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March 2010 Newsletter

>> FEATURE ARTICLE — KYOTO PROTOCOL UPDATE

The Costs Of Doing Business…

The Carbon Pollution Reduction Scheme (CPRS) will apply to large Greenhouse Gas Emission industries producing 25,000 tonnes or more of carbon dioxide equivalent a year.

The Federal Government's present proposal is to increase the upper limit of the emissions reduction target for 2020 from a reduction of 15% from 2000 levels to a reduction of 25% from 2000 levels if certain international agreements are made.

Many businesses will be affected by the Government's proposal. Agriculture is to be included later, but not before 2015. Those working in the construction industry will be affected in a number of ways because of the large number of materials that will be impacted by the Carbon Pollution Reduction Scheme.

The Government proposes that five percentage points of the 25% reduction target could be met by Government purchases of international credits. This is likely to see significant investment in technologies and businesses that will reduce carbon pollution.

The Government will set national annual caps in respect of the industries affected by the scheme.

Entities affected by the scheme will need to acquire a permit known as an Australian Emission Unit for every tonne of Greenhouse Gas Emission generated in a financial year. The total number of AEUs available for any one year will be equal to the national cap. If for example, the cap for a particular industry is two hundred million tonnes of carbon dioxide equivalent for a particular year, there will be two hundred million AEU issued for that year.

The Government proposes that these AEUs will be tradable and will not have an expiry date. Each AEU will cost $10.00.

Some industries are to receive free AEUs because of their special position. Approximately 70% of the total AEUs are to be auctioned by the Government.

Importantly, the Carbon Pollution Reduction Scheme will have a significant impact on major development projects. For example, most building product manufacturers will be required to have AEUs. While some of these industries may have free AEUs because of their status, some will not. The rules in relation to eligibility for free AEUs are complex and therefore developers are likely to face uncertainty regarding the price of building products. Tenders for building projects will have to be reviewed to deal with this potential problem. This is a particular issue in the immediate future because some tenders being entered into now, may be impacted by the Carbon Pollution Reduction Scheme when inevitably it is introduced. Perhaps an adjustment clause should be written into contracts that are prepared in the immediate future.

A significant item in any development contract is the electricity. Presently the Federal Government will provide free AEU's to coal fire electricity generators until July 2016. Beyond that, those generators will be required to purchase all AEUs required to meet their obligations under the scheme. It is likely that there will be an increased interest and emphasis on energy efficiency of buildings due to the increased cost of outgoings.

It is clear that developers cannot ignore the impact on them of the soon to be introduced Carbon Pollution Reduction Scheme and it would be hoped that with careful planning and with proper documentation, an area of increased profitability can be seen rather than a time of increased cost.

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>> LENDING GUIDELINES

If a Financial Institution Does Not Follow Its Own Lending Guidelines, Can The Borrower Ask The Court To Set Aside The Mortgage…

Borrowers often complain that lenders do not follow their own guidelines and therefore should not be entitled to rely on the mortgage when trying to recover monies owing.

This question was examined in the case of Khoshaba and more recently in the case Kowalczuk.

As so often happens in legal disputes, a failure by a lending institution to follow its own guidelines is not conclusive evidence of improper or unfair conduct but it can sometimes assist the borrower.

In Khoshaba, Chief Justice Spigelman said that the failure by the lender was relevant in two ways. He explained that although the guidelines were designed to help the lender assess and minimise its own risk and therefore were for the purpose of protecting the lender rather than the borrower, they gave an indirect benefit to the borrower through stopping risky lending. He noted that one of the purposes of the Contracts Review Act was to protect people not able to look after themselves. The second way that the lending guidelines were relevant was where the lender had no idea of the purpose the loan. A failure to observe the lending guidelines helped the borrower prove that the lender was lending only on the value of the security and the Court held that asset lending of that sort is unconscionable and will, in all likelihood, lead to the mortgage being set aside.

While it is not conclusive proof that a failure by the lender to observe its own guidelines can be used to set aside the mortgage, it should not be overlooked because it might assist in the argument.

> CREDIT REGULATION

Credit providers to be further regulated…

Any person engaging in credit activities from the beginning of 2010 will be required to hold an Australian Credit Licence which will be administered by the Australian Securities & Investments Commission.

There will be industry wide lending conduct requirements for anyone holding a licence.

In the new code there will be an enhanced consumer protection through dispute resolution mechanisms, Court arrangements and remedies.

To obtain a credit licence, certain standards must be met and ASIC can refuse an application where a person does not meet those standards. There also will be a requirement for ongoing standards of conduct. ASIC will have the power to suspend or cancel a licence or to ban an individual from engaging in credit activities.

All credit providers and finance brokers will have to be registered.

The new regime applies from the beginning of 2010. The licensing process will start on 1 January 2010. Before that date, anyone engaging in credit activities will need to be registered with ASIC and must apply for registration between 1st November 2009 and 31 December 2010. They will then have the six month period between 1 January 2010 and 30 June 2010 to apply for an Australian Credit Licence. Anyone who engages in credit activities for the first time on or after 1 January 2010 must apply for, and receive, an Australian Credit Licence before starting business.

There will be minimum training requirements to qualify for a licence. Applicants will have to have adequate financial and human resources to meet their obligations.

Licencees will be required to act honestly, efficiently and fairly. They must properly train and supervise people who act on their behalf.

>> DISCLAIMER

The articles contained in this newsletter are in the nature of general comment only. The articles are neither intended nor should be taken to be, advice in respect of any particular matter. Advice should be sought in relation to particular circumstances.
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