Welcome to the July edition of Enterprise, our quarterly online magazine for business owners and entrepreneurs, bringing you insights into the latest commercial and legal developments.

This edition brings you an interview with Christine Corbett, Australia Post’s Executive General Manager Postal Services, where we chat to Christine about transitioning to the digital age, diversity, and the traits of a successful leader.

We also feature:
• the Federal Government’s draft bill facilitating increased trading in retail bonds in Australia
• welcome changes to BCIPA for Queensland contractors
• legislative reforms simplifying disclosure requirements for land sales off-the-plan
• an update on streamlining the Future of Financial Advice regime
• indemnity clauses in commercial contracts.

Finally, we’re delighted to announce that internationally recognised chief economist Clifford Bennett is the keynote speaker for our annual Forum later this year. Regarded as the world’s most accurate currency forecaster, Clifford will provide cutting edge commentary on economic and financial market developments and join our discussion panel.

What a whirlwind start to the new financial year! The new Federal Senate is due to sit with its somewhat motley crew, the Government has passed the wind back of some of the Future of Financial Advice reforms, the share market generated an annual return of 13 percent (and 18 percent when dividends were included), and a 19 year old Aussie beat the world number one at Wimbledon. And that was all on day one!

The world of commerce needs political stability to confidently stride forward, take risks to create jobs and become more productive. There was once a time when every Federal Senator was from one of the two major parties or represented the Democrats or Greens. Now, with representatives of the Palmer United Party, Family First, independents and, of course, the Australian Motor Enthusiasts, there is no doubt this new Senate will be a challenge for Tony Abbott and the legislative changes he wants to push through. The Prime Minister was relatively confident the carbon tax would be abolished but he is probably jittery about how much more will pass. We can only hope that sense prevails and, if any compromises are to be reached, they are done quickly and effectively.

The economy is still a little patchy, but things are undoubtedly better compared to 12 months ago and the financial press is reporting on robust corporate balance sheets. Most of the sectors in which we act are feeling remarkably buoyant. More property development is happening (although now is a great time to get a cracking lease incentive on commercial premises), fund managers are ramping up establishment and distribution, and even corporate IPO and M&A activity is gathering momentum.

We would like to take this opportunity to thank all of our clients and referrers for the work you have entrusted to us. The 2014 financial year ended well and we are looking forward to an even better 2015.
IN PROFILE

Christine Corbett
Executive General Manager
Postal Services
Australia Post

In this edition partner Langton Clarke chats with Christine Corbett, Australia Post’s Executive General Manager Postal Services, about innovation and the transition to the digital age, diversity, and the traits of a successful leader.

LC: Over the years, Australia Post has made a very significant investment in infrastructure, products and services in support of the digital economy. What has been the greatest challenge in moving Australia Post ahead in the digital age?

CC: Australia Post is one of our nation’s best known brands and has been around for 205 years. The business was founded on face-to-face interaction with customers across the post office counter or via daily mail delivery.

However, our customers’ communication needs are continually changing and our products and services need to adapt and evolve with them. While our market research shows our customers want us to succeed, we need to diversify if we want to be here for the next 205 years.

Our objective is to be a multi-channel player and place the choice between face-to-face interaction and digital products in our customers’ hands. This has meant accelerating investment in a whole range of areas where customer access, convenience and choice is the priority.

For example, Australia Post has recently invested in self-service bill payment terminals in retail outlets as well as 24/7 parcel lockers which offer the ultimate delivery convenience.

LC: McMahon Clarke strives for excellence and innovation. What are the key strategies Australia Post has adopted to become recognised (BRW magazine 2012) as one of Australia’s most innovative companies?

CC: The last four years has seen a real focus on cultivating our own talent and seeking complementary talent. Our mantra is about having the right people, with the right skills and capabilities, a clear strategy, and the right processes and disciplines in order to achieve great results.

Our talent programs are implemented from senior leadership through to frontline leadership. Australia Post recognises and encourages diversity, and that’s where the investment in lots of different people, rather than lots of like-minded people, comes in.

While innovation is a focus for us, great execution is essential.

LC: Australia Post now has Australia’s largest retail network. How did Australia Post go about identifying the opportunities in the retail sector and then exploit them?

CC: It was about looking at things that are naturally adjacent to our core business of delivering mail. For example, it was as simple as thinking that if our customers receive bills in the mail we can provide bill payment services and then extending that to banking services.

With 1 million customers we had to look at leveraging opportunities to cross-sell and up-sell. So we explored adjacent activities to identify everyday jobs we could help our customers with. That’s how we cultivated the market in identity services (eg for financial service providers and passports) and expanded to products like the Australia Post gift card and multi-currency card.

Then we went further up the value chain searching for natural adjacencies and expanded our travel services to a one-stop-shop incorporating passport services, foreign currency, travel SIM and travel insurance.

LC: Your new role as Executive General Manager Postal Services involves leading many large teams of people. What do you regard as the most essential characteristic of a successful leader?

At the end of the day it’s all about great transparent communication. People want to know what it means for them so I strive to have open and honest conversations with my team. Also, a good leader needs to admit that they don’t have all the answers.
Better business for property industry

In a positive next step towards reducing red tape and making Queensland an easier place for property developers to do business the Queensland Government continues to roll out legislative reforms.

Real estate special counsel Adam Geldard says the Land Sales and Other Legislation Amendment Bill (Bill), which was introduced on 3 June 2014, should be well received by the property industry as it provides greater flexibility for doing business and simplifies the disclosure requirements for land sales off-the-plan.

**Headline changes**

If passed, the Bill will amend the Land Sales Act, Body Corporate and Community Management Act and the Property Law Act. The key changes include:

- increasing the minimum deposit amount allowed under contracts for sale off-the-plan (from 10 percent to 20 percent of the purchase price);
- extending the maximum possible sunset date for settlements under community title lot contracts from three and half years after signing the contract to five and a half years;
- removing the requirement for a development permit before selling land lots off-the-plan;
- reducing disclosure requirements, and
- exempting (automatically) landowners from permit before selling land lots off-the-plan.

The Bill does not include transitional provisions. If passed, the Bill will only impact contracts signed after the new legislation commences. Contracts already signed will not be impacted.

**What are the key proposals?**

The Corporations Amendment (Simple Corporate Bonds and Other Measures) Bill (Bill) has recently been introduced into parliament to amend the Corporations Act in a number of significant respects.

The Bill proposes a reduced disclosure regime enabling the offer of simple corporate bonds subject to a two-part prospectus rather than a full prospectus. The two-part simple corporate bonds prospectus will be comprised of:

- a base prospectus with a three year shelf life and containing general company information, and
- an offer-specific prospectus issued at the time of each offer and combining with the base prospectus.

Simple corporate bonds will be able to be offered to retail investors using depository interests (ie a beneficial interest in the underlying corporate bond) in line with the framework adopted for retail trading in Commonwealth Government Securities.

**What are simple corporate bonds?**

'Simple corporate bonds’ must be debentures that satisfy a number of conditions, including the following:

- The debentures must be quoted on a prescribed financial market, have a fixed term of not more than 15 years and have a maximum price of $1,000 each. The price must be the same for all investors who accept the offer.
- The debentures must bear interest at a fixed rate, or at a floating rate plus a fixed margin (and the fixed rate or margin must not be decreased during the term). Interest must be paid periodically and cannot be deferred or capitalised by the issuing body.
- The debentures must not be convertible into another class of securities and must not be redeemable (other than at the end of the fixed term) except in limited circumstances.
- The debt to debenture holders must not be subordinated to debts owed to unsecured creditors.
- The issuing body must have continuously quoted securities or be the wholly-owned subsidiary of a company that has continuously quoted securities. If the issuer is such a subsidiary, then the bonds must be guaranteed by the parent company.
- The auditor’s report about the most recent annual or semi-annual financial report of the issuer must not contain certain statements or qualifications (eg a description of a defect or irregularity in the financial report).

Under the new regime, a minimum investment requirement of $50 million will apply for the first offer of simple corporate bonds made during the three year shelf life of a base prospectus. ASIC can determine that certain bodies do not qualify to issue simple corporate bonds under the new regime.

It is expected the changes proposed under the Bill will provide Australian companies with a viable and attractive alternative to traditional fundraising mechanisms where the relevant conditions can be satisfied.

**What are simple corporate bonds will be able to be offered to retail investors using depository interests.”**

Directors will only be personally liable for misleading or deceptive statements in, or omissions from, the two-part prospectuses if they were actually involved in the defective statements. However, directors will continue to have an obligation to notify the bond issuer if they become aware of a defect during the offer period. Certain due diligence defences to criminal liability of directors for false or misleading statements in these prospectuses will also be introduced.
ASIC facilitates foreign companies offering securities

ASIC is proposing changes to facilitate offers for the issue or sale of CHESS depository interests (CDIs) which will encourage foreign companies to make equity offerings in Australia and promote investor understanding and confidence. Corporate advisory lawyer Rodney Yu explains the use of CDIs in the market, ASIC’s proposals, and the next steps.

What are CDIs?
CDIs are securities offered on Australian exchange markets (such as the ASX, NSXA or APX) to allow foreign companies domiciled in jurisdictions that don’t legally allow paperless holdings or electronic transfer of title (ASX is the typical settlement system used for equity securities traded in Australia) to access Australian equity capital markets and investors.

The holder of a CDI holds a beneficial interest in an underlying share of the foreign company. CDIs afford their holders all the same direct economic benefits as the underlying shares, such as the right to dividends and the right to vote. However, the actual share in the foreign company is registered to a depositary nominee. Whilst other depositary nominees may be used, CHESS Depositary Nominees Pty Limited (CDN) is the only entity to have been appointed by foreign companies to date.

CDIs have been traded on Australian exchange markets since the mid 1990s. However, uncertainty about how CDIs are regulated has resulted in many foreign companies applying to ASIC for individual relief. It is hoped this will encourage foreign companies to make equity offerings in Australia and remove uncertainty about how offers are regulated.

What will happen next?
Submissions in response to CP 220 are due by 25 July 2014, and the regulatory guide and class orders are expected to be released in November 2014.

Please contact us if you have any queries or require assistance making submissions.

In summary, the proposed class order will state the following:
- An offer of CDIs over shares in a foreign company will be regulated as though it were an offer of securities under Chapter 6D of the Act.
- The foreign company that offers and issues the underlying shares is taken to be the entity that offers and issues the CDIs (not the depositary nominee).
- The foreign company that issues underlying shares is not required to hold an Australian financial services licence for arranging for a depositary nominee to deal in CDIs over its shares.
- Foreign companies must explain the differences between holding CDIs and holding the underlying foreign shares in any Chapter 6D disclosure document offering CDIs.

ASIC also proposes to issue a new regulatory guide about what information would generally be expected to be included in disclosure documents to explain the difference between holding CDIs and holding the underlying foreign shares.

The effect of the proposed class order would be that foreign companies would no longer need to apply to ASIC for individual relief. It is hoped this will encourage foreign companies to make equity offerings in Australia and remove uncertainty about how offers are regulated.

ASIC’s proposals
On 28 May 2014, ASIC released consultation paper 220 Fundraising: facilitating offers of CHESS depository interests (CP 220). CP 220 sets out ASIC’s proposal to issue a new class order for CDIs where the underlying security is a share in a foreign company, quoted on the ASX, NSXA or APX and held by CDN as the depositary nominee.

Navigating the indemnity minefield
An indemnity clause is common in most commercial contracts, but these clauses are usually poorly understood and sometimes poorly worded. The existence and scope of an indemnity clause can become critical if a dispute arises from a commercial contract. If you are the party providing the indemnity, what control will you have over the payments you have to make? If you are the party relying on being indemnified, how will you ensure prompt payment?

Special counsel Brit Ibanez says it’s important to read and understand what the clause provides so you enter the contract with your eyes wide open.

What does the clause mean?
The scope and extent of an indemnity has spawned many legal disputes. When asked to interpret indemnity clauses, the court looks at the way the clause is drafted to see if the meaning is clear. If it is not clear, then the court will look at what the parties’ intended the clause to do.

Because the indemnity obligation in your contract could have significant repercussions, you should consider the following things:
- To what extent is the party indemnifying meant to cover those losses? Does the indemnity include all possible losses flowing from a breach or should it be restricted?
- Who would ordinarily be responsible to pay for the losses if the indemnity was not in the contract?
- Do you require additional insurance if you are providing an indemnity?
- If you are required to indemnify, then do you have the right to take over the defence or prosecution of the action, or are you dependent on the other party to manage the dispute?

All of these are important considerations when drafting an indemnity clause, and each indemnity clause must be tailored to the specific situation. McMahon Clarke can help navigate the indemnity minefield.

Brit Ibanez
Special Counsel
Corporate and Litigation

Rodney Yu
Lawyer, Corporate Advisory
Welcome changes to BCIPA for Queensland contractors

Proposed changes to the Building and Construction Industry Payments Act (BCIPA), which are expected to commence in September this year, will affect all industry stakeholders. Partner Kristy Dorney and lawyer Andrew Mackintosh report on the major issues with the current regime and the key proposed reforms.

Background

In late 2012, McMahon Clarke made a detailed submission to the Minister for Housing and Public Works in response to a discussion paper which sought feedback about the effectiveness of the existing BCIPA regime. We are pleased to report the new changes mooted by the Government should largely rectify many of the key issues we raised which is good news for our clients working in the building and construction sector.

Below we discuss some of the key issues we identified and the proposed reforms.

Adjudicator shopping

One issue with the current regime is ‘adjudicator shopping’ where claimants choose the adjudicator they feel would benefit their claim most. This gives rise to a perceived bias, regardless of whether the adjudicator is actually biased.

The Government proposes to form a single adjudication registry within the Queensland Building and Construction Commission which will appoint adjudicators to disputes and monitor their subsequent performance.

The benchmark for the requisite skills and qualifications of adjudicators will be increased and a requirement for continuing professional development will be introduced.

Payment claims

There is a perception claimants are not acting in the spirit of the BCIPA regime by neglecting to make payment claims in a timely manner.

It is proposed to reduce the timeframe within which to make a payment claim from 12 months to six months from when the work was last carried out or the goods or services supplied.

Timeframes

There is also a perception the system unfairly targets respondents because it allows claimants a significant period of time to formulate the payment claim but respondents only have 10 business days to provide their response. It is often necessary to engage relevant experts such as quantity surveyors to undertake inspections and consultation with legal representatives within this short timeframe.

The timeframe is also an issue because respondents are required to include everything they intended to rely on in any subsequent adjudication in the payment schedule. This means if something is missed in the rush to prepare the payment schedule, it could be fatal to the respondent’s case as it could not be brought before the adjudicator.

The proposed changes address these issues as follows:

• Allowing respondents to include in their adjudication response all relevant reasons for withholding payment, whether or not the reasons were raised in the payment schedule. Claimants will then be allowed to reply to the response.
• Excluding from the definition of ‘business days’ the Christmas holiday period (commencing three business days prior to Christmas and ending up to 10 business days after new year’s day).

Who will the changes affect?

The changes to the payment claim regime will generally apply from 1 September 2014. We would expect all participants in the building and construction industry will be impacted by these changes from September onwards.

What are the practical effects?

These changes are overwhelmingly positive and address many of the practical issues our clients have experienced with BCIPA. However, there is a small concern the amendments introduce another layer of complexity to what is supposed to be a simple system.

Contractors and anyone working in the building and construction sector should ensure they understand these changes, particularly given the amendments to the timing requirements and the new dual system. Also, the changes may impact on the terms of standard contracts or existing contracts and we recommend those contracts be reviewed before September to ensure you are not caught out by any of the changes.

Lastly, these changes may be amended further before implementation later this year so you should keep an eye out for further updates from our team prior to September.

McMahon Clarke is proud to announce that internationally recognised chief economist Clifford Bennett is the keynote speaker for our annual Forum later this year. Clifford has been rated as the world’s most accurate currency forecaster by Bloomberg News NY, and will provide cutting edge commentary on Australian economic and property sector developments and also join our discussion panel.

Please save the date:

• Brisbane - 17 September 2014
  7.30am - 9.00am, The Hilton Hotel (1190 Elizabeth Street, Brisbane)
• Sydney - 18 September 2014
  8.00am - 9.30am, Sofitel Sydney Wentworth (61 – 101 Phillip Street, Sydney)
• Melbourne - 19 September 2014
  8.00am - 9.30am, Hotel Grand Chancellor (1131 Lonsdale Street, Melbourne)

Your invitation will be issued soon.

UPDATE ON STREAMLINING FOFA

Following the Senate Economics Legislation Committee Report on the Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014 by way of the Corporations Amendment (Streamlining Future of Financial Advice) Regulation 2014 (Regulation), the changes to FOFA were intended to implement the government’s election commitment to reduce compliance costs imposed on the financial services industry.

On 15 July 2014 a Labour motion in the Senate to disallow the amendments was narrowly defeated by 34 votes to 31. The Regulation has introduced a number of changes to FOFA. Please click here to view an article by Partner Brendan Ivers and law graduate James Crinion which explains the key aspects of these changes.
NEW LITIGATION AND RISK MANAGEMENT TEAM MEMBERS

We welcome two new lawyers to our litigation and risk management team.

Andrew Mackintosh focuses on litigation and risk management in the areas of construction and planning law and has advised large scale commercial developers, major insurers and high net worth individuals.

Deirdre Madden, a qualified lawyer in Ireland, England, Wales and Australia, brings a broad range of litigation experience to the role, particularly the resolution of corporate and landlord/tenant disputes as well as estate administration.

SEMINAR: IPD MARKET RESULTS UPDATE

McMahon Clarke invites you to join us for the IPD market results update – Reviewing the value proposition for green buildings and the role of the ESG.

McMahon Clarke funds management partner Brendan Ivers will moderate a panel discussion, and our speakers include:

- Anthony De Francesco, Executive Director and Head of Australia & NZ, IPD
- Matt Allen, Partner, Real Estate, McMahon Clarke
- Dominic Ambriano, National Sustainability Manager – Property, AMP Capital
- Amanda Steele, Head of Sustainability, CBRE
- Peter Gill, Director, Urbis.

McMahon Clarke is proud to host this complimentary event.

Friday 29 August 2014
8.00am – 9.30am
The Hilton Hotel, 190 Elizabeth St, Brisbane

To register:
Please contact Avril Clayton
(avril.clayton@mcmahonclarke.com or 07 3239 2957)