Hamilton Locke

Real Estate Markets Quarterly

Autumn 2022

Foreword

Welcome to the first edition of Hamilton Locke's Real Estate Markets Quarterly.

It has certainly been a challenging couple of years for many people and businesses. We hope you and your families have fared well and remained safe.

As many will know, Hamilton Locke is one of Australia's newest and fastest growing law firms. We started our journey in 2018 with 5 partners and 10 lawyers with one office in Sydney.

At the time of writing, we now have 37 partners and 170 staff. An extraordinary achievement of which we are extremely proud. Alongside our exceptional growth, we have also grown geographically with the successful launch of our Melbourne, Brisbane and Perth offices.

Whilst we are young as a firm, we have extensive and market leading experience in a range of different practice areas including Capital Markets, Corporate, M&A and Private Equity, Finance, Funds and Financial Services, Litigation & Dispute Resolution, Real Estate, Construction, Intellectual Property & Technology, Restructuring & Insolvency and Workplace & Employment.

Many of our partners have worked in leading law firms and/or held senior in house roles giving us a unique edge in delivering commercial and solutions focused legal advice and guidance to our clients.

The Real Estate Market Group's vision is to deliver an 'end to end ' legal services offering to our clients.

We hope you enjoy this inaugural edition of our Real Estate Markets Quarterly. We look forward to working with you and being an integral part of your growth journey and you a part of our ours.

Most importantly, we wish you and your families the best of health and a safe remainder of 2022.

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Contents

Industry Spotlight

Melissa Kingham
Haben Property Fund
Executive Director

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Please provide an overview of your career to date.

I've had a long career in property and funds management, having studied as a school leaver for my Bachelor of Applied Science (Land Economics) at UTS and remaining in the industry to now. My career has involved all sectors of the property market. My early career focus was on commercial leasing, acquisitions and land subdivision working with the Commonwealth and State Governments in Queensland. I worked on unique and one-off projects involving Defence facilities, hospital developments and compulsory acquisitions for infrastructure projects involving the Native Title Act.

I was approached by a previous manager to join Woolworths in the early 2000's and there began my career in the retail property sector. I worked at Woolworths for almost 10 years and am very proud of our new store, refurbishment, and development achievements. It was an exciting time – I went on to lead the Queensland and New South Wales property teams. I did a secondment to the role of Group Manager Asset Services, which involved leading the team responsible for the property maintenance and contract management for all Woolworths brands before stepping up to the role of Group Property Operations Manager. Post Woolworths, I joined SCA Property Group (Woolworths divested property portfolio) and was Fund Manager for the unlisted funds. I left SCA to pursue a board career and was approached to join Haben's Investment Committee – but the pull of the retail sector took hold again and this quickly led to me taking up a full-time role with Haben as Executive Director and Head of Funds Management, and a mandate to grow funds under management.

Please tell us a bit about your current role and Haben.

Haben is a privately owned funds management business focused on the retail sector and unlocking value across the portfolio. My role as Head of Funds Management includes acquisition, capital transactions, due diligence, majors leasing and capital raising. As Responsible Manager for the AFSL, I am also deeply involved in compliance and reporting. I sit on the Investment Committee and am a member of the development PCGs.

Haben has been active in the Retail Property sector over the past couple of years. What do you like most about working in the sector?

The retail sector is very dynamic and evolving – we are seeing customer support growing for centrally located assets offering convenient access and non-discretionary focused tenancy offerings. Understanding how a retailer trades in a location, how and why a shopper chooses their local centre, and what we can do as managers to improve the performance of the asset underwrites what we do. By viewing a centre from the lens of both a customer and retailer we can identify opportunities for improved customer engagement, creative remixing, centre repositioning and mixed used development. Working together as a team to unlock each asset's potential, improve centre sales, create building efficiencies, and deliver investment returns (which include capital growth) are the drivers that appeal to me most about working in the retail sector.

What are you most proud of in your career to date?

I have had so many amazing work opportunities throughout my career, and I will always be proud of each acquisition and new store opening that my teams have delivered….and where we have achieved significantly ahead of target…yes I am a competitive person! Most recently, I am very proud of what we have achieved at Haben - in terms of growing the business, our team and funds under management. But when I look back, I am most proud of seeing the people I have worked with achieve their goals, be promoted, have success and at the same time enjoy their journey.

What is the biggest challenge you have experienced in your career to date?

It has taken some time for me to talk openly about this but my biggest challenge in my career, without a doubt, was a health challenge that resulted in me falling, breaking bones and damaging nerves on my right side. I had major surgery, was wheelchair bound and had to learn to move and walk again…not knowing my future I resigned from Woolworths. As someone who is focused and driven to achieve, the unknown was challenging. During this time, many colleagues became friends. Losing my independence and then coming back from that after just over 12 months away was hard personally and professionally. Thankfully I fully recovered and had the support of previous managers and colleagues… but after any set back it is challenging to re-establish yourself, regain your confidence and recreate that winning mindset…and I did that.

What are your tips for young professionals aspiring to pursue a career in the Property sector?

Property is a career path that offers many opportunities for progress and areas of specialty. Find that area that most appeals to you and be passionate about what you do. There is nothing more infectious than working alongside someone who loves their job and managers will seek out those who are enthusiastic and goal focused.

If applicable, what other industry roles do you currently hold? What led to these positions?

I am currently Vice-President of the Property Funds Association and a Diversity Committee member. I am also involved with the Property Council of Australia – I sit on the Unlisted Funds Roundtable and am an assessment panel member for the Retail Property Diploma and the Property Investment and Finance Courses. To support women in property I am a mentor in the PCA Mentoring Program and a sponsor in the 500 Women in Property program. Being part of an industry that has given me so much and having had the benefit of great mentors throughout my career, it's a natural progression to 'pass on the baton', 'send down the fishing net' and 'pay it forward'.

Please provide insight into the current Funds sector. What do you think are potential issues and opportunities prevalent in the sector over the next 12 months?

The fund sector is in interesting times with current global events, the challenges of COVID, rising inflation, tightening in the labour market and pressure on the RBA to raise interest rates. With the bond market already pricing in rate increases, the forecasting of rate rises in forward looking statements will need to be front of mind for fund managers. With the reopening of international borders, there is anticipated to be a wall of capital headed for our shores chasing commercial real estate, this should sustain values and keep cap rates tight but balancing investor returns in a sharp market with rising rates can be challenging. Potential still exists within each sector to acquire assets with value-add options and with the benefit of fixed increases in leases, rental increases index linked and the end of mandated rent relief, there remains opportunity for real estate investors.

Getting Your Property Portfolio Ready for an Equity Raise or Divestment

Authors: Edwina Renshaw, Bobby Nader and Lily Cox

Is 2022 the year you will raise equity or sell an asset?

If 2022 is anything like 2021, we anticipate companies will continue to seek attractive investment opportunities and take advantage of the significant amounts of deployable capital to raise equity or divest assets.

Seems simple but taking the time to ensure your property portfolio is organised, with all appropriate arrangements taken care of prior to commencing an equity raise or divestment, will ensure a smooth and streamlined transaction.

Top Tips to getting your portfolio ready for investment or sale

1. Get Your House in Order

Before going to market, we recommend a deep dive into your portfolio to uncover any issues before the buyer does.

If you are a tenant:

1) Ensure all leases, including variations, are fully executed and registered with the relevant land titles office (if required). If any leases are in hold over, or coming up to expiry, seek to secure tenure over those leased premises.
2) If your leases contain a personal guarantee and indemnity from your company directors seek to negotiate those are released and replaced with other forms of security e.g., bank guarantee or cash deposit.
3) Check if there are any side deeds, particularly incentive deeds, which trigger a repayment obligation in the event of a change of control event (which may be triggered).

If you are an owner:

1) Ensure you have the appropriate approvals in place e.g., certificates of occupancy, compliance with fire safety requirements.
2) Undertake statutory property searches to clarify whether any authorities propose to acquire any right or interest in your owned properties. This will be important to investors, given it 'goes to the value' of the asset.

2 - Change of Control triggered?

If you are a tenant who is looking to raise equity, you should check the change of control provisions in your lease. Consent of third-party landlord's is usually required if the equity raise will trigger the change of control provision in your lease.

If the change of control provision in your lease is triggered, we recommend engaging early with third-party landlords to obtain their consent. In many cases, the preparation of an information memorandum will assist in obtaining that consent.

The information memorandum sets out an overview of the transaction, when the raise is anticipated to occur and information about the buyers (which can be as simple as setting out a snapshot of the buyer's experience and expertise and if a corporate entity details of the CEO and/or Executive Chairman).
The third-party landlord will want to satisfy itself that following the raise the tenant will be "backed" by an entity of substance, so providing comfort that the transaction is in their interest is essential.

3 - Financial reporting

For any property you are looking to divest, having an up to date and accurate tenancy schedule can, in our experience, be very helpful in limiting any last minute negotiation requests for a price reduction, rental guarantee regime or the creation of a retention fund.

The schedule should set out the current rent payable, outgoings, rent review mechanism and important dates like expiry, term and option term, a schedule of arrears, incentives which remain outstanding and any Covid related agreements (particularly any agreed rental payment deferral regime).

Summary

Spending some extra time at the beginning of your proposed investment or sale process to "get your house in order" can save you money and time at the closing stages of your transaction.

Our Real Estate team has extensive experience in large transactional property matters, including acquisitions and disposals, and can assist you in getting your property portfolio ready for an equity raise or divestment. Please contact John Frangi or Edwina Renshaw from our Real Estate team if you would like to discuss.

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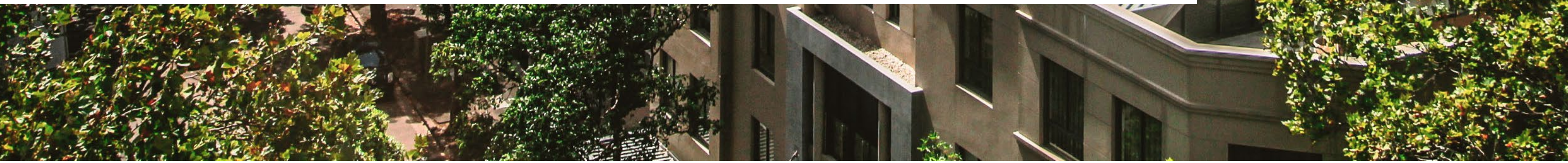
Key Takeaways

- Undertake vendor due diligence – are there hidden issues?
- Is there a change of control provision in your lease? Prepare a transaction overview and seller snapshot to help with consent of any third-party landlords.
- Prepare an accurate and current tenancy schedule
to help avoid any last minute pricing negotiations.



Trends in REITs

Author: Patricia Paton

In March 2020, the ASX300 AREIT index fell approximately 35% with shopping centres the hardest hit, however nearly every sector of real estate was impacted by the onset of the COVID pandemic. In the June quarter 2020, the index recovered 20% as COVID restrictions were eased, and the operations of real estate funds improved overall in 2021.

Two years after the onset of COVID, it is apparent that the Australian real estate market is experiencing what is likely to be a long-term structural shift driven by a change in the way we live our lives accelerated by the pandemic shock. Despite the potential for this structural shift to have had a permanent, negative impact on Australian real estate, that has not transpired. The AREIT market is very well established and sophisticated, covering sector specific and diversified funds, and as a result, has been able to weather differing economic conditions, and has emerged from the COVID pandemic in a relatively strong position.

AREIT performance has always been inextricably linked to the Australian economy and at the start of this year market commentators expected that further macroeconomic recovery would continue to support AREIT growth, as investors looked for predictable and relatively stable income returns. Growth was expected to be driven by a return to office, a return in international tourism, international students and immigration, continued residential property price growth and ongoing construction, whilst the challenges identified included inflationary pressures and rising rates, covid mutations, slower return to office / retail than expected, and continued supply chain disruption.

The war in Ukraine, now entering its third month with no end in sight, has added to the global economic challenges, leading the IMF to state that the war may "fundamentally alter" the global economic order and fuel a global economic downturn. Immediate effects include significant market volatility and global inflationary pressures. In Australia, inflation has hit a 20 year high, and the market is now expecting a more rapid rise in interest rates than previously anticipated.

The following trends are predicted to continue to emerge throughout 2022:

- large malls with discretionary retail will continue to suffer, whereas non-discretionary convenience centres and large format retail centres will continue to thrive;
- continued diversification and focus on REITs with alternate exposure/strategy including social infrastructure and primary produce, and focus to achieve scale in emerging asset classes;
- inflationary pressures and rate increases leading to distress across real estate assets;
- large players will continue to explore opportunities to consolidate the market, and the growing power of super funds will continue to be relevant, particularly where large REITs are trading below book value;
- push for REITs to demonstrate environmental, social and governance credentials;
- significant capital available for new opportunities.

All of the above suggest significant market activity. Hamilton Locke's Capital Markets, Real Estate and Funds teams are well placed to assist market participants to explore potential transactions, please get in contact with Patricia Paton, John Frangi or Brendan Ivers should you require any assistance.

Key Takeaways

- The Australian REIT ("AREIT") market is very well established and sophisticated, including sector specific and diversified funds. As a result, the AREIT market is able to weather differing economic conditions.
- Competition for assets is high and we expect to see significant market activity as opportunities present themselves.

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ESG Guide for Property Fund Managers: Part 1

Authors: Brendan Ivers, Adam Jeffrey and Nick Huett.

The continued growth of inflows into sustainable investments creates a range of risks and growth opportunities for property fund managers. This article is the first of two looking at the key opportunities and legal risks relevant to property fund managers as environmental, social and governance (ESG) investing goes mainstream.

The ESG opportunity

Three key forces are driving the ESG movement:

Capital	Stakeholders	Net zero by 2050
Capital is increasingly allocated to investments that meet ESG criteria. Globally, sustainable fund assets grew by 9% in the December 2021 quarter, totalling US$2.74 trillion.[1] Despite lagging other markets, total new capital invested in Australian ESG funds quadrupled in 2021, to A$3.0 billion.[2]	As shown by the ongoing consumer boycotts and business withdrawals due to Russia's invasion of Ukraine, ESG has become an all-encompassing lens through which commerce and business is viewed. With companies, employees and consumers ever more sensitive to ESG issues, business opportunities are increasingly flowing to accountable businesses that consider their environmental and social impacts, and govern with integrity and transparency.	Momentum towards net zero is building as Australian institutions and businesses take it upon themselves to step up commitments in the transition, despite policy inertia from both main parties.[3] As timeframes compress, government and business will be required to act together to develop and execute plans to hasten the large scale reallocation of capital and resources to low carbon endeavours.[4]

[1] Morningstar, *Global Sustainable Fund Flows: Q4 2021 in Review*, 31 January 2022.

[2] Calastone, *ESG fund inflows boom in Australia in 2021*.

[3] For example, the Australian Council of Superannuation Investors **(ACSI)** reported that almost half of the ASX200 have set emissions reductions targets: ACSI, *Climate reporting in ASX200 companies*, August 2021.

[4] McKinsey Global Institute, *The net-zero transition*, January 2022.

Property fund managers who adapt and respond to these drivers with a well-developed approach to business issues and opportunities will be ideally positioned to thrive in this new reality.

What is ESG investing

Traditionally the domain of activist shareholders and public relations teams, awareness of environmental, social and governance issues have broken into the mainstream as a core factor in business operations.

We consider that there are three main ESG methodologies relevant to property fund managers:

	Integration into traditional models	Ethical investing	Impact investing
Description	Considering ESG factors as a long-term driver of value in investment decisions	Investing in accordance with a set of values, typically by using negative screens to rule out harmful investments	Investing purposefully to increase social good, potentially at the expense of higher returns
Methods	Incorporating ESG risks into models of financial performance Thematic investing that identifies demographic trends as part of investment thesis	Socially responsible investing	Thematic investing that identifies demographic trends as part of investment thesis Impact investing to produce measurable social or environmental outcomes
Proponents	Best in class selections Large asset managers and super funds	Most large super funds offer ethical investment funds or investment options	Actively managed impact investment funds

Integration: ESG factors create sustainable value

There is growing evidence that ESG funds have outperformed their non-ESG peers over both the short and long term, and this view has been highlighted by the CEO of Blackrock, Larry Fink in his 2022 letter to CEOs.

This has evolved as a result of ESG considerations previously being considered as risk mitigants, to now being a driver of improved investment decisions and returns.

We have seen property fund managers take advantage of a range of financial benefits arising through ESG opportunities including:

- access to larger pools of capital and lower borrowing costs available for green finance for the acquisition or development of buildings that meet ESG standards;
- operational savings over a property investment's term, for example through increased energy efficiency; and
- growth opportunities and success in project bids.

Implementing an ESG approach

a. **Understand your ESG drivers—what are your opportunities, legal obligations, and stakeholder views:** any approach must be founded on a firm understanding of your legal obligations and regulatory expectations and take into account the obligations and views of your stakeholders. Given regulatory focus on greenwashing and reporting, we highly recommend that the framework adopted uses credible third party standards such as the TCFD framework or Global reporting initiative (GRI) standards.

b. **Develop policies and procedures to measure and report on ESG:** fund managers must ensure their ESG policies and procedures reflect their legal obligations and individual objectives. This is likely to involve embedding ESG risk assessment measures in investment processes – such as investment strategy, governance practices and risk frameworks. It might also involve passing on appropriate obligations to fund managers or your supply chain.

c. **Implementation**: is likely to involve two stages, with the update of documentation used daily like due diligence practices and internal resources guiding investors' questions, and the review of current contracts to address ESG requirements – such as to impose reporting requirements.

Stay tuned for our next article on the legal risks relevant to ESG investing…

For further information on ESG investing please contact Brendan Ivers and Adam Jeffrey from our Funds and Banking and Finance team.

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Key Takeaways

- We expect that ESG investing will continue to accelerate as fund managers respond to the three forces driving investment opportunities;
- Property fund managers should assess their sources of capital to understand how ESG themes could affect their business;
- Fund structures and investment strategies should respond to identified needs.

Green Gains for Real Estate Industry

Authors: Adam Jeffrey and Chemonica Niranjan

How green is the real estate industry?

Historically, the real estate industry has been responsible for a large proportion of global greenhouse gas emissions primarily due to the materials involved in the construction process and the energy used to operate buildings on an ongoing basis.

However, with the global push to net zero gaining traction, the real estate sector finds itself a key player in this transition. Industry participants will also have their own Environmental, Social, and Governance (**ESG**) considerations and targets to achieve, which are actively scrutinised at the board and governance level. Green financing is one way to assist the real estate sector achieve these ESG targets.

Recent industry examples

Some recent Australian examples of the varied approach to, and use of, green financing in the real estate industry context include:

- The A$700 million green facility made by GIC (through a Gresham Property construction debt fund) being used by the project owners to fund the construction of the 39-storey Parkline Place office tower in central Sydney. The facility is compliant with the Green Loan Principles and qualified as a green loan due to the environmental credentials of the building (which adopted a 5.5-star NABERS Energy Commitment Agreement).
- The A$500 million sustainability linked loan made by MUFG and SMBC to the Charter Hall Office Trust which is linked to the trust's ESG objectives, with the relevant KPIs being measured against the NABERS and Green Star Rating tools.
- The world's first retail property sector green bond was issued by QIC Shopping Centre Fund. QIC raised A$300m to finance sustainability initiatives at three major Australian shopping centres. It was 5 times oversubscribed, showing the demand for financial assets such as this.
- CBA has made an A$130 million green loan to Oxford Properties Group to support the development of Indi Sydney City – Sydney CBD's first build-to-rent development. This building will be a 5 Star Green Star building, will be carbon neutral in its operations and will be the first to achieve a NABERS energy rating for built-to-rent.

What makes financing 'green'?

Green financing can take several forms and can be structured for the debt capital or loan markets, for example:

- **Green bonds** or loans are debt securities or loans where the proceeds are to be used for green projects (such as renewable energy, energy efficiency, water management etc).
- **Social bonds** or loans are debt securities or loans where the proceeds are to be used for social projects (such as affordable infrastructure, access to essential services, socioeconomic advancement etc.).
- **Sustainability linked bonds** or loans are debt securities or loans which are structured to incentivise borrowers to meet agreed sustainability performance targets through pricing adjustments.

Green loans allow proceeds to be used to finance environmental improvements to existing buildings or the development of new environmentally conscious buildings. At a business or portfolio level, sustainability linked products may be able to be used to set sustainability performance targets in respect of a group of assets or the performance of an industry participant more generally. The real estate industry already has a number of benchmarks and ratings systems (including NABERS, BREEAM and GRESB) which readily lend themselves to sustainability targets in green financing.

Social bonds and loans are increasing in popularity, and their application to, for example, social housing or essential infrastructure is something that will invariably be explored further by the real estate sector.

When going green pays-off

There is an increasing amount of capital available for green lending as banks and other investors have mandates to lend or invest in green projects and are generally putting ESG considerations at the forefront of their decision making. This is because green financing arrangements can provide lenders with benefits such as risk mitigation, easier syndication and access to cheaper wholesale funding themselves.

There are also direct financial benefits for participants in the real estate industry for 'going green'. In addition to pricing benefits from lenders in respect of green financing arrangements, some banks are offering specific products to property owners. For example, Commonwealth Bank of Australia has announced that property owners can extend their commercial property loans by up to 20%, with no line fees or establishment fees, in order to pay for major sustainability upgrades (subject to achieving certain NABERS rating or carbon emission reduction). More recently, CBA became the first 'big bank' to offer lower interest rates to homebuyers whose homes meet specific environmental criteria in Australia.

In addition, overall building values will increase and landlords will find it easier to attract tenants to green buildings and will be able to charge a premium for tenancies.

Why the real estate industry should lean into green

The recent 'green' success represents increasing investor demand for high-quality assets that are aligned with current environmental and social values. Green or sustainable projects also make commercial sense for borrowers because they boost the value of properties, whilst reducing operational costs.

As investor demand for environmentally sustainable projects grows, those who embrace environmentally friendly projects, and incorporate green financing, (while avoiding the tarnish of 'greenwashing' by using robust benchmarks), can expect to win big, while those do not will, undoubtedly, miss out. For more information on how you can take advantage of green financing, please get in touch with Adam Jeffrey from our Banking and Finance team.

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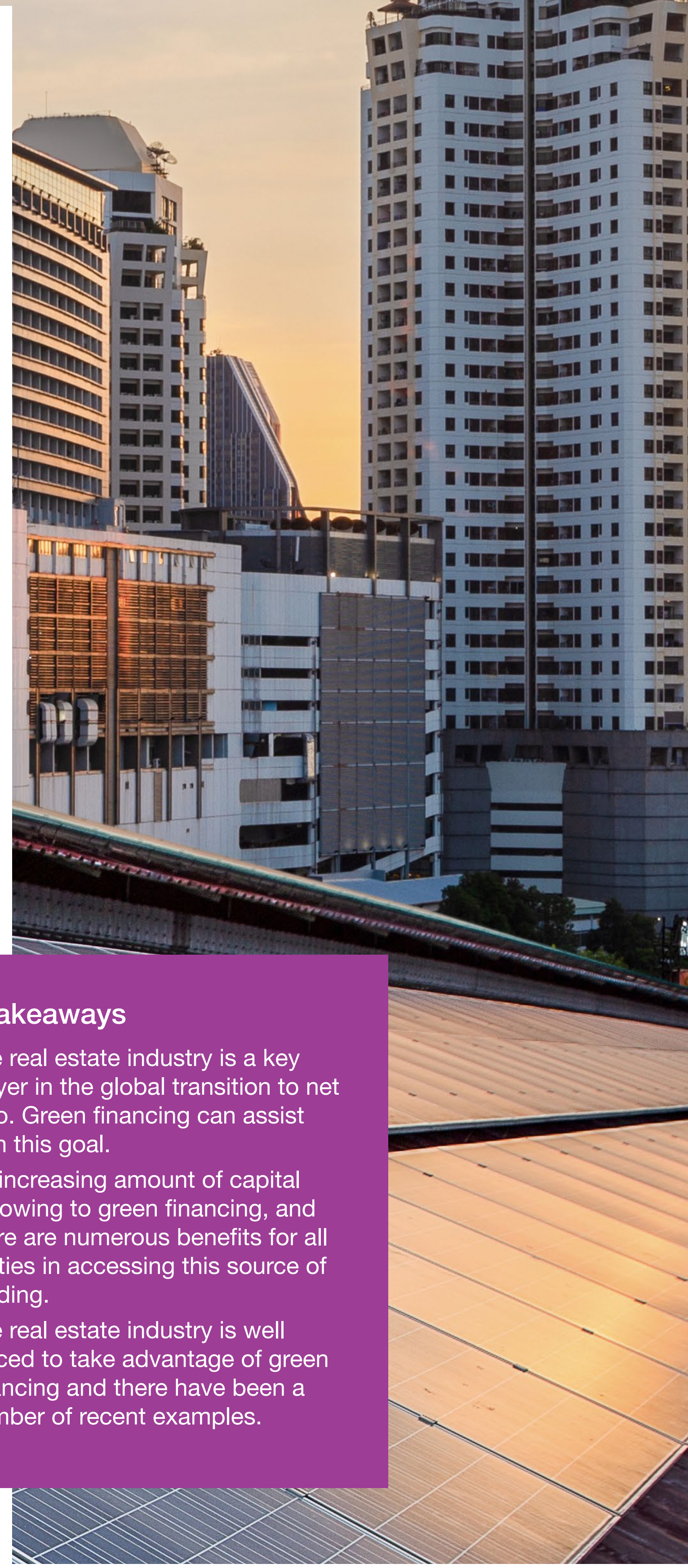

Key Takeaways

- The real estate industry is a key player in the global transition to net zero. Green financing can assist with this goal.
- An increasing amount of capital is flowing to green financing, and there are numerous benefits for all parties in accessing this source of funding.
- The real estate industry is well placed to take advantage of green financing and there have been a number of recent examples.

Have the Brakes Been Lifted from Constructive Acceleration Claims?

Authors: Veno Panicker, Grant Parker and Nasreen Jahan

Contractor wins case against Project Manager and Principal

In V601 Developments Pty Ltd v Probuild Construction (Aust) Pty Ltd [2021] VSC 849, the Victorian Supreme Court found that a Project Manager had colluded with the Principal in a partisan manner to refuse the Contractor's reasonable claims for extensions of time.

As a result of that refusal, the Contractor tried to meet the unadjusted completion date and incurred additional costs in doing so (i.e., in accelerating its works to try and meet that timeframe).

The court found that the Project Manager had failed to act independently, impartially or in a fair and reasonable manner in its assessments of the Contractor's extension of time claims, and that the Principal had breached the contract by failing to require the Project Manager to act independently and reasonably in exercising those functions. The court therefore allowed the Contractor to recover its costs of accelerating its works as damages for the breach of contract.

Background

Constructive acceleration refers to a situation where a Principal wrongfully denies a Contractor's claims for extensions of time and, as a result, the Contractor accelerates its works as a means of mitigating the delay and meeting the unadjusted contractual date for completion - without an express instruction from the Principal to accelerate.

A claim for constructive acceleration costs is a claim for the additional costs incurred by the Contractor in implementing those acceleration measures, such as hiring additional labour and equipment to perform the works at an expedited rate.

Such claims have traditionally failed in Australia, especially in the absence of any written direction from the Principal to accelerate the works, and where the contract does not allow for payment for acceleration absent a written direction to accelerate.

The Decision

In reaching its conclusion, the court found that the Principal had unduly influenced the Project Manager, and that the Project Manager had failed to exercise the requisite degree of independence, impartiality or fairness. The Project Manager had sought and acted upon the advice of the Principal's agents in assessing the Contractor's claims, and the Project Manager participated in meetings with the Principal regarding how to defend the Contractor's claims.

The court found:

1 Provisions of the contract which would render the failure to grant extensions of time valid and permissible under the contract did not operate because the Principal had not given a direction to accelerate under the contract.

2 – The Contractor had not been granted an extension of time so the 'additional cost' limitation provisions of the contract that would otherwise limit the Contractor's claims did not apply.

3 - The Principal was not entitled to its claim for liquidated damages for delayed completion as the Contractor was properly entitled to its claimed extensions of time.

4 – The Contractor was entitled to its claimed acceleration costs, except to the extent that claim overlapped with its entitlement to delay damages. The acceleration costs awarded to the Contractor were the costs incurred in undertaking additional measures to overcome or minimise delay, separate from its direct on-site time-related costs.

Impact for the Real Estate Industry

This case has particular significance in the wake of an industry racked by COVID-related shutdowns, site constraints and procurement delays.

Given the prevalence of extension of time claims in a COVID-hindered world, the case provides important guidance on the circumstances in which a Contractor who has been delayed in completing its works, but has been wrongfully denied its extension of time claims, may be able to recover the costs associated with accelerating its works to meet the unadjusted completion date.

Proving collusion is notoriously difficult and the contract may restrict the Contractor's ability to make a constructive acceleration claim. However, in circumstances where the conduct of the Project Manager and/or Principal has resulted in a breach of the contract, it may be possible for a Contractor to recover constructive acceleration costs.

For further information on how this decision may impact you, please get in contact with Veno Panicker or Grant Parker from our Construction team.

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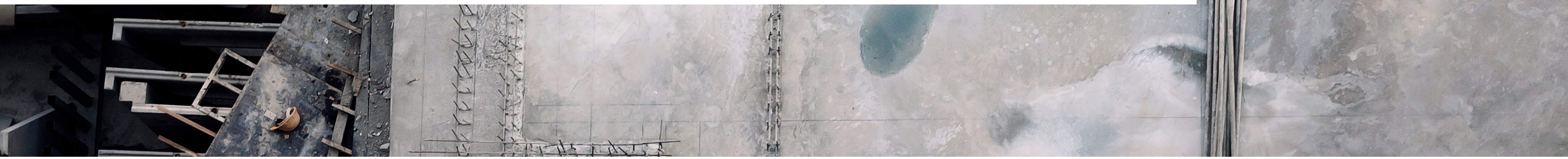
Key Takeaways

- A recent Victorian Supreme Court decision provides welcome guidance on the very limited circumstances in which a contractor may be able to claim constructive acceleration costs.
- Constructive acceleration claims arise where contractors are denied legitimate requests for extensions of time and then seek to recover the costs associated with accelerating their works to meet the unadjusted completion date.
- Australian courts have generally not supported claims for constructive acceleration costs but it will turn on the contract.



Funding Construction Disputes

Authors: Brit Ibanez and Hugh Farquhar

Margins and cashflow in the construction industry are tight.

Tender processes are competitive, supply chains and labour are stretched and in the December 2021 quarter alone construction industry insolvencies jumped nearly 40 per cent compared to the previous quarter. Each of these factors and others combine to create an environment in which it is almost impossible for construction companies to set aside money to litigate their meritorious claims arising out of amongst other things variations, delays and errors.

Third party litigation funding presents an opportunity for construction companies to finance the pursuit of these meritorious claims in a manner which suits individual companies' financial circumstances.

Litigation Funding

Litigation funders are third parties who partly or wholly fund the costs of litigation in return for a portion of the proceeds if the action is successful.

Commonly, that portion will be either a multiple of the funding, a percentage of the damages recovered, a fixed amount or a combination of these.

Significantly litigation funders will fund claims on a non-recourse basis, meaning they only collect a return on their investment in the event of a successful outcome from the claim (the other assets of the company are not available to repay the funder).

If the claim is unsuccessful, the litigation funder will generally have agreed to absorb their loss and in addition, to pay any order to pay the costs of the other party to the litigation. This means a company can transfer the whole of the financial risk of a claim to a litigation funder.

Example – Traditional Litigation Funding Model

Company A has a claim worth approximately $1,000,000 against Company B arising out of Company B's delay in completing works..

Company A has been advised by its lawyers that its claim is straightforward and has a very good chance of success. In addition, Company A is aware that Company B would have the means and incentive to pay any judgment debt quickly.

Company A has been advised by its lawyers that it will cost up to $100,000 to pursue its claim against Company B from beginning to end.

Unfortunately, Company A's cashflow is tight. It has a number of overdue accounts and a number of key upcoming payments that it must make to ensure that its business continues to trade. Company A has stated it will not be in a financial position to pursue the claim within the foreseeable future.

Company A's lawyers suggest that Company A engage litigation funders to fund its claim.

Company A, its lawyers and the litigation funders enter into a funding agreement whereby the litigation funders agree to fund Company A's claim in return for receiving an agreed portion of the damages recovered.

Company A commences proceedings against Company B and within two months of the commencement of the proceedings the parties agree to settle the dispute for payment of a settlement sum of $700,000 by Company B to Company A.

The litigation funders receive their agreed portion of the settlement sum under the funding agreement, and Company A receives the balance of the funds remaining once the lawyers' fees are paid.

Instead of waiting until a time in which it was in a financially viable position to pursue its claim (which may never have occurred), by engaging litigation funders Company A was able to resolve its claim and receive a significant settlement amount within a matter of months.

Alternative Funding Structures

Hamilton Locke can put prospective claimants in touch with litigation funders offering alternative pricing and funding models.

Litigation funders can offer to provide a facility to fund all the disputes which a company may have. This structure allows a variety of claims to be funded, large and small claims and even claims where the company is a defendant. Where funding is provided for a portfolio of claims, the pricing for the company is cheaper as the funder's risk is spread across these claims rather than concentrated in one claim.

Claims can also be viewed as assets which litigation funders will lend against to provide a working capital facility. That is, a company can access non- recourse finance for their business needs which is only required to be repaid from the proceeds of a successful claim.

Litigation funders will also offer to "buy" claims and pay an upfront amount to the company to have the claim assigned to them. This can assist with cashflow for the company in circumstances where margins are tight.

Hamilton Locke

It is no surprise that litigation funders are increasingly involved in project disputes in circumstances where the real estate sector including landlords and asset managers have been hit hard by the downturn in the economy and developers are being subjected to increasing regulation in already oversupplied markets.

At Hamilton Locke, we have extensive connections within the litigation funding industry and experience dealing with both funders and construction disputes.

These connections and experience mean that we are expertly placed to assist in connecting companies and litigation funders.

If you think that Hamilton Locke may be able to assist you in pursuing your meritorious claims, please contact Brit Ibanez or Eric Braun from our Litigation team to discuss.

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Key Takeaways

- Australia's sophisticated third party litigation funding market presents the ideal solution for cashflow constrained construction companies to fund the pursuit of their meritorious claims.
- Litigation fundings arrangements involve a third party who either partly or wholly funds the costs of litigation in return for a portion of the proceeds should the action be successful.

Covid Tenancy Relief Round Up

As COVID-19 restrictions lift across Australia, each State and Territory has adopted a different timeline for wrapping up the residential and commercial tenancy relief measures put in place to protect COVID-19 affected tenants and landlords.

Tenants and landlords alike should be aware of the changing COVID-19 protections and any ongoing obligations required of them.

To help navigate this constantly evolving landscape, find below an overview setting out the relevant cut-off dates for both residential and commercial tenancy relief measures across Australia.

Current as at 6 April 2022.

New South Wales

Residential tenancy support in NSW has largely come to an end following:

- the freeze on evictions which lifted 11 November 2021;
- applications for financial assistance to landlords who agreed to reduce rent for COVID-19 impacted tenants which closed 31 December 2021; and
- since 13 February 2022, landlords have now been able to terminate a tenancy using the standard termination provisions for arrears accrued during the moratorium period.

Relief measures for COVID-19 affected commercial tenants have also wrapped up:

- obligations on commercial landlords to renegotiate rent with an eligible 'impacted lessee' with a turnover of less than $50 million in the 2020-2021 financial year ended on 30 November 2021;
- from 30 November 2021, the definition of who qualified as an 'impacted lessee' was changed to refer to a tenant with a turnover of less than $5 million in the 2020-2021 financial year;
- as of 13 March 2022, there is no obligation on commercial landlords to renegotiate rent with an 'impacted lessee'; and
- measures preventing rent increases also ended on 13 March 2022.

Victoria

As of 16 January 2022, residential residents have no longer been able to apply for the second round of the COVID-19 Rental Relief Grant. As part of this Grant:

- tenants experiencing hardship due to COVID-19 could apply for up to $1,500; and
- landlords were required to negotiate rent reductions in good faith, with the grant to be used to pay the agreed reduced rent.

Support for COVID-19 affected commercial tenants has been extended up until 15 March 2022 under the Commercial Tenancy Relief Scheme, this Scheme:

- provides support to businesses with an annual turnover of less than $10 million that have suffered a decline in turnover of at least 30% due to COVID-19; and
- operates retrospectively from 16 January 2022 up to 15 March 2022.

Western Australia

The extended COVID-19 emergency period end in Western Australia on 28 March 2021

- Since this date, ordinary tenancy laws under the Residential Tenancies Act 1987 (WA) have applied.

Commercial tenants can expect ongoing support following the announcement of the Small Business Rental Relief Package on 24 February 2022, which includes:

- a 'Tenant Rent Relief Scheme' providing grants of $3,000 to eligible small business tenants;
- a 'Landlord Rent Relief Incentive' supporting eligible landlords who voluntarily match the Government's Tenant Relief payments with $1,500; and
- rental waivers or credit of $6,000 for eligible small business tenants of Government-owned buildings.

South Australia

As of 1 December 2021, targeted rental relief measures for COVID-19 affected residential tenants have come to an end.

- However, COVID-19 will remain a designated form of undue hardship for matters being heard by the South Australian Civil and Administrative Tribunal (SACAT) where disputes arise.

Rental relief measures for commercial tenancies expired on 3 January 2021.

- Since this date, any breach of a commercial lease term has been dealt with by way of normal enforcement measures such as evictions.

Queensland

Residential tenancy relief measures have been extended until 30 April 2022, including:

- protections for tenants against being listed in a tenancy database for rent arrears caused by COVID-19 impacts;
- caps on costs associated with re-letting for eligible tenants who end fixed term tenancies early; and
- short term tenancy statement extensions for moveable dwellings.

Commercial tenancy relief measures will also continue until 30 April 2022, this includes:

- all rights and obligations given to commercial landlords under the COVID-19 Emergency Response Act 2020 (QLD) such as the requirement to cooperate and act reasonably and in good faith in all discussions and actions to mitigate the effect of the COVID-19 emergency.

Northern Territory

Relief measures under the Residential Tenancies Act 1999 (NT) apply up until the end of the declaration of the health emergency, which has been extended up until 16 June 2022. Measures still in place include:

- extending notice timeframes for certain pre termination actions; and
- new processes for terminations due to non-payment of rent because of COVID-19 hardship.

Relief measures for commercial tenancies apply up until the end of the declaration of the health emergency, including:

- the requirement of landlords to negotiate in good faith with tenants to allow the tenant to remain in the leased premises before issuing a notice to quit.

Australian Capital Territory

Relief for residential tenants financially impacted by COVID-19 or subject to quarantine directions has been extended until 11 May 2022, this includes:

- prevention of evictions on the basis of debt accrued during the moratorium on evictions (being 2 September-24 November 2021) where rent is being paid when it falls due during the transition period;
- ongoing restrictions on COVID-19 impacted householscds being added to tenancy data bases; and
- eligible renters can apply for a one-off grant of $1000 through Care Financial Counselling Service.

Targeted relief measures for commercial tenants facing financial hardship due to COVID-19 has been revoked as of 31 December 2021: :

- there is no longer an obligation on landlords to negotiate in good faith with their impacted tenant before taking action against the tenant for a breach;
- landlords can now issue a termination notice or take action to evict a tenant even if the parties have not yet engaged in good faith negotiations; and
- parties are no longer required to have regard to the leasing principals contained in the National Cabinet Mandatory Code of Conduct.

Tasmania

Rental relief measures for COVID-19 affected residential tenants in Tasmania have come to an end:

- Rental protections in relation to rental evictions, rental increases and repairs and maintenance ended on 31 January 2021; and
- Financial support for residential tenants under the Rent Relief Scheme and COVID-19 Extra Support Scheme ended on 30 June 2021.

Rental relief for COVID-19 affected commercial tenants also ended on 31 January 2021.

Recent Transactions of Note

Here is an overview of some recent transactions of note that Hamilton Locke's Real Estate Markets Team have been involved in.

SCA Property Group (ASX: SCP)

Advised SCA Property Group (SCA) on the real estate aspects relating to the establishment of a new A$750m metro convenience retail Joint Venture with an affiliate of Singapore-based GIC.

Haben Property Group

Acted for Haben Property Fund Pty Ltd (Haben) in the acquisition of The Station, Oxley Village Shopping Centre, QLD from global fund manager Savills Investment Management.

Primewest Group (ASX: PWG)

Advised Primewest Group (Primewest), one of Australia's leading real estate funds management businesses, in relation to the off-market takeover bid and merger with Centuria Capital Group. The takeover valued Primewest at A$600 million and the merged group at over A$2 billion.

Elanor Commercial Property Fund (ASX: ECF)

Advised MA Moelis Australia as sole underwriter and bookrunner in relation to the accelerated non-renounceable entitlement offer launched by Elanor Funds Management Limited as responsible entity for the Elanor Commercial Property Fund (ECF) to raise approximately A$37 million to fund ECF's 49.9% investment in a fund acquiring the land and buildings at 19 Harris Street, Pyrmont.

Something Different

Bobby Nader
Lawyer
(Real Estate)

You can go anywhere in the world (post-covid and no budget) where are you going to first?
Barcelona, Spain

WFH or Office?
Office

If I weren't a lawyer I would be…
Real estate agent

Favourite book, podcast, movie or musical artist?
Purple Disco Machine

If you had to eat one meal everyday for the rest of your life, what would it be?
Poached eggs (x4), rye toast, smashed avocado, haloumi, mushrooms, feta cheese, grilled tomato

Lily Cox
Graduate
(Real Estate)

Personal goal for 2022?
To run in a half marathon

WFH or Office?
Definitely the office

If you had to eat one meal everyday for the rest of your life, what would it be?
Rare beef pho

Favourite book, podcast, movie or musical artist?
My favourite book is 'A Visit from the Goon Squad' by Jennifer Egan

Name one item on your bucket list?
Road trip around Western Australia and swim with whale sharks in Ningaloo Reef

Adam Jeffrey
Partner
(Banking and Finance)

You can go anywhere in the world (post-covid and no budget) where are you going to first?
Travelling through Bhutan.

WFH or Office?
I have always worked from home a bit, even before COVID times. WFH during lockdown has been great. However, I am looking forward to working from the office more regularly again!

Name one item on your bucket list?
To travel with the family to the Galapagos Islands.

Favourite book, podcast, movie or musical artist?
At the moment, I like the podcast 'Lightning Bugs: Conversations with Ben Folds'. He was one of my favourite musical artists growing up, and the discussions he has with his guests are very enlightening.

Favourite place in the world?
I love travelling in Japan. I find the culture and history very interesting, and the food is amazing!

Edwina Renshaw
Special Counsel
(Real Estate)

WFH or Office?
Depends on the weather . . .

If I weren't a lawyer I would be…
An interior designer

Favourite book, podcast, movie or musical artist?
"Sentimental in the City" and "Pieces of Britney" podcasts. Both a must for any Sex and The City and Britney Spears fans

If you had to eat one meal everyday for the rest of your life, what would it be?
Roast chicken with all the trimmings

Favourite place in the world?
As someone who grew up in the country, nothing beats escaping Sydney for fresh country air

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