Real Estate Markets Quarterly

Autumn 2024

Hamilton Locke

Foreword

Welcome to the Autumn Edition of the Real Estate Markets Quarterly.

Features in this edition include:

1. Spotlight on Co-Founder and Director, Natalie Rayment
2. Incentives for Build-to-Rent Developments
3. Changes Impacting Build-to-Rent Projects
4. Updates to the Unfair Contract Terms Regime
5. Understanding Foreign Investment in Land and Business Assets in New Zealand
6. 2024 Predictions for Private Credit in the Real Estate Market
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10. Dispute Minimisation Strategies to consider when adopting Distributed Energy Resources

As we enter 2024, we are excited about the changes and challenges that will unfold for real estate investment in Australia and New Zealand. The past year, 2023, was particularly intriguing, with significant shifts that reshaped our expectations and strategies. As we head into the autumn season (and the hopeful promise of some cooler weather!), we are gearing up for what appears to be a promising year ahead, marked by the expectation of increased activity across the real estate market.

In this edition of the Real Estate Markets Quarterly, we reflect on some of the recent industry developments and make our predictions of trends that will shape 2024.

Last year, there was a notable realignment in foreign investment, with Japan markedly increasing its footprint in Australian real estate and signalling a renewed confidence in the market. However, a more cautious approach was taken by other foreign investors such as North America, Hong Kong, Singapore, the United Kingdom and Europe, which saw underwhelming levels of investment in Australian real estate, as compared to 2022.

The real estate market has seen real flux over the past 12 months with a general decline in overall investment volumes, but there have been pockets of strong activity and growth within the hotel sector, and industrial and logistics sector. At the same time, there is no doubt the office and retail sectors have faced significant challenges, which have been impacted by uncertainty around sale price and evolving market demands.

Interest rates have also played a critical role in shaping the market dynamics. With the Reserve Bank of Australia currently holding the cash rate at 4.35%, we are anticipating a gradual shift towards price stability and, as a result, a boost in transaction activity as inflation pressures ease.

With the upcoming tax cuts announced by the Australian Taxation Office set for July 2024, these are expected to invigorate the real estate market with an increase in demand for property as we see a rise in disposable incomes.

Welcome to our Autumn 2024 edition of the Real Estate Markets Quarterly, where we explore the various shifts and trends within the real estate market in Australia and New Zealand.

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

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Industry Spotlight - Natalie Rayment

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Please tell us a bit about your current role/s.

I am an owner, Executive Director and co-Chair of the Board of Wolter Consulting Group, a planning, survey, design and environment practice based in Brisbane, Sunshine Coast and Gold Coast. I'm also a planning expert for the Court and a regular speaker on urban policy matters at State and National conferences and in the media. As a registered planner with over 25 years of experience practicing in Queensland, I also enjoy being on the tools and am actively involved in a diverse range of projects. My current focus is on the Cairns Growth Strategy Towards 2050, the adaptive reuse of the former Yeronga Paint Factory into a creative arts suburban renewal precinct, a range of Planning and Environment Court appeals, and an affordable housing project focused on housing older women in regional QLD.

What do you like most about working in town planning?

There's no dull day. And it gives me the opportunity to influence what I'm most interested in – **housing as a human right**.

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

I am most proud of co-founding YIMBY Qld in 2016, a not-for-profit organisation saying 'yes in my back yard' to good development that makes for better living, and the first YIMBY group established in Australia. Through YIMBY Qld, I have been vocal in changing the community conversation around housing and development. While YIMBY Qld lost our first battle to protect a Brisbane townhouse in 2018/19, our advocacy has changed the dialogue and we are now not only witnessing more progressive housing policy but also Ministers openly claiming they are YIMBYs and an emerging group of YIMBY associations setting up across Australia, and we say bring it on! A highlight I am proud of is featuring in Max Holleran's book Yes to the City published in 2022, in recognition of my YIMBY advocacy work. But there are many things I'm proud of. Being the first female owner and Board chair of Wolter Consulting Group. Establishing WOW, the Women of Wolter's, to support the amazing women on my team as their careers prosper. Inspiring students about planning and the YIMBY movement. Those I mentor and continue to support as their careers soar.

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

Take up boxing, it's the best way to relieve some of the frustration you will no doubt experience, particularly in the development assessment space. Travel widely. There's so much to learn from how other cities and regions work. And importantly, get out of your comfort zone, often. It's an exciting place to be.

What other industry roles do you currently hold? What led to these positions?

I joined the inaugural Board of Beddown in 2019, a start up charity providing pop up accommodation in underutilised city buildings. My support for Beddown began with a pro bono meeting with the founder, who needed to translate his big idea (activating underutilised city spaces such as car parks as temporary and intermittent emergency shelter for people otherwise sleeping rough) into a planning approval, and ended up as Board Chair navigating its merger with InCommunity to broaden the service across Queensland. Through that experience, I saw first hand the planning challenge that community organisations face in their pursuit of emergency and community housing and embraced the opportunity to volunteer, join the Board and make Beddown the WCG charity of choice so that the wider Wolter's team could also get involved.

I was also a member of the Management Committee of QShelter until 2022. Both positions were about sharing my planning experience with those who need it most. I also enjoy being on committees and panels, to better influence and advocate for things I believe in. Currently, I'm a Member of the Property Council of Australia's Committee for Cities, a member of the Queensland Government Housing Supply Expert Panel and the Moreton Bay Infill Housing Supply Panel.

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

Every day we're reminded about the housing crisis, whether that be through media, policy, personal experiences or backyard conversations. Planning holds many of the levers that can influence housing choices, delivery and costs. Through YIMBY Qld we are actively involved in the community conversation about housing, focusing on winning over the suburbs when it comes to missing middle housing, social and affordable housing and the links between housing policy and climate policy. YIMBY Qld's current advocacy piece is focused on YIFBY (Yes in Faith's Back Yard), advocating to streamline pathways for social and affordable housing on underutilised community purpose zoned land within the existing urban footprint, which is starting to gain some traction.

How do you see your role evolving in the future?

It will be interesting to see where AI takes us, but I expect the complexity, community focused, place based and performance based nature of planning and development will mean that while AI may save us time and effort and take on some of the more mundane tasks, we'll be able to focus more on the things that really count.

What are your top reading/listening/watching recommendations?

Anything K-drama, which is my current obsession. And Youtube. I'm heading to Seoul later this year to experience the culture, the food and the architecture, particularly the Zaha Hadid designed gem that is Dongdaemun Design Plaza. I love the way it's described - as two giant drops of molten silver on a carpet of green - so I need to see it first hand now.

Battling the Housing Crisis – Exploring Incentives for Build-to-Rent Developments

Author: Amelia Prokuda

The build-to-rent (**BTR**) sector in Australia is gaining momentum and will be critical for creating a more dynamic rental market and housing market, encouraging investment and increasing supply to address the current housing crisis. Even though it is an emerging product in the Australian real estate market, it is well-established in and a significant part of the housing markets in the United Kingdom and the United States of America. BTR development is expected to become the biggest asset class in Australia by 2030, overtaking commercial and student accommodation assets.

What is BTR?

BTR is a development model where residential properties are specifically designed and built for the rental market, rather than being sold to individual buyers. BTR developments typically have the following characteristics:

1. **Ownership and management:** BTR properties are usually owned and managed by a single entity. The unified ownership and management structure ensures a consistent standard of maintenance and service across the property;
2. **Design and construction:** Buildings are designed with renters in mind. This often means including shared amenities such as gyms, communal lounges and outdoor spaces;
3. **Tenant experience:** BTR properties usually offer a more professional rental experience. Tenants deal directly with professional management teams, which can lead to higher service standards, quicker response times for maintenance issues and overall improved tenant satisfaction;
4. **Lease terms:** BTR properties usually offer more flexible lease terms, including the possibility of longer leases which can offer greater security of tenure for tenants compared to traditional rental arrangements;
5. **Community focus:** Developments often aim to foster a strong sense of community among residents by utilising shared spaces and organised social events.

The progress of BTR developments is often stifled by tax and duty hurdles, debt financing challenges, planning laws and construction costs. To encourage BTR developments in Australia, government at state and federal levels is offering incentives to proponents of BTR developments. The type and extent of incentives currently offered varies between the States. In this article, we explore the incentives targeted at stimulating investment in BTR housing in Victoria, New South Wales, Queensland and Western Australia.

Victoria

Victoria is considered by some to be the leading state for BTR development in Australia. Melbourne has the largest number of completed BTR units, including Grocon's Home Southbank and Richmond developments, Mirvac's LIV Munro and Blackstone's Realm Caulfield. Developers of BTR products in Victoria can expect the following incentives:

1. a 50% reduction on the taxable value of the land used for the BTR development for up to 30 years; and
2. exemption from any absentee owner surcharge during the same period.

To qualify for the incentives, buildings must be new or substantially renovated, with at least 50 self-contained dwellings. The property must be managed by a single entity and offer lease terms of at least three years. The owner must continuously use and occupy the land as an eligible BTR property for at least 15 years.

New South Wales

There is now a state-significant development pathway for BTR developments that have a capital investment value of more than $50 million for the Greater Sydney region (except in the City of Sydney) and more than $30 million for development on other land.

The New South Wales State Government requires at least 30% of new housing on public land to be affordable, social or diverse housing.

In December 2023, the City of Sydney Council proposed changes to the Sydney Local Environmental Plan 2012 to add incentives for BTR developments. If the changes are approved, BTR developers will be granted between 20 and 75 percent more floor space. The incentive will apply to BTR conversions and new applications made within five years of the changes being approved.

In New South Wales, BTR developers are entitled to a 50% reduction in land value until 2040 for land used and occupied as a BTR property, provided construction commenced on or after 1 July 2020. There are also surcharge purchaser duty and surcharge land tax exemptions and refunds.

The following criteria must be satisfied to qualify for the incentives:

1. construction must commence on or after 1 July 2020;
2. construction must be completed and an occupational certificate must be issued;
3. there must be at least 50 self-contained dwellings used specifically for BTR purposes;
4. there must be compliance with the relevant affordable housing policies;
5. dwellings must be made available to the general public without restriction;
6. the property must be held in a unified ownership structure for 15 years;
7. dwellings must be managed by a single management entity which has management on site;
8. each tenancy must be subject to a residential tenancy agreement;
9. tenants must be provided with a range of lease terms options, including a fixed term of three years; and
10. at least 10% of the construction labour force hours must involve work by certain classes of workers such as apprentices, long term unemployed workers, workers with barriers to employment and Aboriginal workers.

The tax refunds are only available if the property is constructed by the owner of the land or a related body corporate.

Approval powers for affordable housing developments have been reallocated from local governments to either the Minister or Independent Planning Commission. The New South Wales State Government requires at least 30% of new housing on public land must be affordable, social or diverse housing.

Queensland

In Queensland, BTR developers can enjoy a 50% reduction in land tax for up to 20 years. There is also an exemption from the foreign investor land tax. To be eligible, at least 10% of rental dwellings must be classified as affordable housing.

On 11 October 2023, the Housing Availability and Affordability (Planning and Other Legislation Amendment) Bill 2023 was introduced to into the Queensland Parliament. The Bill proposes new short-term, targeted interventions aimed at facilitating new housing delivery in growth areas including:

1. the ability for the Planning Minister to acquire land and create an easement for critical infrastructure in right locations;
2. a new and streamlined State-led assessment process for proposed development that is a priority for the State, including affordable housing; and
3. a new zone (the Urban Investigation Zone) to help local governments better sequence development and allow for detailed land use planning to occur.

The Bill also contemplates specific types of development (for example, BTR developments) being declared "temporary accepted development", for which no development permit is required.

The Brisbane City Council has also introduced a BTR Incentive Policy under which:

1. the amount of infrastructure charges is reduced for studio, one-bedroom and two-bedroom multiple dwellings in identified well-serviced growth areas; and
2. the payment of infrastructure charges is deferred by up to five years for new BTR developments

The incentives are intended to give developers relief from the financial impact of recovering upfront construction costs, which is often a deterrent in delivering BTR developments in Brisbane.

To qualify for the payment deferral, the development must satisfy a number of criteria, including that it be retained in one single ownership for a minimum of ten years as long-term rental housing. The tenants must have access to 24 hour building management services.

Western Australia

Western Australia has introduced similar incentives for BTR developments, by offering a 50% exemption from land tax for up to 20 years. To be eligible, developments must:

1. contain at least 40 self-contained dwellings available for three-year residential leases;
2. be owned by the same owner or group of owners and be managed by the same management entity; and
3. be completed between 12 May 2022 and 1 July 2032.

The land tax exemptions offered by the States are encouraging and will hopefully start to drive investment in BTR development. The deferral of payment of infrastructure charges and reduction in charges currently being offered by Brisbane City Council is perhaps an incentive that other local governments in Australia could propose. Such incentives may counteract the tax and duty hurdles, debt financing challenges and construction costs that BTR projects often face. Separate approval pathways for BTR developments will also assist in faster delivery of the projects.

For a useful summary of the State tax concessions that apply for BTR developments, we refer you to the article 'Budget Measures for MITs: Build-to-Rent and Clean Buildings' in the Hamilton Locke Real Estate Markets Quarterly: Spring 2023 edition.

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Australia's FIRB Fee Overhaul: A Closer Look at the Changes Impacting Build-to-Rent Projects

Author: Clementyne Rawlyk

In a significant move designed to "improve housing affordability and supply" across the country, the Australian government announced changes late last year to the Foreign Investment Review Board (**FIRB**) fee rules for certain residential land investments.

Among the changes, significantly lower FIRB application fees now apply for foreign investors seeking to invest in build-to-rent (**BTR**) projects, regardless of the kind of land involved. On the other hand, the government has also announced its intention to triple the fees payable by foreign investors who acquire established homes, as well as double the vacancy fees payable in respect of all foreign owned dwellings purchased since May 2017.

We examine the change in fee treatment of BTR projects, including what it means, why it makes sense and why it is a step in the right direction towards addressing the national housing crisis.

Background

BTR projects are a type of real estate development whereby developers build large scale multi-residential properties, such as apartments or houses, specifically for the purpose of renting them out to tenants. Unlike traditional real estate developments, where the primary goal is typically to sell individual dwellings to homeowners, the focus of BTR projects is on creating a rental community or housing complex.

BTR projects have gained prominence globally as an alternative housing model. Although the sector is still relatively young in Australia (compared to more established markets like the United Kingdom and the United States), it is becoming increasingly appealing to developers and institutional investors due to the potential for long-term, stable revenue and government tax breaks. Accordingly, the sector is tipped to experience transformative growth here in the short to medium term.

Reduced FIRB application fees for BTR developments

Prior to the recent changes, the initial investment in residential or vacant land by foreign investors for the purposes of undertaking a BTR project required FIRB approval, regardless of the value of the land. In the case of residential land, extremely high application fees also applied.

Historically, this has deterred foreign investors from investing in the sector. This reluctance, particularly from offshore institutional investors, has made it challenging for developers to realise their BTR investments.

The government has sought to address this by reducing the FIRB application fees for foreign investments in BTR projects. Pursuant to the changes, the FIRB filing fees for all BTR projects will now appropriately be calculated based on commercial land rates, regardless of the type of land that is initially acquired for the development. The practical impact of this change is that the acquisition of any type of land for a BTR project with a purchase price of up to $50 million will now attract a flat FIRB filing fee of just $14,100 (this figure is indexed annually on 1 July).

Recognising BTR projects as commercial developments makes sense and is a welcome change for the sector. By making BTR projects more financially viable for developers and attractive to overseas investors, the government hopes to propel growth in the sector. With an influx of foreign capital, this innovative housing model is poised for transformation in Australia and could well be the key to alleviating Australia's housing crisis.

For more information on the FIRB changes for BTR projects, please contact Clementyne Rawlyk.

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Updates to the Unfair Contract Terms Regime: the Impact on Your Standard Form Lease

Authors: Sarah Roettgers, Matthew Butchard and Faye Winterflood

Significant changes to the unfair contract terms regime under the Australian Consumer Law were introduced by the *Treasury Laws Amendment (More Competition, Better Prices) Act 2022* (Cth) and took effect on 9 November 2023. These amendments require parties to consider whether their form of lease is compliant with the new requirements.

Below, we provide a brief summary of the important changes (including potential penalties for non-compliance) and consider the various lease terms that may require updating to comply with the new regime.

What changes have been introduced?

The Australian Consumer Law makes void any term of a 'small business contract' if the term is unfair and the contract is a 'standard form contract'. Recent changes to the unfair contract terms regime include:

1. Scope of protection – the Act expands the scope of protection offered by the unfair contract terms regime for 'small business contracts'. The broadened definition captures a lease where one party either is a business which employs fewer than 100 people or has an annual turnover of less than $10 million. The monetary contract threshold has since been removed.
2. Determining whether a lease is a 'standard form contract' – in addition to the previous factors that a court must consider in determining whether a lease is a 'standard form contract', the court now also take into account whether one of the parties has used the same lease (or substantially similar terms) before.

   A court may also determine a lease to be a 'standard form contract' despite there being an opportunity for a party to negotiate alterations to the lease terms or select a term from a range of options determined by the other party.
3. Penalties – A landlord may now face financial penalties imposed by the courts for breach of the unfair contract terms regime, with maximum penalties up to the amount of $2.5 million for an individual and for a corporation, the greater of:
   (a) $50 million;
   (b) three times the value of the benefit obtained by the corporation directly or indirectly from the unfair term (to the extent this is able to be determined); and
   (c) if a court cannot determine the benefit obtained by the corporation, 30% of the adjusted turnover during the offence period.

   A separate penalty may be imposed for each unfair term proposed.

Which terms of a lease should be considered on review?

We recommend that businesses involved in leasing activities conduct a review of their standard form lease to ensure compliance with the new regime. This review should ensure a fair balance of rights and obligations between the parties to the lease and avoid terms that would unreasonably favour one party over the other.

In the table below we have set out examples of common lease terms which may require specific review or consideration in light of the unfair contract terms regime.

Lease Provision	Points to consider
Termination rights	Consideration should be given to whether certain termination rights should be available to both parties (e.g. damage or destruction to the premises or building). If the termination right is connected to the default of a party, the defaulting party should be given a reasonable period to remedy the default.
Notice periods	Ensure any notice period imposed on a counterparty is fair and allows a reasonable period of time for compliance.
Amendment of rules	If a landlord is permitted to vary its rules (i.e. for a centre or building) at its discretion and without providing sufficient prior notice or reasonable time for compliance by the tenant, this may be deemed unfair.
Works to premises, building or centre	If the lease permits a party to perform certain works to the premises, centre or building, the other party should be given reasonable notice of such works. There may need to be a requirement on the party performing the works to minimise the disruption caused to the counterparty and other occupiers of the building or centre.
Indemnities and releases	Consideration should be given to the scope of the indemnities and releases in a lease to ensure they are not too broad and extend to matters outside the other party's control. Furthermore, appropriate 'carve-outs' for any negligent act, omission or default of the other party should be included.
Act reasonably	The lease terms should reflect that a party must act reasonably in exercising its rights under the lease.
Recovery of costs	The lease should expressly state that any costs incurred by a party must be reasonably and properly incurred.

At the time of a tenant exercising a lease renewal (or parties varying the terms of the lease), the underlying lease terms will need to be reviewed and updated to ensure compliance with the unfair contract terms.

It is important to note that the unfair contract terms regime does not apply to small business contracts to which terms or matters are prescribed by law (e.g. retail legislation or prescribed environmental obligations and requirements).

Where to from here?

These amendments mark a pivotal moment in the protection offered for small business contracts in relation to unfair contract terms. Businesses involved in leasing activities should review and update their standard form leases to align with these requirements to avoid financial penalties.

If you require any assistance in undertaking a review of your standard form lease, please feel free to reach out to Sarah Roettgers, Matthew Butchard and Faye Winterflood.

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Know Before You Go: Understanding Foreign Investment in Land and Business Assets in New Zealand

Authors: Paul Chambers and Miranda Hing

The Overseas Investment Act 2005 (NZ) (**OIA**) is the legislation which regulates the ability of "overseas persons" and their "associates" to purchase "sensitive land" and "significant business assets" in New Zealand. The rationale for this comprehensive regulatory regime is that it is a privilege for overseas persons to own or control sensitive New Zealand assets. In the absence of an express exemption, transactions which fall within the ambit of the OIA will require the consent of the Overseas Investment Office (**OIO**) before they can proceed, and that consent may be granted subject to conditions. A failure to obtain a required consent can result in serious penalties as well as the mandatory sale or disposal of the asset acquired in breach of the OIA.

Overseas Persons

The OIA regulates certain investments by "overseas persons" which is a term broadly defined in the OIA. The definition includes individuals who are not New Zealand citizens or ordinarily resident in New Zealand and bodies corporate that are incorporated outside of New Zealand or which are more than 25% owned or controlled by an overseas person(s). The definition also extends to trusts, partnerships and limited partnerships which are more than 25% owned or controlled by an overseas person(s).

Investors should also be mindful of the "associate" rules under the OIA which treat an investor as an overseas person if they are associated with an overseas person. This will apply where, for example, the investor is controlled / influenced by, or acting in concert with, an overseas person.

Sensitive Land Transactions

Under the OIA, an overseas person or their associate must obtain consent from the OIO prior to acquiring an interest in "sensitive land". Whether land is "sensitive" depends on the type, location and, in some cases, size of the land. Examples of sensitive land include residential land, non-urban land (over 5 hectares), marine and coastal land, certain land located on islands and certain land held for conservation purposes or which has historical significance.

Benefit to New Zealand test

Overseas persons acquiring sensitive land must satisfy the "Benefit to New Zealand test" to be granted consent. In general terms, this test requires the overseas person to demonstrate that the investment will, or is likely to, benefit New Zealand (or any part of it or group of New Zealanders). If the sensitive land is farmland, then the "Benefit to New Zealand" test is additionally onerous, with greater emphasis on the economic benefit of the investment to New Zealand (such as the creation and retention of jobs). Farmland must also be advertised for sale on the open market in New Zealand before it can be sold to an overseas person.

Exemptions for Australian Investors

Certain transactions by certain Australian investors in land that is residential but not otherwise "sensitive" are exempt from the requirement to obtain OIO consent.
This exemption requires every relevant investor to be an Australian investor or not an overseas person.

Significant Business Assets

A business asset is considered significant if it is worth more than the dollar threshold outlined in the Act (usually NZ$100 million). For a narrow band of Australian investors, the threshold for 2024 is NZ$618 million (with that threshold being updated annually), and in some cases other free trade agreements permit a threshold of NZ$200 million.

An investment in significant business assets by an overseas person requiring consent can occur by the acquisition of an existing business for a purchase price over the applicable threshold, the establishment of a new business by expenditure over the applicable threshold, or the acquisition of securities which provide a more than 25% ownership of control interest and for which the purchase price exceeded the applicable threshold.

Thinking of investing in New Zealand?

The OIA is a complex framework and it is important for prospective investors to obtain advice on whether proposed investments will be captured and require consent, as the penalties for non-compliance can be significant. If you're thinking of investing in New Zealand, reach out to Paul Chambers for more information.

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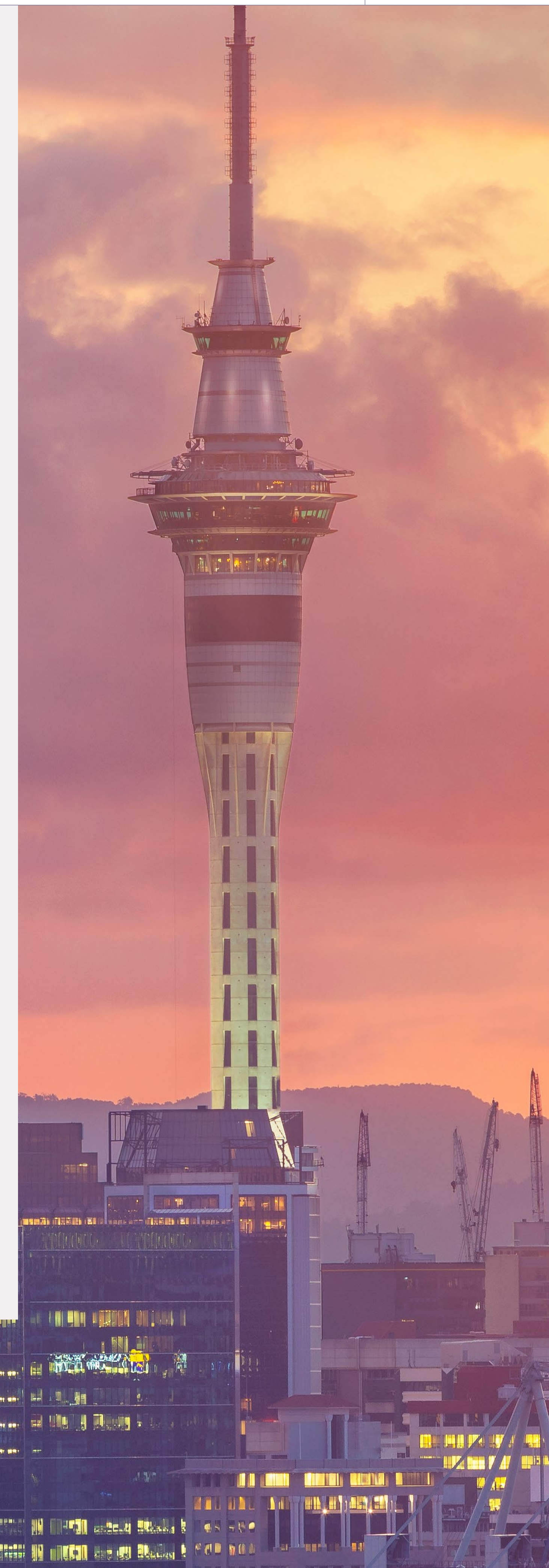

Private Credit in the Real Estate Market – 5 Predictions for 2024

Authors: Andrew Vincent and Tricia Moloney

2023 was a relatively challenging year for real estate development deals in Australia. Developers faced higher borrowing costs following rapid cash rate increases, together with rising construction costs driven by inflation and labour and materials shortages. Perhaps unsurprisingly, over 2,000 building companies filed for insolvency during the 2022/23 financial year.

However, this volatility did present opportunities for the continued growth of private credit, including in the real estate development sector, and we expect that to carry on in 2024. Here, we share our top five predictions for private credit in the real estate market for the year ahead.

1. Continuing growth of private credit

Traditional banks will continue to have a constrained appetite in certain segments of the real estate lending sector. They will be focused on increased cost of funding, the impact of high inflation on project costs and regulated capital and liquidity requirements.

Private credit players will be similarly cautious in times of market volatility, but they are not subject to the same constraints as traditional banks. And, importantly, investment appetite remains strong in this market. Private credit financiers have capital available to deploy, driven by growing investor interest in that asset class as part of the ongoing hunt for yield in a high-inflation environment.

For private credit, it is not generally a question of appetite. It is a matter of finding the right development projects (and, perhaps more to the point, the right developers and builders).

2. Continued congestion and Government support tipped to drive new residential property projects

It is well documented that Australia is experiencing a shortfall in new housing, with demand consistently outstripping supply. Post-Covid immigration increases exacerbate the issue.

With congestion in capital cities, developers and their financiers should continue to have opportunities to "build up" as part of high-rise, high-density developments. Infrastructure Victoria reported in late 2023 that the number of residential high-rises in Melbourne's CBD needs to double.

There is also strong Government commitment to more public housing, bearing in mind the Federal Government's housing reform agenda, including a $3 billion New Homes Bonus and a $2 billion Social Housing Accelerator. Big numbers and great press releases, but similar programs both here and overseas often fall famously short on delivery. The proof will be in the pudding in 2024 and beyond.

3. Uncertainty in the commercial and industrial property landscape

In relation to commercial real estate, 2023 was a challenging year and 2024 is difficult to predict. Although many investors seem optimistic about the year ahead for office property, others caution that fundamental challenges remain. Demand for high-quality office assets has been robust, but other owners/developers will continue to grapple with the legacies of Covid-19, including the "work from home" model. Industrial property has been a darling of investors for years and should continue to perform well, driven by e-commerce and logistics. Will 2024 see a resurgence in "return to the office"? Only time will tell.

4. ESG continues to play a role in investment decision-marking

In any context, residential or commercial, we expect continued focus on ESG considerations. For private credit, this often forms part of the fund establishment documentation, and it will therefore continue to drive fund behaviour.

Private credit will continue to engage each of these sectors, residential and commercial/industrial, although we suspect that residential projects will be the most active in 2024. Again, the issue for the private credit market may be more around "picking winners", rather than availability of capital or appetite for investment.

5. Global volatility will continue to impact the Australian market

A final point to note about 2024 is that Australia, of course, does not exist and do business in a vacuum. We are impacted by wider geopolitical events and circumstances. Global volatility can impact the Australian market in sudden and unexpected ways. In this context, consider the incredibly unstable global geopolitical environment at present, with open conflict in Ukraine and Gaza, the risk of wider conflict in the Middle East, Iran's steady advancement towards becoming a nuclear state, ongoing North Korean saber-rattling across the 38th parallel and the possibility of a flashpoint between the Great Powers over Taiwan.

In terms of how easily this can impact Australia and its property development market, we note that the conflict in Ukraine caused the price of diesel to skyrocket, making it more costly to operate trucks, cranes and other forms of heavy machinery which are essential to construction. Similarly, the disruptions in the Red Sea cause major logistical issues for building materials and other commodities.

On top of that, there is a US Presidential Election later this year, which promises to be particularly partisan and acrimonious, and the recent collapse of China Evergrande could yet have significant knock-on effects in Australia.

In this complex national and global environment, with traditional lenders continuing to tighten lending parameters and risk appetite, we expect that private credit will continue to play a major, and growing, role across the property development market. For more information or support with private credit considerations in 2024, reach out to Andrew Vincent and Tricia Moloney.

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Navigating Corporate Tenant Insolvency – What Powers do Landlords Have?

Authors: Nicholas Edwards and Ariane Thierry

Given the well noted increase in corporate insolvencies, especially amongst retail and hospitality, it is important that landlords understand their rights and the impact of insolvency on a corporate tenant.

Here, we explore the issues landlords may face if a corporate tenant becomes subject to voluntary administration, has a receiver appointed or is wound up in liquidation.

The key takeaways for landlords:

- all insolvency practitioners appointed are there to maximise return to creditors and may see the lease (if on market and fair terms) as a key component of realising value for the business;
- early engagement with the appointed insolvency practitioner is critical to understand your options, their intent and the likely timeframe of any process;
- landlords do have commercial leverage during a restructure or sale if the lease of the relevant premises has value;
- an insolvency event and subsequent sale or restructure may be an opportunity to recut the current lease more favorably;
- if the insolvency practitioner elects to continue to trade from the premises and pay rent, the landlord's rights of access are limited;
- any amount of rent outstanding at the date of the appointment is likely to be an unsecured claim along with any contingent claim should the lease be terminated;
- a landlord's obligation to mitigate will be taken into consideration when assessing the level of claim a landlord has;
- bank guarantees can be called upon, subject to their terms, for outstanding amounts owing; and
- rent incurred during the period of ongoing occupancy as part of an insolvency appointment will be paid in priority to other pre-appointment unsecured creditors.

Scenario 1: Voluntary administration

The aim of the voluntary administration process is to maximise the prospects of the company continuing in the future, or to achieve a better outcome than would be achieved if the company was placed into immediate liquidation.

The *Corporations Act 2001* (Cth) (**Act**) sets out various moratoriums on actions available to landlords during the voluntary administration of their tenant. Landlords cannot commence proceedings to repossess their premises or to recover unpaid rent from the tenant during the period of the voluntary administration. This prohibition can only be circumvented if the administrator consents or with leave of the court.

Landlords are also prohibited from calling on or enforcing director guarantees for the duration of the administration period.

Further, the *ipso facto* regime prohibits landlords with leases that were executed after 1 July 2018 from terminating for the sole reason of the appointment of an administrator or the 'financial position' of the tenant.

How can landlords better their position?

In spite of these stays, there are some avenues for landlords to better their position, especially in circumstances where the administrator wishes to continue to trade the business out of the premises.

Critically, 5 business days after the administrators' appointment, the administrators become personally liable for all rent accrued. All rent that accrues during the administration period will be paid in priority to unsecured pre-appointment claims as it will be a cost of the administration. Most administrators will make a commercial decision in light of the 5 business day timeframe (depending on the circumstances of the company and the view of the administrator as to whether the lease should remain ongoing) to either continue with the lease through the administration or to not exercise the company's rights regarding the leased property. In the latter scenario, the landlord can re-enter the premises and will have an unsecured claim for any unpaid rent and future rent payable (subject to the duty to mitigate).

Secondly, as a creditor of the company, landlords are entitled to vote on the outcome of the company's future at the second meeting of creditors. At this meeting, creditors of the company decide as to whether the company should return to the control of its directors (a rare occurrence given the company must be solvent), whether the company should be wound up in liquidation, or whether any proposed deed of company arrangement (**DOCA**) should be adopted. If the company is returned to its directors, then the landlord may take action as it sees fit (per the terms of the lease) given the administration has ended. If the company is wound up, then the stay will continue.

Key considerations on the impact of a DOCA

A DOCA is a deed that binds the company, most of its creditors, and the proponent (the party that proposed the DOCA). Generally, a DOCA is designed to effect a restructure of the business and creditors will likely be asked to take a 'haircut' on their claims. The DOCA's terms will vary depending on what the proponent puts forward, however will include terms that provide for a dividend being made to creditors. All unsecured creditors are bound by the DOCA's terms if the DOCA is approved at the second meeting. Secured creditors and landlords that vote in favour of the DOCA at the second meeting of creditors will also be bound. This means that a landlord that does not vote in favour will not be bound by the DOCA's terms. The only exception to this rule is if the landlord is ordered by the court pursuant to section 444F of the Act to not take possession of the property or to recover its property. A court will only make such a ruling where the landlord's actions would impact the ability for the DOCA to achieve its purpose and the landlord's interests will otherwise be adequately protected by the DOCA.

Landlords will be a key stakeholder in any DOCA scenario where the business is looking to continue to trade from their premises. If a landlord is comfortable with the counterparty looking to acquire or the commercial terms proposed it can elect to vote in favour of the DOCA. This is often a better outcome than a liquidation as the tenant remains in and with the same terms applying. The entry of a tenant into a DOCA will not prevent a landlord from enforcing any bank or director guarantee subject to its terms, for unpaid amounts. Another factor to consider is the recent trend for DOCA proposals to give non-continuing landlords a lesser return than continuing landlords as a way to indirectly pressure them to vote in favour or support the restructure proposal.

Ultimately if the landlord wishes to re-let the premises it can elect to not vote in the DOCA and take enforcement steps (assuming there remains a breach), noting that in that instance any make-good claims will be unsecured.

Scenario 2: Receivership

The appointment of a receiver is different to the appointment of administrators, as the receiver's primary duty is to the secured creditor who appointed it (**Secured Creditor**). Their goal as receiver is to maximise the return available to that creditor.

Receivers however, similar to administrators, are personally liable for debts incurred. Given this, the receiver will make a decision about whether to continue occupying a lease shortly after appointment.

A receiver may look to sell the business of the company as a going concern (with an assignment of lease potentially), hold a fire sale, or trade the business for a period all designed to maximise return. It will depend on what the receiver considers is the best way to obtain value for the Secured Creditor as to whether a lease will be terminated on behalf of the tenant or whether the receiver will look to engage in relation to an assignment or continuation of lease.

Like in voluntary administrations, for leases executed after 1 July 2018, the ipso facto regime applies, meaning that a landlord cannot terminate a lease or commence enforcement actions simply due to the appointment of a receiver over all or substantially all of the assets of the tenant. The landlord is therefore limited to relying on other events of default if it would like to terminate the lease during the receivership.

Scenario 3: Liquidation

The appointment of liquidators to a corporate tenant means that the tenant is in a terminal process. Because of this, the ipso facto regime does not apply to liquidations, as the aim of the regime is to protect the value of the company by restricting counterparties from terminating contracts. The appointment of a liquidator will usually allow a landlord to terminate a lease. The only exception to this rule is if the appointment of liquidators was preceded by the voluntary administration of the company, as the ipso facto regime will continue to apply.

If the landlord does not choose to terminate the lease, the liquidator can disclaim the lease as an onerous contract.

A landlord may commence litigation against the tenant in liquidation if the court consents. In many circumstances, it is likely uncommercial to commence proceedings given the company is insolvent and it is unlikely the company has sufficient funds to pay any damages order made against it. Like in voluntary administrations, if the liquidator continues to run the lease during the liquidation, all rent and outgoings incurred will be paid in priority to other unsecured claims.

While a liquidator is also empowered to claw back 'unfair preferences' (payments made prior to the liquidation of a company that result in a creditor receiving a greater return than it would receive during the liquidation process), it is rare (not unheard of) that they will make such claims against a landlord. The reason for this is that often the company would not have been able to make any money prior to the appointment of liquidators if it had no premises (the doctrine of ultimate effect) and also that rent is often paid in advance, making the landlord/tenant relationship not characterised as a debtor/creditor relationship.

Need assistance navigating a corporate tenant insolvency?

If you are a landlord with a corporate tenant who has entered external administration, it is important to understand your position quickly to effectively navigate the complex issues as they arise. Each of the processes mentioned above are nuanced, as are your own circumstances.

Please contact Nicholas Edwards, Head of Restructuring and Insolvency or a member of the Property Team for any questions or assistance.

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Compulsory Acquisition – What You Need to Know

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While nation building infrastructure projects such as Sydney's Metro or WestConnex are typically polarising, few commentators would express anything but sympathy for the unfortunate landowners and occupants caught in their path.

While there is very little a landowner can do to prevent the government from compulsorily acquiring their land once a decision has been made to do so, it is however open to a landowner to challenge the amount of compensation offered for their interest.

What is compulsory acquisition?

Compulsory acquisition (otherwise known as resumption) refers to the process by which the government acquires property from a business or individual for the carrying out of a public purpose, such as building a new road or a new railway.

How are landowners and occupants protected?

Each state and territory in Australia has their own statutory framework which deals with the process. In New South Wales, it's the *Land Acquisition (Just Terms Compensation) Act 1991 No 22* (NSW) (**Just Terms Act**).

The Just Terms Act requires the payment of compensation to owners of land on what is known as 'just terms' where their land is compulsory acquired.

What can you expect from the process?

Given each state has their own framework for compulsory acquisition, the process will differ across Australia.

In New South Wales for example, the formal acquisition process is commenced by the issuing of a 'proposed acquisition notice', or 'PAN'. Generally speaking, a PAN must be issued at least 90 days before the date of acquisition. The PAN commences a process under the Just Terms Act where the recipient is able to make a claim for compensation for the Valuer General's consideration. Once this final determination is issued, it is open to the landowner to lodge an objection with the Land and Environment Court of New South Wales.

What are 'just terms'?

A starting point for what amounts to 'just terms' under the Just Terms Act is that any offer will not be less than the market value of the land (as assessed under the Act). In addition to market value, there are a number of other heads of damage that are claimable by a recipient of a PAN.

Head of Damage	Basis for claim
Special value of the land to the claimant (s 55(b))	Special value refers to the financial value of any advantage unique to the landowner's occupation or use of the acquired land, for example a pharmacy next to a medical centre.
Any loss attributable to severance (s 55(c))	Severance applies where only part of a larger parcel of land is acquired and deals with the reduction in the market value of any other land as a result of the partial acquisition (or the land being 'severed').
Any loss attributable to disturbance (s 55(d))	Disturbance loss under the Just Terms Act can capture anything from legal costs and valuation fees associated with the acquisition,
The disadvantage resulting from relocation (s 55(e))	This refers to the non-financial disadvantage resulting from a person having to relocate from their principal place of residence as a result of the acquisition. Some matters that might be considered include length of time someone has lived on the land, or the degree of inconvenience caused by the relocation.
Increase or decrease in value of adjoining or severed land s 55(f)	For example, the compulsory acquisition of land for, and subsequent creation of, a road may result in a decrease in the value of the owner's adjoining land due to higher levels of noise, or it may result in an increase in value due to easier access.

Substantiating claims for compensation

A recent decision in the Land and Environment Court of New South Wales[1] confirmed the onus falls on the claimant in compulsory acquisition cases to establish the basis of their claim.

In this particular decision, Mr Massasso had operated a retail pharmacy business on land which was compulsorily acquired by Sydney Metro. Mr Massasso notably claimed from Sydney Metro (among other things) $1,284,000 in long term business losses arising as a consequence of having to relocate his pharmacy business away from neighbouring land which had been granted development consent to establish a medical centre – a development which did not proceed as a result of Sydney Metro's acquisition of that land.

Unfortunately for Mr Massasso, because the medical centre was never built and there was no evidence of the developer's ability to actually finance the development of the centre or staff it with doctors, the expert business and accounting evidence relied upon by Mr Massasso to demonstrate long term business loss was found to be no more than speculative and the claim was rejected.

Notwithstanding that most of Mr Massasso's claims for further compensation were rejected by the Court, the Court still found that Sydney Metro should pay Mr Massasso's costs of the proceedings. This is good news for landowners seeking to make a claim for further compensation who might otherwise be deterred by the legal or professional costs associated with pursuing such a claim.

Need assistance?

Hamilton Locke has expertise across its Property, Planning & Environment and Disputes practice areas to assist with any stage of the compulsory acquisition process. If you have been issued with a notice of acquisition by an acquiring authority, please do not hesitate to reach out to John Frangi (Head of Property) or Brit Ibanez (Head of Litigation) to discuss your options.

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[1] Massasso (t/as Five Dock Pharmacy) v Sydney Metro [2023] NSWLEC 115 ('Massasso').

Privacy + Cyber – 3 Key Updates for Real Estate Markets for 2024

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2023 was a watershed year for privacy, cyber security and data regulation – with more to come in 2024.

We've seen an unprecedented political will to ensure the regulatory framework for privacy, data and cyber security remains "fit for purpose". Australian and New Zealand Governments have shown their commitment to strengthening privacy and cyber security preparedness and resilience.

In Australia, 2023 saw the Government establish the National Office of Cyber Security, conduct cyber security exercises for critical infrastructure and consult on a wide range of regulatory approaches, strategies and issues. This is expected to come to fruition in 2024, with anticipated reforms to Australia's Privacy Act, introduction of a ransomware reporting scheme for Australian organisations, a NZ Biometrics Code and potential regulation of AI technologies. We also expect to see more regulator enforcement action, particularly with respect to data breaches and other cyber security matters.

So what's on the cards for 2024? We outline 3 key updates relevant to the real estate market from our recent article.

1. Australian Government commits to reforming the Privacy Act in 2024

The Australian Privacy Act is undergoing significant review and the Australian Government has committed to introducing a legislative proposal in 2024.

In response to the recent review of the Privacy Act, the Government has agreed to only a small number of the proposed reforms (38 out of 116). The majority of the reforms were "agreed in principle", with further targeted consultation as to "whether and how" they may be implemented. This includes the proposed removal of the small business and employee records exemptions and the introduction of an overarching "fair and reasonable" test.

Given the large number of reforms that are subject to further consultation, it seems unlikely the reform Bill will address all the "agreed in principle" proposals. However, we can safely assume that the privacy law reform package will include enhanced powers for the Privacy Commissioner and more stringent obligations with respect to reporting of data breaches.

While the detail of the reform package is yet to be determined, the Government's response sets out a clear pathway for privacy law reform in Australia. The key message to regulated entities is that work needs to start now to ensure compliance with the current requirements of the Privacy Act. This will make any up-lift to address the reforms a relatively straightforward process.

For New Zealand regulated entities, while there is not currently a review process underway for the Privacy Act 2020 (**NZ Privacy Act**) as a whole, the New Zealand Privacy Commissioner (**NZ Privacy Commissioner**) has publicly stated that he will recommend amendments to the NZ Privacy Act to make it fit for the digital age. This includes increasing civil penalties for major non-compliance, introducing new data subject rights for individuals, such as a right of erasure, and stronger requirements for automated decision making. In 2023, a Privacy Amendment Bill which would add a new privacy principle to the NZ Privacy Act was introduced to address indirect collection of personal information (and requirements for agencies to notify individuals of the circumstances of the collection). It is currently awaiting its initial reading and if passed would come into force on 1 June 2025.

2. Australian privacy regulator enforcement activities in 2023 and priorities for 2024

2023 saw increased enforcement activity by the Australian privacy regulator, the Office of the Australian Information Commissioner (**OAIC**).

This is perhaps not unexpected given the OAIC's enforcement priorities for 2023 and that the OAIC is better resourced. The OAIC also now has more expansive enforcement powers, following changes to the Privacy Act which came into effect quickly after the Optus data breach in 2022. These changes also saw an increase in civil penalties for serious or repeated interferences with privacy from $2.2 million to an amount not more than the greater of $50 million, three times the value of the benefit obtained from the contravention or 30% of adjusted turnover.

In November 2023, the OAIC commenced Federal Court proceedings against Australian Clinical Labs following an investigation into its privacy practices warranted by a data breach in 2022. The OAIC is seeking civil penalties (this will be under the old civil penalty regime).

The OAIC has stated that its priorities for 2024 will be around security of personal information, artificial intelligence, Consumer Data Rights and privacy law reform, particularly assisting regulated entities to prepare for the reforms.

3. Progress for Australia's digital ID program

In November 2023, a significant step forward in Australia's digital ID program was made with the introduction of the *Digital ID Bill 2023* (Cth) and the *Digital ID (Transitional and Consequential Provisions) Bill 2023* (Cth). This builds on the current voluntary Digital ID accreditation scheme (the Trusted Digital Identity Framework (**TDIF**)) for digital ID services. Following significant data breaches in Australia over the past 12 to 18 months which compromised identification documentation for millions of Australians, the Digital ID scheme aims to reduce the privacy risk associated with providing identification documents to various governments and organisations.

The draft legislation outlines the Digital ID scheme, which would allow individuals to verify their identity online. It also sets out the requirements and processes of accreditation and sets up a more comprehensive legislative framework for additional entities to be accredited. The scheme involves a four-part expansion for access by government services initially and private sector services in the future. It also sets out a number of privacy and security safeguards and a civil penalty regime. The key to this scheme, as opposed to the earlier proposed "Australia Card" and similar schemes, is that it will be voluntary for individuals. This scheme will introduce a "Digital ID" system that individuals can voluntarily use to verify their identity without having to provide copies of identification documents (e.g. passports, birth certificates and driver's licences) each time verification is required (including, for example, where verifying identity in connection with a rental application). The Bill is currently before the Senate.

For more information, please contact our Australian and New Zealand Privacy & Cyber team.

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Dispute Minimisation considerations for the Australian Commercial Property Sector to consider when adopting Distributed Energy Resources

Authors: Veno Panicker and Gareth Howard

Australia is the world leader in the decentralisation and digitalisation of electricity, positioning itself to spearhead the incubation and development of distributed energy resources **(DER)** technologies and product services.[1]

Setting the Scene – Benefits of DER in Commercial Properties

For the commercial property industry, combining DER technologies such as on-site photovoltaic **(PV)** solar (either roof-mounted or ground-mounted) or other technologies (such as thermal storage, solar hot water systems or heat pumps) and incorporating them with load management tools such as batteries and smart metering technologies allow for improved control over energy needs. Reducing electricity consumption, lowering power bills, providing greater certainty for energy budgets by avoiding fluctuations in the cost of grid-supplied electricity, and supporting a least-cost pathway to a net zero carbon built environment[2] are some of the benefits that DER can offer. With the property sector contributing around 23% of Australia's emissions[3], using DER can contribute towards the sector achieving net zero whilst generating an estimated $20 billion in energy savings.[4]

Dispute Risks in DER Implementation

While compelling reasons exist for businesses to adopt DER technologies, the risk of disputes arising in relation to the procurement, installation, commissioning and operation phases of the implementation of these technologies should not be overlooked. With studies confirming that an average of 2.6% of project costs is spent on construction project disputes,[5] understanding the main causes of disputes is one step that can be taken to minimise some of the potential pitfalls that the commercial property industry may face when installing DER technologies.

Five Considerations for Dispute Minimisation

We detail below some considerations for property investors, owners and managers of commercial buildings to bear in mind when contracting for the construction phase of procuring DER technologies:

1. Procurement stage risk allocation: Traditional contract risk allocation usually entails a lump sum contract price where risk is borne by the head contractor. Experience shows that this can result in contractors lodging claims during various project phases to make up the difference between the lump sum price and actual costs, especially where contractors encounter issues such as adverse site conditions, supply chain disruptions, or potential changes in project requirements. The procurement and contract drafting stages present significant opportunities for the parties to take proactive steps to minimise potential issues later on, particularly regarding the potential costs associated with the procurement, installation and commissioning of DER technologies.
2. Design phase considerations: Design-related issues can lead to additional costs and cause delays when there is no planning sequence followed for the release of design information that can affect construction. In addition, inadequate or poor quality workmanship or inferior quality materials can delay a project's completion and cause disputes. Incorporating clear product specifications and quality standards in your contract can help avoid future disputes about the scope and quality of work.
3. Engagement across team members: A well-drafted contract will incorporate provisions that facilitate communication and engagement between the on-site project team and personnel making the ultimate decisions on the project. This may include scheduling regular meetings between the commercial, technical and delivery teams to help ensure that each party is aware of their obligations, responsibilities and applicable timeframes and also help ensure that potential issues can be identified, resolved or escalated timeously.
4. Common Causes of Delay to Project Completion: Contracts should address events causing delays to the date of project completion, which can lead to extra fees due to prolonged equipment hire, labour resourcing challenges and/or liquidated damages to protect a principal. Common issues for projects of this nature include:

    a. *Latent Conditions:* Project proponents often encounter unexpected site or adverse sub-surface conditions. This risk arises because tender bids are often submitted based on current site conditions or – worse still – without contractors inspecting the relevant site before submitting their bid for assessment. It is important to remember that when construction starts, assumptions regarding site conditions may prove to be incorrect due to subsurface conditions, soil conditions, unanticipated structures, and other kinds of obstructions – incorrect assumptions regarding site conditions can easily escalate into disputes;

    b. *Weather:* Taking the risk for adverse or inclement weather conditions, where severe or adverse weather conditions may hamper the ability of parties to complete their project on time, expose the contractor to potential delays, and result in liquidated damages being imposed; and

    c. *Interface risks:* Project delays often occur when attempting to integrate software with installed infrastructure, integrating equipment being installed by separate contractors, or when connecting DERs to the grid; and
5. Incorporating specific dispute resolution processes: With no ombudsman schemes likely to be created to cater specifically for DER-related disputes, parties intending on procuring and installing DER technologies would benefit from considering incorporating tiered dispute resolution processes in their contracts where one process must be exhausted before another can be commenced. This may facilitate early and cheaper resolution of disputes while also avoiding interruptions to projects and preserving future commercial relationships.[6] Depending on the specific circumstances and desired outcomes of the parties, this could include:

    a. Executive negotiations, where senior representatives from each party meet on a 'good faith' basis in an attempt to resolve the dispute with minimal cost and procedural formalities before proceeding with more formal dispute resolution procedures;

[1] Guidehouse Insights, 'Australia Is Positioned As an Incubator, Laboratory for Distributed Energy Resources Opportunities', (Web page) [Date Accessed: 16 February 2024].
[2] Renew Economy, 'Building sector could reach net zero emissions, save billions, with solar + efficiency', (Web page) [Date Accessed: 16 February 2024].
[3] Australian Sustainable Build Environment Council, 'Submission: Australian Government Review of Climate Change Policies', (Web page) [Date Accessed: 16 February 2024].
[4] Ibid n 2.
[5] HKA, Crux Insight, 'Crux 2021: Rebounding Construction Risks Rising Toll of Lost Time and Cash', (Web page) [Date Accessed: 16 February 2024].
[6] PGC Legal, 'Dispute Resolution in Australian Standard Contracts', (Web page) [Date Accessed: 16 February 2024].

b. Mediation, which is a more formal process than executive negotiation where the parties meet before a third party – the mediator – who facilitates the parties' discussion on a 'without prejudice' basis while aiming to ensure that each parties' position is heard while attempting to resolve some or all of the issues between the parties. Usually, any agreement reached at mediation is binding and enforceable between the parties;

c. Expert determination, where the parties agree to appoint an 'expert' who has certain qualities or experience in a particular field to determine the dispute after the parties have presented their arguments and evidence. The parties may agree that the expert's decision is either binding or non-binding (although parties often agree that it will be binding to reach finality to their dispute without the need for further escalation);

d. Adjudication, which is a process typically provided for under security of payment legislation that is aimed at determining the value of work carried out and goods and services supplied under a construction contract; and

e. Arbitration and litigation, which are the most formal, expensive and time-consuming processes, are often seen as 'last resort' measures to determine a dispute. Each of these processes involves a form of trial of legal and factual issues before a decision-maker – for arbitration, the parties retain greater control because they agree on the rules governing the conduct of the arbitration, while in litigation the parties must follow the Court's rules and any particular orders made as to procedure.

Key Takeaways

DER technologies offer exciting opportunities for players in the commercial property industry to reap the rewards of clean energy production on a least-cost pathway to a net zero carbon built environment.

However, there are risks to be mindful of when contemplating installing and commissioning DER technologies, which are best managed contractually between the parties. Sensible risk allocation – and not simply a top-down pass through of risk – and proactive management of certain 'high-risk' items that can cause delays, lead to increased project costs or easily trigger disputes is critical for project success.

Parties opting to implement DER technologies are advised to seek specialist legal advice early on in order to best manage potential risk.

For further assistance with regards to the procurement, installation, commissioning and operational phases of DER technologies, contact Veno Panicker, Matt Baumgurtel or Gareth Howard at Hamilton Locke.

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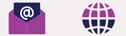

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