million), the multinational could have taken court action to claw back that amount, on the basis that whilst there may have been an 'arrangement' which invoked the security of payments jurisdiction, there was not an enforceable contract at law. Had that happened, the firm would have needed to argue a 'quantum meruit' entitlement to its fees (ie that it should be paid a reasonable amount for work performed, even in the

PITFALLS NTRACTS

absence of a legally binding agreement). It's easy to see how the costs associated with the dispute could have escalated quickly if Court proceedings were commenced. What's worse, the firm would have an uncertain result, with the Court trying to assess the value of its work.

PAY NOW, ARGUE LATER

It is therefore critical for both parties to a construction contract to ensure that the terms of their agreement are clear and that they have been agreed on, otherwise you run the risk of 'paying now and arguing later'. The terms of the agreement should, wherever possible, be in writing and signed by the parties or at least there should be some evidence of the terms and the parties agreement to them, such as an email exchange.

FOR MORE INFORMATION ON THE RECENT CHANGES TO THE NSW SECURITY OF PAYMENTS LEGISLATION, VISIT CLARKEKANN.COM.AU TO VIEW AN ARTICLE BY LITIGATION & INSOLVENCY PARTNER, TIM CRUMPTON.

Tim Crumpton //

PARTNER, LITIGATION & INSOLVENCY

EMAIL

LIVING TRUST

WHERE THERE'S A WILL, THERE'S A WAY

(of avoiding estate disputes)

For most of us, the idea of our family members having a dispute over their entitlements under our Will is distressing. Litigation & Insolvency Partner, Sarah Davies, looks at some of the steps you can take to avoid a dispute arising after you pass away.

Generally, a Will is contested because it hasn't been correctly signed, it is forged or fraudulent, the testator lacked capacity at the time it was made or was subject to undue influence. Even if the Will is otherwise beyond reproach, a spouse, child or dependant may bring a family provision claim if they feel that adequate provision has not been made for their proper maintenance and support.

With that in mind, a number of steps can be taken to minimize disputes after your passing:

1. HAVE A WILL: While this is obvious, many people don't have a Will. A well drafted Will can ensure your assets go to the right people, that they are managed in accordance with your wishes (including, in appropriate cases having a testamentary trust, which is established under your Will to minimise tax and protect assets) and the potential for disputes to arise is minimised.

2. CREATE AN ESTATE PLAN WHILE YOU ARE HEALTHY AND OF SOUND MIND: Don't leave it until you are unwell to think about your estate plan, as you may have other more important things on your mind and emotions are likely to be high. Wills made when the testator is unwell or nearing the end of their life are more likely to be challenged. If there might be doubt about your mental capacity, then take the

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precaution of having your lawyer and doctor involved in the signing of your Will, so they can give evidence later if required that you had capacity at the time you signed it. You might also consider getting a medical assessment done before you give instructions for your Will to be prepared.

3. SEEK INDEPENDENT LEGAL ADVICE: Make sure you make your own choice about which lawyer you'll use. Importantly, don't take any of the beneficiaries with you when you are giving instructions for the preparation of your Will or signing it – as this will ensure the chances of anyone alleging undue influence are minimised. If the Will is done with proper independent advice, as part of a well thought out estate plan, then it will be difficult to challenge. A good lawyer will also make sure the formalities for signing your Will are complied with.

4. CONSIDER WRITING A MEMORANDUM OF WISHES: A Will is a formal document, and there are lots of matters that it cannot adequately record: such as your wishes in relation to your funeral and your reasoning behind the division of your assets. Recording these things in a letter to be placed with your Will can give your beneficiaries a better idea of your wishes so that these are not misconstrued later. This can be particularly important if you are excluding someone who will expect to inherit or if you are leaving a larger than expected amount to someone. Explaining your reasoning won't stop a family member from making a family provision claim if they think they have a right to maintenance, but it can help to minimise the chance of other types of claims and will be useful evidence for you executors to rely on.

5. CONSIDER DIVISION OF SENTIMENTAL ITEMS: Listing personal effects and dividing them between your beneficiaries can reduce the likelihood that they will fight over their distribution. This is particularly the case if certain items have sentimental value within the family. Carefully considering personal gifts and discussing your thoughts with your beneficiaries can help to set their expectations well before the event.

6. DEAL WITH LIFETIME GIFTS AND LOANS: If you've advanced money to your children during your lifetime, then it is a good idea to be explicit about how those advances are to be treated. Are they gifts that don't need to be repaid or loans? Should they be considered an advance on inheritance which might be the reason for leaving that child less under the Will? In the same vein, make sure any assets that are held jointly with your family members for convenience are properly dealt with, otherwise they might end up as an unintended gift.

7. REVIEW YOUR ESTATE PLAN: Your Will needs to be reviewed regularly, particularly if there are changes within your family because of births, deaths, marriages or divorces. As your assets change over time, it will be necessary to review what provision you've made for any dependents and whether or not they are adequate. You also need to review the state of your superannuation, and how this will impact on the amount family members will receive. CK

Sarah Davies //

PARTNER, LITIGATION & INSOLVENCY

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