# Real Estate Markets Quarterly

Spring 2023

Hamilton Locke

# Foreword

**Welcome to the Spring Edition of the Real Estate Markets Quarterly.**

Features in this edition include:

1. Spotlight on CEO, Lisa Hobbs
2. Q&A with our tax partner Seema Sandhu
3. Snapshot on State Tax Developments
4. New Seller Disclosure Scheme for Property sales in Queensland;
5. New Reporting Obligations for Foreign Investors; and
6. Budget Measures for MITs: Build-to-Rent and Clean Buildings.

At the time of writing, the Reserve Bank held interest rates at 4.1% for a second consecutive month, the highest level since 2012 bringing relief to mortgage holders and hope that the Reserve Bank will stop or at least slow any further increases. The bank started lifting rates from a historic low of 0.1% in May last year. What followed were 12 subsequent increases culminating in a 400 basis point increase (the sharpest tightening of monetary policy in more than 3 decades). Whilst there are no shortage of opinions, there is a growing view that property prices have "bottomed out" in most sectors. As for further rate rises, all eyes will remain on consumer spending and inflation (6% at the time of writing) and whether it will continue its downward trajectory towards the Reserve Bank's 2-3% target range.

We are continuing to see a large amount of activity in shopping centre transactions and have started to see more activity in commercial office assets.

On the regulatory front for property funds, Treasury recently released a consultation paper for a wide-ranging review of the operation of managed investment schemes. Of particular note is that Treasury is consulting on changes to the "wholesale client" test, which could have significant implications for any wholesale property fund manager.

Treasury is also consulting on changes to the regulatory framework governing liquidity and withdrawals in managed investment schemes, which also has the potential to significantly impact retail property fund operators.

We hope you enjoy this Spring edition and find it useful. Thank you for ongoing support in FY24.

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# Industry Spotlight - Lisa Hobbs

**Lisa Hobbs**
Chief Executive Officer
Etymon Projects

**Lisa is an executive with over 17 years' senior leadership experience and is the CEO of Etymon Projects.**

Etymon Projects, part of the Aqualand group, is a hospitality and services business pioneering a new level in premium hospitality, luxury accommodation, services, and retail concepts.

As CEO, Lisa is responsible for developing Etymon's vision and leading the company towards consistent and sustainable growth on and offshore.

## Please provide an overview of your career to date.

The majority of my career has been spread across the Finance and Hospitality sector.

I have more than 17 years' experience in senior leadership, beginning my career in the Finance industry and then transitioning into the Hospitality sector around 13 years ago.

I began my career in the Finance sector in marketing communication roles before working at Credit Suisse for 10 years in product development and management within their Investment Bank and Asset Management divisions.

In 2010 when the GFC was well underway and many changes were occurring within the Finance sector, I chose to step away from banking to see where else I might use my skills and experience. It was then that an opportunity with a growing hospitality group presented itself and I took a leap of faith. Since then, I have worked with a few hospitality groups within Sydney, where I have grown businesses and led large teams.

My current role as CEO of Etymon Projects is by far my best role to date given our growth plans onshore and offshore.

## Please tell us a little bit about your current role at Etymon Projects.

As the CEO of Etymon Projects, my role is to lead the team to create, curate and manage world class hospitality and lifestyle businesses within Australia and offshore. I have full accountability for our hospitality and services businesses from our vision, strategy and growth plans to the operations, guest experience, culinary and beverage services and people and culture departments.

My role is also part of the Senior Leadership team within Aqualand group and to add value to our businesses within the group through our hospitality and services.

## Etymon Projects has been active in the Hospitality sector over the past couple of years. What do you like most about working in the sector?

In terms of the sector, it is fast paced, incredibly dynamic, creative and a lot of fun. It's a people business focussed on service, food and beverage and guest experiences. All of which I am incredibly passionate about. In terms of my role, it is broad, has a large mandate and is focussed on strategy, execution, and people. What I love most therefore in this sector is the opportunity I have to combine what I am passionate about with what I am best at and that is a recipe for success.

> *"have a mentor."*
> *"...you only need to ask."*

## How and why did you decide to work in the Hospitality sector?

In 2010 I wanted a change from Finance. I moved out of financial services and into hospitality after accepting an opportunity that arose with a growing hospitality business as COO and then CEO. What appealed to me was the hospitality industry and the challenge of working closely with business owners to define a scalable operating model to achieve growth and a profitable business spanning eight venues.

In the process of making this large career change, I found what I was missing parts o f my Finance career and that was the people part, ensuring the experience of our staff and guest are great. It was very tangible in a humanistic way which spoke to me.

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

Becoming a CEO.

## What are the biggest challenges you have experienced in your career to date?

One would be caring too much about what other people think of me. That was until I learned that it's none of our business what other people think of us.

The other would be being female and not necessarily following the social norms and scripts. There is a different level of narrative and judgement reserved for females in business, particularly at senior levels. I am pleased to say this is changing however, I would be lying if I said I didn't notice it.

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

It's a great industry to work in, with many diverse and flexible career paths. If you want a fantastic, lifelong career including a management position - you can. With some of the best restaurants, bars and hotels in the world, the hospitality industry in Sydney has plenty to offer your career with onsite roles at venues or more corporate environments like head offices. So do your research and talk to people.

Network and find people with whom you can share your experience and workshop issues that arise. Also, back yourself and lean into the change required to grow your career.

Lastly, have a mentor. There are a lot of women and men in our industry ready and willing to assist and mentor - you only need to ask.

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

In terms of issues in the Hospitality Sector, they are around skilled staff shortage, economic pressures (specifically rising cost of food and supplies), supply chain issues and changing nature of the workforce (affecting when and where people are dining..

In terms of opportunities, in Sydney, it's a great time to be growing a hospitality business and to be looking for a career within the industry. There is a lot of development occurring, international and domestic tourism is picking up and state and local government initiatives such as CBD revitalisation and a 24-hour city are very positive and aligned with other countries around the world.

### What are your top reading and watching recommendations?

**Currently:**

Reading:

- Brene Brown – Atlas of the Heart
- Will Guidara – Unreasonable Hospitality
- Kevin Behan - Your Dog Is Your Mirror

Watching:

- 1923
- The First Lady
- The Blacklist (latest season)

## 'Something Different'

Seema Sandhu
Partner

### 1. Favourite book, podcast, movie or musical artist

Anything by Curtis Sittenfeld. I also love books that tell multiple perspectives of the same story. For example, Fates & Furies by Lauren Groff and Fleishman is in Trouble by Taffy Brodesser-Akner.

I'm always completely convinced by the first person's story, only for it all to be undone once I read the second person's story. It's always a good reminder about life.

### 2. Favourite cuisine/meal

Salmon sashimi. And lamingtons. (Not together!)

### 3. Dream holiday destination?

Maldives!

### 4. Fun fact about yourself

I am a Scouser.

### 5. Tips for aspiring lawyers seeking partnership?

Remember that the route to partnership is not always linear – if partnership is what you want (and it's not for everybody!), there are myriad paths to get there. Don't be afraid to take opportunities, even if they are outside the standard traditional pathway.

### 6. If I weren't a lawyer I'd be...

A journalist. I have always loved writing.

### 7. Where did you start practising and what do you like about being a lawyer?

I started at Clayton Utz, Sydney. I like the challenge of law – trying to solve a problem for a client. Balancing legislation, case law, regulatory guidance and policy on one hand, with the client's commercial objectives on the other; it's rarely straightforward.

# Snapshot of State Tax Developments

**Authors:** Seema Sandhu and Anushka De Alwis

## State Tax Developments

There have been a considerable number of state tax developments over the past 12 months. We have summarised below some of the key reforms and proposals.

### 1. Windfall Gains Tax

Victoria has introduced a Windfall Gains Tax that commences on 1 July 2023. It is triggered if land is rezoned and the value increases. The applicable rates are set out in the table below.

| Taxable value uplift | Rate |
|---|---|
| Less than $100,000 | Nil |
| $100,000 to $500,000 | 62.5% for the taxable value uplift in excess of $100,000 |
| $500,000 or more | 50% |

It had been anticipated that deductions would be available for certain costs, such as rezoning related expenses or remediation costs. However, the Victoria SRO has confirmed that no deductions will be available on the commencement date.

There are some limited exemptions, including for residential premises on land less than 2 hectares in size. The tax can be deferred until the land is sold or 30 years has passed (whichever is earlier).

Parties considering purchasing land in Victoria, in areas likely to be subject to rezoning, should carefully consider the Windfall Gains Tax implications. Special conditions may be required in a contract for sale to make it clear who bears the Windfall Gains Tax risk.

### 2. Foreign Investor Surcharges

Revenue NSW announced in February that it will cease imposing surcharge purchase duty and surcharge land tax on purchasers of residential-related land from South Africa, New Zealand, Finland and Germany. This is because of the terms of Australia's international tax treaties with South Africa, NZ, Finland and Germany.

The announcement also extends to trusts and companies which are considered to be foreign solely because investors from the four mentioned countries have a significant interest.

The Victorian SRO has acknowledged Revenue NSW's announcement, but stated that it will continue to apply its own surcharge duty and surcharge land tax to purchases from all countries.

They can't both be right and it is likely a test case will be needed to confirm whether such surcharges are valid. It is unclear why Revenue NSW has confined its announcement to four countries only. Other countries, including Japan, Norway, Sweden and India have similar international tax treaties to the four mentioned countries.

### 3. Queensland legislates Build-to-Rent concessions

The Queensland government has introduced land tax and foreign investor surcharge concessions for qualifying build-to-rent projects. Under the new concession, there will be a 50% land value reduction (for land tax purposes) for up to 20 years. Further, there will be exemptions for surcharge purchaser duty and surcharge land tax. This is consistent with similar concessions on offer in New South Wales and Victoria. The concessions will apply from 1 July 2023.

### 4. Duty on call options and leases in New South Wales

New South Wales introduced new duty rules on 19 May 2022. Those changes were significant and Revenue NSW continues to provide updated guidance on how the measures will apply in practice.

Specifically, the new rules mean that duty is payable on the grant of call options entered into after 19 May 2022. Further, duty may now be payable on a range of transactions involving leases that were not previously dutiable. This includes the grant of a new lease for a non-monetary premium (such as works-in-kind).

Duty advice should always be sought for any material transactions - but this is particularly so in light of these broad ranging reforms.

### 5. Duty on farm-in arrangements in Western Australia

In Western Australia, duty concessions are available for transfers of interests in mining and exploration projects that occur as a part of a "farm-in" arrangement. This typically applies where an investor is transferred an interest in a project after first expending an agreed amount on exploration or other costs.

The Western Australian government wound back some of the concessions through legislative amendments in November 2022. The amendments apply retrospectively from 28 November 2018.

Entities considering entering a farm-in arrangement should consider how this can best be structured to achieve the optimal duty and commercial outcomes.


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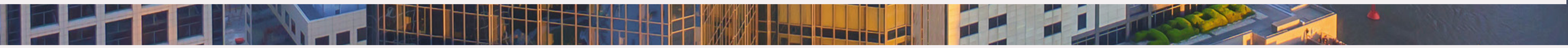


# New Seller Disclosure Scheme for Property Sales in Queensland

**Authors:** Sarah Roettgers and Ramin Beigi

The Property Law Bill 2023 (**Bill**), which is intended to replace the Property Law Act 1974 (Qld), will bring about considerable change to the sale of freehold land in Queensland with the implementation of a new seller disclosure scheme.

The objective of the seller disclosure scheme is designed to bring transparency and consistency to property sales by making it mandatory for a seller of freehold land to disclose relevant information to a buyer, which is more in line with the disclosure obligations of other States. Sellers will be required to disclose specific information to potential buyers relating to the condition and status of the property.

The Bill is currently awaiting the second reading debate in Parliament, which will be sitting next on 22 August 2023.

## What are the disclosure requirements?

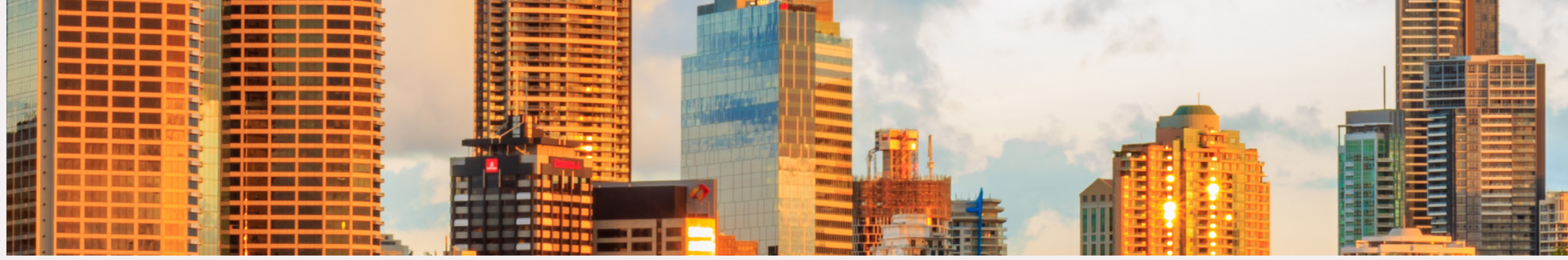
The disclosure scheme will apply to the sale of freehold land, including auctions, mortgagee or receiver sales and sales resulting from the exercise of an option (subject to the various exceptions, as referenced below).

Before a buyer signs a contract of sale, the seller must provide a signed disclosure statement containing prescribed information, which must be in the approved form and completed with accurate information. A draft of the approved form of disclosure statement is here.

The disclosure statement requires the provision of both documents *(referred to as prescribed certificates)* and information prescribed by the Property Law Regulation 2023 in relation to the lot.

**The prescribed certificates that must be provided to a buyer include:**

1. title search
2. registered plan of survey
3. notice of any unlicensed building work undertaken within the last 6 years
4. current show cause notice or enforcement notice issued by the relevant authority under the Building Act 1975 or Planning Act 2016
5. current notice or order issued by an authority requiring work to be done or money spent
6. current notice, order or transport infrastructure proposal issued by an authority that may affect the title or use of the lot (eg notice of intention to resume)
7. if there is a pool for the lot, pool compliance certificate or notice that there is no pool safety certificate
8. if the lot is within a community titles scheme:
   a. body corporate certificate (or a statement that the body corporate certificate is not attached and reasons why the seller has been unable to obtain the certificate)
   b. community management statement
   c. exclusive use by-laws or other by-laws not included in the community management statement
9. if the lot is included in a plan under the Building Units and Group Titles Act 1980, body corporate certificate (or a statement that the body corporate certificate is not attached and reasons why the seller has been unable to obtain the certificate)



The information prescribed by the Property Law Regulation 2023 that must be provided to a buyer include:

| | |
|---|---|
| **Unregistered Encumbrances** | details of any unregistered encumbrance which will not be released at settlement, including:<br>(a) unregistered lease, including a short lease under the Land Title Act 1994<br>(b) access agreement, opt-out agreement or conduct and compensation agreement under the Mineral and Energy Resources (Common Provisions) Act 2014<br>(c) unregistered charge, mortgage, easement or profit a prendre<br>(d) charge, restriction or burden affecting the title in favour of the Commonwealth, State or local government<br>but **excludes** an encumbrance registered on title |
| **Zoning** | zoning of the lot as published in the local government planning scheme |
| **Environmental** | a) whether the lot is recorded on the environmental management register or contaminated land register<br>(b) whether the seller is required to give the buyer a notice under section 408 of the Environmental Protection Act 1994 (Qld)<br>(c) whether the lot is subject to an environmental protection order<br>(d) whether the lot is subject to a transitional environmental program |
| **Community Titles Scheme** | whether the lot is included in a community titles scheme or subject to a plan under the Building Units and Group Titles Act 1980 |
| **Trees** | whether the lot is affected by any tree orders or applications under the Neighbourhood Disputes (Dividing Fences and Trees) Act 2001 |
| **Notice or orders** | whether the lot is affected by a notice, order or transport infrastructure proposal |
| **Pool** | whether there is a pool for the lot |
| **Commercial office building** | if there is a commercial office building of more than 1,000m2 on the lot, that a Building Energy Efficiency Certificate is available on the Building Energy Efficiency Register |
| **Rates and Water** | details of the most recent rates and water service charges for the lot (if rates and water service charges are payable) |

The scheme also prominently alerts a buyer to undertake its own due diligence about matters not covered by the disclosure statement before signing a contract of sale. In particular, the disclosure statement does not require the disclosure of information relating to:

- flood history
- structural soundness of the building
- pest issues
- current or historical use of the property
- current or past building or development approvals
- limits imposed by planning laws on the use of the land and services that are or may be connected to the property.

## Auction contract

For auctions, the seller disclosure scheme makes a distinction between buyers of a lot that register as a bidder either before or after the commencement of an auction. Where a buyer registers as a bidder after commencement of the auction (and has not previously been provided with the disclosure statement and prescribed certificates), the disclosure documents must be made available physically (for an auction conducted in person) or electronically (for an auction conducted electronically).

## Options

The seller disclosure scheme applies to sales arising from the exercise of an option. In these circumstances, the seller will be required to give the relevant disclosure statement and prescribed certificates to:

1. the buyer under the option, prior to the buyer signing the option; and
2. the buyer under the contract of sale arising from the exercise of the option, prior to the buyer signing the option (in circumstances where the buyer under the option and the contract of sale are different).

A seller will need to ensure that the mechanics of its option are drafted such that the seller will have the ability to provide any disclosure statement and prescribed certificates to a third party nominated as buyer under a contract of sale prior to the nominee executing the contract of sale.

## Electronic disclosure

The disclosure statement and prescribed certificates may be given physically or electronically (and also signed electronically), allowing for easier access and convenience. This will facilitate the use of electronic delivery of the disclosure documents using platforms such as DocuSign and cloud storage or as a secure link in an email.

When sending a secure link via email containing these disclosure documents, the seller should request a delivery receipt notification confirming that the email has been successfully delivered to the buyer's nominated email address.

## Exceptions to disclosure requirement

There are various exceptions to the requirement for a seller to provide a disclosure statement, including for example:

1. contract giving effect to the resumption of land under the Acquisition of Land Act 1967
2. transactions involving a boundary realignment between adjoining owners
3. sale between related parties in circumstances where the buyer gives the seller a notice waiving compliance with the disclosure requirement
4. transactions involving a government entity as the buyer of the lot
5. the contract is more than the amount prescribed by regulation (or, if no amount is prescribed, $10 million including GST) in circumstances where the buyer gives the seller a notice waiving compliance with the disclosure requirement.

However, such exceptions do not exempt the seller from providing the required disclosure under another Act, e.g. notice under section 408 of the Environmental Protection Act 1994 (Qld):

## Buyer's right to terminate

A buyer has a right to terminate a contract, on giving a notice of termination to the seller, prior to settlement if:

1. the seller fails to provide the disclosure statement and any prescribed certificates before the buyer signed the contract.

This is an absolute right to terminate the contract and does not require the buyer to prove that the non disclosure related to a material matter.

2. all of the following apply:

a. the disclosure statement or prescribed certificates contain an inaccuracy or are incomplete in relation to a material matter

b. the buyer was unaware of the correct state of affairs concerning the matter when they entered into the contract

c. the buyer would not have entered into the contract had they been aware of the correct state of affairs.

The only exception to a buyer's right to terminate is where the seller's failure to disclose (or inaccuracy in the disclosure) is also a failure to comply with another Act. In this circumstance, the consequence provided for in the other Act will apply instead.

For example, a failure by a seller to give a buyer notice about unlicensed building work under the Queensland Building and Construction Commission Act 1991 does not give a buyer the right to terminate the contract, but instead implies a contractual warranty that the building work was properly carried out.

Where a buyer terminates a contract of sale, the seller must refund any amount paid by the buyer towards the purchase of the land within 14 days of termination. This includes any interest accrued on the amount whilst held by the seller).

## Going forward

Once the relevant provisions of the Bill commence, sellers will need to be mindful of their obligations relating to the seller disclosure scheme.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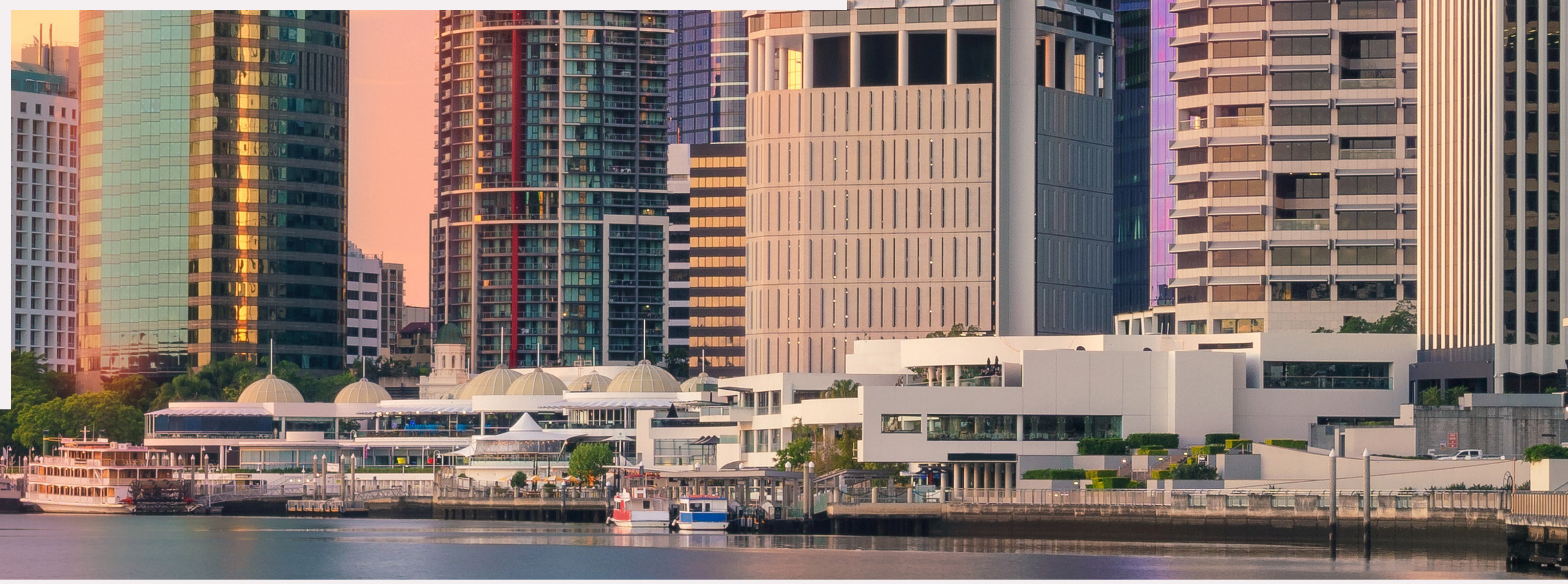

# Impact of the VCAT decision of Q St Kilda Tenancy Pty Ltd v Kane (Building and Property) for other States

**Authors:** Sarah Roettgers and Ramin Beigi

In January 2023, the Victorian Civil and Administrative Tribunal (**Tribunal**) addressed the question of whether a CPI-based rent review mechanism capped at 4% contravenes section 35 of the Retail Leases Act 2003 (Vic) (**RLA Vic**) by employing more than one method to determine the rent on the commencement of the renewed lease term.

The Tribunal answered in the affirmative – finding that a cap on CPI review contravenes section 35(2) of the RLA Vic. As a result, section 35(7) of the RLA Vic was invoked, causing the rent review mechanism to default to a market review, which was a win for the tenant given the poor market for landlords at the time. The Tribunal's reasoning stemmed from the ordinary construction of section 35(2) which states:

> *The basis or formula on which a rent review is to be made must be one of the following:*
>
> (a) a fixed percentage;
>
> (b) an independently published index of prices or wages;
>
> (c) a fixed annual amount;
>
> (d) the current market rent of the retail premises;
>
> (e) a basis or formula prescribed by the regulations.

The Tribunal determined that the text "must be one of the following" mandates the use of only one method for rent review, not a combination of methods. It reasoned that each component, namely the CPI increase and the 4% cap, constitutes a basis or formula under section 35(2). Member Nash held:

> *"[the rent review clause] refers to more than one method or formula for calculating the rent as it requires an assessment of rent after the application of the CPI and then an assessment of that rent to ensure it is not greater than an increase of 4%, and if it is, it is then limited to a 4% increase, which is an alternative calculation."*

The Tribunal ultimately concluded that any rent review involving more than one method of calculation must violate the terms of section 35(2).

The question arising in the wake of the decision is whether, and if so, how, the VCAT decision impacts the interpretation of the legislative position in New South Wales, Queensland, and Western Australia, all of which have a similar retail shop lease legislation framework.

## What is the position under Queensland's Retail Shop Leases Act 1994 (Qld) (RSLA Qld)?

Section 27(5) of RSLA Qld serves as the Queensland counterpart to section 35(2) of the RLA Vic. Both provisions share the same introductory text requiring that the basis for a rent review must be a single basis consisting of 1 of the identified bases, when describing alternative methods of rent review. However, the Queensland version includes an additional alternative (section 27(5)(g) of the RSLA Qld) not found in section 35(2) of the RLA Vic, which allows for two or more of the methods of rent review listed in section 27(5) of the RSLA Qld (excluding market review) to be used in combination to form one base of rent review.

To understand the intention of parliament, it is helpful to refer to the policy review resulting in the introduction of paragraph (g) in section 27(5) of the RSLA Qld:

> In recognition of standard industry practice, it is proposed that Section 27 be further clarified so that current methods of review may be combined to form a single basis of review. For example, rent may be increased at review by 'CPI + 1%'. It should be emphasised that a clause in a lease that allows the lessor to choose between two or more methods of rent review will continue to be prohibited.

Moreover, the Minister's second reading speech and the explanatory note accompanying the legislation provide further clarity as to the intended effect of section 27(5):

> [in relation to rent review, the Bill will] prohibit the use of "ratchet" clauses (where rent can rise, but not fall), and "multiple rent review" clauses (where rent is reviewed by reference to two or more bases and the method resulting in the highest rent is selected).




In this context, a capped CPI-based rent review mechanism would not fall foul of section 27(5) of the RSLA Qld.

## What is the position under the New South Wales Retail Leases Act 1994 (NSW) (RLA NSW)?

The NSW counterpart, section 18 of the RLA NSW, is arguably the most unambiguous. Section 18(3) does not prohibit the use of two or more methods of calculation in so far as the rent review mechanism does not grant one party discretion in choosing which method to apply or does not fix the rent at the highest amount derived from more than one method.

It is important to note that, in the same vein as section 27(5)(g) of the RSLA Qld, section 18 has the effect of invalidating the combination of a progressive increase or CPI clause with a review to market clause.

Considering the differences between the legislative positions in New South Wales and Victoria, it is unlikely that the VCAT decision will influence the interpretation of the former.

## What is the position under the Western Australia Commercial Tenancy (Retail Shops) Agreements Act 1985 (WA) (RLA WA)?

The position in Western Australia is akin to the position in Queensland.

Section 11(1) of the RLA WA restricts the rent review mechanism to adopting a single basis on which the review is to be performed. The consumer protection tenant guide (ie Form 4), which is attached to the front of the retail shop lease and is used to assist tenants in understanding their legal rights and obligations, specifies the single basis on which the rent is to be reviewed, including:

(a) the market rent

(b) an increase by reference to the Consumer Price Index (CPI)

(c) a set percentage increase

(d) an agreed formula or combination, for example, CPI + 2%

The RLA WA contemplates that the single basis for the rent review may be a combination of bases to form one base of rent review, which is reflective of the position in section 27(5)(g) of the RSLA Qld. As with the Queensland position, the Western Australian tenant guide prohibits a "multiple rent review" clause whereby the landlord is entitled to choose the greatest return from a range of rent types at any one review.

In this context, a capped CPI-based rent review mechanism would not fall foul of section 11 of the RLA WA.

Please feel free to reach out to us with any queries regarding the enforceability of a rent review mechanism under a retail lease.

## Summary of Facts

The proceedings concerned a retail lease of 5 years with three further terms of 5 years each. The rent review mechanism at the commencement of each further term was a CPI review capped at 4%. The tenant brought the proceedings against the landlord after the landlord refused to implement the tenant's request for the rent to be reviewed to market at the commencement of the second further term.

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# New Reporting Obligations for Foreign Investors

Authors: James Delesclefs, Joshua Bell and Michael Jefferies

## What has occurred?

Foreign investors need to register their ownership of certain assets on the new Register of Foreign Ownership of Australian Assets from 1 July 2023, which is maintained by the ATO.

Part 7A of the Foreign Acquisitions and Takeovers Act 1975 (Cth) sets out the register notice obligations. The new register also consolidates and replaces various registers that were formerly maintained by the ATO in relation to agricultural land, water entitlements and residential land. However, the registers relating to media assets and critical infrastructure assets remain separate.

## When do the new reporting obligations start?

The reporting obligations apply for any interests acquired on or after 1 July 2023. The changes affect various other areas, but below are some of the key reporting obligations that apply to foreign investors in relation to land.

| Category | Action where notice required | Comment | Deadline |
|---|---|---|---|
| **Land** | | | |
| **Australian land** | A foreign person acquires, on or after 1 July 2023:<br>• a freehold interest in any Australian land;<br>• an interest in a lease or licence that exceeds 5 years (including any extension or renewal);<br>• shares or units in an Australian land corporation or trust (i.e. a land rich entity); *<br>• an interest in a mining or production tenement. | Applies regardless of whether FIRB approval is required or the value of the land.<br>*It is not entirely clear if the acquisition of shares or units in an Australian land corporation is captured, but this appears to be the case. | 30 days after acquiring the interest. |
| **Change in nature of land** | A foreign person holds an interest in land and the nature of that land changes from one type of land to another. For example, agricultural land becomes commercial land. | N/A | 30 days after the first day the person is aware or ought rea-sonably to have become aware of the change. |
| **Exploration tenement** | A foreign person acquires, on or after 1 July 2023, an interest in an exploration tenement such as an exploration licence. | Applies irrespective of whether FIRB approval is required and regard-less of the value of the land. | 30 days after the first day the person is aware or ought rea-sonably to have become aware of the change. |
| **Other circumstances** | | | |
| **Taking action covered by approval** | A foreign person obtains FIRB approval or holds an exemption certificate and then takes an action covered by the approval or exemption certificate (i.e. completes the transaction). | This is an existing obligation. | 30 days after taking the action. |
| **Change in circumstances** | • A foreign person has given a notice under the register and the relevant circumstances cease (i.e. the foreign person sells their interest).<br>• A foreign person has given a notice under the register and the person ceases to be a foreign person. | N/A | 30 days after the change occurs. |

## How can a register notice be provided?

- Register notices need to be submitted using the ATO's online services portal.
- The person updating the register will need to set up a myGovID account. This is something that foreign investors will need to keep in mind because there is a process involved in registering a myGovID account.
- No fee is payable to register an interest on the register.

## What are the penalties for failing to update the register?

Failure to comply with the requirements may result in fines. However, it is likely that a lenient approach will be applied during the initial stages of the reporting requirements.

## Is the register publicly available?

No. However, the ATO may disclose information to other Australian government personnel and bodies for the purposes of exercising powers under the Foreign Acquisitions and Takeovers Act 1975 (Cth).

## What should you do?

Foreign investors looking to invest in Australian land should:

- assess any acquisitions of interests in land after 1 July 2023 to confirm whether they are required to be registered (noting that the usual FIRB analysis should be conducted in any event);
- create a myGovID account; and
- periodically review their circumstances to ensure ongoing compliance, given the requirement to update the register for relevant changes in circumstances or status



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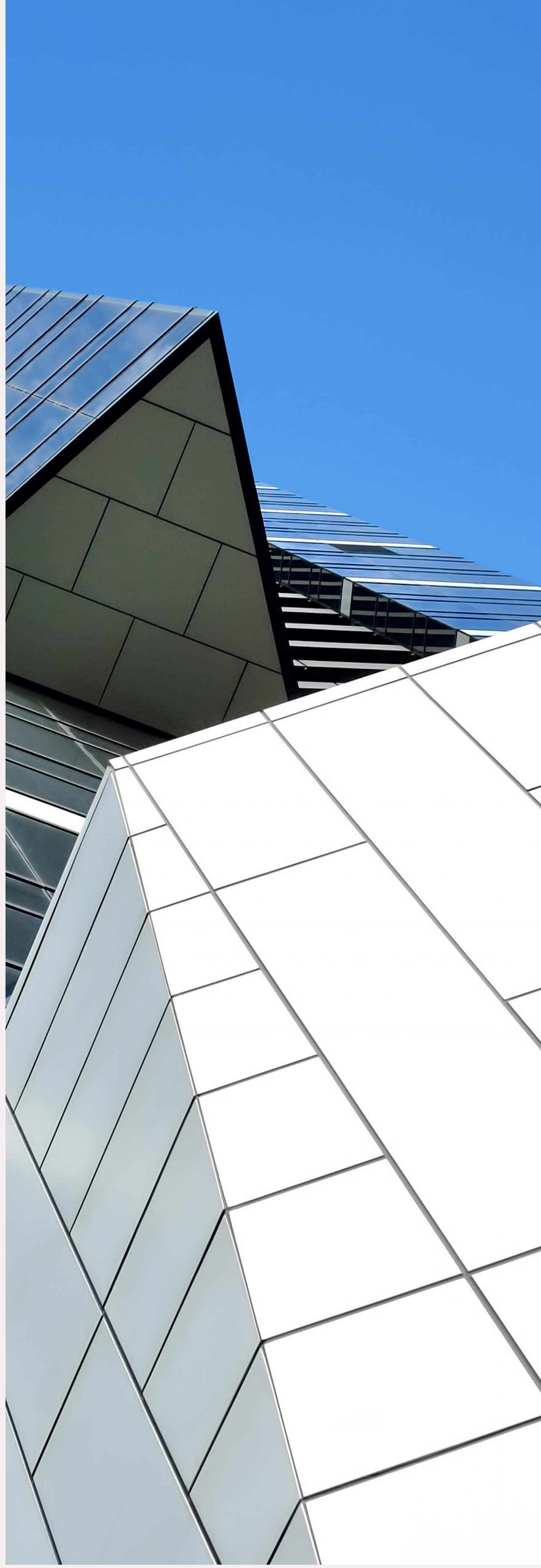


# Budget Measures for MITs: Build-to-Rent and Clean Buildings

**Authors:** Seema Sandhu, Erik Setio, Sarah Roettgers and Nick Huett

New measures in the 2023-24 Budget make build-to-rent projects more tax effective for MITs, and extend the 'clean building MIT' concessions to more kinds of green buildings.

## Build to Rent: MIT concessional tax treatment

The Federal Government has announced changes to the withholding tax rate on income from new build-to-rent investments held by managed investment trusts (MITs) in the 2023-24 Budget.

The changes halve the rate of withholding tax payable on distributions from MITs that invest in new build-to-rent residential real estate projects – from 30% to 15% – bringing its treatment in line with other classes of passive property assets including industrial, office, and commercial real estate. The rate of depreciation that can be claimed on capital works for eligible build-to-rent projects will also be increased to 4% (from 2.5%).

The tax concessions will apply from 1 July 2024 onwards on projects where construction commenced after 9 May 2023.

The change is significant because most build-to-rent real estate projects are funded by foreign institutional investors, who can access the concessional withholding tax rate. The 15% concessional tax rate will align the tax payable by these foreign institutions with that of domestic super funds.

Build-to-rent projects are attractive to institutional investors for their long term stable returns.

The move is expected to stimulate investment in these types of projects and increase the supply of housing, according to modelling prepared by EY for the Property Council of Australia.

The build-to-rent sector has experienced significant growth in the UK over the past 5 years and is an established feature of US property markets worth approximately US$3 trillion.

The differential tax treatment of build to rent projects, compared to other passive commercial real estate investments, has been a vexed issue since the exclusion of residential housing from the concessional MIT regime by the previous government in 2019.

### MITs at a glance

**Trusts that meet the MIT eligibility rules can access tax benefits for investors.**

**Tax benefits**

Foreign investors can generally access concessional tax treatment on income from MITs, with a withholding tax of 15% (or 10% in some circumstances) being payable on distributions rather than 30%.

Australian resident investors can access CGT concessions from deemed capital treatment of gains on eligible assets.

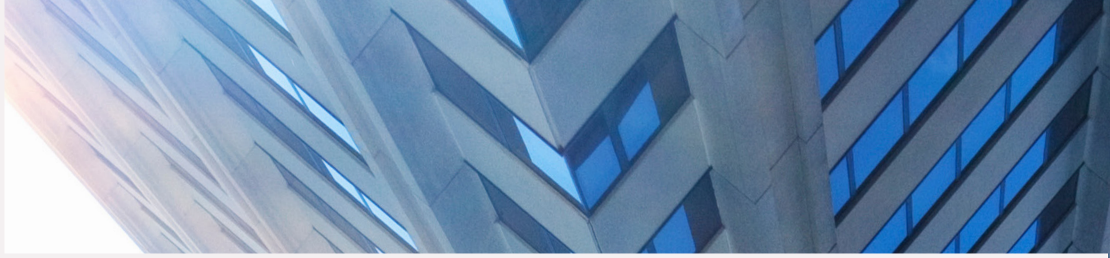
**Eligibility rules**

**Australian**
It has an Australian resident trustee (or its central management and control is in Australia) and investment management activities for Australian assets are carried out in Australia.

**Passive investments**
It does not carry on or control an active trading business.

**Financial services compliance**
It is considered a managed investment scheme under financial services laws and is operated or managed by an AFS licensee.

**Investor spread tests**
It meets the 'widely held requirement' and the 'not closely held restriction'.



## Eligibility criteria

To be an eligible build-to-rent project:

1. The project must consist of at least 50 dwellings or apartments that are made available for rent to the general public. This aligns with the various state land tax concessions that apply to build-to-rent projects (see below).
2. The dwellings must be retained under single ownership for 10 years before being sold.
3. Each dwelling must be offered for lease for a term of at least 3 years.

Further consultation will take place on implementation details.

## Clean building MIT withholding tax concession

The 2023-24 Budget also extends the clean building MIT withholding tax concession to more kinds of green buildings. Currently, MITs that invest in certain buildings that meet green building standards (**clean building MITs**) can access a concessional 10% withholding tax rate on fund payments to foreign investors. To be a clean building MIT, the trust must receive its income from office buildings, hotels, or shopping centres that meet the applicable green standard.

Going forward, warehouses and data centres that meet the applicable green standard will also be able to access the lower 10% concessional withholding tax rate. However, green building standards are being raised for existing and new buildings, with consultation on transitional arrangements planned.

| | Current green building standard | New green building standard |
|---|---|---|
| Green Building Council of Australia | At least a 5 star rating | At least a 6 star rating |
| National Australian Built Environment Rating System (NABERS) | At least a 5.5 star rating | At least a 6 star rating |

These changes will apply from 1 July 2025.

## State tax concessions for build-to-rent projects

Several states have implemented or announced additional tax concessions for build-to-rent properties, subject to meeting the relevant eligibility criteria:

| | |
|---|---|
| Victoria | 50% reduction in land value for land tax purposes where the occupancy date is on or after 1 January 2021.<br>Exempt from Absentee Owner Surcharge and foreign purchaser additional duty surcharge for certain projects. |
| NSW | 50% reduction in land value for land tax purposes for developments started after 1 July 2020.<br>Exemption from foreign investor duty and land tax surcharges. |
| Queensland | The Revenue Legislation Amendment Act 2023 (Qld) received royal assent on 23 June 2023, which gives effect to the proposed reforms to build-to-rent developments announced on 28 March 2023.<br>From 1 July 2023, eligible BTR developments will benefit from the following concessions:<br>▪ 50% discount on land tax payable for up to 20 years.<br>▪ exemption from the 2% foreign investor land tax surcharge and the Additional Foreign Acquirer Duty. |
| Western Australia | Proposed to commence from 1 July 2023, 50% land tax concession on eligible build to rent developments. |
| South Australia | The Statutes Amendment (Budget Measures) Bill 2023, which was introduced into the House of Assembly on 15 June 2023 (but has not yet passed), seeks to reduce the land value for land tax purposes by 50% for eligible developments which commenced construction on or after 1 July 2023. |

Our fund structuring and tax experts have significant experience in establishing managed investment trusts for fund managers across a range of asset classes.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# New building classes covered by NSW building legislation from July 2023

In the Recent Developments in NSW – Building Duty of Care and Insurance article in our Summer 2022 edition we set out how the duty of care under the Design and Building Practitioners Act 2020 (NSW) (**DBP Act**) was being applied by the courts. As we set out there, the DBP Act has applied to class 2 buildings or buildings containing a class 2 part since 1 July 2021. Class 2 buildings are generally multi-storey residential apartments.

The application of the DBP Act and the related Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020 (NSW) (**RAB Act**) has been extended to class 3 and class 9c buildings, and building containing those parts, from July 2023. Class 3 buildings are a common place of long term or transient living for a number of unrelated people. Class 9c buildings are residential care buildings where 10% or more of the residents need physical assistance in conducting their daily activities and to evacuate the building during an emergency.

Examples of class 3 buildings are a hotel, motel, boarding house, guest house, hostel, backpackers or dormitory style accommodation. Aged care facilities are class 9c buildings.

The design, construction, registration and other compliance provisions of the DBP Act and its associated regulation will now apply to these types of buildings, as will the enforcement provisions in the RAB Act. There are transitional provisions applying to these new classes of buildings becoming subject to the DBP Act and regulation, which will expire in July 2024.

If you require further information regarding the application of the DBP Act and the RAB Act, please contact Veno Panicker.


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# Safe Harbour – Critical Protections for Businesses in Distress

**Authors:** Nicholas Edwards, Head of Restructuring and Insolvency and Katherine McMenamin, Senior Associate

With ongoing and well publicised volatility in the construction and property market continuing, directors should be aware of the safe harbour protections available to them to avoid immediate insolvency and that are designed to manage ongoing distress.

It is no secret that the rate of formal insolvency has spiked in the construction space and this is putting pressure on all levels within the industry. This contagion effect, coupled with the ongoing price issues facing the industry, is putting pressure on directors, management and otherwise performing businesses.

The safe harbour provisions contained in the Corporations Act 2001 (Cth) (at section 588GA) exist to provide directors with the critical time they may require to engage with advisors and key stakeholders (if required) and to then make informed decisions in a distressed situation without the spectre of personal liability. In essence, the safe harbour regime requires directors, in consultation with their advisors, to formulate a plan that delivers a better outcome to the company and its creditors than an immediate administration or liquidation.

Once implemented, the safe harbour protections operate to the benefit of the directors personally as a carve out (rather than a defence) to insolvent trading prohibitions and this extends to debts incurred in connection with the safe harbour itself. Critically it should be noted that the safe harbour does not act as a shield to actions taken by creditors or third parties including statutory demands or court applications. Such actions need to be monitored closely and factored into any plan.

Certain entry hurdles must exist before directors can look to avail themselves of the safe harbour protections. Specifically, the debtor company must be:

(i) meeting all employee entitlements when they fall due; and

(ii) complying with tax reporting obligations.

Assuming the entry hurdles are met, no formal step or public statement is required for directors to avail themselves of the safe harbour – clearly maintaining privacy is critical where a director suspects the company is nearing insolvency, as any public statement or misstep can result in value destruction or reputational damage. Whilst in safe harbour directors need to take steps to be fully informed of all matters related to the current financial position of the business and implement appropriate measures to avoid any action (for example, the misconduct of officers or employees), which would adversely impact the company's ability to pay its debts or indeed implementation of the plan adopted.

We recommend that all steps should be carefully documented, along with the components of the proposed plan and demonstrating how it will result in a better outcome for the company. The engagement of qualified lawyers and accountants who can 'stress-test' the plan is also likely to be necessary to enable directors to show that they have properly satisfied their safe harbour obligations and directors' duties, and a counterfactual or liquidation analysis may be required to assess the better outcome.

The plan itself can take many forms and is dictated by the nature of the distress and the underlying business. The plan adopted may involve, amongst other things, negotiations with creditors, amendments to key contracts, a structured and consensual wind-down or a sale of business. It should also be noted the plan can change if circumstances change, however the benchmark of a 'better outcome' must always be met.

There is no prescribed time period for the safe harbour, however the business is of course constrained by cash available to meet employees and key creditors, as well as action from creditors. In practice, the duration will vary case-by-case and will necessarily depend on the size and complexity of the company, its business, assets and liabilities as well as the proposed plan to achieve the 'better outcome'.

Ultimately, the earlier directors can identify risks and take steps to protect the financial position of the company the more likely formal distress can be avoided and value can be maintained for creditors and shareholders. Whilst the safe harbour protections are not a silver bullet to distress, they provide a flexible framework to encourage the formulation of a plan, alongside advisors, to preserve value and save businesses.

If you have any questions or would like to discuss further, please do not hesitate to reach out.

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# Relief Against Forfeiture

**Authors:** Brit Ibanez, Hugh Farquhar and Lily Cox

## Key takeaways

- A tenant can ask the court to "re-enliven" a lease if it has been terminated by a landlord for breach.
- Relief against forfeiture is more easily obtained where the breach is for non-payment of rent.
- Where the termination is for breaches other than the non-payment of rent, the Court will consider whether it is "unconscionable" for a landlord to rely on their strict legal rights to terminate the lease.
- Seeking legal advice at the earliest opportunity is key.

## Intro

Where a landlord has terminated a lease because of a tenant's breaches that does not necessarily mean the end of the lease for the tenant. Provided the tenant is able to satisfy a number of criteria, they can ask a Court for orders granting "relief against forfeiture", effectively re-enlivening the lease.

Landlords, tenants and practitioners alike should note the circumstances in which "relief against forfeiture" is likely to be granted in order to maximise their chances of either obtaining or resisting an order.

## What is it?

Relief against forfeiture is ¬both an equitable and statutory remedy granted by a Court allowing a tenant to return and occupy a leased premises in circumstances where a lease has otherwise been validly terminated by reason of the tenant's breaches.

The general position is that:

A. if a lease was terminated for non-payment of rent, relief against forfeiture will be granted if the rental arrears are made up and the landlord's costs paid, unless exceptional circumstances can be shown;

B. if the lease was terminated for reasons other than non-payment of rent, it will be more difficult for the tenant to obtain relief against forfeiture.

## Broad discretion of the Court

The Courts have a very broad statutory discretion as to whether to grant relief against forfeiture. At a high level, the Court will consider whether the landlord is acting unconscionably in relying on technical legal rights. For example, if the tenant's default (proven or admitted) is capable of being remedied, by the payment of costs, expenses, damages, compensation or otherwise, or the performance of the terms of the lease, then the Court could find it is unconscionable for the landlord to insist on their strict legal rights to terminate

This means a Court will effectively be required to do two things on an application for relief against forfeiture, firstly determine whether there has in fact been a breach of the lease, and secondly, if the breach is established, determine whether in all of the circumstances relief against forfeiture ought to be granted and on what terms.

The speed of any application to the Court is important. It should be made as soon as possible after the purported termination of the lease.

## Termination for non-payment of rent

A Court will rarely refuse relief where the breach is the non-payment of rent so long as the tenant is offering to pay the outstanding rent, costs, interest and other expenses of the Landlord. That is because in those circumstances Courts have determined it would be unconscionable for a landlord to insist on their strict legal rights to terminate the lease.

## Termination for other reasons

Where a lease has been terminated for breaches other than non-payment of rent, the tenant will need to show that those breaches are capable of being remedied (including on terms) and that it would be unconscionable for the Landlord to rely on its strict legal rights to terminate the lease.

By way of example only, Courts have found that relief against forfeiture should be granted in circumstances where:

- a Landlord relied on the Tenant's breach of the clause of the lease requiring the Tenant to provide an increased security deposit, on the basis that the Tenant undertook to provide an increased security deposit if relief against forfeiture was granted;
- a Landlord relied on the Tenant's breach of the clause of the lease requiring the Tenant to use the premises for a specific purpose, on the basis that the Tenant was able to prove the Landlord had varied the lease to allow the alternative use.

## Assistance required?

If you are a landlord considering terminating a lease, or a tenant who has had their lease terminated, the longer you wait potentially the more perilous your position becomes!

Contact **Brit Ibanez** or **Hugh Farquhar** at Hamilton Locke for bespoke advice regarding your situation.

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# How to solve the problem of decommissioning?

**Authors:** Margot King, Charmian Holmes and Matt Baumgurtel

**Short version**

In this article, partners Matt Baumgurtel and Margot King talk with partner Charmian Holmes about Discretionary Mutual Funds and how they might solve issues relating to the decommissioning of solar, wind and battery infrastructure at the end of project life.

## What are the issues?

Project proponents for wind, solar and battery projects are in a race to secure optimal land near transmission infrastructure for projects as the new energy transition and the race to net zero speeds up.

Often, negotiations to secure the land are with individual landowners who have been farming on the land as a family business for some time.

A key concern for landowners is to ensure that project infrastructure is removed at the end of the lease. The landowner is concerned that, in the worst case scenario, a project company might go bankrupt, leaving the landowner with decommissioning and make good costs.

Negotiations to solve this issue usually focus on bank guarantees, parent company guarantees or some form of decommissioning fund. See the Clean Energy Council's page on decommissioning - www.cleanenergycouncil.org.au/advocacy-initiatives/community-engagement/decommissioning

Bank guarantees are not suitable because of the cost and the long term of a project lease (eg 30 years with a 10 year further term). Parent company guarantees are not suitable because they add too much to the cost of capital and make the project unviable. Internationally, there are insurance products available to cover the risks but these are not available in Australia. In other contexts, councils impose a development bond or similar type of security as a development condition. This is also difficult in the context of a long project life.

Generally, parties end up agreeing:

- make good and decommissioning obligations without security; or
- make good and decommissioning obligations with a decommissioning fund as security.

The decommissioning fund typically works as follows:

- 5 years prior to the end of the term, the cost of decommissioning is assessed by an independent person.
- The project proponent contributes 20% per year into an escrow fund.
- The landowner can call on the escrow fund at the end of the term if the project proponent has not met its decommissioning obligations.

This solution is not entirely satisfactory since it ties up capital, requires fees and administration by a third party and does not give complete assurance as the arrangements are not established at the time the documents are signed. There is a risk that the process is not followed properly when it is set up.

How does the renewables industry avoid an unfunded decommissioning liability in 30 years' time? How do we ensure that landowners feel assured about projects on their land? How do we continue with social licence by addressing community concerns about visual pollution from 'rusty windmills' in the future?

All of this made partners in the New Energy and Real Estate teams, Matt Baumgurtel and Margot King start to think about better solutions. Matt and Margot recently talked with Charmian Holmes, Partner in the Financial Services team about how a Discretionary Mutual Fund might play a role in solving this issue.

### Charmian, what is a Mutual Fund?

Discretionary Mutual Funds – often just called 'Discretionary Mutuals' – are usually set up by industry or professional groups, or by businesses or corporate groups, to cover common or similar property or liability risks.

Discretionary mutuals are similar to insurance, but members contribute to capitalising the fund, and members may claim on the fund to cover certain risks that are protected by them. It is a genuine peer-to-peer model where the members can share the risks and the costs of operating the mutual fund.

For example, the Australian Federation of Travel Agents set up a discretionary mutual to protect against 'chargeback costs' – ie, costs that a credit card company passes on to the supplier when a customer cancels or disputes a transaction. This happens in the travel industry for example, when a travel service provider, like a tour company goes insolvent or for some other reason does not honour a pre-paid booking. Typically, the travel agent would wear that cost but the AFTA mutual was set up to allow the travel agents to manage that risk by sharing those costs.

There are lots of other examples where people use discretionary mutuals because of 'hard to place' risks or where there is no appetite at all in the local insurance market or because they need to create a product that is more innovative than what the local insurance market can support at the time.

Discretionary mutuals are often set up by an industry for their industry – as such, the advantages of them include:

- having those with experience in a particular sector consider and approve protection claims which may result in a fairer outcome for the community in line with their industry standards;
- providing products which cater to specific concerns and risks unique to a particular industry compared to what would be available from the traditional insurance market; and
- reinforcing positive and communal methods of risk management which encourages the active participation of mutual members.

Discretionary mutuals can be a good alternative because:

- discretionary mutuals are generally simpler and less expensive to set up and capitalise than an insurance company and do not require an insurance licence (although they do require a financial services licence);
- the discretionary power means that the mutual can manage their exposure in terms of structuring a risk program to maximise their buying power for excess of loss and stop loss (re)insurance – reaching beyond primary markets to access capital that is not normally available to them;
- they have a lower tax burden than an insurance company or captive insurer and there are tax advantages because GST is payable but income tax and insurance taxes like stamp duty are not; and
- mutuals can raise equity by issuing Mutual Capital Instruments (which are similar to shares) to investors.

**Charmian, how might a discretionary mutual work in a renewable industry and decommissioning context?**

The potential liability for decommissioning infrastructure in the future sounds like a good example of a risk that a discretionary mutual might be established to cover – it is industry wide, affects a number of stakeholders and it is not currently protected by a local insurance product.

Setting up a discretionary mutual does require industry co-ordination and co-operation. Generally, an industry body would drive the process by having some of the major participants commit in-principle. There would need to be an actuarial study to work out the feasibility of the pricing for the protection and to ensure it is appropriately capitalised to meet the potential liability.

**How is a discretionary mutual structured?**

A discretionary mutual can be set up as a public company limited by guarantee or a unit trust.

A public company limited by guarantee is useful where membership is to be offered to a larger number of similar businesses or industry stakeholders and not one corporate group. Instead of issuing shares, members apply for membership. Their rights are contained in a Constitution or a set of Rules (or both).

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