Headlines

winter issue 10

LEAKY BUILDING ISSUES

PROTECTING YOUR ASSETS

BUSINESS LAW UPDATE

FIXED TERM AGREEMENTS

Welcome to the winter edition of HHeadlines. The past few weeks have featured some interesting developments on the economic front, notably the significant measures announced by the Government in its 2010 Budget ranging from the increase in GST to a decrease in the corporate tax rate. This was quickly followed by an increase in the Official Cash Rate announced by the Reserve Bank, the first such increase in about three years when the Cash Rate reached its peak of 8.25%. It remains to be seen to what extent these measures will impact on this country's economy, particularly in the context of ongoing international economic developments.

Employment law is always an important topic for any business. In this edition of HHeadlines we have included an article on fixed term agreements. Our employment team discusses two recent cases which highlight the fact that ambiguous criteria in such agreements can lead to unintended results from an employer's perspective. We have also included a selection of brief outlines on various changes to corporate and commercial laws which may have an impact on several business activities.

HESKETH HENRY
The Art of Law

HHeadlines is produced by Hesketh Henry Publications. Editorial enquiries should be made to Joanna Macfarlane on 09 632 0521 or joanna@porternovelli.co.nz. For more information go to www.heskethhenry.co.nz

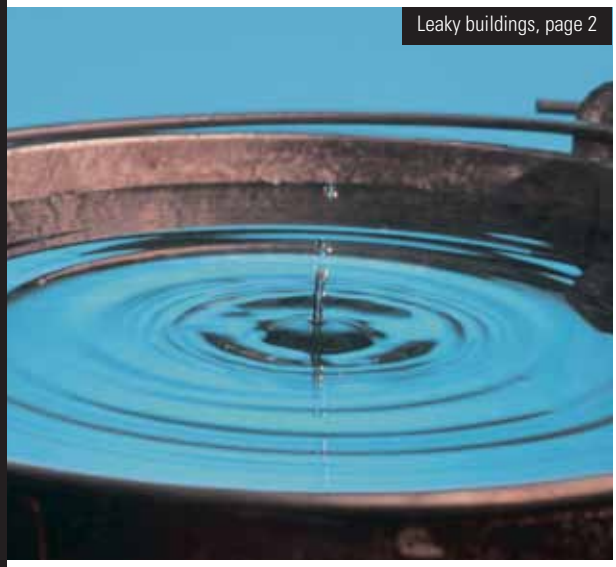
For instance, "financial service providers" will need to be registered and become members of a dispute resolution scheme by December 2010. There is also a discussion on various changes to company legislation which may be implemented in the context of company incorporations as well as actual changes and stronger enforcement procedures. Other articles feature issues arising from the Government's proposed leaky building package and what to look out for, an analysis of recent changes to the Unit Titles Act and a review of a recent case by our Private Client team.

I hope you will find this edition of HHeadlines interesting and useful.

We're very excited about again being a key sponsor of this year's NZ Sculpture OnShore, opening in November 2010. In this edition curator Rob Garrett gives us a sneak preview of some of the established names as well as new and emerging artists who will feature in this iconic event, held at the cliff-top site of Fort Takapuna on Auckland's North Shore.

Finally, I'd like to extend a warm welcome to all our new people. We're delighted to have such a talented group of people join us recently and I welcome them on board knowing they will make an excellent contribution to the firm.

Erich Bachmann
Managing Partner



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NZ Sculpture OnShore preview, back page

By **Harriet Dymond-Cate,** Solicitor

PLUGGING THE HOLES

Issues arising from the Government's proposed leaky building package.

The leaky building crisis is now being compared to a natural disaster with potentially as many as 89,000 homes and buildings affected around the country, copping an estimated repair bill of over $11 billion.

In May 2010, the Government announced its financial assistance package aimed at helping homeowners getting their homes fixed faster. Despite the package being welcomed by many and hailed as the Government stepping up and tackling a significant issue, the devil will be in the detail.

What is the package?

The package centres on the Government and local authorities each contributing 25 per cent of 'agreed repair costs'. Affected and eligible homeowners will be required to fund the remaining 50 per cent, with a loan guarantee underwritten by the Government, provided applicants can meet bank lending criteria.

Affected homeowners will still need to make a claim under the Weathertight Homes Resolution Services Act to access the financial assistance package. It appears, therefore, that the eligibility criteria for access to current services will continue to apply.

Homeowners will still have the option to pursue other parties such as builders, developers and architects but in exchange for the 50 per cent contribution, homeowners would forgo the right to sue local authorities or the Crown.

When the policy was announced on 17 May 2010 it was presented to various Councils who were asked to respond to the Government's offer by 31 May 2010.

On 1 June 2010 Building and Construction Minister Maurice Williamson was advised by Local Government New Zealand that 21 councils are on board, at least in principle. Other councils will be able to opt in at a later stage if they wish.

'Bank lending criteria'

One of the potential snags for homeowners is that in order to be eligible for the financial assistance, they will need to meet bank lending

criteria for the remaining 50 per cent of repair costs. However, it is the very fact that homeowners are struggling to meet bank criteria that is largely preventing them from repairing their homes.

'Agreed repair costs'

Another crucial issue is how the remediation costs will be determined and by whom. The large amount of time dedicated to questions over reasonable repair costs in current Court processes illustrates that parties generally do not agree on repair costs. There are also two further issues often thrown into the cauldron:

1. Betterment (when a dwelling has been improved/repaired to a superior standard beyond simply making the dwelling weathertight); and
2. Mitigation (the principle that requires homeowners to act reasonably in attempting to reduce their losses, for example taking steps to repair the dwelling once problems become known and before damage becomes worse over time).

It is yet to be announced what body will determine the repair costs and the processes by which estimates/costs will be reviewed (or whether they will be capable of review). It seems unlikely that a 'belt and braces' approach to repair will be endorsed by the Government and Councils which may mean homeowners will come to feel that they are being short-changed. No mention has yet been made about allowances for consequential costs (such as alternative accommodation during repairs) and general damages (allowance for stress and inconvenience) which are both claimable in current litigation processes.

Other parties' ability to recover from the Council

One question Councils will wish to consider is whether there is a need for some form of bar to cross-claims (against Councils making payments under the scheme) from other potentially liable parties who may still be sued by homeowners. Our view is that such a bar would not really add a great deal. As matters stand in current litigation processes, where several parties are each held to be responsible in law for particular defects, then they are each held liable to the claimant for 100 per cent of the costs associated with those defects. As between the jointly liable parties themselves, the Courts then generally apportion the Council's share of the costs at 20 per cent. Given that, under the scheme, the Council will already have contributed 25 per cent towards total repair costs, there will be little incentive for other parties to cross claim against the Council, as it would be unlikely the Court would make an order giving those parties the right to recover some further contribution from the Council. However, in cases where the Council is the only substantial (or deep-pocketed) party left standing, it is to be expected that homeowners will frequently choose not to opt into the scheme and will instead pursue current litigation processes to ensure that they recover more than just 50 per cent of repair costs.

Purchasing with knowledge

Another undefined issue is what the process will be for determining whether a homeowner has purchased a leaky dwelling with full knowledge of the problems. As it presently stands, this enquiry is not made at the eligibility stage but generally transpires during the interlocutory stages of litigation (such as after inspection of documents). It is unlikely that Councils, or the Government, will be wanting to fund 50 per cent of repair costs for owners who purchased with their eyes wide open to the problems (presumably also after obtaining a discount as a result).

What happens when there is both part Council/part private certifier involvement?

As the proposal stands, if a dwelling was certified by a private certifier then the relevant local Council (which will have been statutorily required to issue a building consent and a code compliance certificate based on corresponding certification provided by the private certifier) will not be liable to pay a 25 per cent contribution. Private certifiers no longer exist under the new Building Act regime. However, their role under the 1991 Act means it is unclear what will happen when there was both Council and private certifier involvement during the construction of a dwelling, and whether the Council will still contribute some proportion towards repair costs.

The Government says it wants to ensure a fair solution that will assist affected homeowners to move on with their lives. There are, however, still plenty of details to be fleshed out before the package's intended release date of early 2011.

For further information please contact **Harriet Dymond-Cate** on **+64 9 375 8744**

By **Jim Roberts,** Partner

TIMELY REMINDER FOR EMPLOYERS

Implications for Fixed Term Agreements in Employment Court Decision.

Fixed term agreements have been scrutinised recently in an Employment Court decision which serves as a timely reminder for employers to be cautious when hiring employees on this basis.

The Employment Relations Act 2000 ("the Act") allows for fixed term employment where employment will end either:

- at the close of a specified date or period; or
- on the occurrence of a specified event; or
- at the conclusion of a specified project.

In order for fixed term employment to be lawful, the employer must have genuine reasons based on reasonable grounds for specifying the employment of the employee is to end in that way. They must advise the employee of when or how their employment will end and the reasons. Additionally, the employment agreement must state this in writing.

Where an employee is purportedly engaged on a fixed term basis and these requirements are not met, the employee may ignore the termination date and continue in employment on an ongoing basis. Alternatively, they may raise a grievance for unjustified dismissal, as Ms Shortland did in **Shortland v Alexander Construction Ltd.**

Ms Shortland was employed by Alexander Construction Ltd ("Alexander Construction") on what purported to be a fixed term agreement. In May 2008 her employment ended at Alexander Construction's insistence and Ms Shortland claimed that she had been unjustifiably dismissed.

The Employment Relations Authority had found in favour of Alexander Construction but, in April 2010, the Employment Court overturned this in finding that Ms Shortland had been unjustifiably dismissed and was entitled to reimbursement of lost wages and compensation for distress she had suffered.

In May 2007 Ms Shortland had been offered a position as site administrator for a project known as "Elephant Hill". Her written employment agreement had a fixed term clause stating:

"The parties agree that this is a fixed term employment agreement. This agreement…will end on the completion of the Elephant Hill project. The Employer has genuine reasons based on reasonable grounds for specifying that the employment agreement is to end at this time, namely the end of the Elephant Hill project…"

In mid April 2008, Ms Shortland was told her job would soon come to an end. She queried this as she considered the project was far from complete but was told that decamping from the work site indicated the completion of the project. On 1 May 2008, Ms Shortland received a letter stating her employment would end the following day. The site office was then disestablished on 7 May 2008 but approximately 10 staff remained working on the project which was then managed from Alexander Construction's head office. Ms Shortland's work, or what was left of that work, was taken over by other employees.

The Employment Court found that the reason given in evidence by Alexander Construction for entering into a fixed term agreement – that the company had no other significant work prospect than Elephant Hill – was "close to the border" but a genuine reason based on reasonable grounds for entering into a fixed term agreement under the Act.

The real problem for Alexander Construction was that this reason was not recorded in writing. The employment agreement gave the reason as "the end of the Elephant Hill project", which the Court found not to provide reasonable grounds for having a fixed term agreement. To be reasonable, the additional element – "that the company had no other work in prospect" – needed to be included.

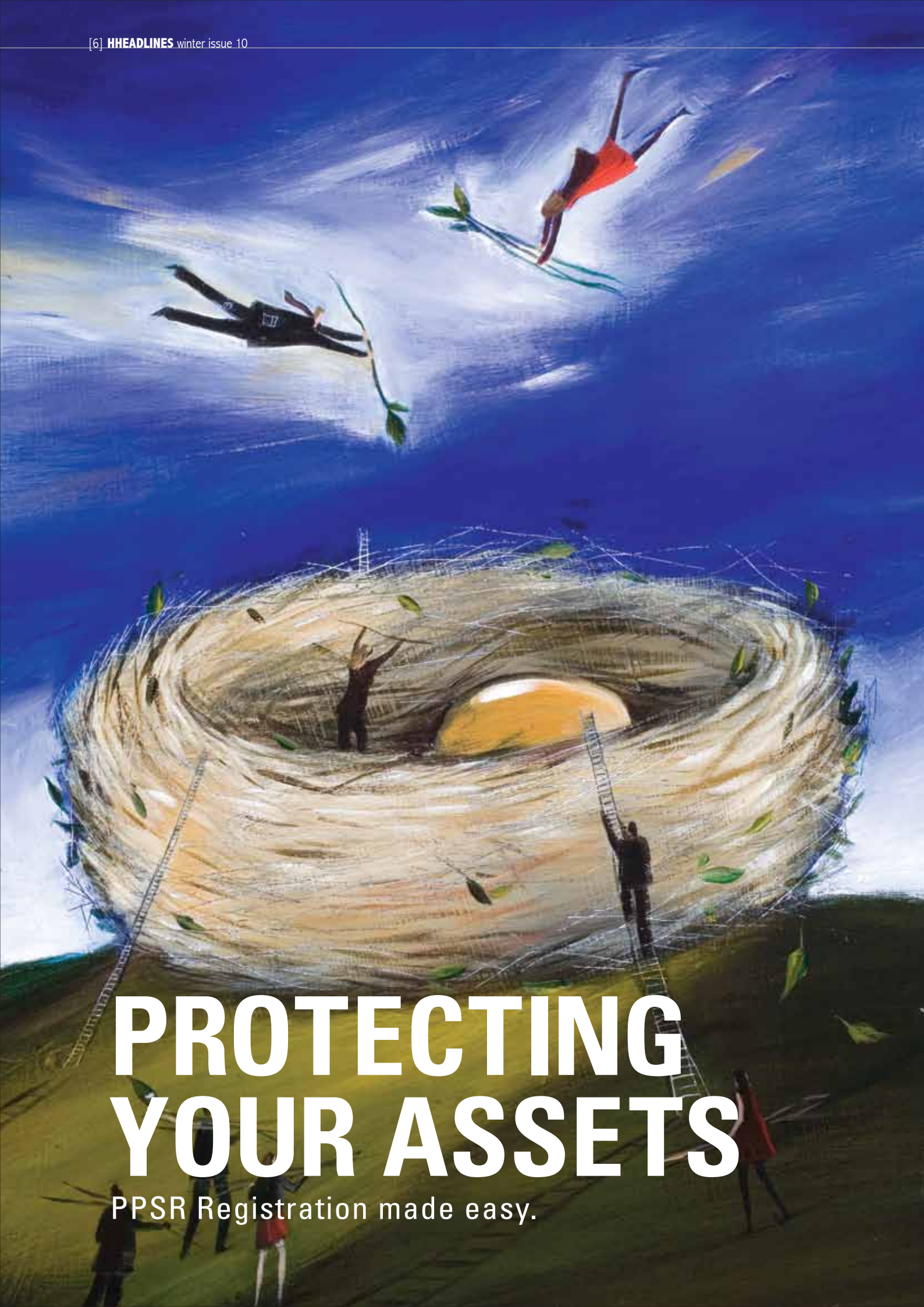
Because the fixed term clause in the employment agreement did not comply with the Act, Ms Shortland could claim remedies based on unjustified dismissal as her employment was deemed to be open-ended and had not been terminated fairly.

In our view…

This case highlights the importance for absolute clarity and certainty in the reasons written into the fixed term employment agreement.

While a project can be a genuine reason to engage an employee on a fixed term basis, as in this case, employers need to carefully consider how they scale down a project because there could be a range of matters that may need to be identified differently for various employees. For example, where there are identifiable milestones that employment is limited to and whether fixed term agreements on a project will end at different times.

We strongly recommend fixed term employment agreements are tailored to each situation as standard form fixed term agreements are unlikely to comply. If you need help drafting a fixed term employment agreement or addressing any issues arising in relation to fixed term employment, please contact **Jim Roberts** on **+64 9 375 8723**



PROTECTING YOUR ASSETS

PPSR Registration made easy.

By **Bryce Davey,** Partner
and **Shona Stockwell,** Solicitor

Even though the Personal Property Securities Act 1999 (the **"PPSA"**) has been in force for eight years, we continue to see people failing to recognise that the simple act of registering on the Personal Properties Securities Register (the **"PPSR"**) may be the difference between being paid or receiving very little or nothing on a receivership or liquidation.

"That's not fair"

High profile cases where unregistered security holders have lost valuable assets or large amounts of money have been widely publicised. For example:

- the New Zealand Bloodstock case where New Zealand Bloodstock leased a stallion to a farm for an initial period of three years, and subsequently lost the horse, without compensation, to a bank (who had registered a security interest on the PPSR) when the farm went into receivership. When the receiver sold the horse it was rumoured to have been worth $3 million; and
- cases where a shareholder has registered a security interest on the PPSR for a shareholder loan, and a supplier of goods hasn't registered its security interest. In the event of liquidation of the company, it is the shareholder who stands to be repaid first as a secured creditor whereas the supplier, having failed to register on the PPSR, will rank as an unsecured creditor.

Despite these cases, many businesses still fail to adequately protect their interests on the PPSR. We find that clients often fail to recognise when a security interest exists which is registrable on the PPSR. Some simply think that it is too difficult to register.

Our view is that no business in the current environment can afford to ignore the protection that the PPSR offers. We do not believe that the registration process is complex or difficult and set out below the basic steps that need to be undertaken to register.

When does a security interest arise?

A security interest can arise from the supply of goods to a customer or the provision of a loan. However, there are other registrable security interests which may also be protected by registration on the PPSR if the correct documentation is signed, such as:

- shareholder loans
- a lease or bailment of goods for more than one year. As in the case of New Zealand Bloodstock, if you have equipment or goods on another person's property for more than a year (even if there is no rent being paid for the goods or equipment), this creates a registrable security interest; or
- a deposit for the purchase of a business – registration provides security in the event that the sale agreement is cancelled and the deposit is repayable.

Requirements to register

The following practical steps are required to register on the PPSR:

- a security interest must exist. As you can see from the examples above, a security interest can arise in a number of different circumstances. If in doubt, phone Hesketh Henry for advice
- a security agreement must be signed by the debtor. Unsigned standard terms of trade are not effective; and
- a security interest must be registered within the timeframe required by the PPSA. If in doubt, register the security interest before the collateral (be it a loan, intellectual property or goods) is provided to the debtor.

Common mistakes

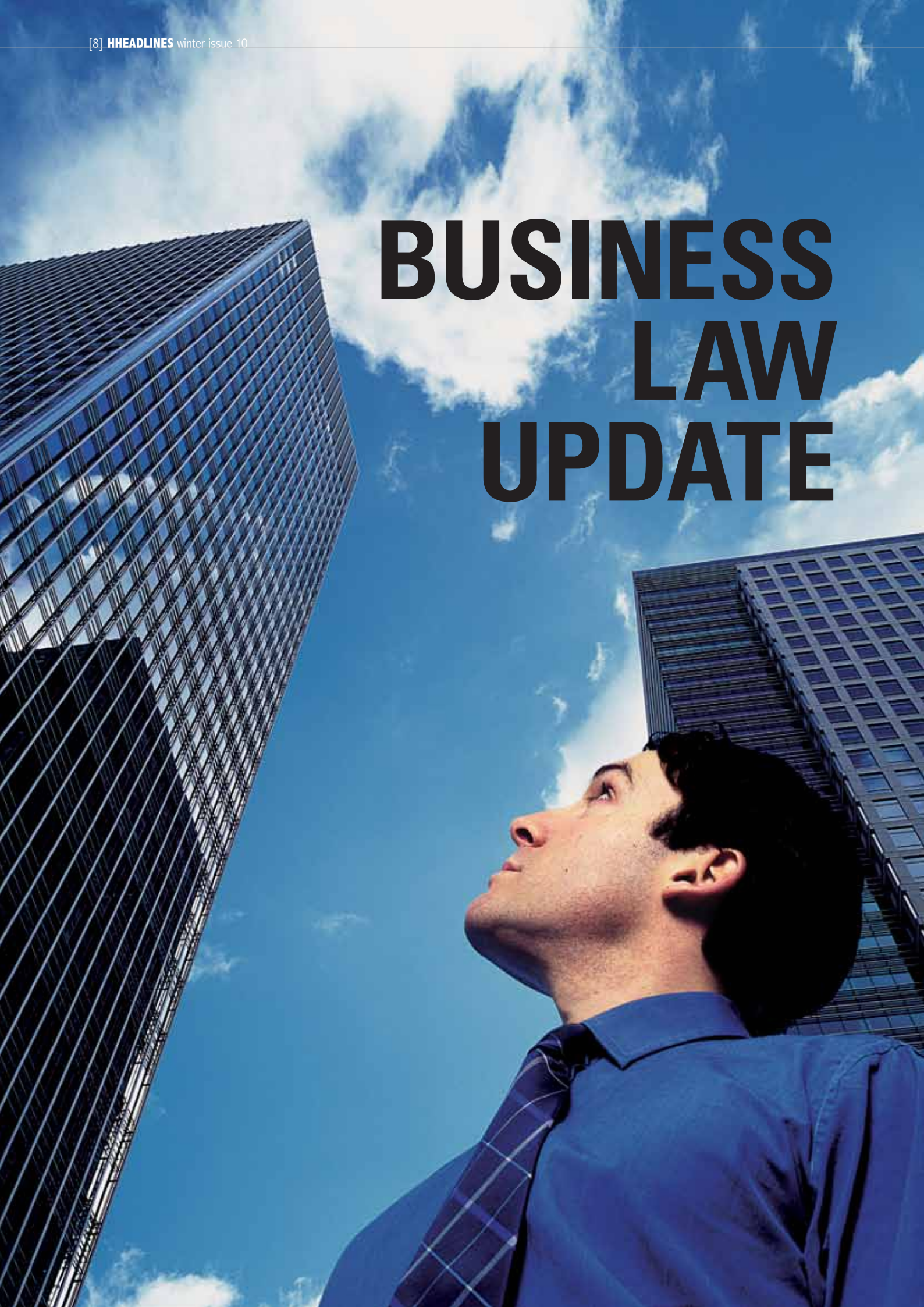
Common mistakes that can occur when registering a security interest on the PPSR are:

- failure to get a signed security agreement – while we appreciate that many clients find it difficult to force long-standing customers to sign new paperwork with the correct PPSA clauses, this is now an accepted part of doing business. Debtors should not object, as the PPSA clauses do not give you any greater rights than your old terms of trade – it just ensures that notice of your rights is recorded on the PPSR should the customer become insolvent
- failure to register in time; and
- failure to keep adequate records. A liquidator or receiver will require copies of the security agreement and information recording transactions between the creditor and debtor.

How can we help?

We are happy to come to your business to provide training to your credit staff on the process and practical steps to register a security interest on the PPSR. We can also assist by advising whether there is a security interest which could be registered, drafting security agreements protecting your interests and reviewing your customer documentation to ensure these adequately address the PPSA.

For further information please contact **Bryce Davey** on **+64 9 375 8690** or **Shona Stockwell** on **+64 9 375 8697**



BUSINESS LAW UPDATE

There have been a number of developments in business law. Below we take a brief look into some of these, including:

- the new registration regime for financial service providers
- some potential changes to New Zealand's company registration process
- additional issues to be considered when restructuring companies; and
- the improved rights of intellectual property holders under the proposed Anti-Counterfeiting Trade Agreement between New Zealand and its significant trading partners.

Financial Service Providers – be sure to register by December

The Financial Service Providers (Registration and Dispute Resolution) Act 2008 (**"FSP Act"**) now provides for mandatory registration of all financial service providers and membership of a dispute resolution scheme.

Applications for registration are expected to be accepted by the Financial Service Providers Register (**"FSPR"**), administered by the Companies Office, from July 2010 and from the end of the transition period on 1 December 2010 all financial service providers must be registered in order to legally provide financial services.

The information required to register on the FSPR will include:

- membership of an approved dispute resolution scheme or the Government's reserve scheme
- confirmation of the types of financial services provided; and
- for financial service providers that are business entities: name, gender, date of birth and residential address of each director, senior manager and controlling owner and details of registration if incorporated outside New Zealand; or
- for financial service providers that are individuals: residential address, date of birth, gender and any other names the financial service provider was formerly known by (if any).

The FSPR's proposed fees for filing an application for registration are $350. There are also additional proposed fees of $35 for each criminal history check that the Companies Office carries out on individuals named in the application and a dispute resolution regime administration fee of $30.

Financial service providers include persons who undertake any of the following (among other) activities:

- in the course of business, give financial advice, undertake transactions involving investments or provide financial planning services
- act as deposit takers
- keep, invest, administer or manage money, securities or investment portfolios on behalf of others or otherwise enter into derivative transactions or trade in money market instruments, foreign exchange, interest rate and index instruments, transferable securities (including shares) and futures contracts on behalf of others
- provide credit (under certain contracts)
- operate a money or value transfer service
- issue and manage means of payment (e.g. credit and debit cards, cheques, travellers' cheques, money orders, bankers' drafts and electronic money)
- give financial guarantees
- participate in the offer of securities to the public (in certain roles)
- change foreign currency; and
- carry on insurance business.

Possible changes to company registration requirements

The Minister of Commerce recently announced the Ministry's intention to review potential measures strengthening New Zealand's company registration process.

These measures include the possibility that New Zealand registered companies may be required to have a New Zealand resident director (as is currently the case in Australia, Canada, Singapore and other countries). This may make it more difficult and expensive for companies owned by foreign interests to be incorporated in New Zealand. Local directors would probably require adequate remuneration and directors' and officers' indemnity insurance cover before agreeing to accept appointment as the New Zealand resident director.

In addition, directors may be required to provide other information to the Companies Office to help in verifying their identities such as dates of birth.

The recent case of SP Trading Ltd highlights concerns with New Zealand's current registration process.

Continued over page

BUSINESS LAW UPDATE, CONT.

This New Zealand registered company chartered a Georgia registered cargo plane in Asia for the purposes of transporting arms. Inquiries revealed that the address recorded at the Companies Office as the director's residential address was simply a rented "virtual office" in Queen Street, Auckland. Because this person was in fact resident overseas and their identity is uncertain, attempts to prosecute the participants under relevant laws (in this case, terrorism laws) would be unlikely to succeed.

Enforcement of "Phoenix Companies" legislation begins – caution when restructuring

The Ministry of Economic Development's first prosecution under Phoenix Companies legislation serves as a timely reminder of the care that needs to be taken to ensure restructurings do not contravene this relatively new regime.

A "Phoenix Company" is a company known by a pre-liquidation name (or a similar name) of a failed company – a company liquidated at a time when it is unable to pay its due debts. Directors of a failed company are prohibited from being a director or involved in the management of a Phoenix Company for a period of five years.

Any individual who contravenes this restriction is now also prohibited from being a director, promoter or otherwise participating in the management of any company for a five year period. In addition to significant penalties, such persons may also be personally liable for the debts of the Phoenix Company.

The prohibition also extends to being concerned in a "business" with the same or similar name as a failed company, therefore involvement in other business entities, such as partnerships, will also be captured.

In the context of a restructure, care should therefore be taken to ensure that the transferor company is solvent at the time of the transaction where the business and assets of one company are transferred to another company of the same or similar name.

Anti-Counterfeiting Trade Agreement – rights of intellectual property holders enhanced

New Zealand recently hosted the eighth round of negotiations in relation to the Anti-Counterfeiting Trade Agreement ("ACTA"), the participants of which include the United States, Australia, Canada, the European Union, Japan, South Korea, Mexico and Switzerland.

The goal of ACTA is to combat the ever-increasing global trade of counterfeit goods and pirated copyright protected works by establishing common standards for intellectual property rights enforcement among signatory states.

The aim of increased rights available to intellectual property holders under ACTA is to significantly reduce losses to businesses in New Zealand and signatory states resulting from counterfeiting and piracy. This is an ongoing problem. For example, between 1997 and 2007, New Zealand Customs intercepted approximately 1.1 million counterfeit goods and studies show that piracy cost the New Zealand film industry $70 million in 2005 alone.

ACTA's focus though is on global trade on a commercial scale – not intellectual property rights infringements by individuals for private use.

A draft text of ACTA has been made publicly available since the Wellington round of negotiations. In its current form ACTA requires (among other things) that all signatory states ensure that intellectual property rights holders:

- under civil procedures: have the right to seek damages and have profits accounted for, have the right to request that infringing goods be destroyed as well as the right to request that materials and implements used in the manufacture of infringing goods also be destroyed and have the right to request that information be given to them which an infringer possesses in relation to the origin and distribution network of the infringing goods (which may include the identity of persons involved in any aspect of the infringement); and
- under border measures: have the right to request that authorities suspend the release of suspected infringing goods, have the right to request information about specific shipments of goods (including description and quantity) and have the right to request the name and address of consignors, importers, exporters and consignees and the country of origin of infringing goods together with the name and address of the manufacturer.

If you wish to discuss any of the above, please contact **Liesl Knox** on **+64 9 375 8756, Christopher Tompkins** on **+64 9 375 8742** or **Matthew Bishop** on **+64 9 375 8786.**

HESKETH HENRY BRINGS NEW ZEALAND CLOSER TO EUROPE

Hesketh Henry not only has a solid presence in New Zealand but also a strong focus on international markets. One key example is the firm's well established connections with Europe which has resulted in the firm advising European clients in a variety of matters including mergers and acquisitions and other business transactions as well as acting for investors with extensive commercial property portfolios.

This strength is driven by the fact a number of the firm's practitioners speak fluent German. Managing Partner, Erich Bachmann, is a native German speaker which, he says, often gives German speaking clients a level of comfort in dealing at a business level with a New Zealand firm. Apart from being the Honorary Consul of the Federal Republic of Germany in Auckland, Erich is also the President of the New Zealand German Business Association, the official representative in New Zealand of the German Chamber of Industry and Commerce.

"All German businesses are required to belong to this organisation which means it has millions of members and is an incredibly powerful organisation in terms of lobbying. This size of membership also offers the potential for unrivalled connections in a country which is Europe's leading economic power house."

Mr Bachmann says it is the combination of the extensive connections the firm has forged with European companies and investors and information about Hesketh Henry available in Germany, Switzerland and Austria that has assisted the firm in becoming a first port of call for many enterprises wishing to do business in New Zealand.

In addition to these very strong connections in Europe, over the years the firm has also worked on fostering a network of international contacts, including international corporations and offshore law firms across Asia, the US and Australia. These connections are underpinned by the firm's membership and active participation in a number of alliances and associations.

For further information please contact **Erich Bachmann** on **+64 9 375 8709**

NEW UNIT TITLES ACT PROVIDES GREATER PROTECTION FOR PURCHASERS

Unit title developments have multiple owners and take the form of apartment blocks, townhouses, office and industrial blocks or retail complexes. Individual unit owners of a development will have shared ownership in common areas such as lifts, lobbies or driveways. Collectively, all of the individual owners of the development make up a body corporate. The body corporate has a responsibility for a range of management, financial and administrative matters relating to the common property and to the building as a whole.

The Unit Titles Act 2010 ("Act") was passed into law on 1 April 2010. This Act governs the duties of the individual unit owner and the body corporate.

Although the Act has been passed, the provisions cannot be enforced until the supporting regulations have been finalised. The regulations will cover issues such as covenant structures, management and maintenance, financial statements and disclosure requirements.

It is currently anticipated that the date for the commencement of the Act will be in late 2010 or early 2011. Until the Act takes effect, the provisions of the Unit Titles Act 1972 remain in force.

Requirement of disclosure

The Act has been greatly improved to provide significant consumer protection. An essential requirement of the Act is a mandatory disclosure regime for vendors and developers to enable purchasers to make informed choices.

The Act imposes four forms of disclosure:

- pre-contract disclosure, which the seller provides before entering into an agreement for sale and purchase
- pre-settlement disclosure, which the seller provides after entering into the agreement for sale and purchase but before settlement of the sale
- additional disclosure, which the seller provides on request from the buyer
- disclosure by the original owner to the body corporate, which the original owner provides to the body corporate on the date its major control ends.

Pre-contract disclosure statement

Before a purchaser enters into an agreement to purchase a unit, the vendor must provide a pre-contract disclosure statement to assist them to make an informed and confident decision about a purchase. The Department of Building and Housing has indicated that the pre-contract disclosure statement is likely to include the following:

- certificates of title
- unit plans, including stage plans and proposed plans
- ownership and utility interests
- body corporate rules
- any easements or other restrictions affecting the title
- Land Information Memorandum and
- claims settled or currently within the Weathertight Homes Resolution Service.

Pre-settlement disclosure statement

Once an agreement to purchase has been entered into, the vendor must provide a pre-settlement disclosure statement no later then the fifth working day before the settlement date.

The pre-settlement disclosure statement must be certified by the body corporate who may withhold certification if any debt due to the body corporate by the vendor is unpaid.

A pre-settlement disclosure statement will provide information about the financial commitment a purchaser is making, such information is likely to include:

- the body corporate contributions
- the manner and time of payment for those contributions
- whether the contribution has been paid
- amounts outstanding
- whether there are any unpaid metered charges
- whether the body corporate has entered any contract for repair or maintenance which will incur a levy payable by the owner
- the rate at which interest accrues on any money owing to the body corporate

- whether the body corporate has received notice that any court or tribunal proceedings involving the body corporate are pending
- the body corporate rules; and
- the long term maintenance plan.

Additional disclosure statement

The purchaser may at its own cost request from the vendor additional information other than that contained in the pre-contract and pre-settlement disclosure statements.

Such information is likely to include:

- balances of all funds or bank accounts operated by the body corporate
- accounts of the body corporate
- body corporate minutes
- insurance details
- lease details (if applicable); and
- contract details for body corporate and the body corporate committee.

The requirement of the vendor to provide the purchaser with the mandatory pre-settlement disclosure statement and, if requested, the additional disclosure statement is of paramount importance to the vendor and the vendor must ensure that it does so within the prescribed time frames.

Under the Act and the current ADLS standard agreement the purchaser has the right to postpone settlement if disclosure is not made within the prescribed time.

A major change to the rights of the purchaser is that the Act also entitles the purchaser to cancel an unconditional contract for non disclosure by the vendor.

This means that from a situation where a disclosure statement has been unintentionally omitted or a body corporate withholds certification of a disclosure statement due to unpaid debts resulting in disclosure being provided outside the required time period, the purchaser may cancel the agreement.

A vendor, operating within an unconditional agreement, may have also entered into on-going commercial arrangements with other parties and cancellation by the purchaser will result in a costly flow on effect.

Disclosure by the original owner

The Act requires turnover disclosure between the original owner of the development (usually the developer) and the body corporate. The purpose of a turnover disclosure statement is to make sure that when the original owner no longer has a majority control over the development (that is likely to be the date from which it no longer exercises 75% of the votes of the body corporate), the body corporate has the right information to support its maintenance function.

Information to be included in a turnover disclosure statement is likely to include:

- as-built building plans and specifications
- asset schedules
- code compliance certificates
- maintenance schedules of construction materials and infrastructure from manufacturers or installers
- warranty and guarantee details for products used in the construction of the unit title development
- fire evacuation plans
- building warrant of fitness
- existing and proposed maintenance and service contracts; and
- any direct or indirect interests the original owner or any associate of the original owner has in any contract or arrangement.

The turnover disclosure statement will ensure the body corporate has all the information needed to manage the development.

The effect of the warranties to be provided by the vendor in respect of the disclosure statement places the onus squarely on the vendor. However, the benefits to the purchasers are considerable and will enable a purchaser to make an informed decision about whether to purchase the property and provide an awareness of its rights and responsibilities, what the body corporate does, who is responsible for running the development and how well the development is doing financially. The disclosure measures provide a significant degree of consumer protection and confidence.

It will be interesting to see the prescribed information stemming from the regulations and the implementation of the Act once it comes into force. It is recommended that legal advice be sought to ensure that the information supplied complies with the Act.

For further information please contact **Barret Blaylock** on **+64 9 375 8753.**

NEW FACES

MERRAN CHISHOLM
Senior Associate

Merran's extensive experience has included working for a mid-sized commercial firm establishing its litigation practice. The practice specialised in commercial litigation including finance, priorities of securities, liquidators' and receivers' actions and civil claims in the construction industry.

KATE ASHCROFT
Senior Solicitor

Kate joined Hesketh Henry's Employment team after working with a boutique employment law firm in Auckland and a large Waikato firm. She is passionate about employment law and has advised employers across a range of industries, including education, transport, manufacturing, forestry and local government, with clients ranging from small and mid-range businesses to large and multi-national corporates.

STACEY HAHN
Senior Solicitor

Stacey brings to Hesketh Henry's Litigation team considerable experience from her five years at the Australian law firm, DibbsBarker. She joined that firm as a paralegal in 2004 and was promoted to solicitor in July 2006 after being admitted to the bar. As a solicitor, she initially worked for a partner who was later appointed a Federal Magistrate, and subsequently for a partner recognised as one of Sydney's leading insolvency lawyers.

MATHEW BISHOP
Senior Solicitor

Mathew joined our Corporate and Commercial team in March 2010. He has experience advising on a broad range of corporate and commercial and banking and finance transactions, with a particular focus on mergers and acquisitions, venture capital, joint ventures, project and acquisition finance and capital raisings.

DINESH MENON Solicitor

Dinesh joined our Private Client team after working as a solicitor at Babbè Advocates in Guernsey, where he undertook trust and private client work for high net-worth private and institutional clients in Guernsey and Europe. This included work that involved multijurisdictional issues and parties. Dinesh has also worked in South East Asia, the Pacific and the Caribbean.

RANDALL WALKER
Solicitor

Randall joined our litigation team after 11 years in the Royal New Zealand Air Force. After spending time as a pilot, he transferred to the New Zealand Defence Force's Directorate of Legal Services in mid-2007. Randall brings with him a broad range of experience in criminal law, public and administrative law, commercial and contract law, employment law, and international law. Randall graduated with a Bachelor of Laws degree from Victoria University in 2007,and is currently studying towards his LLM.

JOANNE CHILVERS
Senior Solicitor

Joanne Chilvers has returned to the Hesketh Henry Commercial Property team after three years in London where she worked for a large international law firm on a range of transactions including property finance, leasing and commercial property sales and acquisitions. Joanne's focus at Hesketh Henry will be leasing and sales and purchases.

SARAH HOLDERNESS
Law Graduate

Sarah Holderness joins the Hesketh Henry Litigation team after graduating with a Bachelor of Law (Hons) and Science from the University of Auckland. She will be admitted to the bar in September.

HARRIET DYMOND-CATE Solicitor

Harriet Dymond-Cate joined the Hesketh Henry Litigation team after two years as a solicitor at Grimshaw & Co where she specialised in litigation and dispute management, with a specific focus on the leaky building disputes. Between 2008 and 2010 Harriet worked on an array of litigation and dispute cases appearing as co-council in numerous judicial conferences, mediations as well as working for a Weathertight Homes Tribunal adjudication.

SARAH BROOKS Solicitor

Sarah joined our Litigation & Dispute Resolution Team in 2009 after a seven year stint in the media industry, three of which were spent working in the UK. During this time Sarah worked with clients including SKYCITY Entertainment Group, BBC, Vodafone and Microsoft MSN. Drawing on her experience in the media industry, Sarah brings to Hesketh Henry a strong skill set including an understanding of advertising, media and intellectual property. Sarah achieved a conjoint Bachelor of Law and Arts degree from the University of Auckland and will complete a Master of Laws in 2010.

VIVIANA HERMIDA

Viviana joined Hesketh Henry in early 2010 to take care of all in-house training within the firm. She joins us from Brookfields Lawyers and has a degree in Adult Education and Learning.

PROTECTING THE NEST EGG

The case of **Kidd v Van den Brink**[1] concerns a son of the well-known 'rich listed' Van den Brink poultry family, Stephen Van den Brink ("Steve"), and his ex-wife, Nicola Kidd ("Nicola"). Due to the social status of the Van den Brink family, this case made headline news in the National Business Review. The High Court's decision in this case provides comfort that a trust established by a parent well before their children's marriage will be shielded from an attempt by a child's spouse to make a claim against that trust.

Steve's father, Anthony Van den Brink ("Anthony"), established the Hilversum Family Trust No. 2 ("Trust") in January 1990. When the Trust was established Anthony had four adult children between 16 and 22 years old, including Steve, and none of the children were married at that time. The trust deed for the Trust defines 'the Final Beneficiaries' as being any children of Anthony and included in the definition of 'the Discretionary Beneficiaries' is any wife, husband, widow or widower of any Final Beneficiary. The trust deed provides the trustees with wide powers to apply the assets of the Trust towards the benefit of any one or more of the Discretionary Beneficiaries of the Trust.

Steve and Nicola commenced living together in August 1998 and occupied a property owned by the Trust. They were married in early 2001; had a son in 2004; separated in May 2006; and their marriage was dissolved in August 2008. During their relationship the Trust provided the couple with a family home, paid various expenses, provided chattels such as cars and horse trucks, and partially funded, by way of a loan of $500,000, the acquisition of a landscaping business.

Nicola applied for a court order, under section 182 of the Family Proceedings Act 1980, to provide capital to her out of the assets of the Trust, including a suitable residence for her son and herself. She asserted that the Trust was set up for the purposes of acquiring and preserving assets for Anthony's children, their spouses and the children of their respective marriages and, as such, the Trust constituted a trust settlement on Steve and her, in her capacity as a spouse (based on the definition of 'Discretionary Beneficiaries').

Section 182 has been on New Zealand's statute books for many decades, but it is only in recent years that it has been actively argued and applied. In order for section 182 to apply, the Trust must be an 'ante-nuptial' or 'post-nuptial' settlement, but what exactly does this mean? In the **Van den Brink's** case, the courts grappled with this concept and clarified the law.

The trustees of the Trust applied to strike out Nicola's application on the basis that the Trust could not be regarded as being an 'ante-nuptial' or 'post-nuptial' settlement made on Steve and Nicola, as:

- the Trust was established about eight years before Steve and Nicola met and about eleven years before they got married; and
- the Trust was not established in contemplation of, or as a result of, Steve and Nicola's marriage, nor was it a settlement on either Steve or Nicola in their respective capacities of husband and wife.

Both the Family Court and, on appeal, the High Court agreed with the trustees. There were no grounds for making an order to benefit Nicola as the Trust was not an 'ante-nuptial' or 'post-nuptial' settlement on Steve and Nicola.

The High Court decided that Nicola's application failed because:

- the Trust was established and became operational several years before Steve and Nicola had even met, and it was created for the benefit of a wide group of beneficiaries, including Anthony's grandchildren, other family trusts, family companies and charitable trusts; and
- all of Anthony's children were unmarried when he established the Trust and the trust deed did not make specific reference or relate to any particular marriage.

At best, the trust deed contemplated a marriage might occur, but not specifically Steve and Nicola's marriage.

[1] High Court, Auckland [21 December 2009] (CIV-2009-404-4694)

By **Mary Joy Simpson**, Senior Associate
and **Dinesh Menon**, Solicitor

Furthermore, according to the High Court, the Trust was not based on the existence or continuation of Steve and Nicola's marriage, and its purpose was not to make continued provisions for their particular marriage. There is not a sufficient link between the Trust and Steve and Nicola's marriage. In essence, the Trust's purpose was to provide for a range of individuals who might include Steve's wife, while Steve and his wife remained in a state of marriage, or any other person who married one of Anthony's children.

The lawyer for Nicola tried another route by arguing that subsequent addition of assets to the Trust during the time when Steve and Nicola were married can be regarded as being individual post-nuptial settlements since Nicola, at the time of the addition (i.e. settlement) was a 'wife of any Final Beneficiary'. The High Court rejected this argument stating that each addition of assets to the Trust during the marriage could not be regarded as the creation of separate trusts since, to do so, would be artificial. The Trust defines 'trust fund' as being 'the trust fund from time to time in existence'. The Court found that there was one trust to which various items of property were added and held as a mass, not several 'trusts' in identical terms with individual items of property held on trust separately. On that basis, the Court found that each subsequent addition of assets to the Trust did not constitute a new or separate post-nuptial settlement in relation to the marriage of Steve and Nicola.

This decision provides some comfort for parents who are making provision for children and their spouses through a family trust. Just because provision is made, does not make the trust vulnerable to a claim by a child's spouse. However, each case rests on its facts and this decision may have been different if the Trust had been established during Steve's and Nicola's marriage. Therefore, we would recommend trusts have a narrow group of beneficiaries and not include spouses, civil union partners or de facto partners as beneficiaries, unless it is intended to directly benefit these people.

For more information contact **Mary Joy Simpson** on **+64 9 375 8776.**

A BIT OF SPARK! BRIGHTENS LAW FIRM OFFERING

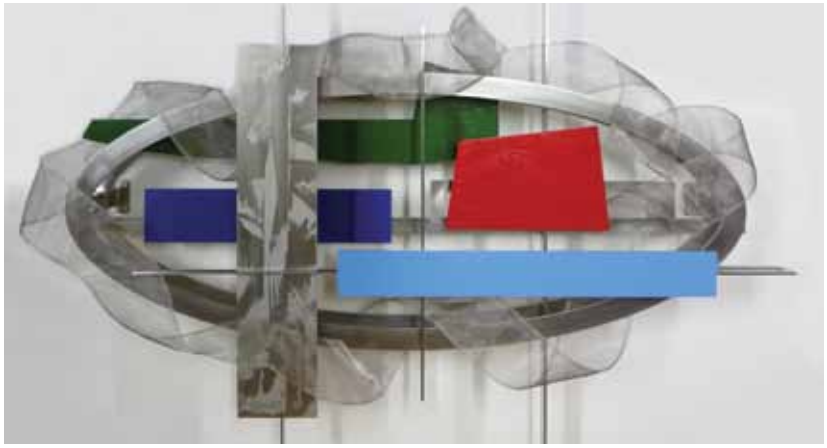
Hesketh Henry runs a unique, firm-wide programme aimed at empowering and enhancing the skills of our intermediate and senior solicitors. Dubbed Spark!, the programme aims to provide solicitors with the necessary skills before they arrive at senior associate or partner level.

The goal is to support, grow and retain young talent, develop strong multi-disciplinary teams to provide comprehensive services to clients and meet the global challenges of rapid change, collaboration and new partnerships.

Regular tailored training sessions are held throughout the year, focused on developing core skills. Spark! also provides members with networking opportunities with a view to building and developing business opportunities. Recent training topics have included personal marketing, presentation skills, using technology to improve efficiency and managing client relationships. This year's programme has also involved networking events with accounting firms PKF Ross Melville and the Restaurant Association.

For more information contact **Katie Ashby-Koppens** on **+64 9 375 8761.**

NZ SCULPTURE ONSHORE HITTING THE SHORE



Curator Rob Garrett

Hesketh Henry is delighted to be a key sponsor of this year's NZ Sculpture OnShore, the largest outdoor sculpture event in New Zealand, for the fourth consecutive exhibition.

Curator Rob Garrett says this year's exhibition will provide art lovers and collectors with an opportunity to see a fresh and diverse snapshot of current contemporary art practice from around New Zealand.

"Most of the art works have been specifically made for the exhibition and will include innovative site-specific works, beautifully crafted works in bronze, steel, ceramic, glass, stone and found materials and a group of sculptures that will literally tower over visitors – from a human giant by Christian Nicolson to an elegant abstract column by Humphrey Ikin."

Mr Garrett says the exhibition will feature works by over 100 New Zealand artists, including well established names such as Peter Lange, Bronwynne Cornish, Christine Hellyar, Sally Tagg, Paul Dibble, Gill Gatfield, Paora Toi-Te-Rangiuaia and Gregor Kregar together with talented newcomers such as Iain Cheeseman, Yona Lee, Yolunda Hickman, Sean Crawford, Carolyn Williams, Anna Korver, Niko Thomsen, Ben Foster, Tim Holman, Trish Clarke and Paul Brunton.

Hesketh Henry Managing Partner Erich Bachmann says the firm is a strong supporter of the arts in New Zealand.

"We believe NZ Sculpture OnShore is a great opportunity for both established and emerging artists to showcase their works in a dramatic setting. We are thrilled to be involved in such an iconic event which has also raised hundreds of thousands of dollars for Women's Refuge."

The event will be held on the cliff-top site of Fort Takapuna on Auckland's North Shore from 3–14 November 2010.

www.nzsculptureonshore.co.nz