

Commercial eSpeaking

BMC LAWYERS

5 Kodex Place, Paraparaumu
4 Cobham Court, Porirua
PO Box 140, Paraparaumu 5254
T 04 296 1105 | F 04 297 3231
info@bmc-law.co.nz | www.bmc-law.co.nz



ISSUE 63 | Summer 2023

Welcome to the first issue of *Commercial eSpeaking* for 2023. We hope you have had a good start to this year despite the economic headwinds that are gathering.

We hope you enjoy reading this e-newsletter, and that the content is both interesting and useful.

If you would like to talk more about any of the topics covered, or indeed on any legal matter, please don't hesitate to contact us. Our details are on the top right of this page.



Letter of Intent

Useful, but can present problems

A letter of intent, also known as a heads of agreement, is often used by parties before entering into a formal contract. While such a letter can be a useful tool to maintain momentum during a commercial transaction, the document itself has been the centre of many disputes over the years.

We give an overview on why parties may wish to use a letter of intent, and the downsides that could lead to business losses and commercial disappointment.

PAGE 2 ▶



What is the PPSR?

Gives protection when leasing or selling goods

Anyone who has been in business, even for a short time, will have encountered the Personal Property Securities Register. The PPSR is a searchable online register that records if a third party has a financial interest in the assets of individuals or entities.

If you or your business leases or sells goods on credit terms, or if you have lent money to a third party, you should seriously consider registration on the PPSR in order to protect your business or yourself.

PAGE 3 ▶



Business briefs

Employment Court rules four Uber drivers are employees

This decision challenges the traditional gig economy model of such workers being contractors rather than employees.

Facial recognition and the Privacy Act: balancing security and individual rights

The Office of the Privacy Commissioner has urged businesses to proceed with caution when using facial recognition technology.

Cartel conduct: Commerce Commission warns eight freight forwarding companies

The Commission's warning highlights the need for businesses to take care when entering into a supplier/customer relationship with competitors.

PAGE 4 ▶

Letter of intent

Useful, but can present problems

A letter of intent, also known as a heads of agreement, is often used by parties before entering into a formal contract. While such a letter can be a useful tool to maintain momentum during a commercial transaction, the document itself has been the centre of many disputes over the years.

We give an overview on why parties may wish to use a letter of intent, and the downsides that could lead to business losses and commercial disappointment.

What is it?

A letter of intent is a signed document with two or more parties that shows a commitment to achieve a particular outcome – usually in a commercial setting. A common example is when two or more parties are forming a joint venture or one party is procuring services from another.

The document may contain terms that have been agreed upon to date. It may include, for example, the subject of the transaction (a joint venture, merger, etc), key dates, pricing and details around what remains to be determined.

Purpose

Setting out the terms that have already been agreed can allow the transaction to proceed with confidence to more costly stages such as engaging specialist legal or taxation advice. It can also help tie together many different points of a negotiation process and give clarity to the parties as to what still remains to be resolved.

What could go wrong?

The primary issue with a letter of intent is enforceability. A letter often requires some goods or services to be procured while the contract is not yet finalised. If the letter is found to be unenforceable, this could lead to significant losses. For example, in a 2020 case¹, the High Court determined that the letters of intent exchanged between the companies did not constitute a binding contract. In this matter, Electrix had provided services of up to the value of \$28 million, despite the various letters of intent exchanged between the parties capping the work at approximately \$14 million. The High Court found in favour of Electrix and determined that because there was no binding contract, Electrix was entitled to recover its reasonable costs of services rendered.

The accepted legal position is that letters of intent can be both enforceable or unenforceable; the content of the agreement, as well as the conduct of all the parties to the document, will be relevant in deciding if a letter of intent is enforceable.²

This means that if a party is relying on the spirit of a letter of intent and the transaction is cancelled or it is unenforceable, the result could mean a significant over-investment and loss for that party. It could also mean that after not following through on a letter of intent, a disappointed party could challenge the right to cancel or one party could seek to limit their losses, which can result in costly litigation.

If you really want a letter

A letter of intent should always be reviewed by your lawyer before it is signed. It is particularly important to ensure all parties receive legal advice on the enforceability of the document before it's signed.

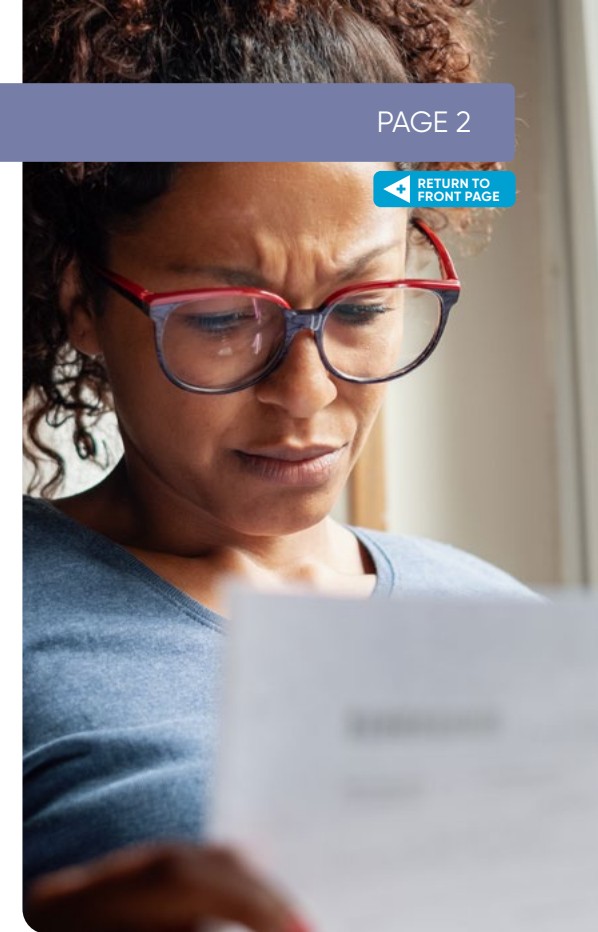
At a minimum, a letter of intent should state whether the letter is intended to be binding, if only parts of it are binding, and what happens if the parties decide not to proceed.

If all parties involved are seeking a non-binding and unenforceable document that ties together all the threads of a negotiation purely for reference or record keeping, a letter of intent may be a great option. In these circumstances, the letter of intent must be abundantly clear that it is not designed or intended to create a legal obligation between the parties.

Is a letter of intent worth the risk?

Considering the risks outlined above, it may be reasonable to ask why non-binding letters of intent are even used?

A non-binding letter of intent can be a useful way to document negotiated and agreed points in complex business transactions with multiple parties or stages. It can also be used as a good faith gesture from each party that the documented terms have been agreed and will not be renegotiated. A good faith gesture allows the necessary legal or taxation advice to be given with certainty while leaving the



parties with the flexibility to back out if necessary or desirable.

If you want to secure services or a form of commitment that is available in a letter of intent while a formal contract is being prepared, tread carefully. If there is sufficient information to reach a formal contract, finalising a contract will provide the best protection and certainty to both parties.

If you are entering into a complex legal transaction and are considering using a letter of intent, please contact us *before* you sign it. +

¹ *Electrix Limited v The Fletcher Construction Company Limited* NO 3 [2020] NZHC 2348

² Lord Justice Robert Goff in *British Steel Corp v Cleveland Bridge and Engineering Co Ltd* [1984] 1 All ER 504

What is the PPSR?

Gives protection when leasing or selling goods

Anyone who has been in business, even for a short time, will have encountered the PPSR (Personal Property Securities Register). The PPSR is a searchable online register that records if a third party has a financial interest in the assets of individuals or entities.

The register only records interests in personal property (not land). Personal property includes all property that is not land or ships.

If you or your business leases or sells goods on credit terms, or if you have lent money to a third party, you should seriously consider registration on the PPSR in order to protect your business or yourself.

Registering a security on the PPSR

It is helpful to look at examples where registration on the PPSR would be appropriate.

- + Leasing assets for a term of longer than 12 months, such as eftpos or photocopier equipment
- + Selling goods on credit terms, for example, payment is due on the 20th of the following month
- + Selling goods on consignment terms where payment is due when the goods are sold, or
- + Making a loan to an individual or a company.

In each of the above situations, registration on the PPSR provides you with protection if rental payments or invoices are not paid or loan payments are not

kept up. PPSR registration ensures you will be paid before parties that do not have registered securities.

If you register, you may be able to collect any goods or even trace the proceeds of the sale of those goods. When goods are supplied on credit terms, a 'super priority' exists if registration is completed within 10 working days of delivery of the goods. This super priority will have priority over all prior registrations no matter when registered.

What happens if I do not register?

If you don't register on the PPSR, it may mean that you are not paid in full – or at all.

How to register?

To register on the PPSR you must have a contract with the party you have leased to, sold goods to or lent money. That contract needs to include a right to register on the PPSR.

Timeliness of registration on the PPSR is critical. Where there are two registrations in respect of the same property the first registration will have priority.

Registration is completed online [here](#).

Searching the PPSR

You would search the PPSR if you are:

- + Considering leasing, selling, or lending to a third party to determine what other obligations and registered securities they have
- + Considering buying personal property from a third-party. The most common example of this is the purchase of a motor vehicle. Money may be owed



on the vehicle, and without having the security discharged as a condition of purchase, you run the risk of losing the vehicle and the money you paid for it

- + Buying a business that includes personal property as part of the assets
- + Selling a business and you want to determine if any money needs to be repaid, or
- + Buying land with buildings on it that includes chattels.

How long does PPSR registration last?

Registrations on the PPSR expire five years after registration. It is important to note when to renew registrations before they expire. If registrations are renewed, their priority continues from the date of the original registration.

If registrations are not renewed and you subsequently reregister, the priority will be from the date of the subsequent reregistration.

What if things go wrong?

If a person or entity you have leased to, sold goods to or loaned money to becomes bankrupt, goes into liquidation or placed into receivership – what should you do?

Talk with us as soon as possible so we can advise you on your options. If you have registered on the PPSR, your position is stronger than if you haven't.

Regularly lease, sell goods or loan money to third parties?

We can help you to review your existing contracts or prepare contracts to help protect your business. We can advise you on how and when you should register on the PPSR.

Navigating the PPSR is fairly straightforward. If, however, you have any questions or queries regarding the PPSR and how it benefits or affects your business, please don't hesitate to contact us. +

Business briefs

Employment Court rules four Uber drivers are employees

In October last year, the Employment Court ruled that four Uber drivers are employees rather than independent contractors³, challenging the traditional gig economy model. You can read the full Uber decision [here](#).

The court's ruling means that Uber drivers could now be entitled to receive the minimum wage, holiday pay and other benefits that are typically provided to employees.

Two major factors that led to the court's decision were that:

1. Uber drivers are dependent on the Uber platform for the opportunity to earn income, and
2. Uber exerts a significant degree of control over the way in which the work is performed.

This decision is a landmark ruling that potentially has far-reaching implications for the gig economy as a whole, where companies such as Uber typically classify their workers as independent contractors.

If you engage workers as independent contractors, we recommend you carefully consider whether the nature of the work gives rise to an employment relationship. Please contact us if you need specific advice.

³ *E Tū & Anor v Rasier Operations BV & Ors* [2022] NZEmpC 192



Facial recognition and the Privacy Act: balancing security and individual rights

The Office of the Privacy Commissioner has urged businesses to proceed with caution when using facial recognition technology (FRT).

The Commissioner's warning comes as Foodstuffs, that owns Pak'n Save, New World and Four Square, trials the use of FRT in 29 North Island stores. Foodstuffs says its use of FRT is aimed at preventing crime, and keeping its staff and customers safe.

The Commissioner is doubtful whether the benefits of FRT outweigh its privacy-intrusive nature in the retail setting.

The Commissioner is monitoring Foodstuffs' controlled trial and will release a report outlining a proposed regulatory approach to FRT at the end of this year.

If you are thinking about using FRT for your business, you should conduct a privacy impact assessment. If you need more help, please be in touch.

Cartel conduct: Commerce Commission warns eight freight forwarding companies

In October 2022, the Commerce Commission warned eight freight forwarding companies for likely engaging in cartel conduct. This highlights the need for businesses to take care when entering into a supplier/customer relationship with competitors.

The warnings related to conduct that occurred between 2014 and 2018. At that time, the eight companies engaged Mondiale Freight Services Limited and Oceanbridge Shipping Limited to provide wholesale freight forwarding services. These services included, for example, a company combining its customers' freight with that of Mondiale or Oceanbridge, for the sake of efficiency, if the company did not have a full container of freight.

Given the eight companies were also in competition with Mondiale and Oceanbridge, they were concerned Mondiale and Oceanbridge would learn confidential and commercially sensitive information regarding the companies' customers. To protect against this, the companies entered into arrangements with Mondiale and Oceanbridge not to compete for each other's customers. This included:

- + Refusing to quote for the other party's customers
- + Apologising to the other party when the other party's customers were approached, and



- + Discussing the amount a party should quote the other party's customers to ensure the price would not be competitive.

The commission considered these arrangements likely amounted to cartel conduct and went further than necessary to protect the companies' confidential and commercially sensitive information.

In June 2022, Mondiale and Oceanbridge were fined almost \$10 million combined for their involvement. The commission decided on a warning for the eight companies given they had significantly less market and negotiating power.

All businesses entering into a supplier/customer relationship with a competitor should ensure the arrangement does not breach their obligations under the Commerce Act 1986. +