

Horizons

Harris Wheeler Newsletter

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Newsletter

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Personal Property Securities Update IS YOUR BUSINESS PPS READY?

The commencement of the new Personal Property Securities regime is just over 3 months away. It is essential that businesses consider how the PPS regime will impact upon the way they do business and to ensure they put in place systems to ensure compliance with the laws.

The implications of this new regime will be far reaching for all business, not just those in the finance sector. The definition of "personal property" under the Act can be somewhat deceptive and it is vital that business understand that the regime will encompass securities over not only the typical consumer goods, but a wide range of commercial goods.

The Act defines 'personal property' as 'property other than land' with two particular exclusions being any right that is granted under a Commonwealth, State or Territory law and anything particularly declared not to be personal property. This definition will result in security interests taken over a very wide range of both consumer and commercial property being subject to the new regime.

The result of this wide definition is that many security interests previously not required to be registered will now need to be included on the Personal Property Security Register ("the Register") to ensure businesses protect their priority. Failure to register existing and newly created securities will result in those securities being exposed to subsequent interests being created over that property and those interests in turn obtaining priority through registration.

The new regime significantly expands the traditional concept of 'security interest'. Again the Act includes a wide definition

that includes any interest in personal property provided for in a transaction that in substance, secures payment or the performance of an obligation. The effect of this wide definition, combined with the wide definition of 'personal property' is that transactions that have previously not been registrable security interests will now need to be registered under the new regime.

The commencement of the new regime in October 2011 will now bring into the scheme business transactions that previously did not fall within any registration system. For example, consignment agreements, retention of title arrangements, hire purchase agreements.

In order that businesses ensure they protect their current and future security interests it is essential that they act now to undertake the following steps;

- Review all existing business contracts and consider whether they must be registered ;
- Check whether any of the above contracts comply with the necessary requirements under the Personal Property Securities Act;
- Set up any process for identifying and managing registration of security interests.

This new regime introduces significant new priority rules and in order to ensure businesses do not lose existing security protection and to ensure they obtain priority on security interests created post PPS, action should be taken before the commencement of the scheme in October 2011.

If you would like further information on any aspect of the regime please contact Special Counsel Susan Moran on 02 4907 6300.



What Our Clients Say...

Here's what some of our clients have had to say about us.

Micah Jenkins
Partner

- Commercial Litigation



Thank you so much for your assistance - I appreciate your advice and professionalism.

Emilia Cardillo
Solicitor

- Commercial Litigation



I wish to take this opportunity to thank you for your assistance in defending me. I truly believe that you and your team helped me save my family home.



Some highlights at Harris Wheeler



A lot's been happening at Harris Wheeler so I'd like to share some of those highlights with you.

Partner Katrina Reye was recently appointed to the Property Council of Australia's Regional Hunter Chapter

Committee. The committee represents the industry in the Hunter region and meet regularly to discuss various topics including planning issues, economic development, public affairs and professional development.

Solicitor Emilia Cardillo joined the committee of PULSE, an organisation that supports HMRI (Hunter Medical Research Institute) and is devoted to raising funds for early career researchers including research into asthma, stroke and cancer.

We are proud to announce that Harris Wheeler has been appointed to Newcastle Permanent Building Society's legal services panel and the RTA's Property legal services panel for the Hunter Region. We are delighted with these appointments and look forward to working closely with both clients and providing high quality and reliable legal advice.

The firm participated in Australia's Biggest Morning Tea in May which helps raise money for the Cancer Council's work in research, education, prevention and support. The staff and Partners enjoyed some delicious food and a cuppa for a great cause.

We have been fortunate enough to be invited to support the Westpac Rescue Helicopter Service's major fundraising event known as the Drover's Run. This 4WD outback adventure has been organised to raise money for the service so that they can continue to provide their life saving rescue services free to the community. More details on page 3.

Lastly, some baby news! Partner Micah Jenkins and his wife Louise are expecting their third baby in September. Micah and Louise recently travelled to Tasmania with their 2 sons Max and Ari, and Louise's parents John and Michele Williams. The highlight of Micah's holiday was when he sailed from Dover to Bruni Island with the family, spending the day soaking up the sun and fresh ocean breeze.

Until the next edition, I wish you and your family well.

Matthew Smith

New Occupational Health and Safety Laws



By Tony Cardillo

A new national system of workplace health and safety laws will significantly change all employers' current occupational health and safety responsibilities and obligations. The Work Health and Safety Act ('the WHS Act') is set to come into effect on 1 January 2012

and will replace the Occupational Health and Safety Act ('the OHS Act'). The new laws will endeavour to harmonise all workplace health and safety laws in Australia and ensure greater accountability for directors and senior managers. Employers should note that NSW has already adopted a number of the WHS Act's key changes effective as of 7 June 2011.

What does this mean for employers in NSW?

Employers who operate their business throughout Australia will benefit from a workplace health and safety system which will no longer impose different rules, obligations and responsibilities in different States and Territories. However, there are a number of changes which employers should be aware of and prepare for. These include:

- Harsher penalties overall: Up to \$3 million for a company or 5 years imprisonment for

individuals (including directors and officers) who have breached the Act;

- A positive duty of due diligence for directors and senior officers of corporations to ensure all workers' health and safety;
- A requirement to eliminate all risks to health and safety, so far as is reasonably practicable;
- New risk assessment requirements for certain high risk or hazardous workplaces; and
- New roles and responsibilities for OHS Representatives or, as they will be known, Health and Safety Representatives.

Importantly, the new duties under the WHS Act are now in effect in NSW. Officers of corporations should be aware that they are now subject to the duty to exercise due diligence in respect to acts or omissions occurring on or after 7 June 2011.

What should employers?

Employers should review all current policies and procedures in handling risk management and health and safety matters in the workplace to ensure compliance with the new legislation.

For further information on how the proposed legislation may affect you and your business please contact Partner Tony Cardillo or solicitor Emilia Cardillo on 02 4907 6300.

The Commercial Building Disclosure Scheme



By Anna Bailey

The Commercial Building Disclosure Scheme (CBD) is a national initiative designed to improve the energy efficiency strategies of large commercial buildings in Australia. The CBD Scheme plans to widen its scope to encompass hospitals, hotels and shopping centres in the near future.

Disclosure obligations under the Act

The disclosure obligations only affect the sellers, lessors and sublessors of buildings with a net lettable office space greater than 2,000m². The major disclosure requirements began on 1 Nov 2010 with a 'transitional period' of 12 months until full compliance is required on 1 Nov 2011.

The Department of Climate Change and Energy Efficiency decided to use the already established National Australian Built Environment Rating System (NABERS) rating method as the tool for determining the energy efficiency of the building. The NABERS method uses a star rating system from 1 to 5, with 5 being the best possible rating.

Once the transition period expires, the major requirement of the Act is the disclosure of a Building Energy Efficiency Certificate (BEEC). The BEEC must then be accessible on the online Building Energy Efficiency Register (BEER).

Exemptions

Please refer to the full article on our website for more information on the applicable exemptions.

What is it going to cost me?

This is the obvious question all property owners affected by the legislation are asking. The simple

answer is: a lot if you don't comply. The penalties for non-compliance are severe with a maximum prescribed penalty of \$110,000.00 for the first day of non-compliance with each subsequent day of the contravention costing up to an additional \$11,000.00 per day.

The extra cost involved in retrofitting existing buildings is seen as a major hurdle for building owners. However, upgrades should provide advantages in the long term.

Green: The colour of the future

Property owners should be enquiring into energy efficiency standards even if they are not currently affected by the legislation. As stated in a recent Master Builder's Magazine:

"Should commercial buildings not make the (green) grade; tenants will have the advantage when negotiating leasing deals and driving down rents. Accordingly, investing in environmental sustainability now will result in stronger returns in the future."

Although the CBD Scheme focuses on the sellers and the lessors of properties, it is important for purchasers and prospective tenants to assess their due diligence procedures when purchasing property to avoid any compliance problems in the future.

In conclusion, sellers, purchasers, lessors and lessees affected by the legislation need to make a commitment to the CBD and should work closely with their solicitor, builder and developer to ensure compliance with the new laws.

Please visit our website for an extended version of this article. For more information concerning the Commercial Building Disclosure Scheme visit www.cbd.gov.au or call Partner Katrina Reye or solicitor Anna Bailey on 02 4907 6300.

Client Profile

4WD'ing for a good cause

Willow Tree Gravel is a family owned quarry company based in the Liverpool Plains shire. The company is managed and controlled by Phil Marheine, a long-time client of Harris Wheeler, who previously established and operated a specialised fuel and oil filter company known as Filter Technology Australia at Rutherford. Willow Tree Gravel has been successfully operating for many years and has had involvement in many major infrastructure projects such as the Upper Hunter Valley Alliance project. Harris Wheeler has assisted Willow Tree Gravel with the negotiation of major supply contracts.

This year Phil's wife, Robyn will be participating in the Inaugural Drover's Run, a major fundraising event for the Westpac Rescue Helicopter Service. Harris Wheeler is proud to sponsor Robyn's 4WD for the 9 day trip that promises to be full of fun and adventure, particularly for those game enough to take

on the chilling temperatures of some of New South Wales' most



beautiful country towns all nestled in the foothills of the Great Dividing Range. The run will start at Quirindi, and the group will take in Haddon Rig, Louth, Reola, Bourke and Lightning Ridge, before finishing at the Westpac Base in Tamworth.

Pictured is the campervan that Robyn will be calling home for 9 days.

Managing Partner Matthew Smith says of the sponsorship 'I have been working closely with Phil for many years and he is such a great bloke. When the opportunity arose to sponsor Phil's fundraising event for the Westpac Rescue Helicopter, I couldn't wait to sign up because it is not often that one gets a chance to say a special thank you for the years of loyalty and friendship that Phil has shown to me and the Firm'.

a perfect recipe for Winter



Lamb shanks with bacon and mushroom

Ingredients (serves 2)

- 8 small brown onions
- 1 tbs olive oil
- 6 lamb shanks
- 200g button mushrooms, thickly sliced
- 4 bacon rashers, rind removed, coarsely chopped
- 2 celery sticks, trimmed, thinly sliced
- 2 garlic cloves, crushed
- 500ml (2 cups) beef stock
- 400g can diced tomatoes
- 3 fresh rosemary sprigs
- 80g baby spinach leaves

Method

1. Use a sharp knife to make a small cut in the base of each onion. Place in a heatproof bowl and cover with boiling water. Set aside for 5 minutes. Drain and peel. Cut in half.

2. Heat the oil in a large saucepan or stockpot over medium-high heat. Cook 2 lamb shanks, turning occasionally, for 5 minutes or until brown. Transfer to a plate. Repeat with the remaining lamb shanks, reheating pan between batches.

3. Add the onion, mushroom, bacon, celery and garlic to the pan. Cook, stirring, for 5 minutes or until soft. Increase heat to high. Add the stock, tomato and rosemary. Bring to the boil. Reduce heat to low. Return the lamb shanks to the pan. Cover and cook for 1 1/2 hours or until the lamb is tender and falls off the bone. Transfer lamb shanks to a plate and cover with foil to keep warm.

4. Increase heat to high. Simmer, stirring occasionally, for 10-15 minutes or until the sauce thickens and reduces by half. Season with salt and pepper. Add the spinach and stir until the spinach wilts. Return the lamb shanks to the pan and stir to coat. Cook until heated through.

Do you know the difference between a contractor and employee?



By Emilia Cardillo

Do you know the difference between independent contractors and employees and when an independent contractor can be deemed an employee? The consequences of not identifying the difference can often be a costly exercise for employers.

The recent decision of *On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation (No 3)* [2011] FCA 366 (“**On Call**”) contains a review of relevant factors to consider in making the distinction between employee and independent contractor.

The Facts

- On Call provides interpretation and translation services. It receives requests from clients and then distributes the work to a translator or interpreter on its panel.
- The translator or interpreter is able to reject any work that is offered and is able to work for competing companies. The interpreter or translator cannot negotiate the rate that they are paid and On Call requested that the translators and interpreters be professional, wear name badges and not to change jobs between each other without notifying On Call.

The Test

• The Court will look beyond the contractual descriptions used to describe the relationship and will consider the actual interactions between the parties and the roles and functions of each party.

• In the On Call case, the test was stated as follows:

“Is the person performing the work as an entrepreneur who owns and operates a business? and

In performing the work, is that person working in and for that person’s business as a representative of that business and not of the business receiving the work?”

• A person will not be considered an independent contractor merely by the fact that they have their own ABN and are required to issue tax invoices in respect of their services.

- There are a number of indicators that can be used to determine whether a person is truly an independent contractor or an employee. Some of these indicators include:
 - o Does the contractor have goodwill attached to their business?
 - o Can they employ or sub-contract the work to others?
 - o Can they negotiate their own fees and do they have their own insurance?

These are just a few of the indicators that may be used to determine whether a person is a contractor or employee.

Lessons for Employers

- Unfortunately, there is no simple and clear definition that can be applied in every situation. Employers should be aware that simply describing an individual as an independent contractor will not be sufficient on its own. The employer will need to look at the arrangement as a whole to consider whether the person they are engaging is truly an independent contractor.
- The consequences for getting it wrong can include penalties under the Fair Work Act 2009, orders to pay unpaid superannuation, back payment of wages and statutory entitlements such as annual leave.

What Should You Do Now?

Employers should think carefully about the type of arrangement they are entering into when engaging independent contractors.

If you are unsure about whether you have independent contractors or employees or are thinking about engaging independent contractors, we can provide you with strategies and advice to help you identify the difference and minimise the risk to your business.

If you are unsure about the arrangements of your employees or contractors or would like further information please contact our Employment Lawyers Partners Tony Cardillo or solicitor Emilia Cardillo on 4907 6300.

Staff Profile

Meet one of the firm’s Commercial Litigation Lawyers



Susan Moran

Susan Moran joined the firm in December 2010 and brings a wealth of knowledge and experience in the area of commercial litigation and risk management. Her key areas of expertise include insolvency, debt recovery and administrative law.

Susan provides services to a number of the firm’s large institutional and government clients as well as our SME clients.

Susan has extensive experience in a wide range of commercial matters including

acting in the area of mortgage enforcement, product liability, contractual disputes, building and construction disputes, trade practices and insolvency. In addition to commercial law, Susan has advised both private and public sector clients in relation to administrative law matters, including issues arising under the Privacy Act and Freedom of Information Act.

Susan is the ideal person to assist you and your business in relation to risk management issues.

If you would like to get in touch with Susan please call 02 4907 6300 or email susan.moran@harriswheeler.com.au.

www.harriswheeler.com.au

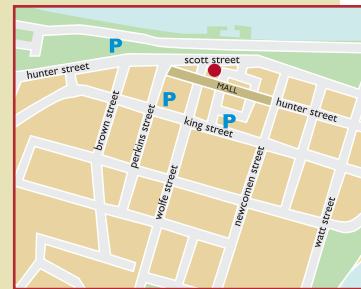
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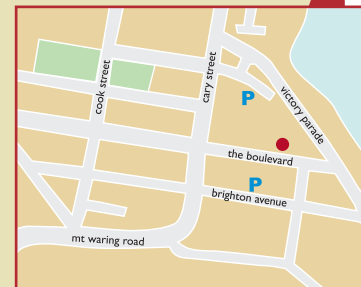
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