

# momentum

Q&A WITH  
JAMES VANCE  
FROM FIIG  
SECURITIES

OPENING UP THE

## australian BOND MARKET

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ClarkeKann  
LAWYERS



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# Welcome

to the February 2015 edition of **CK MOMENTUM**, our regular newsletter for business owners and corporate executives.

Featured in this edition is an interview with James Vance from FIIG Securities, Australia's largest independent fixed income specialist. Partner, Paul O'Dea, chats to James about the likely trends in the Australian bond market in coming years and opportunities for property groups to access debt capital markets.

We also highlight what the China/Australia Free Trade Agreement means for us, the new rules and reforms affecting water usage for agribusiness, some tips on protecting confidential information from ex employees, and the challenges for stakeholders in the aged care sector.

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





# CONFIDENTIALITY ASSURED?

PROTECTING YOUR CONFIDENTIAL INFORMATION FROM EX EMPLOYEES



Often it takes the departure of an influential employee to prompt an employer to review what safeguards are in place to protect their confidential information from misuse. As companies and employees embrace the use of social media as a business tool, employers need to be more vigilant and proactive in protecting their business edge.

## ➤ DUTY OF CONFIDENTIALITY

An employee owes a general legal duty of confidentiality to the employer even if they do not have a written employment contract or the contract is silent on the topic. However, it is far better to have a contractual provision to rely on. The general duty only provides protection where the information is truly confidential and is not trivial. If the information becomes part of the employee's "know how" and skill it will not be protected by the general duty of confidentiality.

While confidential information is typically broadly defined in an employment contract, it is also best to specifically include the types of "make or break" information that is applicable to your business. Unless the information is accessible in the public arena, a court is likely to uphold a contractual obligation to maintain confidentiality.

If an employer needs to rely on the general duty of confidentiality, then the issue of what is publicly accessible or trivial is not always easily answered. For example, in the UK a recruitment firm retained ownership and confidentiality in a former employee's LinkedIn contacts gained during the period of his employment on the basis that LinkedIn was a common forum used by companies in the recruitment industry (and particularly by the employer) to gain contacts and referrals of work.

These circumstances are not unique to the recruitment industry as a number of

industries draw heavily on connections made in social media forums for business growth. Ownership of social media contacts, such as LinkedIn contacts, is yet to be considered by the Australian courts, and there is uncertainty as to whether this information is confidential.

## ➤ WHAT YOU SHOULD DO TO PROTECT YOUR BUSINESS

Employers should limit their exposure to potential court proceedings and arguments over whether or not information is truly confidential by taking the following steps:

- Undertake an information audit of the business and determine what really is critical and confidential, and requires protection. Then, limit the number of personnel that have access to that information or take other practical steps available to protect it. This will go a long way towards ensuring the material retains its confidential nature.
- Ensure your employment contracts contain a clause dealing with confidential information and provide a broad definition of "confidential information" for maximum protection. If you need to protect particular information, then this should be set out clearly within the definition of "confidential information".
- If there is no confidentiality clause in your employment agreements, then ask employees to sign a confidentiality

agreement. It is often necessary to do this when pay increases are being negotiated, so that there is a valuable consideration for the new contractual restraint.

- Create a confidential information policy and a policy dealing with employee use of social media. If you wish to protect contacts, such as LinkedIn contacts, gained by an employee during the employment relationship, then the policy should clearly state that employees are only permitted to use contacts which they have established in the course of their employment for the purposes of their employment and, upon termination of the employment relationship, the contacts must be deleted from the LinkedIn account. Better still, if social networks are considered an essential part of an employee's role, consider paying for premium memberships of these services, so that ownership of the account is less likely to be questioned by a court. **OK**



➤ EMAIL

**Allana Agnew //**

ASSOCIATE, LITIGATION & INSOLVENCY



# m Taiwan Business



## AUSTRALIA-TAIWAN BUSINESS EXCELLENCE AWARD

IN NOVEMBER 2014 CLARKEKANN WAS HONoured TO RECEIVE THE AUSTRALIA-TAIWAN BUSINESS EXCELLENCE AWARD CONFERRED BY THE AUSTRALIA AND NEW ZEALAND CHAMBER OF COMMERCE IN TAIWAN.

The Award was in recognition of our efforts in Taiwan over the last 20 years in promoting and advising on most of the major investments from Taiwan into Australia. The most recent transaction was the largest investment ever from Taiwan of USD 1.15 billion by Formosa Plastics Group in the Iron Bridge Joint Venture with Fortescue Metals Group.

Managing Partner, John Toigo, who leads our Taiwan practice, accepted the Award at a gala dinner in Taipei attended by various dignitaries, including representatives from both the Taiwan and Australian Governments. John said, "It was both humbling and gratifying for our efforts in Taiwan to be recognised in this manner. We have built strong and enduring trusted relationships in Taiwan, and we look forward to continuing to help Taiwanese companies with their business interests in Australia".



## The Art of Deception

In a case that put the spotlight on the artistic world, the New South Wales Supreme Court has found the auction house Christie's liable for misleading and deceptive conduct and unconscionable conduct under the Trade Practices Act (now called the Australian Consumer Law), as well as being found guilty of deceit. The case involved a painting sold by Christie's as a work of Albert Tucker. However, it was found to be false approximately 10 years after the sale. Both an art dealer and an adviser were also found partially liable for the loss.

Christie's actions were said to be "commercially reprehensible and unconscionable in the circumstances" due to suspicions about the painting's authenticity, that arose soon after the sale, not being communicated to the buyer. This lack of communication led to the 5 year guarantee by Christie's expiring and a significantly lower value of the work. This only became known when the buyer looked to sell the painting years later.

The case shows the wide application of Australian Consumer Law protections and how industries that may not normally be considered to be subject to the consumer protections can be found liable under the Act.



# WATER, WATER, EVERYWHERE ...

The CK Agribusiness group has been watching and receiving reports of much needed rain falling in certain parts of Queensland and New South Wales. While not widespread and more being required, the water has provided relief to a number of communities severely affected by drought and increased hopes for the winter crop. For all stakeholders we hope reports of more to come are true as water is one of the key components of a successful agribusiness operation. The efficient use, distribution and regulation of it cannot be stressed enough in the current dry times.

In Queensland, recent reforms made by the Water Reform and Other Legislation Amendment Act amended a number of legislative acts that govern water usage. Reforms include:

- support for the expansion of water markets across Queensland;
- amendment to the Mineral Resources Act and the Petroleum and Gas (Production and Safety) Act so both the mining and petroleum and gas sectors in Queensland will operate under the one consistent framework for the management of groundwater;
- support for the accelerated transition of water licences to tradeable water allocations; and
- provide a framework for allowing use of water for particular low risk activities without a licence.

With a long history of drought likely to repeat itself, even those fortunate enough to have received some of the recent falls should be aware of the new rules and rights affecting their use of water.



## SAVE THE DATE: Bullet proofing your business seminar series

### ► THRIVING IN THE ASIAN CENTURY

Focusing on Asian investment in Australia in 2015 and beyond, our first business seminar for the year will look at opportunities arising from the China/Australia Free Trade Agreement.

Our presenters include Corporate & Commercial Partner, John Toigo, who will share some insights gained from advising some of Taiwan's biggest corporations over the last 20 years.

- Brisbane Tuesday 24 March
- Sydney Thursday 26 March

FURTHER DETAILS WILL BE PROVIDED SHORTLY.

TO REGISTER YOUR INTEREST, PLEASE

CONTACT ANNA-LYN McCAFFERTY ►

[CLICK HERE](#)





# the CHINA/AUSTRALIA FTA

WHAT  
DOES IT MEAN  
FOR US?



It took a decade of negotiations spanning three governments, but in late 2014, Australia and China finally concluded a Free Trade Agreement ("FTA"). Corporate & Commercial Lawyer, Sam Bassingthwaite, looks at the likely impact of the FTA.

## ➤ WHAT HAPPENS NOW?

For the FTA to take effect, the two governments need to go through their respective domestic treaty making processes, including converting the terms of the FTA into legal text and passing the legislation through parliament. This ratifying process is likely to be completed towards the end of 2015.

The FTA with China, on the back of the recent FTAs with South Korea and Japan, means that significant trade barriers, covering more than 61% of Australia's export of goods, will be removed immediately or incrementally over a number of years.

## ➤ WHAT DOES FTA MEAN?

Until the full details and substance of the Australia-China FTA are finalised and released to the public, it is difficult to accurately assess the impact it will have on our economy. Initial forecasts suggest the FTA will increase Australia's economy by \$18 billion over the next

decade – although there is some debate as to whether this is too conservative or optimistic. According to Trade Minister, Andrew Robb, the overwhelming majority of Australian exports to China will eventually become tariff free, and there is no doubt that trade with China, our largest export market in both goods and services, will increase once the FTA commences.

With the resources industry presently accounting for the majority of Australia's exports to China, the removal of tariffs on some resource commodities will clearly benefit many Australian resource companies.

Some cost of living expenses for Australians should decrease, as consumers will have access to cheaper household goods, electronics, vehicles and clothing from Chinese companies.

Service providers, manufacturers and agricultural producers who already export to China will be allowed greater access to the markets in which they operate; and with fewer trade barriers in place, companies that do not currently export to China may now have reason to do so.





## ➤ AGRICULTURE

The agriculture industry, in particular, stands to benefit significantly from the reduction in trade barriers. China currently buys more of Australia's agricultural produce than any other market, and this trend is set to continue with the implementation of the FTA creating competitive advantages over our major agricultural competitors such as the United States and Canada. The National Farmer's Federation has said that the industry could conceivably see a tripling in agricultural exports to China within the decade.

Trade Minister, Andrew Robb, has described the FTA as the "dairy deal", highlighting the widely held view that the Australian dairy sector and its \$13 billion annual value is at the core of the agreement. Interestingly, all dairy products, except whole milk powder, will not have the tariff safeguards that were implemented in the 2008 FTA between China and New Zealand. Those safeguards ensure that once a certain trade quota is reached,

the tariffs on that particular product will once again apply. This is a great outcome for the Australian dairy industry and the benefits of an absent tariff safeguard should be substantial.

[CLICK HERE](#) FOR MORE INFORMATION ON THE KEY AGRICULTURAL AND FOOD OUTCOMES

## ➤ CHINESE INVESTMENT INTO AUSTRALIA

While Chinese investment in previous years has largely been confined to resources, sectors such as agribusiness, health, aged care, tourism and infrastructure will start to command greater interest from investors. The FTA will facilitate increased investment by allowing privately owned Chinese entities to invest in non sensitive sectors in amounts up to \$1,078 million (up from \$248 million) without review by the Foreign Investment Review Board ("FIRB"). However, while the FTA in general provides Chinese investors with greater access to Australian assets and projects, agricultural land over

\$15 million, agribusinesses over \$53 million and all investment proposals by Chinese state owned enterprises (regardless of the transaction size) will still be subject to foreign investment review scrutiny by the FIRB.

## ➤ SOMETHING TO REMEMBER

The removal of tariffs and the opening up of the trade lines with China, a country that already accounts for nearly a third of our total exports, will have a positive effect on Australia's domestic market and should promote even greater Chinese investment in Australia. **CK**



➤ EMAIL

**Sam Bassingthwaite //**  
LAWYER, CORPORATE & COMMERCIAL





# state of the NATION



As the Australian population ages, the demand for accommodation, services and care within the aged care sector continues to increase rapidly. This demand, the highly regulated nature of the industry and the complex political and legislative environment in which the industry operates present many challenges for operators, providers and other stakeholders in this sector. Here, Property & Projects Partner, Judd Last, looks at some of those issues.

#### ➤ OVERVIEW OF THE SECTOR

As we are living longer, the aged care industry is coming under greater pressure. Currently, the Australian Government spends more than \$14 billion annually on aged care. This is anticipated to increase to approximately \$17.5 billion per annum by 2016/17.

The aged care system in Australia directly and indirectly affects the lives of millions of Australians every day. Here are some interesting facts:

- More than 1 million people receive aged care services, with over half a million people receiving “at home” support.
- We have 2.7 million unpaid carers, many of whom are family members.
- The industry employs around 350,000 aged care staff across some 2,100 aged care providers.
- Millions of Australians have a loved one receiving aged care services or are thinking about their own or someone else’s needs.

#### ➤ LIVING LONGER, LIVING BETTER REFORMS

The Federal Government has recently introduced a number of important changes with the stated objective of ensuring aged care is sustainable and affordable, offering choice and control to consumers, encouraging businesses to invest and grow, and providing diverse and rewarding career options.

The changes are intended to give older Australians more choices, easier access and better care. They commenced in 2012, with the first significant changes implemented on 1 July 2013. The second tranche of major changes commenced on 1 July 2014.

#### ➤ IMPORTANT CHANGES

The more notable changes include:

- greater support for older Australians to stay independent in their own home by utilising more home care packages to meet their needs;
- greater choice and flexibility for seniors in how they decide to pay for accommodation and services (allowing them 28 days to decide how they wish to pay);
- transparent accommodation prices and services, with all residential aged care providers required to publish the maximum amount they can charge for accommodation and extra services;
- a new means test in residential aged care to help determine a person’s fair contribution to their accommodation and care needs, which will also apply to home care packages;
- new capping arrangements to assist make the system more affordable overall for individuals; and

- removing the distinction between high and low care in residential aged care.

#### ➤ IMPACT

The changes will have a significant impact on financing and funding arrangements in the residential aged care industry. Generally, these reforms are expected to have a positive effect on the aged care industry, but some have the potential to have a negative impact.

The broad consensus is that the “for profit” operators and providers specialising in high care needs and operating facilities out of metropolitan or city areas are likely to receive the greatest benefit from the reforms. Operators and providers who focus predominantly in low care needs and operate facilities in rural or regional areas appear less likely to receive the same benefits.

[CLICK HERE](#) FOR A REPORT PUBLISHED BY KORDAMENTHA “RESIDENTIAL AGED CARE INDUSTRY: CONSOLIDATION AND CONVERGENCE”, PUBLICATION NO. 14-07, DECEMBER 2014 



➤ EMAIL

**Judd Last //**

PARTNER, PROPERTY & PROJECTS

# OPENING UP THE australian BOND MARKET



Property & Projects Partner, Paul O'Dea, chats to James Vance, Debt Capital Markets Director, about market trends and how FIIG helps Australian corporates fund their growth through access to bond markets.

## ➤ WHAT CHANGES HAVE YOU SEEN IN THE AUSTRALIAN CORPORATE BOND MARKET IN RECENT TIMES?

Over the last 2 years we have seen increased issuance of sub investment grade and unrated corporate bonds opening up the domestic bond market for mid sized Australian corporates across a range of industries.

Previously, access to the bond market was generally only available to larger investment grade rated corporates with at least \$500 million in debt funding requirements, largely driven by institutional investor demand. Now, smaller retail type investors, such as self managed super funds and high net worth individuals, can invest in bonds directly with a minimum investment of \$50,000. This in turn has allowed mid sized corporates with lower debt funding requirements to access the bond market. FIIG has been at the forefront of this development.

## ➤ WHAT ARE SOME OF THE TRENDS THAT MIGHT INFLUENCE THE EVOLUTION OF THE AUSTRALIAN BOND MARKET IN COMING YEARS?

The aging population of Australia has and will continue to grow our superannuation investment pool, including self managed super funds. As people move into retirement they generally seek lower risk regular income as opposed to capital growth. Australian investors are also becoming more aware of their ability to invest directly in fixed income products. Consequently, we expect to see increased allocations to the fixed income asset class, including direct bonds.

The ability to tap the bond market for unrated debt capital is becoming more widely known in the corporate sector. Australian corporates are also seeking to diversify and lengthen their funding sources. Consequently, we expect to see more and more mid sized corporates issuing unrated debt over the coming years.





FIIG Securities,  
Australia's largest  
independent fixed income  
specialist, provides private and  
corporate investors with direct  
access to a range of fixed income  
investments and issuers with  
reliable access to debt capital.  
FIIG has placed over \$1.6 billion  
in long-term bonds for both  
rated and unrated  
debt issuers.

➤ WHAT PRODUCTS ARE  
GAINING ACCEPTANCE WITH  
AUSTRALIAN INVESTORS?

In fixed income markets, high yield unrated debt is increasingly gaining acceptance with investors. With low interest rates expected to stay around for some time, investors are increasingly looking for higher yielding fixed income investments to meet their cash needs and are prepared to take on a little more risk to get them. This means they are often prepared to invest in bonds that provide greater flexibility and more competitive terms than the bank market in return for a modest premium.

➤ WHAT TYPE OF PROPERTY  
GROUPS CAN ACCESS THE  
DEBT CAPITAL MARKETS?

Bond investors want regular and reliable fixed income so issuers need to have a similar cashflow profile. Property groups with regular income to support

the payment of interest on their bonds can best access debt capital markets.

For example, last year FIIG raised \$75 million for the ASX listed 360 Capital Group at 6.9% for a 5 year term - flexible unrated debt that was unsecured and ranked behind secured bank debt. Our capital provided them with the flexibility to grow their property funds management business while not diluting equity.

We also structure deals to suit different circumstances. In late 2013, ASX listed Payce Consolidated was seeking \$50 million in holding company debt finance to secure new residential development sites. At the same time, Payce was half way through completing the construction of a \$330 million mixed use property in Sydney. Confirming that the construction risk was well mitigated and that Payce would soon have a \$200 million investment property with regular income to underpin the bond,

FIIG developed a bond structure that protected the interests of bondholders while giving Payce a piece of long term capital (5 years) that suited their needs.

➤ IS FIIG UNDERTAKING ANY  
SPECIFIC RESEARCH?

FIIG will shortly launch the Smart Income Guide to 2015 focusing on fixed income assets and the market factors that will drive investment in 2015. We expect this report to be available on our website ([www.fiig.com.au](http://www.fiig.com.au)) early February. 



➤ EMAIL

**Paul O'Dea //**

PARTNER, PROPERTY & PROJECTS



# UPDATE NSW & QLD

## New South Wales

On 4 December 2014, Mark Secivanovic and Feda Dabbagh from our Sydney Litigation team and barrister Francois Salama presented an evening seminar on recent changes in the NSW building and construction industry, including changes under the Home Building Amendment Act ("Home Building Act"), and recent changes to the Building and Construction Security of Payments Act ("Security of Payments Act").

The main changes under the Home Building Act are:

- the requirement to pay a 10% deposit for all contracts for residential building work (even those over \$20,000);
- structural defects are now classed as "major defects" and include "major elements of a building"; and
- builders can claim a defence where statutory warranties are breached if they have received instructions from another professional.

Changes to the Security of Payments Act are primarily directed at promoting timely payment of subcontractors. Mandatory deadlines for making prompt progress payments have been introduced, and

"principal", "head contractor" and "subcontractors" have been defined, so that parties may identify the timeframes applicable to their contract. As part of the changes, payment claims no longer need to be stated as being made under the legislation. That means a payment claim, whether or not in the form prescribed under the contract, can still be the subject of an adjudication application or court action.

It is now mandatory to serve a payment claim with a supporting statement and a head contractor can be fined and face imprisonment for providing a false supporting statement.

The changes should also result in a smoother adjudication process as new evidence or material cannot be introduced once a payment schedule has been given. For recipients of a payment claim, this means a lot more care needs to be taken when providing a payment schedule in response to the claim.

## Queensland

Changes to the Building and Construction Industry Payments Act took effect on 15 December 2014. The changes in NSW and Queensland are immensely different.

By way of example, unlike the NSW amendments, in Queensland it remains a pre condition to a valid payment claim that it state it is a payment claim made under the Act. As a result of the recent Queensland amendments, payment claims are now categorised as standard or complex payment claims (ie complex being a claim over \$750,000). These new Queensland amendments also resulted in new timeframes imposed on contracts entered into after 15 December 2014. Different timeframes will now apply for responding to payment claims and for issuing final payment claims depending on whether the payment claim is complex. Given the significant differences between the States, it is highly recommended you seek advice if you are in this industry.

All members of the building and construction industry should be aware of these reforms, which will significantly change the process in building and construction projects and raise a number of issues of which industry members should be aware. Our teams in Sydney and Brisbane have extensive knowledge and expertise in the building and construction industry and are always available to provide advice. 