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**Merry Christmas & Prosperity for 2013**

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*If you have any questions about the newsletter items, please contact us, we are here to help.*



Our offices will be closed from 5 pm, Thursday, 20 December 2012 until Monday, 13 January 2013.

If you require urgent assistance with any matter during the holiday period please leave a message with our answer service, or email jad@jdlo.co.nz, and we will contact you as soon as possible.



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**ELECTRONIC IDENTITY VERIFICATION BILL**

The Electronic Identity Verification Bill ('the Bill') had cross-party support for its second reading on 29 August 2012. The stated purpose of the Bill is to "facilitate secure interactions" between government agencies and individuals, by enabling people using the Internet to have a secure electronic identity to use when dealing with all government agencies.

Under the Bill, an individual will be able to apply for an Electronic Identity Credential ('Credential'), which is an electronic record stored by the newly created Electronic Identity Verification Service ('the Service'). The Service will be managed by the Department of Internal Affairs, and an individual's permission must be granted each time an agency wishes to access their Credential.

The process is designed to save each agency time and money because they can rely on the Service rather than having to set up and administer their own identity verification process. Hopefully the introduction of Credentials will also improve an individual's ability to deal with government agencies by utilising a uniform identification system.

**CREDENTIALS**

Applying for and using a Credential is optional. Each Credential contains personal information that can be accessed by a government agency when they need to verify the identity of an individual. A Credential can contain the following information about the person: full name (including past names or other names used), gender, date of birth and place of birth.

A photograph of the person does not form a part of the Credential. However, a photograph may be required in the application process. Other identity related information may be stored on the Service database, but only the information contained within a Credential

is expected to be released to government agencies. Other identifying information held, including any photograph, will only be accessible in limited circumstances.

#### **PRIVACY CONCERNS**

Clearly any proposal for the Central Government to store personal information, potentially available for access by its agencies and departments, will be controversial as "Big Brother" concerns spring to mind. To avoid any such concerns, the Bill puts significant controls on how the information can be used. It is telling that the Privacy Commissioner made submissions that were substantially in favour of the Bill to the Select Committee.

The principles of the Bill allow complete discretion for people to choose whether or not to have a Credential issued, and even whether to use a Credential once it has been issued. Therefore

government agencies must ensure that people without a Credential still have access to their services. The Credential is to be used for identification purposes, and may only be used by government agencies for the purpose of verifying identity. Information sharing between government departments is proposed in a separate, and perhaps complementary bill, in pursuit of the Government's objective of streamlining the public service sector.

The Bill proposes to make it an offence for anyone to use information stored in a Credential improperly. An individual can be sentenced with up to two years in prison and/or a fine up to \$50,000, while a corporation faces a fine of up to \$200,000. Anyone caught trying to use someone else's Credential, or applying for a second Credential, faces a similar punishment.

## **COMMERCIAL LEASES – RIGHTS OF RENEWAL**

Many tenants under commercial leases seek to negotiate a shorter initial term with rights to renew the lease in the future, rather than committing to a long term lease at the outset. These rights are referred to as 'rights of renewal', and allow the tenant some flexibility by giving them the right (subject to certain conditions) to renew the lease for a further term or let the lease expire.



lease. Tenants must ensure that when they give notice of their intention to renew the lease they are complying with all their obligations under the lease, including any non-monetary obligations. A tenant is advised to ensure it is aware of its obligations under the lease in advance of renewing the lease.

#### **EXERCISING THE RIGHT**

Generally a right of renewal is not exercised automatically. It is important, therefore, that any tenant wanting to stay in the premises is aware of the need to exercise the right of renewal, and to do so in advance. Continued occupation of the premises after the expiry of the current term does not mean the lease has been renewed. Although commercial leases vary, the widely used Auckland District Law Society lease requires the tenant to give at least three calendar months' notice of its intention to renew. This is usually done by the tenant giving written notice to the landlord, in accordance with the terms of the lease, that it wishes to renew the lease. If notice has not been given before the last three months of the term, the right to renew the lease may lapse, as the period of notice is a term of the renewal.

The tenant's decision to give notice of the intention to renew the lease must be carefully considered. It is a commitment to be responsible for all obligations under the lease for a further term, often a number of years.

#### **BREACH OF THE LEASE**

Almost all leases will provide that a tenant cannot exercise its right of renewal if it is in breach of the

#### **A NEW LEASE**

Where the lease is renewed pursuant to a right of renewal, it is deemed to be a new lease, rather than an extension of the prior lease. The landlord is entitled to require, as part of the renewal, that any guarantor of the existing lease also guarantee the new lease. It is, therefore, recommended that a landlord has the renewal formally documented, and signed by the guarantors to record their ongoing obligations. Guarantors should also review all aspects of the lease and think carefully prior to agreeing to this obligation.

#### **WHEN THE LEASE IS NOT RENEWED**

Provided that sufficient notice has been given, the tenant is not in breach and is complying with any conditions of the renewal of lease, the landlord must agree to a renewal of the lease. A tenant who has a right to renew the lease, and that right has been refused by the landlord, may apply to the Court for relief under the Property Law Act.

If you have missed the deadline for exercising a right of renewal, you wish to renew the lease but are in breach, or you have been refused by the landlord, contact us promptly. If relief from the Court is necessary, there are time limits within which you must apply.

## PERSONAL PROPERTY SECURITIES REGISTER AND TERMS OF TRADE

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Since 2002, New Zealand has had a universal register on which parties are able to register any security taken over assets (other than land) called the Personal Property Securities Register ('PPSR'). Security is rights in respect of an asset granted to a creditor to support your obligations to them. These rights commonly include the right to take ownership or control of the asset if you do not meet your obligations.



Anyone can register security (called a 'financing statement') for a small fee. The financing statement identifies the debtor (the party giving security), the secured party (creditor), and the collateral (the assets to which the security applies).

The priority of competing security interests depends on when the security interest was registered. Generally priority relates to the date of registration, even if the underlying security agreement was completed much earlier. If a financing statement is not registered, registered securities take priority. Prompt registration is, therefore, key.

### IMPACT ON TERMS OF TRADE

Before the PPSR, it was common for a supplier's 'Terms of Trade' to include a clause recording that ownership of the goods remains with the seller until payment for the goods is made in full (commonly known as a 'Romalpa clause'). However, the Terms of Trade alone will not protect against parties who have registered security. To obtain priority over other registered creditors, a financing statement must be registered on the PPSR.

### CONSEQUENCES ON LIQUIDATION

When a business goes into liquidation, the assets of the business are realised to repay as much of the debt as possible. Where there are competing creditors, the order in which they receive their share of any proceeds is determined by their

## ADLS BUILDING REPORT CLAUSE 9.3

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Recently the Auckland District Law Society ('ADLS') updated its Agreement for Sale and Purchase of Real Estate ('Agreement'). This Agreement is the most common contract used for the sale and purchase of real estate throughout New Zealand.

Amendments included the introduction of a pre-prepared clause for the purchaser's use when making the Agreement conditional upon a satisfactory builder's report. This clause is included

'priority'. Secured creditors have priority over unsecured creditors but even amongst secured creditors there is a pecking order. A creditor with a registered security interest takes priority over a creditor with unregistered security. Furthermore, a creditor with an earlier registered interest takes priority over a later one.

Since it is common for a bank to have a registered security interest over a trading company's present and future property, a supplier of goods or services on credit with an unregistered security interest takes a big risk.

### PURCHASE MONEY SECURITY INTERESTS

Fortunately, there is an exception to the normal priority rule. A Purchase Money Security Interest ('PMSI') is possible when personal property is taken as collateral to ensure the payment of the purchase price, and can apply to Terms of Trade type situations. A PMSI can take priority over an earlier general security.

In order to ensure the priority of a PMSI the supplier needs to ensure that:

- the buyer has agreed in writing to the security interest, and
- the security interest is registered within 10 days of the buyer taking possession.

A supplier is not required to register a separate financing statement every time it supplies goods, but rather can register a financing statement to secure goods supplied from time to time on credit.

### EXPIRY

Financing statements expire after five years. Once they expire the original registration date is lost, and with it priority is lost. Prior notice of a pending expiry is not given by the PPSR. It is up to the secured party to monitor their registered security interests to ensure they are renewed before they expire.

by indicating 'yes' on the front page of the Agreement, similar to a LIM report condition.

Previously, specific building report clauses were frequently prepared and inserted by the agent or purchaser's solicitor. These were contractual terms recommended to a purchaser to benefit them and protect their interests. These clauses were used by the purchaser to request that outstanding repairs and maintenance be completed, or negotiate reductions in the price or in some instances, cancel



the agreement. The clauses varied but tended to either:

- allow the purchaser to cancel immediately (as adopted by the ADLS Agreement), or
- set out a process by which the vendor is given the option of remedying issues raised in the building report, and only upon a refusal to do so, could a purchaser cancel.

#### THE NEW CLAUSE

The details of the building report condition are in clause 9.3 of the Agreement. It records that the Agreement is conditional on the purchaser obtaining a satisfactory building inspection report, with the purchaser to advise within 10 working days if the building report is unsatisfactory. Crucially, the clause contains the requirement that this report be “prepared in good faith by a suitably-qualified building inspector in accordance with accepted principles and methods”.



#### ‘SUITABLY QUALIFIED’?

The meaning of “suitably qualified building inspector” is vague, with a builder or at least someone experienced in the building industry envisaged. The ADLS has indicated that in principle this can include an ordinary builder, provided the

builder has experience in the particular type of building that is being inspected.

It is in the purchaser’s best interest to obtain a thorough inspection and report from a builder or specialised building inspection company that is experienced in inspecting properties and has appropriate liability insurance in place. A purchaser cancelling the agreement based upon a building report must, if requested, immediately provide a copy of the report.

It is possible that purchasers who attempt to avoid agreements may find themselves being challenged by vendors, as the clause requires an objective assessment of the property. As yet it has not yet been established what issues will be too insignificant to justify cancellation. Regardless of the provisions of the clause, it may still be possible for parties to co-operate and agree for any issues raised in a builders report to be remedied prior to settlement.

The new clause may not always meet your needs. A vendor of a building with identified issues may want the option of undertaking the works prior to settlement, to prevent the sale being cancelled once an inspection has been obtained. It is always prudent to seek legal advice before signing an agreement, to explore alternative or additional provisions as necessary.

## SNIPPETS

### OLYMPIC LITIGANTS – LONDON 2012

The courtroom may not be an athlete’s usual arena of competition, however disputes do arise in sport like anywhere else.

The Court of Arbitration for Sport is the supreme tribunal for all sports-related disputes across the globe. Ordinarily based in Switzerland, the Court established a specialist ad hoc division in London for the Games. Its charge: to quickly, freely, and finally determine any and all disputes that may arise throughout the competition.



In total, 11 disputes by athletes and nations were decided by the Court in London. The issues varied, but in all cases the Court pulled together a panel of arbitrators from around the world to make a decision, usually within 24 hours, offering real-time solutions for athletes at the Games.

The women’s triathlon was such a case. Sweden, whose athlete received the silver medal after a photo finish, challenged the referee’s decision believing she deserved gold. The Court upheld the ‘field of play’ principle and decided not to intervene. Rightly or wrongly the referee had made the call. Further argument was reserved for the fans alone.

### LAWYERS V CONVEYANCERS

Not everyone acting for a buyer or a seller in a real estate transaction is a lawyer. The Lawyers and Conveyancers Act 2006 introduced to New Zealand the separate profession of ‘Conveyancer’. Conveyancers are distinct from ‘Lawyers’ or ‘Solicitors’. They are not required to hold law degrees or be supervised by lawyers.



Lawyers may provide a full range of services to the public, being both conveyancing services, and general legal services. Conveyancers may provide conveyancing services, but are unable to advise on other areas of law.

Buying or selling a property or business rarely happens in a vacuum. Personal, business and financial factors are all often critical considerations. We cannot only advise on the transaction at hand, but also on how the transaction will affect you and your family. Relationship property laws, estate planning and protection from creditors, while not an extensive list, are all factors you should be talking to us about when buying or selling.