# mentum

O&A WITH AARON HATCH OF JLL

## chinese investment IN AUSTRALIAN PROPERTY

## ≥ 03 ≥ 08 ≥ 12

EMPLOYMENT // HAVE YOU BEEN PAYING ATTENTION? WHS REPORTING REQUIREMENTS BUILDING & CONSTRUCTION // TIPS & TRAPS FOR ADJUDICATIONS UNDER BCIPA INTELLECTUAL PROPERTY // LEGAL RISKS OF SOCIAL MEDIA





#### EMPLOYMENT //

HAVE YOU BEEN PAYING ATTENTION? WHS REPORTING REQUIREMENTS

#### SNAPSHOT //

Q&A WITH AARON HATCH CHINESE INVESTMENT IN AUSTRALIAN PROPERTY

BUILDING & CONSTRUCTION // TIPS & TRAPS FOR ADJUDICATIONS UNDER BCIPA

RISK MANAGEMENT / CORPORATE SOCIAL RESPONSIBILITY

PROPERTY & PROJECTS // PROPERTY IN QUEENSLAND

INTELLECTUAL PROPERTY // LEGAL RISK<mark>S OF</mark> SOCIAL MEDIA

## Welcome

to the September 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 in the Building & Construction industry, including impending changes to the security of payments legislation in NSW and Queensland. We also provide a timely update about workplace health and safety reporting requirements that will potentially impact all business owners and raise some issues about social media that are worth keeping in mind.

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



## HAVE YOU BEEN PAYING ATTENTION? WHS REPORTING REQUIREMENTS



Business owners have some important obligations under the workplace health and safety laws. They include reporting certain incidents to the workplace health and safety regulator in the relevant state and preserving sites where incidents have occurred. Employment and Industrial Relations Partner, Belinda Hapgood, provides some useful tips for employers in complying with their obligations.

#### ➢ WHAT DO I NEED TO REPORT?

Only "notifiable incidents" must be reported to the WH&S regulator. The name of the regulator varies across states: in Queensland it's Workplace Health and Safety Queensland and in New South Wales it's WorkCover.

Notifiable incidents are those that result in the death, serious injury or illness of a person, or involve a dangerous incident. The person affected doesn't need to be an employee or even a worker: it covers any person, including a member of the public (even if they are not meant to be at the workplace).

#### ➢ WHAT'S A SERIOUS INJURY?

A serious injury includes:

- those resulting in an in-patient stay in hospital
- an amputation
- a serious head or eye injury
- a serious burn
- a spinal injury
- the loss of a bodily function

- serious lacerations, or
- exposure to a substance.
- ➢ WHAT'S A DANGEROUS INCIDENT?

Dangerous incidents are those that expose workers or others to a serious risk to their health or safety. They include:

- an uncontrolled leak or spillage of a substance
- an uncontrolled fire or explosion
- electric shock
- a fall from a height, or
- · the collapse or malfunction of plant.

Importantly, dangerous incidents include "near misses". Even though a dangerous incident does not result in actual harm to a person, it must still be reported. While only serious incidents related to the workplace are intended to be notifiable incidents, many people have difficultly determining whether an incident should be notified. Most incidents falling in this category will be reasonably clear cut, but if you are unsure about whether an incident should be notified, it's useful to contact the workplace health and safety regulator in your state for guidance.

Incidents that are not related to work are not notifiable incidents, for example, a person with epilepsy having a seizure at work or a person suffers a heart attack which is unrelated to the work. While these events certainly require medical attention, it is not necessary to report them to the regulator.

➢ WHEN DO I NEED TO REPORT?

If a notifiable incident occurs, then you are obliged to notify the regulator immediately after becoming aware of it. CK





Belinda Hapgood // PARTNER, EMPLOYMENT & INDUSTRIAL RELATIONS 0

### AGRIBUSINESS DINNER

In July, Tim Ferrier and Paul O'Dea hosted the Federal Minister for Agriculture, the Honourable Barnaby Joyce, as special guest at an agribusiness dinner and he provided wide-ranging feedback on activities in the agribusiness sector to the enthusiastic guests including graziers, agribusiness consultants, bankers, accountants and property agents. The Minister was very buoyant about escalating export trade for commodities and domestic initiatives particularly in northern Australia.

> THE CK AGRIBUSINESS GROUP IS PLANNING FURTHER SUCH GATHERINGS



## GST free? Treatment of going concerns and farmland

In December 2013, the Government announced its intention to replace the GST free treatment for the supply of both going concerns and farming businesses with a "reverse charge" mechanism. Until the draft legislation is released, uncertainty will remain as to how the reverse charge mechanism will operate. Depending on the drafting of the legislation and the consent of the States and Territories, the stamp duty and GST exemptions under the previous mechanism may no longer be available and so there are potential pitfalls for purchasers of farming properties.

FOR AN OVERVIEW FROM CORPORATE & COMMERCIAL LAWYER, SAM BASSINGTHWAIGHTE, ABOUT HOW THE REVERSE CHARGE ARRANGEMENTS MAY APPLY AND HIGHLIGHTING SOME OF THE POTENTIAL IMPLICATIONS OF THE PROPOSED CHANGES •

CLICK HERE

### Recent appointments



#### JOANNE CHANG

has joined us as a lawyer and is working across the Corporate & Commercial, Property and Litigation business

units. Prior to joining ClarkeKann, Joanne worked most recently as in-house legal counsel for Bank of China Limited (Sydney Branch), and prior to that as a foreign legal consultant in Taiwan. She is a fluent speaker of Mandarin and Taiwanese and has particular experience in the areas of banking and financial services.



#### ALLANA AGNEW

has joined us as an Associate in our Employment & IR and Litigation & Insolvency teams in

our Brisbane office. Allana has worked exclusively in commercial litigation with a focus on building and construction, financial services, employment and industrial relations as well as significant broader commercial litigation relating to shareholder disputes. Prior to joining us, Allana was an Associate at a mid-tier Brisbane firm where she represented a number of responsible entities in defence of investor claims of misleading and deceptive representations in product disclosure statements and in opposing aggressive takeover bids initiated by disgruntled unitholders.



#### MELANIE MCGUIRE

has joined us as a lawyer in our Brisbane Litigation & Insolvency team. Prior to joining the CK team, Melanie

worked in Litigation and Dispute Resolution at a mid-tier Gold Coast firm where she gained experience across a number of jurisdictions providing advice and representation in body corporate and community management, building and general commercial disputes. Melanie has particular experience in the area of body corporate and community management.



### Beef Australia 2015

The CK agribusiness group is continuing planning for the firm's involvement in Beef Australia 2015 being held in Rockhampton next May. The firm will operate a trade stall for the full week of the event and conduct seminars for the benefit of participants. The Agribusiness group continues to liaise with event organisers and many others who propose to involve themselves in the event. Some 85,000 visitors attended the last expo held in 2012. A large international contingent is expected.



### Bullet proofing your business

BREAKFAST SEMINAR

Please join us for breakfast in November, when we will be looking at some important aspects of risk management for business owners. Property & Projects Partner, Steven Cardell, will explore the important issues that business owners need to consider when entering into a lease of premises, including outgoing contributions, fit-out incentives, tax issues, rent reviews, refurbishment and make good clauses. Litigation & Insolvency Partner, Mark Secivanovic, will give an essential overview of Australian Consumer Law and its impact on all business owners.

The seminar will be held on Tuesday 18 November in Sydney and Thursday 20 November in Brisbane.

In our August Bullet Proofing seminar, we heard from Corporate & Commercial Partner, Peter Karcher about the importance of protecting your intellectual property such as your business name, brand and trademarks, and some simple steps that you should follow. Financial Services Partner, Miles Anderson, explained what every business owner needs to know about PPSA with some real world examples of pitfalls to avoid. Our Bullet Proofing Your Business seminars are held quarterly and cover topics that help business owners minimise and manage risk.

FOR FURTHER DETAILS 🔊

CK HERE

## Chinese investment NAUSTRALIAN PROPERTY



?

Those of us who have been involved in property development and investment in Australia in the last few years have witnessed a surge of interest from Chinese investors and corporations. In 2013, Australia was ranked second behind the USA as a destination for Chinese investment.

On the "street level", Chinese developers, whether in their own right or in partnering arrangements with local developers or experts, are transforming the landscape. Greenland's forthcoming projects, Greenland Centre, opposite Sydney Town Hall, Brisbane Casino and Wanda's proposed \$1 billion Jewel in Surfers Paradise, are high profile projects which have made headlines.

At ClarkeKann, we have a long history of acting for foreign businesses. Our clients have included Formosa Plastics, Bank of China, Nara Resorts, China Steel, Daiyko, Hankook and Daiwa House. We have proven capacity in assisting Asian (including Chinese and Taiwanese) property development and investment companies, with several lawyers and staff who are fluent in Mandarin and Chinese dialects.

Also, we will soon offer the ability for developers to sign contracts on-line enabling property developers to tap into international buyer markets and sell their stock instantaneously anywhere in the world.

To give a clearer picture of who are the leading Chinese developers currently operating in Australia and who will lead the next wave, Property Partner, Bernard Tan, caught up with Aaron Hatch, National Director of Project Marketing at JLL. WHICH MAJOR CHINESE DEVELOPERS ARE ACTIVE IN AUSTRALIA AT THE MOMENT?

Presently, they would be Country Garden, Greenland, Far East Consortium, Starryland and more recently Wanda Group and Roxy Pacific.

#### WHY ARE THEY INVESTING IN AUSTRALIA?

Several reasons, but the main drivers are:

- the low Australian dollar and relatively low prices for real estate compared with their local markets. This is particularly the case for residential markets;
- the property cooling measures introduced in markets such as Hong Kong and Singapore which include higher stamp duty costs;
- the need to connect with established local family and friend networks, with a relatively large concentration of Hong Kong and mainland Chinese populations in Sydney and Melbourne;
- Australia's education system, with approximately 35% of university

In this edition, our Property & Projects Partner, Bernard Tan, talks to Aaron Hatch, Director of JLL's residential project marketing division. Aaron's expertise lies in the sale and marketing of low to high-density residential projects across the Sydney Metropolitan area and eastern seaboard of Australia. In addition to conception, design and planning, Aaron has a proven track record in managing complex projects including off the plan sales, marketing and end delivery.

enrolments being from overseas students. Student enrolments in 2014 are at an all time high with the highest concentration in Victoria which has overtaken NSW. Temporary visa holders and student visa holders are able to buy new residential property in Australia; and

• the introduction of the Significant Investor Visa Scheme.

#### CAN YOU PROVIDE A BRIEF DESCRIPTION ON THEIR PROJECTS?

They are primarily interested in residential projects or purchasing CBD office assets with residential upside. Some examples are shown in the table to the right.

#### WHICH DEVELOPERS DO YOU SEE INVESTING INTO AUSTRALIA IN THE NEXT 12-24 MONTHS?

Roxy Pacific have already purchased an office building in Sydney. Poly Real Estate and China Merchant are two of a number of companies that are looking to enter the Australian residential market.

Country Garden	Ryde Garden in Macquarie Park - featuring International Architect Bates Smart - the lead architect of Macau's Crown Towers "City of Dreams"
Greenland	Greenland Centre - 115 Bathurst St, Sydney CBD. This tower will be the tallest residential building in Sydney
JOZ Pty Ltd (formerly Tong Group)	Primarily developing residential buildings in Sydney being Waterloo, Burwood, Parramatta, Homebush, Campsie, Ryde and Meadowbank
ICD Property	Melbourne CBD and inner areas
Wanda Group	Gold Coast
Garuda GC Corporation	Gold Coast
Dahua Group	Boutique residential in Sydney, such as Mosman and Rose Bay

#### FOR FURTHER INFORMATION, CONTACT:



Aaron Hatch // NATIONAL DIRECTOR, RESIDENTIAL PROJECT MARKETING, JLL



Bernard Tan // PARTNER, PROPERTY & PROJECTS

EMAIL

## FOR ADJUDICATIONS UNDER BCIPA

Allana Agnew, Associate in our Litigation & Insolvency team, provides a brief summary of some tips and traps to be weary of when engaging in the adjudication process. The Building and Construction Industry Payments Act 2004 ("BCIPA") regime is intended to be an efficient and reasonably low cost method for contractors and subcontractors to ensure payments are made to them. This flow of funds down the construction chain will only occur where the person claiming moneys owing can properly establish an entitlement to that payment under BCIPA. Where that entitlement is disputed by the other party, recourse to the adjudication process will be necessary if the claimant wants to rely on the BCIPA regime.

#### ▷ TIPS FOR THE CLAIMANT

#### DON'T ADD NEW GROUNDS:

Claimants cannot add new grounds to recover a payment claim in an adjudication and must therefore only rely on the grounds raised in the payment claim as the basis for entitlement to payment.

#### **RESPOND TO ALL GROUNDS:**

Any reason given in a payment schedule for withholding payment must be addressed in the adjudication application submissions to maximise prospects of succeeding in an adjudication application.

S TIPS FOR THE RESPONDENT

#### NEW GROUNDS:

The adjudication response (for construction contracts entered into before the BCIPA amendments commence) cannot seek to raise a new ground for withholding payment of any amount which is not addressed in the payment schedule. An adjudication decision made in reliance of any new ground can be invalidated by the Court, increasing the costs of adjudication to both parties.

#### JURISDICTION ISSUES

Adjudicators will usually consider objections to jurisdiction, even where you have not served a payment schedule within the required timeframes. Where there is a basis for doing so, respondents should always make these submissions on lack of jurisdiction (eg, there was no contract or arrangement).

### CHANGES TO SECURITY OF PAYMENTS LEGISLATION

#### Queensland

Proposed amendments to the Building and Construction Industry Payments Act 2004 (Qld) ("BCIPA") are likely to come into effect before the end of 2014. They were originally intended to take effect from 1 September 2014, but that date has been pushed back.

Participants in, and service providers to, the building and construction industry should familiarise themselves with these proposed reforms, as they significantly change the recovery of payments process in building and construction projects. The changes relate to 3 key areas:

- the appointment of adjudicators and the adjudication process;
- timeframes for claimants and respondents to a payment claim; and
- the ability to provide additional information during the adjudication process.

● FOR AN ARTICLE WRITTEN BY SENIOR ASSOCIATE HUI LING DEAN

CLICK HERE

#### New South Wales

In April 2014, the Building and Construction Industry Security of Payment Act 2013 (NSW) commenced. The new legislation enhances the existing Building and Construction Industry Security of Payment Act 1999 (NSW) ("SOPA"), and introduced a new regime impacting principals, head contractors and subcontractors.

#### THE KEY FEATURES OF THE CHANGES MEAN THAT:

- contractors will no longer be required to state on a payment claim that the claim is made in accordance with SOPA
- head contractors will be required to include a supporting statement declaring that all subcontractors have been paid all amounts due and payable in relation to the construction work concerned
- mandatory payment deadlines for making progress payments will be introduced; and
- regulations can be promulgated that could require head contractors to create a trust account to hold retention money for subcontractors.

FOR AN ARTICLE WRITTEN BY SENIOR ASSOCIATE MORGEN KERRY

CLICK HEF

#### ▷ TRAPS FOR ALL PARTIES

SERVICE OF DOCUMENTS: Understand how to serve documents under BCIPA, including adjudication applications, as correct service determines whether or not the adjudicator can decide the matter. If your contract provides for the way in which you serve a document, then serve it in that manner. If it does not, make sure you serve the respondent according to legislation.

**COURT PROCEEDINGS: BCIPA is not the** only process to recover payment and often not the most cost efficient. It is designed to ensure those carrying out construction work receive progress payments as quickly as possible for goods and services they provide, by using an adjudication process. However, BCIPA does not extinguish a party's other legal rights, including the right to recover or "claw back" part or all of a progress claim. You should therefore not assume it is the best process for you to follow in every situation.



#### BREAKFAST **SEMINAR**

On 17 September 2014, we are holding a breakfast seminar "What you need to know about BCIPA", which is an essential update for anyone dealing with the security of payments legislation in Queensland. It will cover the important amendments that will shortly be made to the Act, how to make sure you comply with the requirements and timeframes, and tips and traps when dealing with adjudications.

If you are involved in the building and construction industry, please join us for breakfast.

FOR FURTHER DETAILS >







Allana Agnew // ASSOCIATE, LITIGATION & INSOLVENCY



There are some who argue that the only way to survive the next wave of innovation will be to better understand and engage with our natural, social and financial resources ...

Richard Branson, in his bestseller, "Screw Business as Usual", exhorts us to stop doing business as usual, as it is wrecking the planet, and to transform companies into a force for good. Michael Porter, the acclaimed Harvard Professor, has been talking in recent years about his own take on this, "Creating Shared Value", which is based on the premise that the competitiveness of a company and the health of the communities around it are mutually dependent. The result is that Corporate Social Responsibility ("CSR") has become a hot topic for business owners and boards, and organisations big and small are adopting CSR statements, amid growing cynicism from the public that it is all a green-wash.

Business owners and directors need not pursue profit maximisation to the exclusion of all other goals, but the reality is that CSR is often only considered an option where it has a neutral or positive impact on profitability. However, there are good arguments to suggest that those controlling the business must consider the impact the organisation has on other stakeholders if they want to manage potential

reputational damage. That becomes even more relevant considering the power of publishing platforms such as social media, where negative publicity can spread quickly and exponentially, and can remain accessible online indefinitely. In addition, government departments and large corporations are increasingly requiring suppliers to have CSR policies in place as a condition of tendering for their work, so having a CSR framework in place becomes less about the legal requirements and more of a commercial incentive.

FOR A THE FULL ARTICLE ON THE LEGAL FRAMEWORK FOR CSR AND WHAT THIS MEANS FOR AUSTRALIAN BUSINESS 🔊



EMAIL

Sarah Davies // PARTNER, LITIGATION & INSOLVENCY

## PROPERTY IN OUEENSLAND

#### Asbestos Registers

Recent changes to the law amended the requirement for all commercial premises built before 31 December 2003 that are used as a workplace to maintain an asbestos register. The requirement to keep an asbestos register now only applies to premises built before 31 December 1989.

Commercial premises used as a workplace must comply with the workplace legislation regarding asbestos. The owner or person who has management or control of the workplace is required to appoint a qualified asbestos assessor to audit the premises for asbestos or asbestos containing material.

If the workplace contains asbestos materials, then the owner must maintain an asbestos register that records any asbestos materials on the premises, its location and the date which it was identified. Even if no asbestos is identified, an asbestos register must still be maintained which states that no asbestos material is present.

The register must be updated and accessible to the people working or conducting a business at the workplace as well as health and safety representatives. It must also be reviewed every 5 years or earlier if asbestos material is removed, disturbed, sealed or enclosed or if further material is identified.

Commercial workplaces don't need to maintain an asbestos register if the premises were constructed after 31 December 1989, no asbestos has been identified and it's unlikely to be present at the workplace. There have been a number of legislative changes passed recently that are expected to bring significant benefits to those involved with property transactions and development in Queensland.

#### Introduction of the Land Sales and Other Legislation Amendment Bill 2014 in Queensland Parliament

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. Legislation to amend the Land Sales Act 1984 (Qld), the Body Corporate and Community Management Act 1997 (Qld) and instalment contract provisions in the Property Law Act 1974 (Qld) were introduced into Parliament on 3 June 2014.

Once enacted, notable changes will include the removal of the maximum deposit restriction of 10% for the sale of proposed lots under the Property Law Act 1974 (Qld) and allowing a deposit of up to 20% of the purchase price before the instalment contract provisions are triggered. Significant changes to the disclosure requirements under the Land Sales Act 1984 (Qld) in relation to proposed community title scheme lots are also intended.

➢ FOR MORE INFORMATION ON THE RECENT CHANGES TO PROPERTY LEGISLATION, PLEASE CONTACT OUR PROPERTY & PROJECTS TEAM

#### Property Occupations Act 2014 replaces PAMDA in Queensland

The development and real estate industries have welcomed the passing of the Property Occupations Act 2014 by the Queensland 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).

Some of the changes the repeal will see include the removal of the requirement to attach a PAMDA Form 30c Warning Statement and a Body Corporate and Community Management Act 1997 (Qld) Form 14 Information Sheet to a relevant contract, the redefinition of "Residential Property" to allow greater certainty on whether the Act will apply and changes to the disclosure and capping of agents commission. CK

### • FOR MORE INFORMATION ON THE PROPERTY OCCUPATIONS ACT 2014

CLICK HERE



EMAIL

Steven Cardell // PARTNER, PROPERTY & PROJECTS

## LEGAL RISKS OF SOCIAL MEDIA

In an article profiling a social media consulting business, *The Australian* recently commented that in 2008, when the business was founded, the number of times the term "social media risk" was searched on Google was so low it didn't even show up on statistics. Today the same search term is Googled 15,000 times per month.

There are no specific "social media laws", but the nature of the medium is so accessible and immediate that it poses unique legal challenges. Corporate and Commercial Partner, Peter Karcher, looks at some strategies to protect yourself and your business when delving into the social media world.

DEFAMATION: Last November, a former high school student was found liable for defamation and had \$105,000 damages awarded against him for comments he made about his former high school music teacher on Twitter and Facebook. This case is a wake up call that everyone is a publisher these days, and comments you make on social media are subject to the laws of defamation, contempt, misrepresentation, and misleading or deceptive conduct. So you need to tread carefully and be sensible!

If you or your business is defamed or damaged online, it is important that, in addition to any legal avenues you may have, you inform yourself about the complaint and takedown procedures of the social media platform concerned. This will maximise your chances of having offensive material removed swiftly. ADVERTISING: With nearly 10 million daily active Facebook users in Australia, having a corporate Facebook page is becoming de rigeur. Yet businesses can be liable for not just what they post themselves, but also for material posted by users of their site.

In 2012, the Advertising Standards Board held user-generated comments on VB's Facebook page to constitute "advertising" which was in breach of the national advertising Code of Ethics. There have also been court judgments holding false customer testimonials on a business's website and Facebook pages to constitute misleading and deceptive conduct by the business from a consumer law perspective.

Businesses need to actively moderate any online media forums or platforms they control, and react quickly and seek advice in the event that problematic or questionable content is posted.

#### ▷ INTELLECTUAL PROPERTY

INFRINGEMENT: In May this year, Jetstar started advertising free airfares to Sydney and 5-star accommodation holiday give-aways on their corporate Facebook page. Too good to be true? In fact it was, turning out to be a hoax site under the name "Jetstar Australia" but using Jetstar's official logo and corporate indicia. That didn't stop the page getting 18,000 likes within 24 hours.

To protect your brand and assist in getting infringing material taken down as quickly as possible, register your brands and logos as trade marks with IP Australia.

ONE FINAL TIP: check the terms and conditions of the social media platform you are operating on for any onerous obligations or potential liabilities. When you play on Facebook, Twitter, or LinkedIn, remember you are playing on their turf, and by their rules! CK





**Peter Karcher //** PARTNER, CORPORATE & COMMERCIAL

m@me**ntum** 

#### Clarke Kann LAWYERS

CLARKEKANN.COM.AU

Queensland Level 7, 300 Queen Street Brisbane QLD 4000 Australia

// +61 7 3001 9222 // +61 7 3001 9299 // ck@clarkekann.com.au New South Wales Level 4, 9 Castlereagh Street Sydney NSW 2000 Australia

T // +61 2 8235 1222 F // +61 2 8235 1299 E // <u>ck@clarkekann.com.au</u>