Piper Alderman

The impact of the Personal Property Securities Act on leasing or hiring equipment

This is the second of a series of articles that will examine the impact of the Personal Property Securities Act 2009 on specific business sectors. In this article Corporate Lawyer, Llon Riley deals with the impact of the PPSA on leasing or hiring equipment.

With less than 12 months before the *Personal Property Securities Act 2009* (Cth) (**PPSA**) is scheduled to apply it is vital for lessors to prepare for and understand the impact that the PPSA will have on their current practices of preserving and protecting their security interests in the goods they lease or hire. If lessors do not take heed of the provisions of the PPSA they risk losing their interests, including title, in the goods they lease or hire and having their interests in those goods rank behind the interests of other creditors.

It is expected the PPSA will start to apply on 1 May 2011.

In this article a reference to a lessor means both an equipment lessor and the owner of property the subject of a hire agreement and a reference to a lessee means to both a lessee and hirer of personal property.

What is the PPSA and what leases and hiring agreements will it govern?

The PPSA creates one national regime for security interests over personal property. The national regime will be made up of the PPSA, including the regulations, and the Personal Property Securities Register (**PPS Register**). The PPSA also introduces substantive changes to the current laws that govern security interests and the methods used to protect those interests.

The PPSA governs security interests in tangible and intangible personal property. Personal property is any kind of property other than land, fixtures, water rights and certain licenses and authorities granted under Commonwealth, State or Territory laws. Common examples of personal property that are leased or hired include motor vehicles, aircraft, watercraft, mining equipment, farming equipment, earthmoving and construction equipment and portable buildings.

The PPSA will govern three types of leases and hiring agreements:

- a lease or hiring agreement of personal property for a term of more than 1 year or combination of sequential terms that equal 1 year or more
- a lease or hiring agreement of personal property that may or must be described by serial number (ie. motor vehicles, watercraft or aircraft) for a term of 90 days or more or a combination of sequential terms that equal 90 days or more, or
- a lease or hiring agreement of personal property for any length of time which is considered to secure payment or performance of an obligation.

Each of these will be a security interest for the purposes of the PPSA.

Current methods of protecting a lessor's interests

Under the current law, lessors protect their interests in the goods they lease or hire by retaining their title in the goods. The only leases or hiring agreements that currently require registration are those dealing with motor vehicles, boats and a very limited range of agricultural equipment. However, the new provisions of the PPSA will mean that the current practices used by lessors will no longer be adequate to protect their title and interests in the equipment or other movable property they lease or hire.

Specific provisions the PPSA which will apply to lessors

Lease or hiring agreements must be in writing and signed or adopted by the lessee.

A lease or hiring agreement must be in writing (ie. the lease or hire terms need to be documented in an agreement or document of some kind) and that writing must be signed or adopted by the lessee. The writing must also contain an adequate description of the property leased or hired.

If the lease or hire agreement is not in writing and the lessee has not indicated its acceptance of those terms, the lease or hire agreement will NOT be enforceable against a third party.

Registration of new leases and hire agreements

Once the PPSA applies, lessors will need to have a security interest registration covering each new lease or hiring agreement which is governed by the PPSA. If an lessor's security interest is properly registered on the PPS Register it should obtain a special priority over other security interests given by the lessee. This is because a lessor's security interest will normally be a purchase money security interest (unless the transaction is a short term lease or hire agreement or a sale and lease back of property already owned by the lessee).

The PPS Register is not a document register but rather a notice based register of interests. A physical or electronic copy of the lease or hiring agreement will not be lodged with the PPS Register.

One consequence of failing to register or improperly registering a lease interest is that the lessor may only have a claim against the lessee as an unsecured creditor. Others consequences for unregistered lease interests are detailed below.

Registration of pre-existing leases

When the PPSA commences, lessors will need to register their lease interests in all pre-existing leases and hiring agreements (ie. leases and hire agreements already in place before the PPSA starts to apply). Lessors will be given a period of 2 years to complete the process of registering their pre-existing lease interests. However, failure to register a lease interest on the PPS Register within the 2 year period will result in the lessor's interest being subordinate to other registered security interests and the lessor will risk losing their title in the goods. Lessors should consider registering their security interests as soon as possible.

Title in goods the subject of an unregistered lease or hiring agreement will vest with or transfer to the lessee on insolvency or bankruptcy

If a security interest (other than a lease or hire agreement for a term between 90 days and 1 year and for serial numbered goods) is not registered on the PPS Register and the lessee goes into liquidation, is wound up or is declared bankrupt, the lessor's title in the goods will automatically transfer to the lessee and those goods will be available to satisfy the claims of other creditors.

This provision of the PPSA is in stark contrast with the current law and practice of lessors. Under the current laws, if a lessee goes into liquidation or is declared bankrupt, goods subject to a lease or hire agreement will remain the property of the lessor due to the fact that title and ownership are sufficient to preserve the lessor's interest in the goods.

If lessors ignore the consequences of this vesting provision of the PPSA, there is a very real risk of them losing their title in the goods they lease or hire.

Priority of unregistered lease interests

Even though an lessor retains title in the goods they lease or hire, under the PPSA an unregistered lease interest will be subordinate to a registered security interest. This means that another entity that claims a security interest in the leased goods and has registered that interest - for example, a bank who has an all assets charge over the purchaser's property - will have priority over an lessor's unregistered lease interest. If the other entity enforces their security interest in the goods, the lessor may lose its title and interests in the goods.

Enforcement provisions will only apply in certain circumstances

While the PPSA governs leases and hire agreements which are of the type listed above, if a lease does not secure the payment or performance of an obligation the enforcement provisions of the PPSA will not apply to the lease or hire agreement.

Increase gender diversity on boards? If not, why not?

ASX listed companies may soon be required to pay closer attention to board membership with particular emphasis on gender diversity. Annual reports may soon need to include the company's performance against measurable objectives for achieving gender diversity. Corporate Lawyer, Paul Henry discusses.

When must you act

On 22 April 2010, the ASX Corporate Governance Council released an exposure draft of amendments to the ASX Corporate Governance Principles and Recommendations and the consultation period for the proposed changes closed on 31 May 2010. It is intended that the changes to the reporting requirements will apply to an ASX listed company's first financial year commencing on or after 1 January 2011. However, the ASX Corporate Governance Council encourages an early transition to the proposed changes.

What will change

It is proposed that the Corporate Governance Principles and Recommendations will be amended to insert new recommendations which will require ASX listed companies to:

- establish a diversity policy with measurable objectives for achieving gender diversity and disclose that policy or a summary in the company's annual reports
- disclose in their annual reports the extent to which the gender diversity objectives set by the board have been achieved
- disclose in their annual reports the proportion of women employees in the whole organisation, in senior executive positions and on the board.
  The concept of "diversity", for the purposes of a diversity policy, is not limited to gender and includes age, ethnicity and cultural background.

The amended Principles and Recommendations listed above will operate on an "if not, why not" basis. In other words, if the company deviates from the recommendations then it should publicly explain the rationale behind the alternative approach, how its practices accord with the "spirit" of the relevant corporate governance principle, that the company understands the relevant issues and has considered the impact of its alternative approach.

It is proposed that there will be changes to the existing commentary to the Principles and Recommendations, recommending that board nominations committees:

- regularly review and report to the board about the proportion of women at all levels of the company
- formulate strategies to address board diversity
- ensure that succession planning considers diversity in addition to skills, experience and expertise.

Further, when conducting board performance reviews, gender diversity objectives should be considered in addition to skills. Boards will also be required to disclose the mix of skills and diversity for which the board is looking to achieve in membership of the board.

What does this mean

Whilst the impact of these proposed changes should not be underestimated, the changes do not establish a mandatory quota of women at various levels within an ASX listed company. The changes are intended to increase female participation in senior management positions, in particular female board membership, by increasing transparency and accountability for ASX listed companies on the issue of diversity.

Building Energy Efficiency Disclosure Bill – how efficient are your premises?

The Building Energy Efficiency Disclosure Bill 2010 will establish a national scheme to require the disclosure of information about the energy efficiency of large commercial office buildings at the point of sale, lease and sublease in the form of a building energy efficiency certificate. Property and Projects Lawyer, Brooke Thomas explains.

The *Building Energy Efficiency Disclosure Bill 2010 (Cth)*(**Bill**) was presented to the Commonwealth Parliament on 18 March 2010 as part of the Australian Government's promotion of environmental responsibility. It will initially apply only to office buildings (or parts of office buildings) with an area greater than 2,000 square meters. Similar disclosure requirements are expected to be introduced for residential premises by May 2011.

The Bill is anticipated to commence on 1 July 2010 with the obligations on parties to disclose to begin on a later date (**implementation day**). The implementation day is predicted to be around October 2010 but at least before 31 December 2010.

Obligations under the Bill

There are three primary obligations under the Bill:

1. An owner/landlord must not offer to sell or lease a building (or part of a building) unless a valid and current Building Energy Efficiency Certificate (**BEEC**) has been registered for that building (or part of the building).
2. An owner/landlord is required to give a copy of the registered BEEC to a potential purchaser or tenant if requested expressly in writing by that purchaser or tenant.
3. In all advertisements for the sale or lease of a building (or part of a building) a valid "energy efficiency rating" will need to be clearly disclosed.

The BEEC must be provided "as soon as is reasonably practicable" after the owner/landlord receives a written request from the potential purchaser or tenant.

Components of a Building Energy Efficiency Certificate

Generally, a BEEC must contain three elements:

1. an energy efficiency rating
2. an assessment of the energy efficiency
3. energy efficiency guidance.

It is expected the legislation will recognise the National Australian Built Environment Rating System (**NABERS**) as the acceptable rating standard. A BEEC is expected to cost between $6,000- $15,000 and can only be prepared by a registered assessor. Assessors are likely to be sourced from the current pool of NABERS assessors.

Transition period

There will be a transition period of 12 months from the implementation day. If an owner/landlord has a current NABERS Energy Rating before the implementation day, the rating can be used during the transition period in place of a BEEC.

Exemptions

The Secretary (of the Commonwealth Department of Climate Change and Energy Efficiency) can decide whether to grant an exemption from the disclosure obligations. An application will need to be made in each case where it is intended to claim an exemption.

Further, the Bill will not apply:

1. if the building or the area of the building is used for police or security operations, or
2. where it is not possible to conduct a building assessment to obtain a BEEC.

It is expected that new regulations will be introduced to prescribe category exemptions for:

- newly constructed buildings
- buildings that have undergone major refurbishments and are vacant for an extended period
- strata titled (body corporate) offices
- sale of a building through the sale of shares or units, and
- the sale of a partial interest.

Electronic registers

There will be three electronic registers created which will be accessible to the public via the internet:

1. Building Energy Efficiency Register
2. Energy Efficiency Non-Disclosure Register (see below)
3. Register of Accredited Assessors.

Penalties for Non-Compliance

The maximum penalty for not having a registered BEEC or failing to provide an energy efficiency rating in an advertisement is $110,000. A separate contravention occurs for each day that the owner/landlord fails to comply with the requirement. If the owner/landlord does not disclose information two or more times in a period of 12 months, they will be listed on the Energy Efficiency Non-Disclosure Register.

Implications

It is advisable that owners of office buildings obtain a NABERS Energy Rating before the implementation day to obtain the benefit of the transition period. A NABERS rating assessment requires 12 continuous months of data in the format which complies with the NABERS system. Building upgrades or changes to operations/management may be necessary to improve the building's energy efficiency.

Leases will need to be reviewed to ensure they will properly support the disclosure regime. In particular, consideration should be given to the party responsible for energy alterations and access to the tenancy for fitout and gathering data. Alteration to the lease may be required so that the tenant can make the necessary disclosure if a sublease is entered into. For many businesses, having a BEEC in place will become part of its annual compliance process so that sales and leases may proceed without delay.

The Senate Committee presented a report to the House of Representatives on 12 May 2010. We will continue to monitor its progress and advise on developments.

Blackmagic in the Federal Court

A recent Federal Court of Australia judgment has emphasised the need for employers to be specific when creating non-competition and copyright obligations for employees under employment contracts. Employment Relations Partner, Stephanie Vass and Law Clerk, Brett Watson examine the decision in Blackmagic Design Pty Ltd v Ian Overliese.

Facts

Blackmagic is a Melbourne based company involved in the marketing and sale of computer software and hardware for television and film production and post-production. Ian Overliese and Jeromy Young were employees of the applicant who resigned in May 2008. They held senior positions in the company in the areas of computer engineering and business development respectively.

Overliese had an oral contract with Blackmagic. Young's contract was in writing and he was required to keep confidential all confidential information, was prohibited from modifying and distributing confidential information and from competing with the company. The contract required him to disclose to the applicant any conflicts of interest under clauses restraining competition.

Early in 2007 Overliese and Young discussed the possibility of entering into business together in the area of electronic audio products. After a series of informal discussions and plans the pair registered a new company 'Atomos Audio Pty Ltd' (the third respondent), for the purposes of the new electronics business. In subsequent months plans for the business developed in a series of documents that were ultimately the concern of the Court. This time period also coincided with a succession of professional disputes between the pair and CEO of Blackmagic, Grant Petty.

The disputes between Petty and Overliese were grounded in the development of new video software. Petty wished for the company to develop an upgrade of the capabilities of their software in a manner that would increase its cost, while Overliese felt this would expose Blackmagic to losses in profits, as competing companies were offering similar software at a cheaper price. In February 2008, Overliese compiled a spreadsheet entitled 'ycalc' in which he compared the costs and profits of Blackmagic's software against those of competitors, including theoretical competition from Atomos.

Evidence indicated that it was around this time that Overliese began to contemplate developing software beyond the scope of audio electronics for the purposes of Atomos. In a document entitled 'marketing plan', Overliese described the comparison of costs and sale prices of all products in Blackmagic's range. Further, in an updated version of the 'ycalc' spreadsheet, Overliese stated that plans for SDI (video) cards to be developed by Atomos would "blow away everything Blackmagic has." These and other documents were made available to Young via an internet based file sharing facility. Young strongly rebuked the idea of competing with Blackmagic upon reading the documents.

This did not stop the progress of Overliese in compiling business documents for Atomos for the purpose of developing video software. Documents tendered in evidence from March 2008 clearly indicated, that Atomos was to be involved in video software. An Atomos marketing document prepared on 21 March pre-empted Overliese's resignation from Blackmagic and proclaimed that Atomos was sitting on a 'goldmine' in relation to the video software market.

Overliese resigned from Blackmagic on 29 April 2008 without indicating that the reason for his departure was dissatisfaction with the management of Petty. Following a dispute over company investments, Young resigned on 5 May 2008.

Following his resignation, Overliese placed all confidential information concerning Blackmagic stored on his home computer onto external storage devices before reformatting his computer. These storage devices were left at the residence of Young on 8 May. Upon searching the work computers of Overliese and Young, Petty was alerted to the documents concerning Atomos, such as the 'ycalc' spreadsheet, and the use of Blackmagic's confidential information in these documents.

The involvement of the fourth respondent, Clare Young, was limited to a small amount of assistance she provided to Young in preparing business documents and transferring relevant information for the purposes of Atomos.

The Claim

Blackmagic argued that the respondents contravened the *Corporations Act 2001* and *Trade Practices Act 1974*, infringed copyright regulations and breached their fiduciary and employment obligations to Blackmagic in terms of their use of confidential information.

Confidential Information

Overliese sought to argue that the existence of confidential information concerning Blackmagic on his computer was not a misuse of this information, and was a 'necessary concomitant' of the seniority of his position. This was not disputed by the Court, nor was there a dispute that the commercial information found on Overliese's computer was confidential.

The key question, however, was whether Overliese used Blackmagic's confidential information for his own purposes or those of Atomos. Based on the evidence from the 'yclac' spreadsheet and other documents, Justice Jessup concluded that this personal use had occurred. As such, His Honour found it appropriate to issue a permanent injunction restraining Overliese from using information specifically identified in this case in future.

Young, by way of being privy to the confidential information supplied by Overliese, was similarly restrained, as was Atomos. Ms Young, however, was excused from the permanent injunction as the Court was satisfied that due to the transient nature of her involvement in the development of Atomos, she did not possess any knowledge of the confidential information that could be used to the detriment of Blackmagic.

The Corporations Act

Overliese was held to be in breach of sections 182 and 183 of the *Corporations Act 2001* (**Act**) as an employee of Blackmagic, he had improperly used confidential information available to him to gain an advantage for himself. The expression 'improperly use' was held to be no different to the kind of impropriety found in an equitable breach of fiduciary duty. Despite finding in favour of Blackmagic that Overliese breached the Act, Justice Jessup declined to restrain him more than once since he had already done so in equity.

Young was not found to have improperly used any confidential information. The confidential information did not come to him by way of his employment with Blackmagic, rather by way of his association with Overliese. Further, the evidence suggested that Young discouraged Overliese from pursuing an arrangement in competition with Blackmagic.

An application for damages was denied on the basis that Blackmagic had not suffered any loss as a result of Overliese's actions.

Diversion of business opportunity

Justice Jessup rejected Blackmagic's arguments that the development of ideas by Overliese for the Atomos business in any way restricted the business potential of products manufactured by Blackmagic, as they were different in functionality.

Equitable damages

Blackmagic sought to argue that it had suffered a lost opportunity to develop some of the software ideas developed by Overliese for the purposes of Atomos, and as such Overliese was in breach of his fiduciary duty. Justice Jessup found this argument unconvincing, saying there is no general duty for a senior employee to disclose the details of a potentially useful idea to their employer.

Misleading conduct

Blackmagic argued that Overliese had engaged in misleading and deceptive conduct by developing software for Atomos that he had described as being unfeasible to Blackmagic. This argument was dismissed, as nothing in the evidence suggested Overliese had departed from conventional wisdom in his dealings with Blackmagic.

Copyright

His Honour was satisfied with Overliese's evidence that the copy of the confidential information made from his computer onto an external storage device was for the purpose of removing the information from his computer. His action in leaving the device at Young's residence was done in mere inadvertence. As such, he did not face liability for breaches of the *Copyright Act 1968*.

Mr Young's employment contract

Blackmagic argued that Young was in breach of the non-compete restraints in his employment contract. It did not bring any argument in relation to the requirement of disclosure where a conflict of interest arises. The non-compete restraints in Young's contract are set out below:

> "*The Employee must not, in any capacity including on his account or as a member, shareholder, unitholder, director, partner, joint venturer, employee, trustee, beneficiary, principal, agent, adviser, contractor, consultant, manager, associate, representative or financier or in any other way or by any other means:*
>
> 1. *During the period specified below (Restraint Period) and in the area specified below (Restraint Area) perform the duties of a software developer – broadcast video products, participate in, be interested in, assist with or otherwise be directly or indirectly involved, engaged, concerned or interested in a business, activity or operation that is the same as, substantially similar to, or competitive with, the Company's business or any material part of it (Related Business)".*

His Honour noted that the reference to 'software developer' was something of a misnomer, as Young never held such a position. The 'Restraint Period' was defined as the period of Young's employment plus a maximum of 12 months. This restraint period had already passed by some years as at the date of the hearing.

Justice Jessup held that the contractual term 'business, activity, or operation' was not sufficient to capture the "embryonic structure" of Atomos when the investigation was conducted by Petty. While 'activity or operation' are terms of extension, they are to be read as a reference to an existing businesslike entity or undertaking of some kind." Since Atomos had not undertaken any business activity, it fell outside the scope of this definition.

Accordingly, the argument that Young breached his employment contract was dismissed.

Analysis

The decision of Justice Jessup to permanently restrain Overliese, Young and Atomos in this case from the use of confidential information gained during the course of their employment indicates a willingness by the Court to respect the sanctity of employer's confidential information and encourage employers to pursue an injunction in circumstances where they feel their information has been misused.

Particular regard should be had to the distinction in the judgment between the *possession* and *use* of confidential information. While it was not improper for a senior employee such as Overliese to have access to and store Blackmagic's sensitive information on his personal computer, impropriety begins when this information is not used for the purposes of the company, but is used for personal or other purposes. The finding that Overliese was in breach of the Act for improper use of confidential information, while Young, who merely accessed the information and did not act on it, was not, further emphasises this point.

His Honour's comments in rejecting the arguments of Blackmagic in relation to Young's breach of his employment contract are also of importance. Young's restraint period and title were clearly insufficient for the purposes of not only his employment, but his restraint from competition. Despite Atomos being registered as a company, this was not sufficient for it to be included in the ambit of a 'business, activity, or operation' in competition with Blackmagic. Employers seeking to clarify the activities in which their employees can and cannot engage in competition with their company would be wise to exercise greater care than shown in this case in the drafting of non-competition provisions of employment contracts.

Director bans – a time limit on ASIC's power to disqualify?

A recent decision of the Full Federal Court, Culley v ASIC clarified any lingering doubt about the time within which ASIC may take action to disqualify an individual from being a company director pursuant to section 206F of the Corporations Act, as Dispute Resolution Partner, Tom Griffith explains.

On 26 February 2007 the appellant, Mr Culley, was disqualified from being a director of or managing corporations for two years. In an appeal to the Full Federal Court (which was ironically held after the two year period had expired) ASIC conceded that the power to disqualify under section 206F was subject to an implication that it be exercised in a reasonably timely fashion, but successfully argued that the power was not subject to any requirement that a show cause notice be issued within any shorter period than the seven year period expressly articulated in section 206F(1)(a). The Full Court identified the balancing act inherent in the disqualification power. On the one hand there is the public interest in protecting the public by having a facility for the removal from the pool of managers those who are, or have been officers of two or more corporations which have been wound up for inability to pay their debts. On the other hand there is the need for corporate officers not to be exposed to disqualification as a result of corporate failures separated by an inordinate length of time.

The Full Court concluded that Parliament intended that the seven year window within which the relevant collapses must have occurred struck the balance between the competing interests, and that section 206F should not be interpreted more narrowly than the express words of the section.

State and Federal Governments want Australia as a regional arbitral hub

Dispute Resolution Partner, Andrew Robertson discusses some significant developments happening with respect to arbitration. Governments at the State and Federal levels are taking some major steps to encourage the use of arbitration as a dispute resolution tool.

Arbitration is a process whereby parties to a dispute refer their dispute to a private individual to resolve their dispute. As a mechanism it has a very long history of 100s if not 1000s of years but its history in recent years in Australia has been that it has been neglected by parties. Seen as too inflexible compared to mediation, too long and expensive compared with expert determination and as technical as litigation without the support of the Court system arbitration has not prospered as a dispute resolution mechanism.

Arbitration promises a system where the private dispute resolver use their skill and expertise to resolve a dispute quicker, more flexible and therefore cheaper way than can ever be achieved in litigation, and potentially with more finality (as there are no rights to appeal findings of fact).

State and Federal Governments have identified arbitration as a mechanism with the prospect of reducing Court lists and provide a valuable tool to commerce. As a result they have been very active in a series of recent developments which are discussed below.

Modernising arbitration for international players

The Federal Attorney-General has been very active. In a speech in Melbourne in December 2009 the Attorney-General indicated that he was determined to make Australia a regional hub in international arbitration.

International commercial arbitration is a process of resolving disputes between parties from disparate parts of the world with disparate legal systems. Arbitral awards can be enforced in 142 countries (and the Cook Islands and the Holy See) because of an international treaty known as the New York Convention. This means it is easier to enforce an arbitral award in many countries than it is to enforce an Australian judgment.

To develop Australia as that regional hub in 2008, the Attorney-General undertook a review of the Commonwealth *International Arbitration Act* and in 2009 introduced a Bill to Parliament to modernise the Act. That Act was passed on 18 June.

The Act is significantly based on the UNCITRAL Model Law. UNCITRAL is the United Nations Commission on International Trade Law. Such is the international nature of arbitration that this UN body has prepared a Model Law for arbitration. That Model Law has been part of Australian law since 1989.

In 2006 UNCITRAL amended the Model Law. The new Act largely adopts those amendments while also modernising other provisions in *International Arbitration Act*.

A new arbitration Act from the States and Territories

When arbitrating between Australians in Australia the arbitration law is governed by State and Territory legislation. The State and Territory arbitration law is quite different to the Federal arbitration law. While each State and Territory has its own law, the respective Attorneys-General have agreed to use a common form such that for over 20 years the States and Territories have largely had the same *Commercial Arbitration Act* (with some minor idiosyncratic differences). The *Commercial Arbitration Acts* do not reflect the UNCITRAL Model Law.

The State and Territory Attorneys-General have now agreed to pass new *Commercial Arbitration Acts* which will also be based on the Model Law. This will have the effect of both modernising the law with respect to domestic arbitration and creating a degree of consistency with the *International Arbitration Act*. The Model Law has been changed and supplemented in parts reflecting the particular needs of domestic commercial arbitration.

Although the decision was only made in early May the new *Commercial Arbitration Bill* is already before the New South Wales Parliament.

Assisting with facilities for the conduct of arbitration

This is not the end of Government support for increased use of arbitration.

In March the Federal Government and New South Wales Government in conjunction with the Australian Centre for International Commercial Arbitration (ACICA) and the Australian Commercial Disputes Centre (ACDC) announced joint funding of $600,000 for a new special purpose centre for holding international arbitrations to be opened in Sydney's CBD. That the Governments were willing to commit their own funds to this venture plainly demonstrates their commitment to developing arbitration.

This new centre already has competition before it opens with the Institute of Arbitrators and Mediators Australia (IAMA) having operated a Dispute Resolution Centre in Philips Street, Sydney for a number of years. Those rooms are already available for hire for use in arbitrations, mediations or similar processes where a neutral venue is required.

Legislation tabled to reverse Sons of Gwalia

As foreshadowed earlier this year, on 2 June 2010 the Minister for Financial Services, Superannuation and Corporate Law, Chris Bowen MP introduced the Corporations Amendment (Sons of Gwalia) Bill 2010. Associate, Justin Le Blond summarises the Bill.

The proposed amendments in the Bill will return the order of claims in a corporate winding-up to the situation that was commonly understood to exist prior to the *Sons of Gwalia* judgment. That is, priority will be given to creditors ahead of shareholders in granting access to the equity of an insolvent company.

The Honourable Mr Bowen claims that the High Court decision in Sons of Gwalia has increased the cost and reduced the availability of credit for companies. While he supports the compensation of shareholders who have been deceived into making their investment, Mr Bowen argues their interests should not be placed ahead of creditors who are often owed money for work or materials already provided.

The Bill achieves this end by repealing the current section 563A of the *Corporations Act* 2001 (Cth) (**Act**) and substituting it with a classification of company members' claims as subordinate to the satisfaction of all other claims. Shareholders are no longer able to vote as creditors in voluntary administration or winding up without permission from the Court, or receive reports to creditors without a written request to the external administrator. It also proposes the addition of section 247E to Chapter 2F of the Act, which removes restrictions on a shareholder's ability to claim damages from a company based on their current or previous share ownership and the nature of their share acquisition.

Piper Alderman

Sydney
Level 23
Governor Macquarie Tower
1 Farrer Place
Sydney NSW 2000
DX 10216, Sydney Stock Exchange
t + 61 2 9253 9999
f + 61 2 9253 9900

Melbourne
Level 24
385 Bourke Street
Melbourne VIC 3000
GPO Box 2105
Melbourne VIC 3001
DX 30829, Collins Street
t + 61 3 8665 5555
f + 61 3 8665 5500

Brisbane
Level 9
239 George Street
Brisbane QLD 4000
GPO Box 3134
Brisbane QLD 4001
DX 105, Brisbane
t + 61 7 3220 7777
f + 61 7 3220 7700

Adelaide
167 Flinders Street
Adelaide SA 5000
GPO Box 65
Adelaide SA 5001
DX 102, Adelaide
t + 61 8 8205 3333
f + 61 8 8205 3300

enquiries@piperalderman.com.au
www.piperalderman.com.au