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momentum

Q&A WITH BRETT DRAFFEN OF MIRVAC

developing AUSTRALIA

Clarke Kann LAWYERS

Welcome

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

This edition features an interview with Brett Draffen from Mirvac, which will be of interest to all readers involved in the construction industry or with an interest in the property market. If you invest in property, then you will also be interested in our articles on the new e-conveyancing system which could have flow on cost savings and a warning about bank guarantees given by tenants. We also look at some important issues for business owners such as some tips on dismissing employees for poor performance and the Government's changes to the tax treatment of employee share schemes.

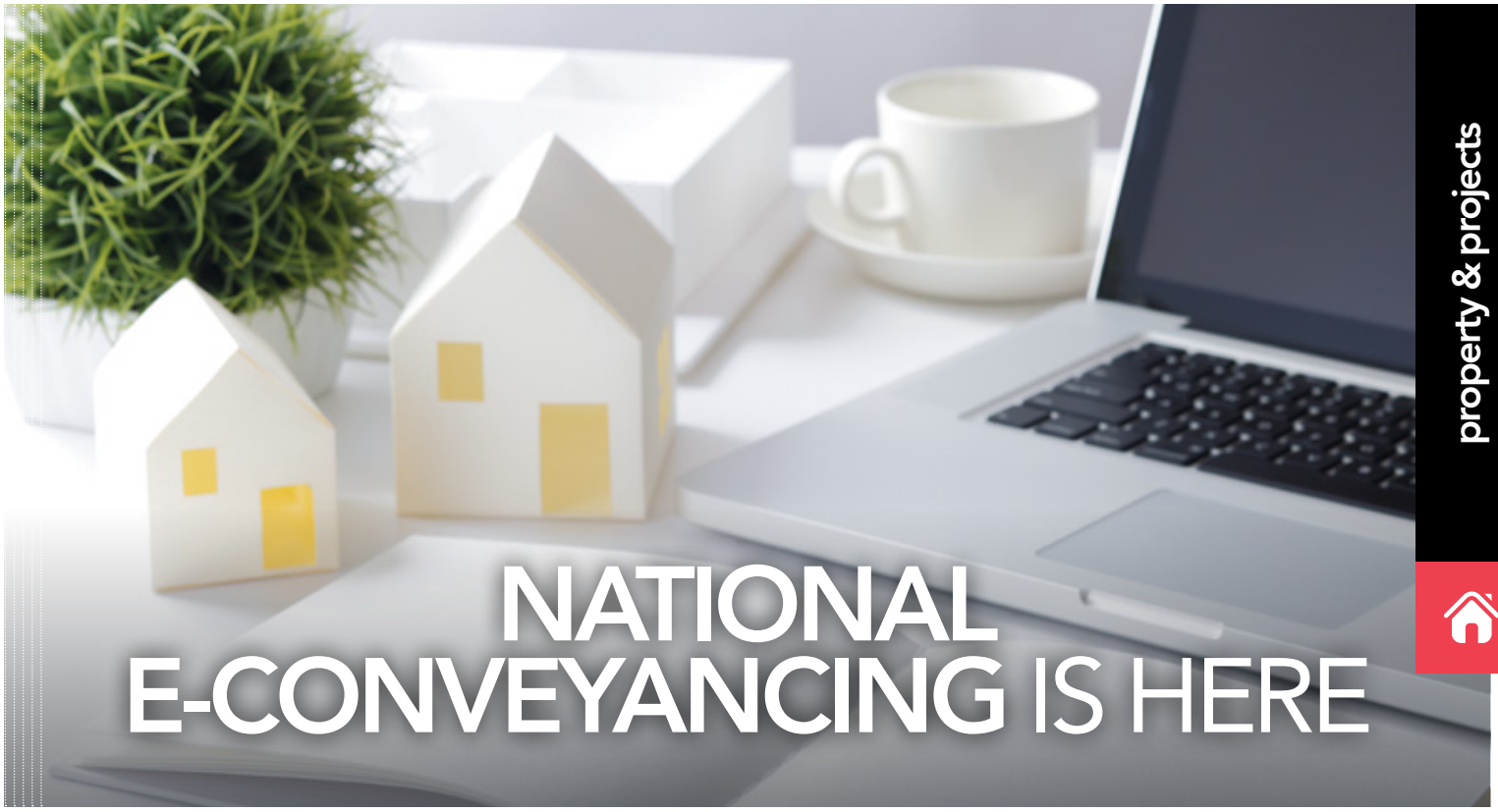
Our aim is for **CK MOMENTUM** to help keep you up to date with pertinent developments that may affect you or your business. With offices in Brisbane and Sydney, our expertise covers commercial & corporate transactions, employment & IR, financial services, litigation, risk management and insolvency,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



NATIONAL E-CONVEYANCING IS HERE

In October 2013, New South Wales first experienced electronic lodgement and registration of land dealings. In Victoria, financial institutions have been settling discharges of mortgages, withdrawals of caveats and refinance transactions electronically even longer. Queensland expects its first electronic land title dealings in the next few months.

It is expected that solicitors and conveyancers will be able to conduct all aspects of conveyancing transactions electronically along the eastern seaboard within a year. National e-conveyancing is here to stay! Jacqueline Law, a lawyer in our Property & Projects team, tells you what you need to know about the new digital environment for land title dealings being progressively rolled out across Australia.

WHAT DOES IT MEAN?

E-conveyancing means lawyers will be able to conduct settlements, digitally sign and lodge land transfers, pay duty, discharge mortgages and lodge caveats at each State land registry without any physical documentation.

All this will be undertaken on a national digital system known as Property Exchange Australia ("PEXA") which is accessed by Land Titles Offices and Registries, financial institutions, lawyers and conveyancers, State Revenue Offices and peak industry bodies such as the Australian Institute of Conveyancers and the Law Council of Australia.

Lawyers will need to obtain their client's authority before using the system to undertake a transaction.

HOW E-CONVEYANCING OPERATES

The final details of how e-conveyancing is to operate are yet to be determined but it is expected that:

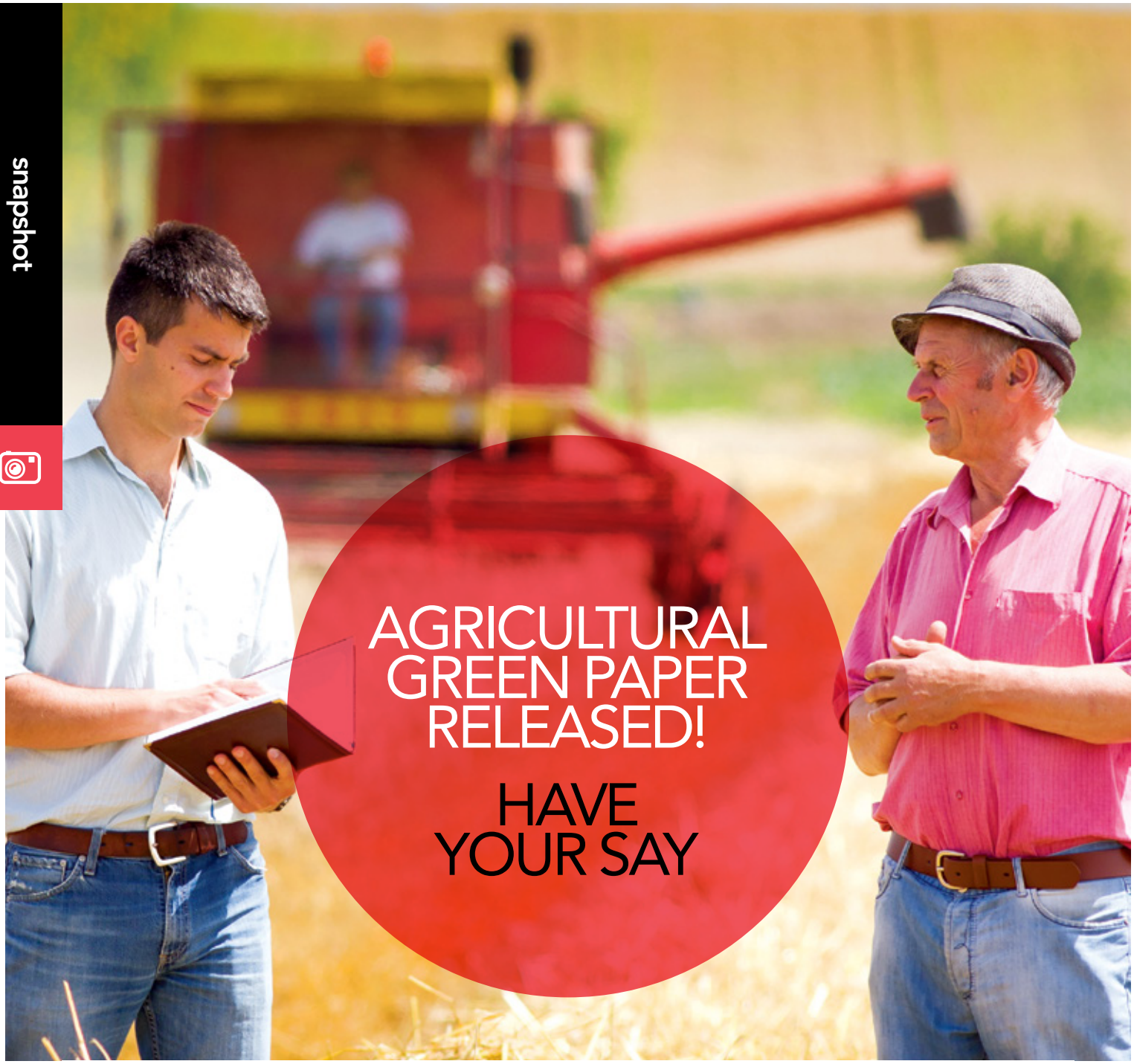
- The PEXA system will link conveyancing practitioners, banks and land registries. Once parties lodge information for a particular matter, it will immediately be seen by the other parties.
- The subscriber will prepare and lodge the transfer online by completing appropriate details through the PEXA system.
- Completion occurs when settlement funds arrive in the vendor's solicitor trust account. Stamp Duty on the transfer will need to be paid prior to settlement.
- Confirmation of completion is given by the subscriber to the purchaser (or their legal representative).
- The Titles Register is either updated live online or promptly processed by the Registry following settlement.

Australia has about 5 million property transactions each year with an estimated value of $2.5 billion. Once the e-conveyancing system is bedded down, it will result in less room for error in the process and it is expected to result in savings of around 10% on transactions. CK

EMAIL

Jacqueline Law //

LAWYER, PROPERTY & PROJECTS



AGRICULTURAL GREEN PAPER RELEASED!

HAVE YOUR SAY

The Federal Government has released its Green Paper as part of the ongoing review into Australian agricultural competitiveness and is calling on all stakeholders to comment on a range of new proposals and policy suggestions. The Paper outlines ideas thought to increase farm gate returns, open new markets and allow farmers to better prepare and plan for events such as drought and flood.

The Paper sets out a number of proposals to support the sector, including the introduction of numerous tax breaks, permanent access to concessional loans, cheaper imported labour, expanded foreign investment restrictions and a revitalisation of co-operatives. Also raised is the possibility of court ordered divestments by supermarkets of their businesses and forcing supermarkets to negotiate prices with a new farmer-owned co-operative and industry marketing boards.

Proposals have also been put forward as to infrastructure requirements and investment, including plans to build more dams and fund irrigation projects across the country. Interactions between farmers and mining companies have also been addressed with a particular emphasis placed on the impact of operations on aquifers and land.

Submissions on the issues and ideas raised in the Paper are open online until 12 December 2014. A White Paper will then be released early next year outlining what ideas the Government will adopt as policy.

IF YOU REQUIRE ANY HELP IN MAKING A SUBMISSION, THEN PLEASE CONTACT TIM FERRIER.

Recent Appointments:
CK's Property & Projects team

JUDD LAST returns to the firm more than a decade on and has been appointed as a Partner in the Property & Projects group at CK. Prior to returning, he was a director in the property group at a top tier national law firm in Brisbane.

Judd has acted for and advised clients on all aspects relating to property and commercial transactions. He has a particular specialisation in advising developers and operators of retirement villages and aged care facilities in both the profit and not-for-profit sectors. Clients for whom he acts in the retirement living and aged care sector have included listed companies, major banks, not-for-profit providers, benevolent institutions and churches. Judd has been actively involved in this sector and has presented at many of industry functions and seminars on this sector of the property market.

ROSE MACKAY and ANG LI have also joined Judd from his previous firm.

ROSE has been appointed as a Senior Associate. She has significant experience in retirement village transactions, and acquisition and disposal of commercial, rural, residential and industrial properties in all states of Australia. She has also acted in large commercial and retail leasing matters and has conducted legal due diligence in relation to a number of major property projects. Rose has particular expertise and interest in the retirement village industry having acted for a number of not-for-profit and commercial retirement village scheme operators in all aspects relating to the establishment and operation of retirement villages.

ANG has been appointed as an Associate. He has significant experience in acting for clients in commercial and retail leasing, and in the acquisition and disposal of a wide range of residential, commercial and industrial properties. Ang's clients have included publicly listed property trusts and financial institutions, as well as Chinese state-owned enterprises and high net-wealth foreign investors. He has considerable expertise in advising foreign developers and investors on foreign investment requirements and compliance issues. His experience also includes acting for financial institutions and receivers in the disposal of distressed assets. Ang has a significant following out of China, he is active in the local Chinese community and sits on the board of many Chinese community organisations.

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 and Projects Partners, Bernard Tan and 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, including what business owners need to know about unfair contract terms, how silence can amount to misleading and deceptive conduct, unconscionable conduct and the remedies available to consumers.

The seminar will be held on Tuesday 18 November in Sydney and Thursday 20 November in Brisbane. Click here for further details.

FOR FURTHER DETAILS CLICK HERE

Employee Incentive Schemes – the future is back to the past

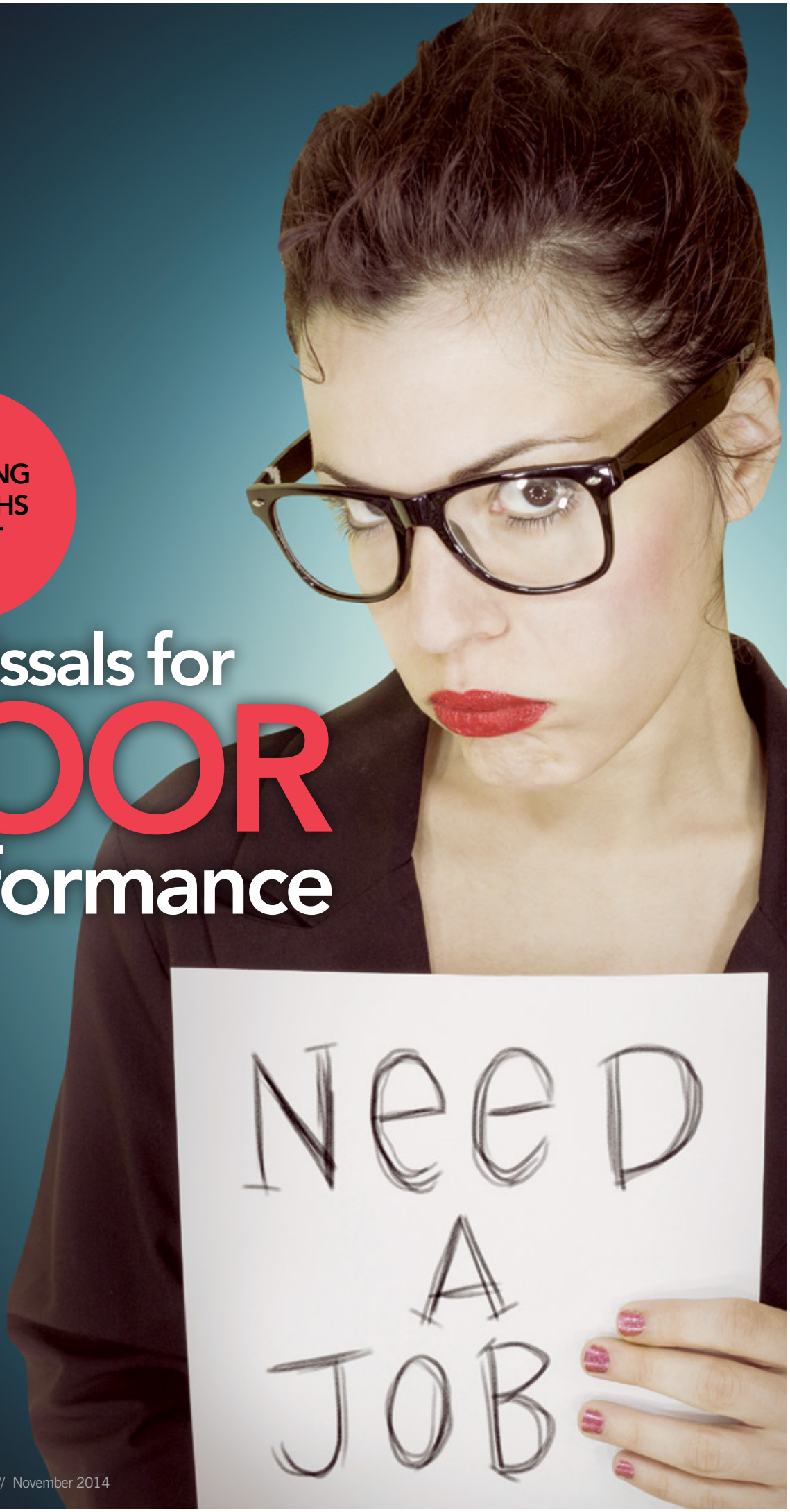
Securities based employee incentive schemes will again become a more effective tool to attract and retain staff, given the Federal Government's recently announced changes to the rules governing employees share schemes. The major impediment with the current rules, particularly the imposition of tax upfront on the issue of options, will be abolished. Broadly speaking:

- The Government will reverse the changes made in 2009 to tax for options on grant, so that options will generally be taxed once they have been exercised;
- Eligible start-ups will be able to offer discounted shares and options to employees at a small discount, with the discount exempt from upfront tax (so long as they are held by the employee for at least 3 years); and
- Eligibility criteria are being developed for companies to be able take advantage of these concessions. The criteria will include a company having an aggregate turnover of not more than $50 million, being unlisted and being incorporated for less than 10 years.

LEGISLATION IS PROPOSED TO COME INTO EFFECT ON 1 JULY 2015. WE WILL KEEP YOU UPDATED AS THE CHANGES TAKE SHAPE.

DISPELLING THE MYTHS ABOUT

dismissals for POOR performance



Terminating employees for performance based issues can be difficult for employers to navigate at the best of times. An employer's right to terminate because of poor performance has not been helped by a number of myths that have taken hold in this area …

Take for example the "3 strikes and you're out" rule which many employers follow believing it will protect them from unfair dismissal claims. That is simply wrong, and slavish adherence to these "rules" often leads the employer to overstep the mark between a reasonable dismissal and a dismissal that is harsh and unjust, and leaves the employer exposed.

In reality, there is no one "rule" to follow when dismissing employees, particularly where the dismissal is performance based. The process need only be fair and reasonable in the circumstances of each particular case.

EMPLOYMENT AND INDUSTRIAL RELATIONS LAWYER, LAURA GERCKEN, PROVIDES THE FOLLOWING TIPS TO HELP MINIMISE YOUR RISK OF AN UNFAIR DISMISSAL CLAIM:

- Action incidents of poor performance with the employee by:
  - IDENTIFYING each specific manifestation of poor performance
  - MEETING with the employee (and any support person requested by the employee to attend). Preferably there should be 2 people from the employer at that meeting
  - TELLING the employee the conduct or performance is not acceptable and that it will be monitored over a specified period of time (usually at least 1 month)
  - WARNING that the matter is serious and that if performance is not improved, disciplinary action may follow, including termination of employment
  - ENSURING that the employee is given a WRITTEN STATEMENT (preferably under letterhead) setting out each of the performance issues discussed, and remedial action the employee is expected to take, and
  - MONITORING the employee's ongoing performance as the employee must be given an opportunity to improve their performance. This is critical in any assessment of whether or not a dismissal is "harsh, unjust or unreasonable" for the purposes of an unfair dismissal claim.
- If there is no improvement in performance or further incidents occur, then you should again follow the procedure in respect of the ongoing issues and any new issues that have occurred since the first meeting with the employee. Provide the employee with a further letter setting out each of the matters discussed at the second meeting and give them an opportunity to respond to the issues raised and offer a suitable plan moving forward to improve their performance.
- If the employee does not provide a suitable plan and you feel the employment relationship is no longer tenable, then you can terminate their employment.

Many variables can impact on the process, including:

- The seriousness of the performance issues and the consequences of the performance issues to both the employee and the employer (eg. health and safety issues)
- The nature of the business
- The tasks performed by the employee within the business, and
- The length of time that the employee has been employed.

Importantly, don't rush the process, as the time provided to employees to improve performance is often a critical factor when assessing whether or not a dismissal is "harsh, unjust or unreasonable". Getting the process right will minimise fall out and help you to withstand claims for reinstatement or compensation of up to 6 months' wages. Needless to say, if in doubt seek advice. CK

EMAIL

Laura Gercken //

LAWYER, EMPLOYMENT & IR

FOFA REFORMS – what you need to know

WHAT IS IT?

The FOFA reforms:

- Introduced heightened obligations on advisers to act in the best interests of retail clients and place the interests of clients ahead of their own ("Best Interests Duty")
- Imposed a ban on conflicted remuneration structures (for example, volume based commission payments)
- Implemented requirements for advisers to renew ongoing fee arrangements with clients every 2 years (the opt-in requirement), and
- Imposed an obligation on advisers to send annual fee disclosure statements to clients.

These consumer protections have been the subject of much criticism and debate, with arguments that the reforms created unnecessary red tape on industry participants and are too costly to implement. In December 2013, acting on its election commitment to reduce this compliance burden on the financial services industry, the Federal Government announced a further package of changes to FOFA. New legislation to implement this suite of changes to reverse and water down some of the FOFA laws is currently before the Senate.

In the meantime, due to a "need for swift action", the Government controversially implemented regulations that took effect on 1 July 2014 which mirror many of the Bill's proposed changes. These interim regulations will be repealed once the new legislation takes effect.

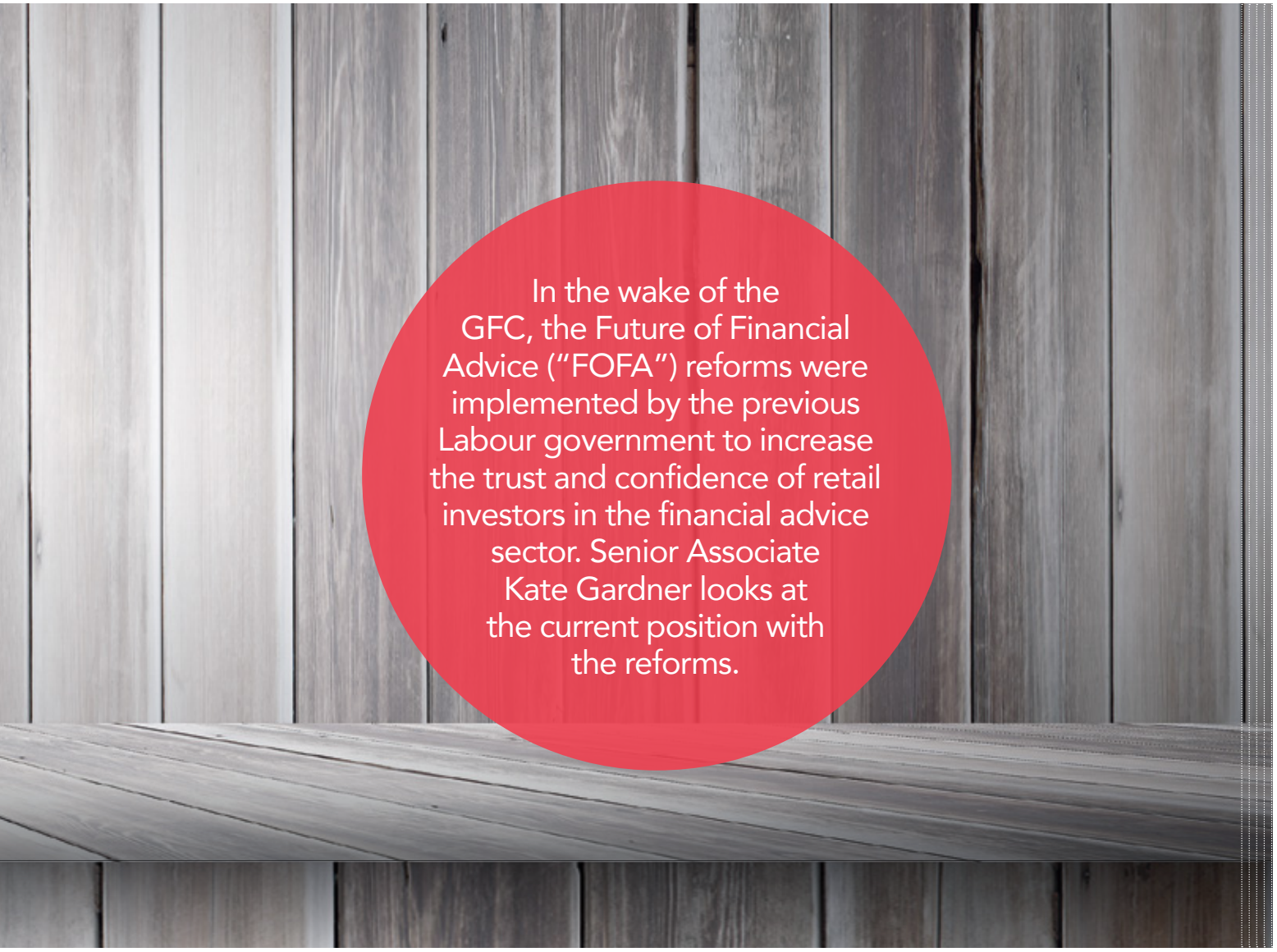
WHAT ARE THE IMPLICATIONS OF THE CHANGES?

For advisers, the changes mean reduced compliance obligations. The new regulations have removed the opt-in requirement for all clients and it is no longer necessary to send fee disclosure statements to pre 1 July 2013 clients.

While the changes will reduce compliance costs, they do not come without some compromise. The disclosure requirements surrounding Statements of Advice ("SOA") will be amended, requiring additional information to be set out – essentially information about the client's rights and the legal obligations owed by the advisers. The SOA must be signed by both the adviser and the client. If after receiving a SOA a client requests further or varied advice, the adviser will have an obligation to document these instructions, have the instructions signed by the client, and then acknowledge receipt of the instructions (although this can take place after the advice is given).

Some positive changes, from the advisers' point of view, are:

- Giving clarity as to the steps to be taken by advisers to discharge



In the wake of the GFC, the Future of Financial Advice ("FOFA") reforms were implemented by the previous Labour government to increase the trust and confidence of retail investors in the financial advice sector. Senior Associate Kate Gardner looks at the current position with the reforms.

their Best Interests Duty, including removing the obligation to take any other steps reasonable in the circumstances (known as the "catch-all provision")

- An explicit acknowledgment that advisers and clients may agree that the advice is limited to a particular product or range of products (known as scaled advice), and
- Carving out general advice from the conflicted remuneration provisions so that performance related benefits may be provided to employees of AFSL holders who provide general advice in certain circumstances.

WHAT DOES IT MEAN FOR THE MUM AND DAD INVESTORS?

For retail clients, the amendments essentially mean less consumer protection.

Advisers will not need to renew ongoing fee arrangements every 2 years and the onus will fall on investors to cancel arrangements that are no longer required. The risk for investors is that they may continue paying fees indefinitely for advice they are not receiving.

For arrangements entered into before 1 July 2013, advisers will no longer need to provide annual fee disclosure to their clients. The onus will be on clients to seek this information from their adviser.

Retail clients should also be mindful of the concept of scaled advice. While scaled advice arguably was available before the changes took effect, the express recognition of its availability may lead to an increase in advisers offering to provide more specific or targeted advice, as opposed to more holistic advice. Whilst this will undoubtedly provide more affordable access to advice for retail clients, individuals must be conscious that the Best Interest Duty of the adviser will be limited to the scope of the advice agreed upon.

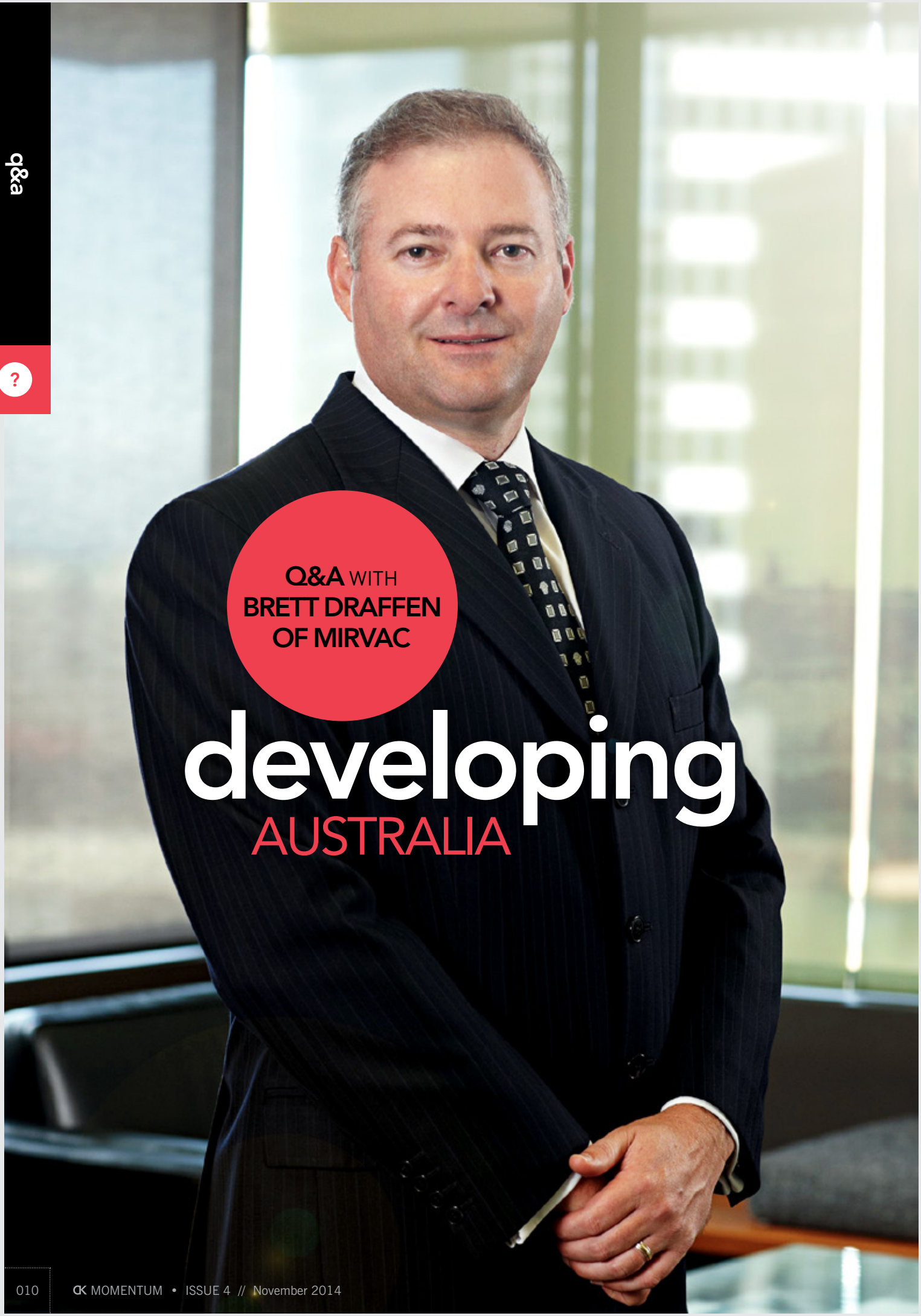
MOVING FORWARD

The Senate Committee examining the new legislation has recommended the Bill be passed. However, given the present unpredictability of the Senate, the passage of the new legislation is somewhat uncertain. If the Bill is disallowed in the Senate, then it is likely the regulations will be repealed and FOFA laws will revert to the more stringent requirements for advisers as originally enacted. Time will tell. CK

EMAIL

Kate Gardner //

SENIOR ASSOCIATE,
CORPORATE & COMMERCIAL



Q&A WITH BRETT DRAFFEN OF MIRVAC

developing AUSTRALIA

Mirvac is well known for its role within the Australian development and construction industry, with a diverse portfolio of assets and projects across the office, retail, industrial and residential sectors. In May 2014, Brett Draffen was appointed Chief Investment Officer, having previously held a number of senior positions with Mirvac. In this edition, Brett speaks to Property & Projects Partner Steven Cardell about future opportunities and some of the emerging issues that will impact on new ventures.

WHAT MARKET SECTORS DO YOU SEE AS PROVIDING OPPORTUNITIES FOR MIRVAC GOING FORWARD?

Mirvac is committed to being a diversified and integrated group, leveraging our integrated delivery model to create assets. There are opportunities for us to exceed our benchmarks in a number of sectors. The question is; how can we be more focussed in each sector around capital allocation?

In the office sector, it's about creating and repositioning assets. Mirvac is not a buyer of the new, shiny thing, rather we're a creator of the new, shiny thing, such as 8 Chifley in Sydney; or we look at repositioning assets using our integrated skill set.

In the retail space, it's about improving the quality of our portfolio with a focus on non-discretionary, food-based, subregional or urban centres and CBD centres. It's about repositioning, exiting out of some non core centres, and then using our integrated model to develop some $800 million of accretive development potential in our existing portfolio.

For industrial, we're a niche player and have a relatively small portfolio. Our strategy is around specific opportunities to, again, leverage our development capability to create new assets or reposition existing assets, potentially through change of use.

LOCALLY, MIRVAC HAS BEEN VERY ADAPTABLE AND WAS THE FIRST TO RIDE THE CREST OF THE RESOURCES BOOM AND GET INTO A NEW MODEL OF DELIVERY. HAS THE MODEL BEEN ADAPTABLE FOR NEW VENTURES?

Mirvac's integrated delivery model allows us to fast track how we respond to market opportunities. Our strategy is to narrow our directional mandates so that our teams know where they can and can't play across the sectors.

While extra flexibility might allow us to go into emerging markets, it doesn't necessarily mean the returns are there. Some markets might provide a higher return initially, but if those markets don't have the depth, ultimately, it's better not to play.

That was probably the case with the resources space – we went in quickly, did a few things, and made some good returns. However, we also made sure we didn't risk a lot of capital.

IS THE ASIAN MARKET HAVING ANY IMPACT ON THE WAY YOU DEVELOP AND MARKET YOUR PROPERTIES?

Over the last 20 years, the Asian market has had several investment cycles, but it's always been in established development product. Now, for the first time, the Chinese are entering the market as developers, particularly in the residential sector, and undertaking much larger projects. They're long term players, and their return expectations appear to be lower. Also, many of the Chinese groups are developing products for their own markets, rather than our local markets.

We tend to look for projects where we can leverage our integrated model; something that is multi-staged, has a level of complexity about the planning, or has a partnering angle with the State government or private organisations.

In the long term, there is room for both players. Over time there will be a greater focus on return from offshore parties. At some point, the discipline around capital will kick in and there'll be some stability. Asian investment will be a significant part of the market, in terms of competition, for some time.

CORPORATE SOCIAL RESPONSIBILITY AND SUSTAINABILITY ARE BECOMING INCREASINGLY IMPORTANT IN BUSINESS LIFE. HOW IS MIRVAC'S 2014 SUSTAINABILITY PLAN IMPACTING ON THE WAY YOU DO BUSINESS?

Sustainability has gone from something that is "nice to do" to something that is embedded. We have just returned from our international roadshow where our top investors wanted to know about our approach to sustainability and social responsibility, which is very encouraging.

For office space, sustainability is at the forefront. Now you can see a premium price for a building because of its sustainability rating, and you will see that in the cap rate. Tenants are requiring it and some tenants, such as government and big corporates, have a minimum requirement, so it's a strong driver.

It is fair to say this has also filtered quickly down into retail and industrial asset classes. Sustainability is also critically important in the residential sector, however it is often a delicate balance between "compliance" and purchasers seeing extra value for leadership in this area.

Mirvac's sustainability strategy is called "This Changes Everything" and is very specific about our expectations relating to Resources, the Future of Place, Communities and Portfolio thinking. It deliberately doesn't yet have all the answers, but does provide a sound framework to measure our performance.

We have already made great progress and I recommend you download our FY14 Sustainability Report from www.mirvac.com.

EMAIL

Steven Cardell //
PARTNER, PROPERTY & PROJECTS

property & projects

BANK GUARANTEES

WHAT ALL LANDLORDS SHOULD KNOW

Bank guarantees are often used by tenants to provide landlords under commercial or retail leases with security about the performance of their obligations. Typically, the terms of the bank guarantee will provide for the landlord to have immediate access to the guaranteed funds without having to wait for a Court decision to confirm that the lessee has breached the lease. Joanne Chang, a lawyer in our Property & Projects team, provides a warning to landlords about a possible pitfall.

RECENT CHANGES TO THE LAW

A recent case casts some doubt on the proposition that landlords have immediate access to guaranteed funds: it all depends on how your lease and bank guarantee is worded.

The Court considered whether a landlord could demand payment under a bank guarantee based on a claim that the tenant had breached the lease, or whether it was only entitled to do so once it was proven the tenant had breached the lease. The Court found the bank guarantee was drafted in a way to suggest that if the tenant was not actually in breach of the lease, the landlord had no right to call on the bank guarantee. An injunction was granted to stop the landlord from calling on the bank guarantee.

The outcome is clear: landlords need to ensure that leases and bank guarantees are drafted to provide them with immediate access to the bank guarantees without having to prove that an actual breach of the lease has occurred.

WHAT SHOULD LANDLORDS DO?

As a landlord, you should ensure that:

- Your lease allows you to approve the bank guarantee, so that you can make sure it is in a form acceptable to you
- The lease allows you to call on the bank guarantee where you believe you have acted in good faith and consider that the tenant has breached the lease
- You are cautious in assessing your right to call on the bank Guarantees before doing so to avoid any potential litigation, and
- You review all current leases and bank guarantees to ensure that you are not unduly restricted from calling up under the bank guarantee. While it may be difficult to amend the terms now, you may be able to do so when the lease falls for renewal. CK

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