Thynne Macartney

Agribusiness Update

May 2020

Have you got a COVID-19 clause in your commercial contracts?

Peter Kenny
Partner

What has become very obvious during the period the country has essentially been in lockdown mode as a result of the COVID-19 pandemic is that the pace of completing a business transaction in Australia has slowed considerably. This has led to a situation where delays are now more the rule rather than the exception.

While this is perhaps more evident in property sales and purchases, it also applies to other supply contracts, particularly where there is a financier involved in either approving funding for the buyer or releasing securities for the seller. Our recent experience is that instead of taking the usual 14-day period to approve finance for a buyer with completion of the contract taking place 14-days or so later, it is not uncommon now to see a finance approval period be more like 30-days with a further 30-days for the transaction to be completed. It is far too easy to say that banks and other financiers are the source of this problem because the reality is that all businesses, whether big or small, are operating in a completely unfamiliar and high risk environment.

The principal risk to the parties in a commercial transaction where time is usually expressed to be of the essence of the contract (meaning that time limits must be strictly observed, failing which the non-defaulting party can terminate the contract and retain any deposit moneys or other payments made) is as follows:

- **for the seller –** where its bank or financier is unable to provide releases of its securities on the day completion of the contract is to take place; and
- **for the buyer –** where its bank or financier is not in a position to provide the funds which have been approved on the completion date of the contract (usually because there has been a delay in having the buyer sign all the necessary security documents).

In order to avoid the prospect of a contract being terminated unilaterally in circumstances such as these while there are Government directives in place because of a declaration by a body such as the World Health Organization, it has become both common and important for a variety of commercial contracts to contain a provision stating that a party will be given a reasonable extension of time to comply with an obligation it has under the contract if the delay can be reasonably determined to have been caused by a Government directive.

While many standard contracts for the sale of land in Queensland contain a clause which provides for a reasonable extension of time to be given to a party which has failed to comply with an obligation within the nominated time frame because of what is commonly known as an "act of God", our view is that the wording of the particular clause does not go far enough to protect someone who is delayed from doing something solely because of the current COVID-19 Government directives.

If you are in any doubt as to what protection you need to have in your commercial contracts at the present time, please contact Thynne + Macartney's Agribusiness Group.

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Having a connection with the land — Native title claim (#2) by the *Jangga* People

Mark Boge
Consultant

The *Jangga* People of Central Queensland have lodged an application in the Federal Court of Australia seeking a determination of native title over an area of approximately 27,990 square kilometres south of Charters Towers and east of Hughenden.

A determination of native title is an order of the Federal Court recognising the rights the native title holders have under their traditional laws and customs with respect to land and water within the determination area. The *Native Title Act 1993* protects those rights.

The application is currently being publicly notified by the National Native Title Tribunal. Landholders whose land maybe subject to native title should have received correspondence from the Tribunal about the claim. Freehold land and perpetual leases are not claimable. Landholders whose lease land is subject to claim may apply to become parties to the application by filing an appropriate form in the Federal Court. Together with AgForce Queensland, Thynne + Macartney have sought funding from the Commonwealth Government to represent and assist affected landholders in the Federal Court proceedings.

The funding provided by the Commonwealth is to ensure landholders' interests are protected. That funding is limited and does not cover the costs of engaging experts to comment on the claim or participating in a trial. We are funded to ensure any determination that is made accords with other determinations of pastoral land in Queensland and to engage with the claimants to negotiate an Indigenous Land Use Agreement to regulate the exercise of native title rights over leasehold land.

Landholders have the right to contest the claim but would only spend their own money contesting the claim if there was a real prospect of defeating the claim. Native title litigation is prohibitively expensive – any trial will take weeks (not days) and will involve hearings "on country". A significant factor in favour of the *Jangga* in this claim is that they already have a determination of native title in their favour. That determination was made in October 2012 and covers land to the east of this new claim.

The issue in the *Jangga* #2 claim is whether by their traditional laws and customs the *Jangga* have a connection with the land in the claim area. You need to be aware that the connection does not have to be physical – it can be a spiritual connection. It is far easier to prove a spiritual connection than it is to disprove it. Evidence that Aboriginal people have not been seen on the land leases does not necessarily mean that native title does not exist.

The State Government has a key role to play in native title proceedings. It will thoroughly scrutinise the claim and if satisfied that the elements of native title are established it will agree to negotiate a consent determination of native title. The State's role also includes examining the tenure history of each parcel of land subject to claim to ascertain whether native title has been extinguished by a previous grant of tenure.

> Landholders who would like to become a party and be involved in the Federal Court proceedings, must file the appropriate form **on or before 10 June 2020**.

If you would like representation and assistance in this claim please contact Thynne + Macartney's Native Title Consultant, Mark Boge, on mboge@thymac.com.au.

Changes to the *Pastoral Award*: Tips for Employers

Alex Ramsey
Partner

Harriet Adcock
Graduate

The *Pastoral Award* governs the employment of most employees working in agribusinesses within Queensland. The Award and the National Employment Standards set out minimum employment terms and conditions between certain employees and employers and, in most cases, cannot be overridden by agreements between the employer and the employee.

On 1 March 2020, new provisions were added to the *Pastoral Award* to introduce ***annualised wage agreements***.

Employers and full-time employees now have the option to enter into written agreements for the payment of an annualised wage. These agreements are not available to part-time or casual employees.

An annualised wage is a type of salary that factors in award requirements (such as the minimum wage, estimated overtime, allowances and penalty rates) as an alternative to paying an employee on an hourly basis each pay period or roster cycle.

If an employer and employee enter into an annualised wage agreement, it must specify the following:

- the amount of the annualised wage payable to the employee;
- which provisions of the *Pastoral Award* have been included in the annualised wage (eg whether it includes overtime and allowances for vehicle use, accommodation, rations etc);
- how the annualised wage was calculated; and
- the maximum (or "outer limit") number of penalty hours and overtime hours employees may be expected to work in a pay period or roster cycle before they are entitled to extra payment on top of their annualised wage.

Our tips

Annualised wage agreements must not disadvantage employees and prevent them from claiming overtime or penalty rates over and above the amounts agreed upon in the wage agreement.

Employers should carefully track and record all employee hours, including accurate recordings of when employees start, finish and take breaks to provide as evidence to an employee if an audit is required.

In some pay periods or roster cycles, employees may exceed the expected outer limits set out in their agreement and the annualised wage will not sufficiently compensate them for the hours they worked.

Employers should adopt a check mechanism as part of payroll practices to ensure that an employee is paid at the *Pastoral Award* rate for any hours worked in excess of the outer limits expected of them under the agreement.

Every 12 months from the commencement of an annualised wage agreement, or on the termination of employment, employers must calculate the amount which would have been payable to the employee under the *Pastoral Award* and compare this to the annualised wage.

Employers should diarise the anniversary of each employment and audit the payments made to the employee so that if the amount owed under the award exceeds the annualised wage, the difference must be paid to the employee within 14-days.

Annualised wage agreements are not mandatory and employers and employees do not need to change their existing employment arrangements.

Unless there is a pattern of predictable overtime hours to be worked, private vehicle usage, accommodation or ration provisions, it will be difficult for employers to estimate and provide for the appropriate allowances to employees.

Annualised wage agreements can be onerous in terms of recording requirements, reconciliation reviews and the determination of anticipated overtime and penalty hours. For many employers, the traditional method of paying employees in accordance with the *Pastoral Award* (or paying an annual salary under a contract with an Award set off) remains the most effective options.

Thynne + Macartney's Agribusiness group has expertise in dealing with all types of employment agreements and are here to help.

COVID-19 changes to Australia's foreign investment review rules

Emma Kime
Lawyer

On 29 March 2020, the Treasurer, Josh Frydenberg, announced several temporary changes to the foreign investment review framework in response to COVID-19.

For the duration of the COVID-19 crisis:

all monetary screening thresholds under the *Foreign Acquisitions and Takeovers Act 1975* (Cth) have been temporarily reduced to $0; and

the standard 30-day review and decision-making timeframe is being extended by up to six months.

Due to all monetary thresholds being reduced to $0, from 29 March 2020 every purchase by a foreign person (including by a foreign corporation or government) of an interest in Australian agricultural land or of a 10% or more equity interest in an Australian agribusiness will require Foreign Investment Review Board (**FIRB**) approval, unless an exemption applies.

The changes will add another level of complexity to sales of agricultural land worth less than $15,000,000, being the former threshold below which FIRB approval was generally not required (although there were already situations in which the threshold was $0).

The parties to a transaction should carefully consider how FIRB requirements will affect the likely timing of the transaction and ensure the contract for sale makes adequate provision for the process.

Thynne + Macartney's Agribusiness team specialises in transactions involving agricultural land.

Primary producers within scope of State Government rent relief

Ari McCamley
Partner

The Queensland Government has waived the requirement to pay rent on certain Crown leasehold land for the 1 April 2020 to 30 June 2020 and 1 July 2020 to 30 September 2020 quarters.

Category 11 leases issued for primary production, being most of the Crown leases held by Thynne + Macartney's rural clients, fall within the scope of this relief.

No application is necessary to receive the waiver. It will be automatically applied by the Department of Natural Resources, Mines and Energy. For rents paid annually for the full 2019-20 financial year, the Government will process a refund for the portion related to the April to June quarter.

CORONAVIRUS CRISIS: **Challenges for Landlords**

Alex Ramsey
Partner

Harriet Adcock
Graduate

The National Cabinet has released a Mandatory Code of Conduct for landlords and tenants during the COVID-19 crisis. The Code deals with the temporary reduction of rents for those tenants whose businesses are adversely affected by trade during the crisis.

While the principles of the Code are not yet legislated, we expect that the State Government will impose laws, backdated to 3 April 2020, to formalise the Code within the next fortnight.

The Code will apply to tenants of commercial and industrial premises that are a small to medium sized business with an annual turnover of up to $50 million and eligible for the JobKeeper Payment.

Where a tenant is still trading, accounting evidence of their actual decline in turnover relative to the same period in 2019 will need to be provided to the landlord. The tenant will then be entitled to a rent reduction equivalent to the percentage drop in turnover.

The Code prescribes an "ideal" composition of the reduction as 50% rental waiver and 50% rent deferral for the period of the crisis. The deferred rent will then be recouped by the landlord over either the next 24 months or the balance of the lease term.

For example, a tenant who suffers a 50% loss in trading turnover during a month would be eligible for a 50% reduction to their monthly rent as "cash flow relief". If the tenant was due to pay $40,000 a month in rent, a discount of $20,000 would apply and structured as a $10,000 "waiver" and $10,000 "deferral" to be recouped by the landlord after the crisis period.

Where a tenant is no longer trading due to mandatory social distancing requirements or the economic impact of the crisis, the tenant will be entitled to a 100% rent reduction to be structured in the same manner of waiver and deferral components.

Residential property owners and managers are also being encouraged to negotiate with tenants impacted by the COVID-19 economic downturn.

The Queensland Government has placed a freeze on evictions due to rent arrears for 6 months, commencing from 29 March 2020. This moratorium is available for all tenants experiencing financial distress associated with the impact of the crisis. If a lease is set to expire during the pandemic period, the landlord will be required to offer a 6-month extension of the term to the tenant. Alternatively, where tenants cannot pay rent due to the impact of the crisis, tenants may be entitled to end their lease earlier than the termination date under their lease.

The State Government has introduced a three-month rebate of land tax for the 2019-20 land tax year and a further three-month deferral of land tax for the 2020-21 land tax year for commercial and residential property landlords who provide rent relief to their tenants affected by the crisis.

As with all agreements, any variations to residential and commercial tenancy agreements should be recorded in writing and acknowledged in the appropriate documents. Thynne + Macartney is working with landlords to understand these government frameworks and are here to help.

COVID-19 restrictions do not prevent you from updating your Will

Emma Kime
Lawyer

To make a valid Will, you must ordinarily sign in the physical presence of two adult witnesses. The witnesses should not be a person or the spouse of a person who stands to receive a gift under the Will.

COVID-19 restrictions mean it can be difficult to arrange for two suitable witnesses to be in the same room.

On 22 April 2020, the Supreme Court of Queensland issued a Practice Direction allowing the Court Registrar to decide whether to grant probate of a Will witnessed by video conference between 1 March 2020 and 30 September 2020.

For a Will signed by video conference during this period to be valid, the Court Registrar will require evidence to be produced to satisfy the following conditions:

1. a solicitor was involved in either drafting the Will, witnessing the Will or supervising the execution of the Will;
2. the Will maker intended for the document to take immediate effect as their Will;
3. the Will maker signed the Will in the presence of one or two witnesses by way of video conference;
4. the witnesses are able to identity the document signed by the Will maker; and
5. the reason why the Will maker was unable to execute the Will in the physical presence of two witnesses was because of COVID-19 restrictions.

Thynne + Macartney's Agribusiness team are continuing to offer teleconferences and video conferencing to assist you update your Will and estate planning matters.

The importance of protecting your agribusiness brands

Sandra Camilleri
Senior Associate

Branding

Graziers and farmers often use logos, words or a combination of both to promote and sell their products. The value of these brands can grow over time and become, with wide-spread recognition, an important and valuable asset.

Use in Australia and overseas

The brands may be used by an agribusiness in its home state, interstate and in some cases internationally where goods or services are being exported.

The brands will often appear on cartons, labels, boxes, bottles, packaging, websites, social media platforms and on promotional material (for example, hats, shirts, pens and letterheads).

How your brands can be protected

It is important for agribusinesses to protect their assets, including their brands. The best way to do this is to register their trade marks. A trade mark may be a word, logo, name, picture, and in some cases extends to colours, sounds, scents and shapes.

It is a way of identifying your product and acts as a 'badge of origin' within the community and to your competitors.

A trade mark is different to a business name, company name and a domain name which have their own registration processes.

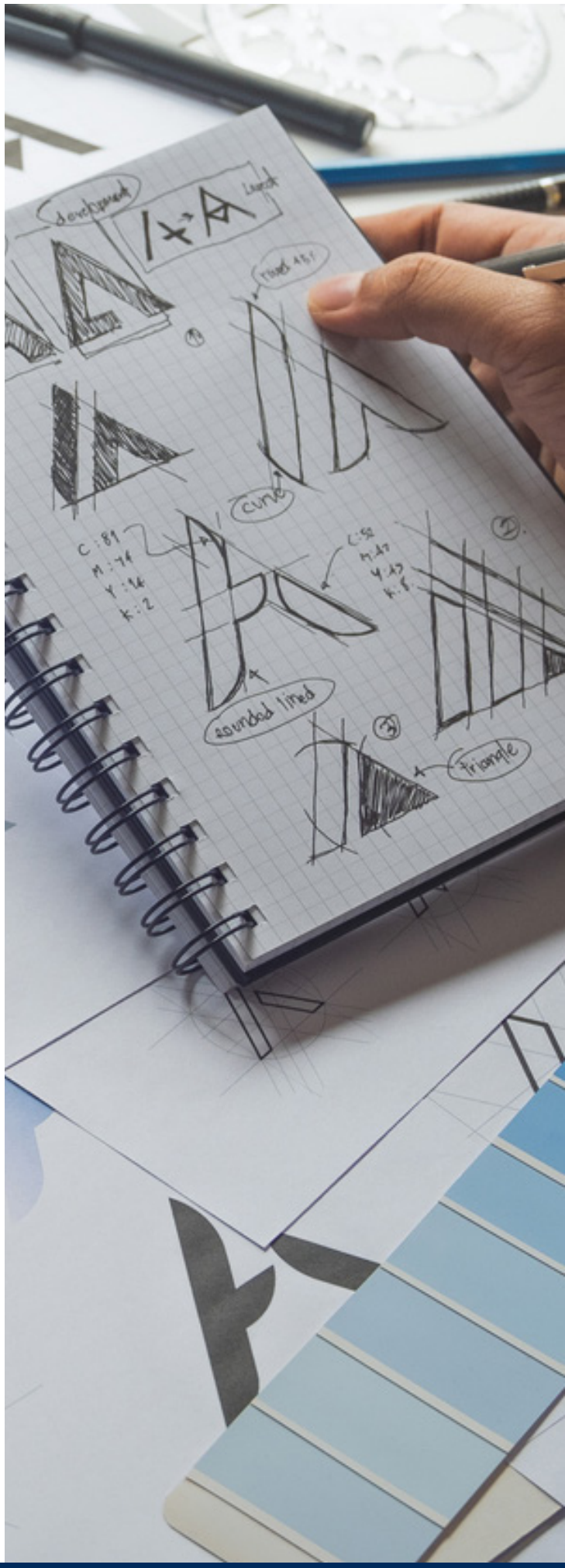
The benefits of protecting your brands

When you register a trade mark it will give your business the exclusive right to use that trade mark, which makes it easier to prevent others from using it.

It is often the case that attempting to protect your trade mark without the benefit of registration will be a lot more difficult and expensive in the long run.

Thynne + Macartney's intellectual property experts assist farmers and graziers to put in place effective protections for their emerging and established brands.

For further details or information, please contact Sandra Camilleri at Thynne + Macartney on scamilleri@thymac.com.au or call (07) 3231 8806.



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