Hamilton Locke

Real Estate Markets Quarterly

Spring 2022



Foreword

Welcome to the second edition of our Real Estate Markets Quarterly. Since our last edition in mid-May 2022:

1. Australia has had a change of Government and Anthony Albanese was elected as Australia's new Prime Minister;
2. The RBA has increased the official cash rate 4 times from 0.50% to 2.35% (current at the time of writing);
3. Demand for industrial real estate assets has continued to increase as a result of falling industrial vacancy rates and the growth of e-commerce and onshoring;
4. Demand for the acquisition and development of healthcare real estate assets has continued to increase, particularly by way of joint venture arrangements amongst investors to improve their bargaining position to compete for these assets in the (currently) competitive healthcare market;
5. Capitalisation rates relating to retail assets have slightly increased in response to rising interest rates;
6. Inflation has continued to increase and is currently at 6.1% (current at the time of writing); and
7. Unemployment rates have continued to fall and at the time of writing were at 3.4% - the lowest figure recorded since August 1974.

Featuring in this edition is an industry spotlight on Erica Rees from SCA Property Group. Greg Preston of Preston Rowe Paterson Australasia gives an insightful view on the post-COVID 2022 inflationary environment.

We hope you enjoy this edition of our Real Estate Markets Quarterly. We thank you for your continued support and hope you enjoy this edition.



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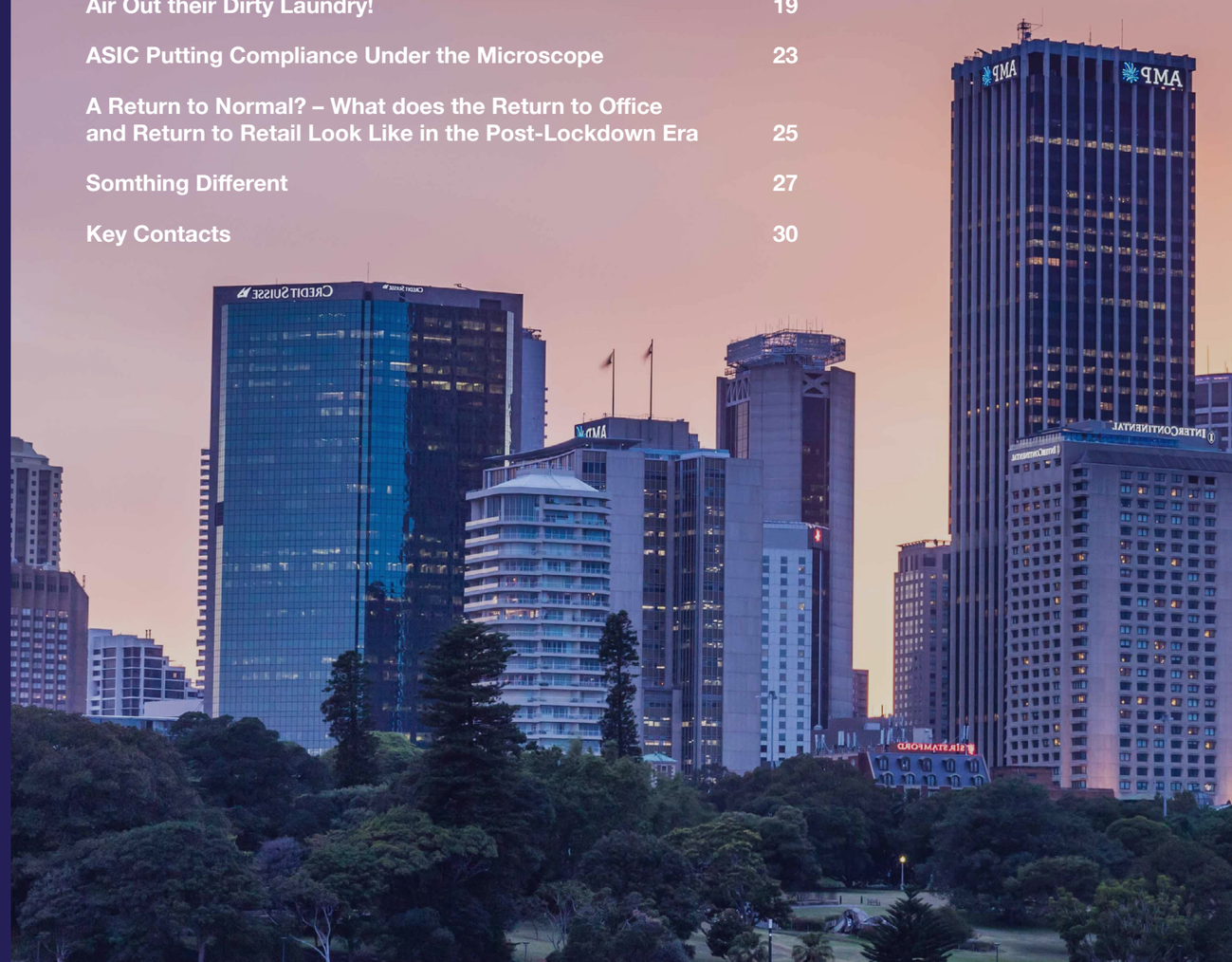


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Industry Spotlight: Erica Rees



General Counsel / Company Secretary

Please provide an overview of your career to date.

Throughout university I worked in smaller suburban law firms before starting with the real estate team at DibbsBarker (now part of Dentons) shortly after I graduated. I then moved with my supervising partner over to Herbert Geer (now Thomson Geer) which was a well-established Melbourne firm looking to grow its presence in Sydney. I then moved over to SCA with the partner I was working with at the time at Herbert Geer. I have been at SCA for almost 10 years now, in the roles of Legal Counsel, Asset Manager, Senior Legal Counsel and now General Counsel / Company Secretary.

Please tell us a bit about your current role at SCA Property Group.

I am the General Counsel / Company Secretary, and so responsible for all things legal, regulatory and compliance related. My role is very broad, from property and construction type matters through to corporate and commercial matters and AFSL compliance. I am also the Company Secretary for SCA and oversee all aspects of our company secretarial function including Listing Rule compliance.

SCA Property Group has been active in the Real Estate sector over the past couple of years. What do you like most about working in the sector?

I like that, generally speaking, parties to a transaction are trying to achieve the same end goal, albeit for different reasons. A party might want to sell, SCA wants to buy. In the end we are all working to conclude that transaction, which makes for a great working environment. You can also see the actual outputs of your (and many, many others'!) work, for example when a new shopping centre is constructed.

How and why did you decide to work in the Real Estate sector?

It was a bit of an accident really! I had thought I wanted to move into litigation, but when I took the role with DibbsBarker I worked out pretty quickly that property was for me, and I shelved the plan to move into litigation.

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

I think the journey that SCA has been on. When we were first spun out of Woolworths, we had to build the business from the bottom up, and we were all wearing so many hats to keep the business running. It's amazing to see where it is today, 10 years later, and see all our hard work paying off.

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

I wouldn't say a challenge necessarily, but the steepest learning curve I had was when I left private practice and moved to SCA. There's a lot more you have to get your head around than just the legal side of a property transaction, which is what I had been dealing with in private practice. I had some great help along the way, and was very fortunate to have some wonderful colleagues who invested the time in mentoring and teaching me. Otherwise probably the biggest challenge has been balancing being a mum to my little boy, and working full time. It's hard, as every parent will attest to!

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

Jump straight in. There are so many career paths in property so you can try your hand at many different things and find the thing you really enjoy. I think it's a great career if you're willing to work hard, learn new things and be adaptable.

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

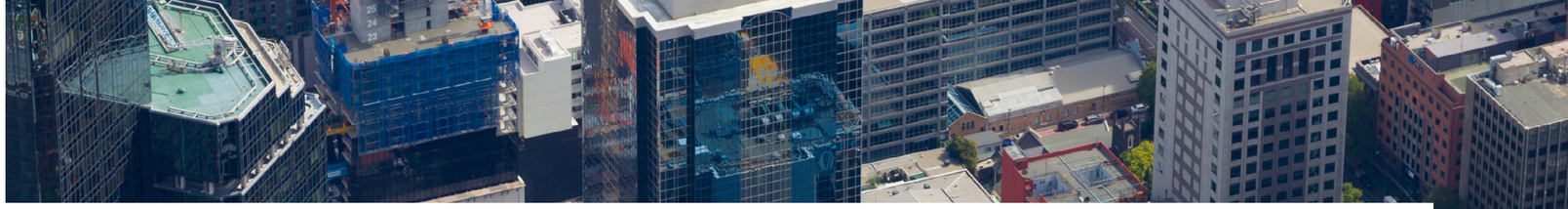
The current interest rate environment is obviously something that has impacted FY23 guidance for most REITs, and so cost of debt is a big one at the moment and the flow-on impact that might have on cap rates potentially. That could also present opportunities for groups like SCA, however, as the neighbourhood shopping sector is very fragmented, and so there may potentially be consolidation opportunities.

What are your top reading/listening/watching recommendations?

I'm a bit late to the party but currently (very strangely and not something I ever thought I would watch let alone like) hooked on watching Drive to Survive.



Experience and Reflections in the Post COVID 2022 Inflationary Environment





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Thank you to Hamilton Locke for the opportunity to participate in the conversation on the state of the economy and real estate markets in the almost post COVID inflationary environment we are facing in 2022.

There are many continuing challenges confronting most stakeholders in the economy and real estate markets in general that go to uncertainty and risk, and as a result, require significantly increased administration (time) and new thinking on how to get the best out of real estate as an asset class in the near to medium term.

Please provide an overview of your career to date

Poignantly my career began at Hardie and Gorman (now Knight Frank) in investment property management in the Sydney CBD during the 1979 oil shock induced inflationary spike. The parallels in 2022 with rolling strikes and cost of living pressures in daily life being the main topic of discussion around the dinner table are a reminder of how both the economy and real estate markets move in cycles noting that the recent up cycle prevailed for a much longer time than previously in history.

I started Preston Rowe Paterson (PRP) as a broad-based valuation, advisory and management firm in December 1988 with a couple of colleagues (Greg Rowe) from Colliers who I joined after Knight Frank. We walked straight into the Paul Keating banana republic induced recession which he famously coined as “the recession we had to have”.

It is important to note that this was the last real formal recession we have had prior to 2022 even though we had 2 quarters of negative GDP growth during the COVID pandemic lockdowns. Whilst we had a technical recession during COVID it was induced by the pandemic lockdowns and doesn’t really count as a cyclical recession in the opinion of most commentators.

We wore a lot of shoe leather out chasing business in the first 5 years of the business in the early 1990s environment. Winning business was tough at the time as asset values were correcting very quickly and interest rates were well into double digit figures. We learnt many vital lessons that served us well through the GFC and have prepared us for the economic world we are in today.

In my journey, I have managed, valued, bought, sold, and advised on most asset classes including commercial offices, retail shopping centres, industrial and warehouses, hotels, as well as special purpose assets including airports, shipping ports and portfolios of oil company owned service stations. I even swung the gavel as Colliers’ Sydney auctioneer for 3 or 4 years in the early 1980s.

Whilst at Colliers I was very fortunate to have met and worked for Stephen Baker, a chartered surveyor (RICS) who, in the early 1980s, was a preeminent pioneer of Discounted Cash Flow (DCF) maths in multi-tenant investment real estate valuation and development valuation. We were encouraged to learn and apply the logic of DCF to all investment and development asset classes. It is a shame that, in 2022, the Australian Courts continue to generally shun the approach in favour of simplistic value metrics when the approach is, and has been for some time, commonplace in the market for all investment and development property valuation.

From this point on in my career whenever asked what I specialise in, my reply has always been “complicated investment and development cash flow based real estate”. In fact, the more complicated the better. It generally rocks people as they often expect you to go straight to a single asset class which, unfortunately, is the way most people are introduced to real estate and taught these days. In my view a valuer and property consultant is really only worth their pound of flesh if they can interpret investment and development cash flow generating documentation (cash flows) and apply it mathematically; and interpret capital markets (capitalisation rates and discount rates) and value the asset, irrespective of the asset class.

I have also been an avid student of valuation, commerce, economics and applied finance throughout my career having studied for 14 years to achieve a commerce/ land economics degree, an applied finance master’s degree and an associate diploma in real estate valuation. The master’s in applied finance really brings perspective to real estate as an underlying asset class amongst all asset classes including fixed interest treasuries, stocks and shares and derivatives.

Whilst my career is obviously well advanced, it is far from over and I remain as keen and enthusiastic as ever to continue learning, imparting my experience and knowledge on future generations and to meet the next challenges head on.

Please tell us a bit about your current role and Preston Rowe Paterson

I am currently chair of Preston Rowe Paterson Australasia Pty Ltd and managing director of our capital markets valuation and advisory business. As a start-up in 1988 PRP comprised two of us and one assistant operating from a tiny office in Sussex Street in Sydney. Today we have 34 offices in capital cities and regional Australia as well as four offices in New Zealand and relationship offices in China and Japan.

In my role as chair, I am focussed on working with our board and CEO, Greg Sugars OAM, to drive the growth of the business through increasing our office network in Australia and New Zealand and consolidating and growing relationships with our broad-based customer network including bank and non-bank lenders, listed and unlisted REIT’s, sovereign wealth funds, listed corporations, private companies, governments, developers and private investors.

I also get directly involved with our valuation and advisory team on significant complex valuation and consultancy matters, some of which are for expert witness matters related to commercial disputes and compulsory acquisition for infrastructure projects.

Preston Rowe Paterson is a board-based investment and development real estate valuation, advisory and management firm. What do you like most about the service your firm provides?

Our mantra in providing the valuation, advisory and management services that we provide has always been to act for owners and assist them in successful outcomes in their real estate endeavours. It is always very satisfying when the services we provide assist in successful outcomes for clients, whether it be in an acquisition, sale, or leasing transaction, asset valuation for financial reporting or defending a position in litigation as an expert.

We also spend a considerable amount of time in the 2022 economy training the next generation of property professionals and it’s fantastic to be able to pass on experience and knowledge to our cohort of graduates and see them absorb and apply the knowledge and experience.

The breadth and depth of our service offering across investment, development and asset advisory is sometimes challenging but also one of the fundamentals of PRP that today defines what we are as a business. We refer to this breadth and depth as our five pillars as follows:-

1. The categories of clients we deal with;
2. The property types we deal with;
3. The reasons clients require our services;
4. The locations we operate from and service;
5. Our people and culture.

Being at the forefront of the development and application of ESG, Proptech initiatives, diversity and inclusion initiatives, and identifying opportunities for business in the emerging climate change economy are things that are great to be involved in. Our internal Proptech solution PRP online is cutting edge in valuation service delivery, data storage and client connectivity and interaction and it is fantastic to participate in the continuing Proptech revolution which is ever changing and improving.

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

Being appointed as a Member of the Order of Australia for services to the property valuation industry this year in the Queen’s Birthday honours list was overwhelming and something I am still coming to grips with. It is the culmination of lots of things that I am proud of in what we do.

Among them are the properties that we have been involved with in one way or another in the Sydney CBD and their owners that we have advised and continue to advise. From participating in their development evolution to restructuring head leases or simply assisting in their acquisition or disposal, there are many office, retail, hotel and residential tower developments that we have been actively involved with in the heart of the Sydney CBD. I am proud of being involved in every one of them.

I am an active advocate for our fantastic and vibrant City and will be doing my best to promote the benefits of attending the office to participate in not only the business environment in a competitive way but also everything that a city like Sydney has to offer. Whilst I am all for an element of employment flexibility I don’t understand those individuals who would seek to spend a majority of their time working from home.

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

I think the biggest challenges are always the ones you are facing in the here and now (whether they are positive or negative).

The inflationary forces driving change in the economy and real estate markets at present, in many respects, are fundamentally unprecedented and a significant challenge for all stakeholders.

However, there are of course many historic challenges that come to mind such as steering a business in survival mode through the GFC where I was up at 4.30am most mornings watching the market in New York close on Bloomberg and wondering what was coming at us that day and then lamenting where things were most evenings on the back step with my two dogs at the time. The dogs were always happy to see you and spirit lifting at a time of significant disruption and I perhaps did more thinking and planning with them than I did in the boardroom at the time.



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

The economy and real estate markets we have been through during COVID and now that we are navigating because of the economic shift to an inflationary cycle are presenting many challenges for those that haven't experienced it before.

It is a huge opportunity to be like a sponge and learn from the cycle. Dealing with tenants in leasing transactions and capital transactions in this environment will be different and what you learn now and over the coming 18 or so months will serve you well for the rest of your career.

If you are genuinely interested in real estate as an asset class, there are many pathways to follow. Having early career experience in on the ground commercial property management and then valuation and transactions will prepare you for a career in property funds management. To really understand property as an asset class amongst all asset classes a master's in applied finance is a must.

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

I have held various voluntary roles over 20 years with the Australian Property Institute (API). This included having roles as both state and national president and chairing various boards and committees including the standards board and finance committee board.

I am also currently on the executive of the Property Funds Association of Australia (PFA) which represents not only unlisted fund managers but also has a growing number of listed fund members. My passion has always been investment real estate and the way it has capital (debt and equity) allocated to it through economic cycles, the way it is leased, bought and sold and the way it is regulated by ASIC; and the PFA not only brings together people and firms that do these things, but it is also at the forefront of all issues affecting investment real estate on behalf of its members.

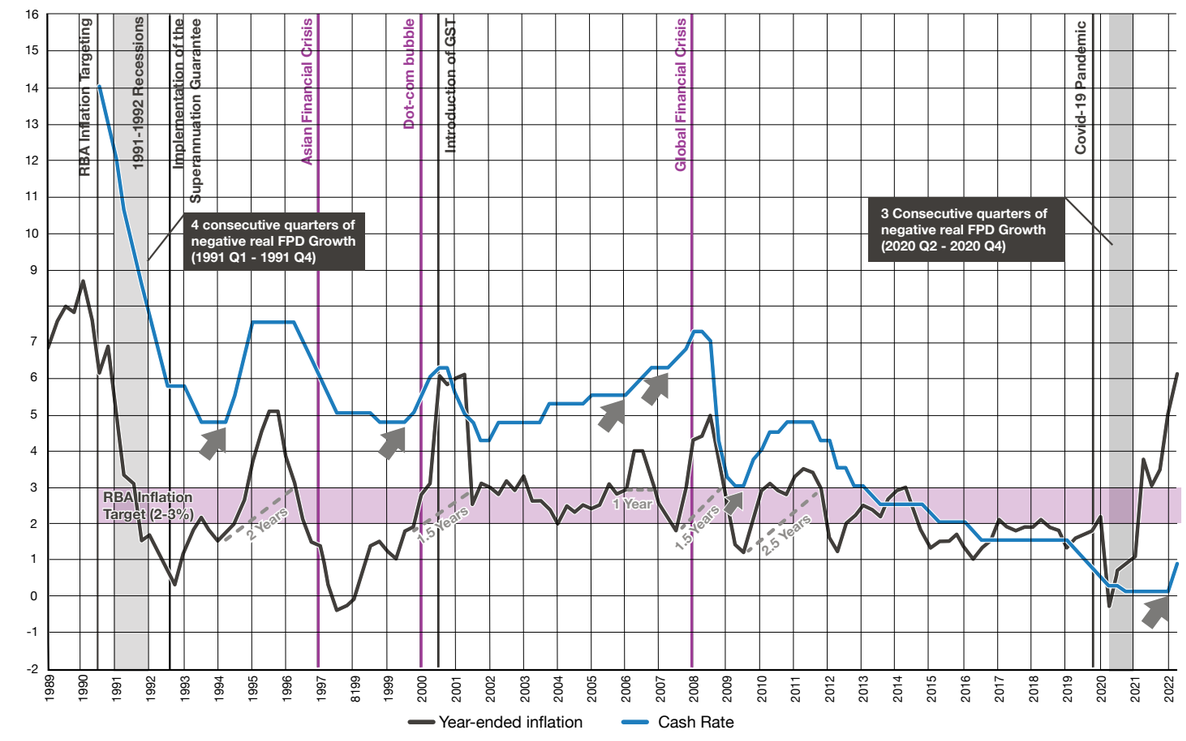
Please provide insight into the current economy and real estate markets. What do you think are potential issues and opportunities prevalent in the economy and market over the next 12 months?

In contemplating the challenges of the here and now it would be remiss of me not to comment on the economy and real estate markets in general as they sit in the 2022 inflationary environment.

It is certainly a time where we must react and adapt to what has been and is going on around us and plan a path through it and beyond.

As we reservedly emerge from the COVID pandemic period (let's hope that it rapidly becomes a distant memory) we have, in 2022 entered an unprecedented inflationary environment.

Duration of Infation Coming Backto RBA's Targetafter Intrest Rate Increases



ɔurce: Reserve Bank of Australia, Australian Bureau of Statistics, Preston Rowe Patterson Research

To consider the likely duration of the current inflationary economic cycle we have been looking closely at the economic cycle historically to focus on the length of the cycle. The chart below shows the movement in inflation and the RBA Cash Rate. We have overlayed major economic events and the RBA target inflation rate at 2-3% (targeting commented in 1990). As can be seen, since targeting commenced it has taken between 1 and 2.5 years to get inflation back into the target range returning to a stable economy. Let's hope it is closer to one year to normalisation.

I was at a conference recently where Bill Evans of Westpac was the keynote speaker and Bill described the three stages of the inflationary cycle that we are now well into.

Stage one was caused by the breakout of pent-up demand from the COVID lockdown periods. Stage two has been clearly attributable to the war in Ukraine and its impact on global food and fuel prices (fuel prices have encouragingly eased in recent weeks). Bill then went on to describe the third inflationary phase as one where inflation gets embedded in the economic system, and it is this phase that is the most challenging for central banks to deal with. He commented that if the RBA gets it right (slowing inflation to target without triggering a recession) we should see improvement in the back half of next year (2023). However, if it overshoots and triggers a recession it could be a different matter.

Investment real estate is completely about net rental cash flows and discount rates, ultimately driving valuations and performance.

On the income side of the ledger, the extent to which real estate income is a partial hedge to inflation (with either fixed or CPI rental growth) will depend ultimately on how the tenants' businesses fair in the inflationary cycle.

Tenants reliant on discretionary spending are perhaps more likely to be impacted than those which are not. Food based retail centres and industrial property are less likely to be impacted than offices which are faced with other COVID induced challenges. Notably the accelerated work from home trend. It is remorseful to hear of building vacancy factors of 10ish% at a time when occupancy factors for office space users are reported to continue to be low post COVID lockdowns at approximately 50%. Unfortunately, where all this lands office markets and CBD's in the future is a waiting game currently playing out. I am told that premium buildings in prime locations with historically low vacancies in Sydney will weather the storm far better than lower grade office buildings.

The key to forecasting rental incomes for all asset classes in 2022 surely lies with taking a view of supply and demand as well as vacancy before COVID and the 2022 on set of inflation and then thinking about how tenant demand will react relative to the known current and anticipated future supply. Clearly, it will be different for each asset class and each geographic market.

On the capital markets side of the equation, no asset class is immune to the upward shift in interest rates and its consequential impact on the cost of capital (both debt and equity).

As can be seen in the summary table below the 10 year bond yield had increased from 1.88% in January 2022 to 3.77% at the end of June with a slight correction to the end of July at 3.42%.

6 month period	Jan-22	Jun-22	Change (Basis Points)
Cash rate	0.10%	0.85%	0.75% (+)
90 Day Bill rate	0.07%	1.60%	1.53% (+)
10 Year Government bond rate	1.88%	3.77%	1.89% (+)
7 month period	**Jan-22**	**Jul-22**	**Change (Basis Points)**
Cash rate	0.10%	1.35%	1.25% (+)
90 Day Bill rate	0.07%	2.07%	2.00%
10 Year Government bond rate	1.88%	3.42%	1.54% (+)
8 month period	**Jan-22**	**Aug-22**	**Change (Basis Points)**
Cash rate	0.10%	1.85%	1.75% (+)

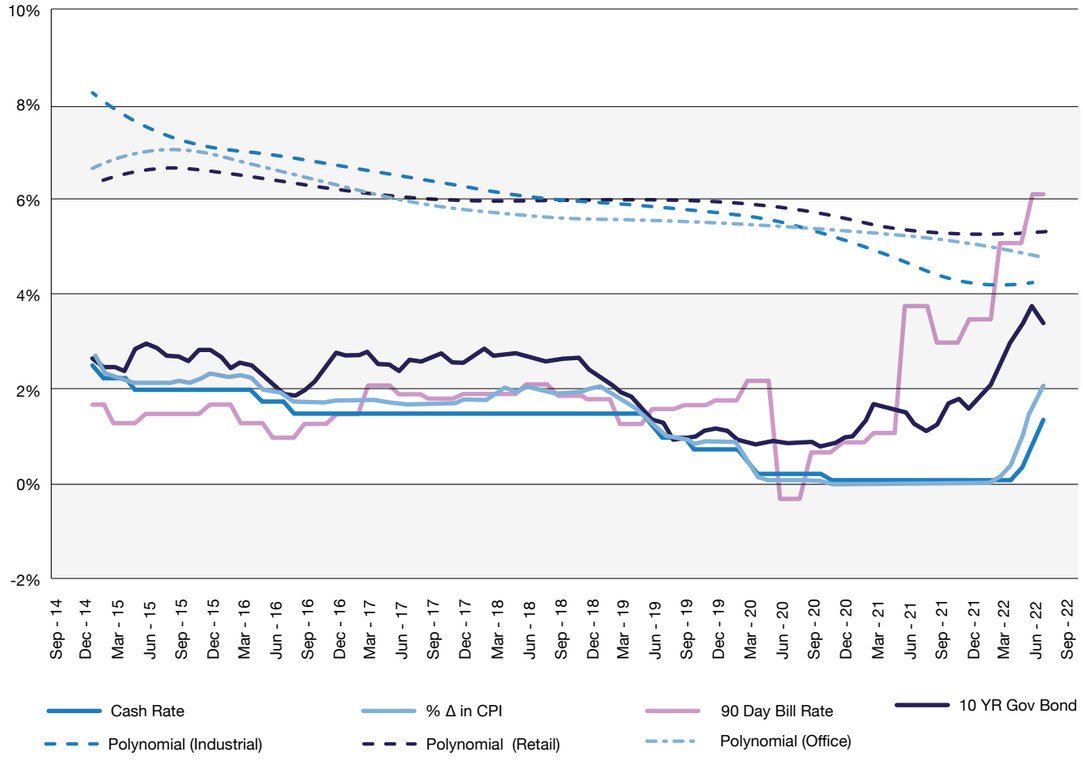
Source: RBA (2022)

The effect of a rising bond rate (risk free rate) will most likely impact property cap rates and discount rates dependent on the rates hold up and on how the weight of capital in the market looks through the inflationary cycle.

It is likely that there will be a slowing of transactions (already occurring) as buyers postulate the circumstances of rising rates and anticipate where they will settle. It is clear however that the gap between cap rates and bond rates has narrowed significantly when compressed cap rates before the rate rises commenced are considered.

The chart below shows a line of best fit (polynomial) for reported cap rates for sales over $25m for all capital cities in Australia (sourced for Real Capital Analytics) against the 10 year bond rate and the margin has clearly diminished in the last six months.





Source: Reserve Bank of Australia (2022), Australian Bureau of Statistics (2022), Real Capital Analytics (2022)

At the start year, we had seen a period of cap and discount rate compression as interest rates were at their lowest for many years.

By February when the rate rises started to bite a few commentators starting espousing terms like cap rate expansion or cap rate decompression or basically the prospect of cap and discount rates rising.

In my view, a relevant barometer for cap rate and discount rate compression and decompression at the property level is the likely movement of the cost of capital of the listed REITs. In other words, their likely Weighted Average Cost of Capital (WACC).

I successfully used the following logic a few years ago in a transaction for a Sydney CBD office building on behalf of a listed REIT to argue cap rate compression beyond sales of buildings in the market at the time and had a significant win for a REIT client. Unfortunately, the reverse logic applies in a rising rate market.

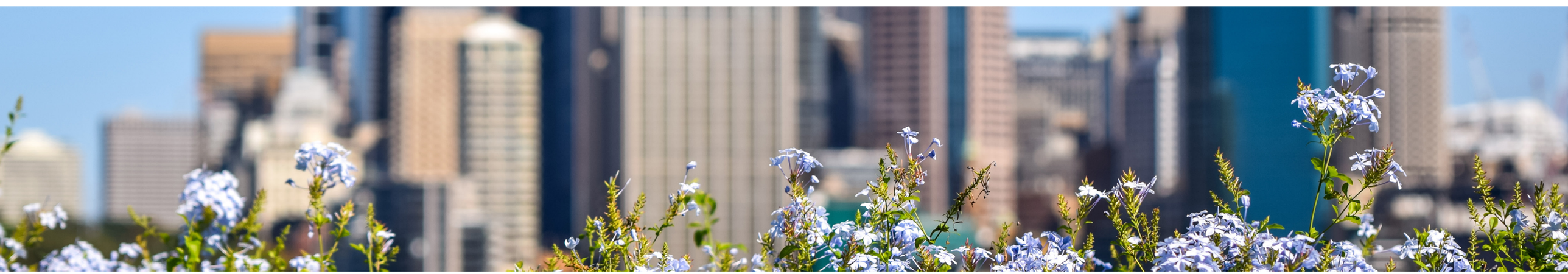
In the table below we have shown the WACC movement based on showing the actual 10 year bond rate movement as an input to the CAPM and the movement of Swap rates as an input to the cost of debt. With these two inputs moving upward and no matter how you tinker with the equity betas, debt margins or the debt /equity ratios, the cost of capital is expanding/rising.

Potential Impact of Rising Interest Rates - Decompression!

Cap Rate - Derived From WACC Discount Rate

Input		Actual							
		Dec-21	Jan-22	Feb-22	Mar-22	Apr-22	May-22	Jun-22	Jul-22
Cost of Equity - CAPM									
Equity Beta	Assumption (upper end of range)	1.200	1.200	1.200	1.200	1.200	1.200	1.200	1.200
Risk-free rate	**10yr govt bond**	**1.61%**	**1.88%**	**2.11%**	**2.50%**	**3.01%**	**3.38%**	**3.77%**	**3.42%**
MRP	Assumption (typically 5-6%)	6.00%	6.00%	6.00%	6.00%	6.00%	6.00%	6.00%	6.00%
Cost of equity (CAPM)		**8.81%**	**9.08%**	**9.31%**	**9.70%**	**10.21%**	**10.58%**	**10.97%**	**10.62%**
Cost of Debt									
BBSW	**Swap rate**	**1.45%**	**1.92%**	**2.24%**	**2.99%**	**3.42%**	**3.65%**	**3.66%**	**3.21%**
Margin	Assumption	3.00%	3.00%	3.00%	3.00%	3.00%	3.00%	3.00%	3.00%
Corporate Tax Rate (Non Base Rate Entity)		30.00%	30.00%	30.00%	30.00%	30.00%	30.00%	30.00%	30.00%
Cost of debt		**3.12%**	**3.44%**	**3.67%**	**4.19%**	**4.49%**	**4.66%**	**4.66%**	**4.35%**
Target gearing	Assume Target Debt	60.00%	60.00%	60.00%	60.00%	60.00%	60.00%	60.00%	60.00%
Weighted Average Cost of Capital (WACC)									
WACC		**5.39%**	**5.70%**	**5.92%**	**6.40%**	**6.78%**	**7.03%**	**7.19%**	**6.86%**
Implied Hurdle Cap Rate (Adjusting WACC Based Discount Rate for Growth and Cap Ex)									
Growth rate	Assumption (lower end of range)	3.00%	3.00%	3.00%	3.00%	3.00%	3.00%	3.00%	3.00%
Maintenance & leasing capex	Assumption (rule of thumb)	1.20%	1.20%	1.20%	1.20%	1.20%	1.20%	1.20%	1.20%
Implied Cap Rate		**3.59%**	**3.90%**	**4.12%**	**4.60%**	**4.98%**	**5.23%**	**5.39%**	**5.06%**

This upward pressure is front of mind for purchasers in a rising rate market. What remains to be seen given that transactions have slowed is whether the weight of capital will see the inflationary environment as short term and purchasers will look through it for trophy assets if they become available? Or will there be a structural shift once it becomes clear where rates are likely to settle?



A Snapshot of the 'Build-to-Rent' horizon post-2022 Federal Election

Authors: Adam Jeffery, John Frangi, Bobby Nader, Lily Cox

What is 'Build-to-rent'?

As the name suggests, 'build-to-rent' **(BTR)** assets are new buildings which are constructed for the sole purpose of renting, as opposed to selling. These purpose-built rental housing properties comprise of a single owner/landlord and are professionally managed on-site (often by a management entity which is different to the owner of the land), providing the tenants with various lifestyle facilities and services (which may include gymnasiums, pool facilities and childcare services).

Planning barriers historically imposed a significant hindrance on the emergence of new BTR developments in the NSW property sector, which saw the introduction of the *State Environmental Planning Policy Amendment (Build-to-rent Housing) 2021* (**SEPP Amendment**). The SEPP Amendment incorporated new provisions into the *State Environmental Planning Policy (Affordable Rental Housing) 2009* which, subject to certain provisos, had the effect of permitting the development of BTR buildings in the B3 (Commercial Core), B4 (Mixed Use) and B8 (Metropolitan Centre) land use zones, as well as any zones in which the development of residential flat buildings are permissible. These provisos *include* the following:

- the BTR development must contain at least 50 dwellings occupied, or intended to be occupied, by individuals under residential tenancy agreements;
- all buildings containing the leased dwellings must be located on the same parcel of land (however see point 3 below); and
- BTR parcels of land constructed in any land use zone (except in the B3 Commercial Core zone) must not be subdivided for 15 years, commencing on the day an occupation certificate is issued for all parts of the BTR building, whereas BTR developments constructed in the B3 land use zone cannot be subdivided in perpetuity.

These planning changes were expected to facilitate an uplift in the development of BTR assets, in a property market that was experiencing a shortage of affordable rental accommodation. With the recent interest rate rise, it could reasonably be inferred that consumer demand in the property sector may shift from owning real estate towards renting, given ongoing uncertainties concerning interest rate stability. As such, developers may seek to rely on the heightened flexibility offered by the SEPP Amendment in the short to medium term, and are incentivised to do so having regard to certain tax concessions and financing options.

BTR financing considerations

Given the emerging nature of the BTR market in Australia, traditional financiers are not as experienced with BTR as their international counterparts. Accordingly, they are likely to be more conservative in their approach, given there is little to no comparative market analysis making it difficult to assess potential value and risks of BTR developments.

From a financier's perspective, BTR has a different risk profile from the traditional 'build-to-sell' model. Some key differences in the risk profile for BTR are:

- there will be limited lease commitments prior to commencement of the development. Banks will need to assess feasibility of a particular development by reference to market reports and the developer's track record, rather than having the certainty of sold properties as is usual for 'build to sell' developments (or leased commercial premises in a non-residential context). Construction facilities will need to contemplate a period after completion of construction to 'lease up' the building before the building income can be used to pay interest costs on the facility.
- given the nature of the BTR model, there will invariably be a high level of turnover of tenants. In addition to needing to ensure that the building remains attractive for re-letting, the WALE (weighted average lease expiry – a key focus of financiers in such financings) will be lower. Developers will need to show that the project is of a high quality and sustainable, and attractive to tenants – hopefully securing longer term tenancies. Financiers will also focus on the quality of the leasing manager managing the re-letting process.

Considerations such as these are likely to result in a higher cost for funding such developments (reflecting the financier's higher risk) and tighter financial covenants for the developer to comply with.

While there are other lenders willing to lend on a fund-through basis (such as superannuation funds and foreign pension and wealth funds who are traditionally longer term in their investment considerations and comfortable with the lower yields), developers considering a BTR development can take comfort from overseas experience, where the BTR market is more developed, and where financiers have been willing to lend to BTR developers in a more traditional manner. Australian financiers should become increasingly comfortable lending to BTR developers and investors as the market develops here. In fact, there have been some recent Australian examples of BTR financings – including CBA and Oxford Properties Group's A$130m BTR green loan in respect of Indi Sydney City.

BTR tax considerations

The term "BTR" is used to refer to a number of different types of residential accommodation. However, as alluded to above, typically denotes large scale residential accommodation which is owned by a single entity and operated on a commercial basis.

Determining the correct classification of such premises can be important for a number of reasons, including tax. The term "commercial residential premises" is defined in the GST Act. It specifically includes premises such as: hotels, motels, inns, boarding houses, caravan parks and camping grounds. It also includes other forms of accommodation that are sufficiently "similar to" such premises.

By way of example, student accommodation (which is not used exclusively in connection with one education institution) may qualify as commercial residential premises if the premises are sufficiently similar to a youth "hostel". Serviced apartments may qualify if similar to a "hotel" and land lease developments may be similar to a "caravan park". Further, modern "co-living" developments may be sufficiently similar to "boarding houses". The classification is ultimately fact dependent and usually needs to be considered on a case-by-case basis. Where certainty is required, a private ruling can be sought from the Australian Taxation Office.

Classification as a commercial residential premises is important for GST purposes, as it generally means that full input tax credits (GST credits) will be available for all land acquisition and development costs. Such credits are generally not available for the development of "residential premises" that do not qualify as "commercial residential premises".

Premises that qualify as "commercial residential premises" may also be treated differently to residential premises for FIRB purposes. Such premises are also less likely to attract foreign investor surcharges for duty or land tax. Further, Managed Investment Trusts may be able to distribute income derived from commercial residential premises to qualifying non-resident investors at a reduced withholding tax rate of 15%, versus a rate of 30% for income derived from residential premises.

Some States have also announced their own tax incentives to encourage BTR developments. New South Wales, Victoria and Western Australia all offer 50% land tax discounts for qualifying BTR projects.

It should be noted that there can be tensions between the different tax treatments and incentives. For example, to qualify for the BTR land tax concession in New South Wales, the owner of the relevant premises must offer tenants a residential lease with a term of at least 3 years. While tenants can opt for shorter lease terms, the requirement that a 3-year lease be genuinely offered is a pre-condition for the concession. It is unlikely such premises could ever qualify as "commercial residential premises", meaning other tax and GST benefits outlined above may not be available.

There are also separate tax concessions that may apply to particularly categories of residential premises. This may include social housing and affordable housing offered by endorsed charities. Further, there are specific GST concessions for specialist disability accommodation provided to NDIS recipients. These types of premises may be included as a part of a mixed-use development project and should not be overlooked.



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Harmonised Disclosure for Residential Energy Efficiency gaining Momentum

Author: Margot King

Commonwealth, state and territory governments have been collaborating on a national framework for disclosure of residential efficiency information. *The National Framework for Disclosure of Residential Energy Efficiency Information* (**Framework)** was released in February 2022 for public consultation and a cost benefit analysis of the proposed initiatives is expected by end of 2022.

Overview

The draft Framework has two functions, to:

- outline and nationally harmonise settings for residential disclosure schemes; and
- provide guidance and recommendations on the right market environment for disclosure and home energy upgrades.

The work is part of the policy development under the 'Addendum to the Trajectory for Low Energy Buildings'.

The goal of improved disclosure is to overcome:

- inadequate information for prospective buyers, tenants and owners;
- information asymmetry between sellers and buyers and between landlords and tenants; and
- split incentives – between a landlord and tenant – a landlord is not incentivised to upgrade a home and neither is the tenant.

Research reviewed in the Framework concluded that there was high demand for disclosure of information about energy efficiency performance in homes. ACT has had a mandatory disclosure system since 1997, and evidence there showed that people were willing to pay a premium for a higher 'Energy Efficiency Rating' (EER).

Recommended schemes

The Framework concluded that:

- NaTHERs is the most suitable rating scheme for residential disclosure as it has national coverage and is being expanded to cover both 'As Designed' ratings for new buildings (NaTHERS Thermal and Whole of Home) and 'InHome' ratings for existing buildings (NaTHERS In Home); and
- NABERS is the most suitable rating scheme for the disclosure of shared services/common areas of apartment buildings, as it provides a national operational rating, ie, quantifies energy and water performance and shows relative efficiency of shared services. Developers can enter into a 'NABERS Commitment Agreement' to formally commit to an operational rating.

The Framework flagged the possibility of a 'detailed' and 'simplified' assessment approach to data. Data collection in the simplified approach would not need to be done by an Energy Assessor. Instead, data collection could be undertaken by home owners or tenants or industry professionals such as valuers, property managers, building inspectors and insurance companies. The data would be verified off-site by an energy assessor and would provide a lower cost option at the start 'of the [efficiency] improvement journey'. The simplified assessment could only be used provide a simple rating for lower performing homes.

Market Environment for Disclosure

The Framework identified key stakeholders and delivery partners that 'could assist to develop the 'market environment' 'and act as an enabler for disclosure and energy performance upgrades'. The Framework considered the drivers for these groups and sectors to be involved.

- Finance and insurance groups – need to manage exposure to physical and transitional climate risks in residential building stock (in turn, due to reporting changes driven by the 'Climate-related Financial Disclosures (TFCD) recommendations).
- Social and community housing sector groups – need to understand energy performance in building stock to support the improvement of tenants' financial wellbeing, comfort and health. There would also be opportunity to improve asset management decision making and allocation of capital based on energy efficiency.
- Real estate sector, building and building services – agents and building managers are often present in consumer decision making on properties and could assist in raising awareness and providing information.

The aim is to create a supportive market environment to promote the wide uptake of voluntary disclosure and create optimal conditions to transition to mandatory disclosure.

Establishment of REEDI

The Report proposed establishing the 'Residential Energy Efficiency Disclosure Initiative' – referred to as 'REEDI'. The purpose of the REEDI is to 'act as a clearing-house for decision-making, policy development and collaboration in developing consistent settings for:

- providing nationally consistent settings in implementing disclosure schemes;
- overseeing a market environment to support disclosure schemes; and
- overseeing and supporting the transitionary pathway for implementing the disclosure scheme, whether voluntary or mandatory.

Next steps

After the cost benefit analysis expected by the end of 2022:

- by mid 2023 - the States and Territories will develop processes for disclosure schemes based on national frameworks
- by mid 2025 - the States and Territories will being to implement disclosure schemes based on national frameworks.

Key Takeaways

- State and territory governments are moving to a harmonised energy disclosure system, it will be based on existing tools.
- It will not necessarily be a mandatory system, this is up to the relevant State or Territory but over time, it looks like it will move in that direction.
- There is work around data collection and analysis, how and when it can be disclosed and privacy concerns.
- There is work to create a market environment for disclosure that is developed with key partners – the market would help:
  - create a ratings baseline to inform policy, market incentives and consumer choice;
  - create awareness for asset owners and improve their capacity to make informed choices about energy efficient upgrades;
  - monitor, evaluate and implement lessons learnt from across Australia and internationally; and
  - identify, test and create low cost and highly trusted data collection, validation.

The Framework is another welcome step in the direction of harmonised energy efficiency disclosure rules. Similar disclosure systems have been successful in other contexts.

The recent weather events and energy crisis have brought into sharp relief the need to continue to improve housing stock energy performance. Improved disclosures will benefit the quality developers in the market and see and overall improvement in standards as well as delivering benefits to consumers. At the same time, there is the potential for increased cost from disclosure and compliance requirements and increased regulation and bureaucracy and this will need to be closely monitored.



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Managing Cost Escalation Risks in Construction Projects

– The Return of 'Rise and Fall' Clauses and Other Alternatives to a Fixed Lump Sum Contract

Authors: Veno Panicker, Grant Parker and Nasreen Jahan

The post COVID 19 construction market in Australia has seen unprecedented numbers of insolvencies in real estate markets. A major contributor to these insolvencies has been a failure to adopt what used to be a standard 'rise and fall' clause in building contracts in the face of a global supply crisis and domestic labour shortages and resulting inflation. The failure across the projects spectrum at all levels to adopt such clauses has been disappointing – reflecting an industry that has enjoyed over two decades of minimal inflation together with government, financiers and other industry participants being lulled into a false sense of security provided by a fixed lump sum agreement. This article details options for rise and fall clauses and other alternatives to fixed lump sum contracts with a particular focus on the urgent need for such clauses to revert to being the norm in residential and commercial projects.

What is a Rise and Fall Clause?

A rise and fall clause in a contract serves as a mechanism by which the contract price can be increased or decreased to correspond with fluctuations in the price of specific materials or labour over the course of the contract, in the geographical region where construction occurs. Such clauses were common in Australia until the early 2000s.

Depending on market conditions, rise and fall clauses can be:

(a) measured by reference to actual costs against a schedule of rates or other baseline;

(b) tied to CPI or other price indexes; and/or

(c) applicable to all costs for a project or key risk items (such as steel and timber in the current market).

Clauses which entitle the contractor to a rise or fall of the contract sum by the application of a formula, irrespective of actual cost fluctuations, are more commonly seen. These formulae are based on published price indices which record overall changes in the value of specified commodities or materials over time, and assume that the contract price has been determined by reference to the value of wages and materials as stated on a particular price index, current (usually) as at the date of the tender. The clause will then nominate a reference date on which any rise or fall in the contract price is to be determined by reference to the updated price index. If, at the date of adjustment, the value of the stated commodity or material has increased on the chosen price index, the contract sum will "rise" to the degree calculated by the formula outlined in the clause. The same is true if the price index indicates a decrease in the value of a particular material or good – at the date of adjustment, the contract sum will "fall" to the extent determined by the relevant formula.

Alternatives to a Rise and Fall Clause

In addition to rise and fall clauses, the market is beginning to see 'risk shares' or hybrid rise and fall clauses whereby:

(a) the contractor takes the risk of rise and fall of key materials plus or minus 10 or 15% based on prices at tender; and

(b) the parties share the risk 50/50 outside of that range on an open book basis – effectively a 'pain share/gain share' model.

In a fluctuating market, particularly in relation to long term contracts, such hybrid models provide more certainty for financiers – who have become used to pure fixed lump sum models.

Why Change the Status Quo?

The impact on the construction industry is clear. According to ASIC, insolvency in the construction industry increased by 40% from the start of 2021 to the end of the year.[1] In 2022, the construction industry places among the highest out of other industry sectors for the number of recorded insolvencies.[2]

But external circumstances are not the only culprit – current industry practices are also contributing to the problem. Traditionally, the major risks of a project (including many COVID-related risks and price escalations) are shouldered by the contractor and there remains an ongoing resistance to pursue a fair and equitable allocation of the risk between the parties. The long-entrenched industry culture of under-pricing, with the belief that the lower tender wins, is of no assistance. A survey conducted by the University of Sydney, University of New South Wales and ISIS Group Australia in 2014 found that under-pricing is primarily driven by a contractor's need to find work and maintain a steady cash flow, but the practice generally results in a lower standard of work being achieved and discourages long-term profitability for the contractor.

When a risk such as cost escalation is passed to a head contractor, this is usually passed down the contractual chain to subcontractors and suppliers. In the current market, over the past year, this has meant that some material costs, such as steel, have escalated over 40 percent, with no compensation for the head contractor or its subcontractors for such costs. The result has been an unprecedented rate of insolvency – and increased risks of defective works. A distressed contractor working under a fixed lump sum model is not incentivised to undertake anything other than the minimum required to complete a project. Indeed, invariably, cost cutting (if not cutting corners) is inevitable as down the contractual chain parties are struggling.

Counter intuitively, a sensible risk share on cost escalation using a rise and fall clause or hybrid model, is likely to provide more cost certainty and better project outcomes for all concerned.

Outside of some states which have some constraints on the use of such clauses in residential projects[3], there is no legislative barrier to the adoption of such clauses.

In long term infrastructure projects, it is respectfully considered that such risk should be borne by the state or federal government as principals – and that the failure by such government bodies to drive the re-adoption of such clauses more rapidly has been a missed opportunity. Such usage would give comfort to financiers and other project participants – proving that such models are 'bankable' as they were for decades prior to the early 2000s.

In real estate projects, such clauses will provide more confidence in the ability of all parties down the contractual chain to deliver a project. Leadership from developers and financiers seeing past the illusory benefits of a 'fixed lump sum' is urgently required to adapt to the current market fluctuation.



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[1] https://www.afr.com/property/commercial/construction-industry-on-notice-as-insolvencies-jump-40-per-cent-20220204-p59tz2

[2] https://www.abc.net.au/news/2022-04-01/building-companies-going-broke-consumers-half-built-homes/100929896

[3] For example, Home Building Contracts Act 1991 (WA), Domestic Building Contracts 1995 (Vic)

Construction Industry in the Spotlight: Recent Spate of Insolvencies

Authors: Brit Ibanez, Nicholas Edwards and Eliza Buchanan

Businesses operating in the construction industry have long carried a greater risk of financial distress than in other industries, largely ue to entering into fixed price or lump sum contracts and being beholden to fluctuating material prices. In light of recent high-profile collapses, we discuss below a number of tools which property developers and construction companies and their directors can use to protect themselves in a high-risk environment.

Insolvencies Generally

Government stimulus payments designed to support businesses through the covid-19 pandemic have now ceased and as a result the economy is starting to see an uptick in formal insolvency appointments.

The first wave of insolvencies has commenced, with 'zombie companies' – those companies able to survive on government support throughout the pandemic, but with insufficient assets to meet their ongoing trading and legacy liabilities – the first to fall.

But it is not just zombie companies driving the spike in external administrations in the construction industry.

Earlier this year, ASIC published figures showing the construction industry contributed to 40% of corporate insolvencies between September and December 2021, an increase of 30% on the previous year.

Impacts on the Property Industry

The construction industry has faced a number of well publicised external shocks recently, with companies trying to balance the covid-19 pandemic which forced site shut-downs and caused significant delays to work. Even though these temporary restrictions have stopped, construction companies have been forced to deal with supply chain and shipping delays which has heavily impacted the delivery of raw materials and also caused significant cost pressures as the price of such materials continues to creep higher. Additionally, increasing wage pressure due to a lack of qualified staff and interest rate increases from the RBA (with more to likely come) have put further pressure on balance sheets.

Since December 2021, a number of big names in the construction industry have been forced into insolvency due to a combination of such pressures.

Queensland-based construction firm BA Murphy collapsed owing nearly $11 million to 550 creditors, including employees and contractors and leaving 50 unfinished building projects across Australia.

Also based in Queensland, Privium collapsed just prior to Christmas 2021, having suffered a $28 million loss in 2021. 831 largely residential projects were left unfinished, leaving homeowners and sub-contractors to pick up the pieces.

In March 2022, the board of industry behemoth Probuild called in administrators, with its South African parent company Wilson Bayly Holmes-Ovcon Limited having pulled the plug on continued financial support.

The flow on effects to employees, sub-contractors and residential homeowners is enormous. The collapse of large enterprises such as Probuild has a domino effect on smaller players in the industry, affecting small businesses especially sub-contractors.

Federal Election Policy Shifts?

With political certainty delivered by the Albanese-led Labor Party obtaining a majority in the Federal House of Representatives, what can participants in the construction industry expect from the new government?

The Labor Party's election platform included, most relevantly, a promise to adopt reforms to the *Building and Construction Industry Security of Payment Act* **(SOPA)** (as it applies from state to state) as recommended by John Murray AM in 2018, including:

- tightening timeframes for payment claims, progress payments and adjudication applications.
- creating a trust into which payments to head contractors are paid, which are then held on trust for sub-contractors to ensure payment of future invoices, where a contract is valued at greater than $1 million.
- streamlining documentation required to submit payment claims by implementing standard forms, therefore promoting certainty and consistency in the SOPA process and in adjudication decisions.

Some of these suggestions have already been implemented in some states.

The Labor Party's election platform also hinted at amendments to various insolvency regimes, the specifics of which were not detailed.

It remains to be seen when and to what extent these election promises will be implemented but with corporate financial distress increasing, the sooner the better.

What can you do?

Re-assess your risk profile for new and existing contracts

Reassess risks such as freight, commodity fluctuations and labour shortages in your tendering – the market has dramatically changed.

Consider whether lump sum contracts are feasible on new projects. We consider the use of rise and fall clauses and hybrid risk models later in this publication.

Ensure you're making claims on a timely basis in accordance with your contract

Early notice of claims best place all parties as to how to manage an issue or risk. Regrettably, it's often when a project is distressed that claims are deferred, and the focus is on getting works back on track.

Critically, many claims are either compromised or lost for a simple failure to strictly comply with notice and time-bar requirements for variations, extension of time and other claims.

Ensure you're using the SOPA properly

Hopefully, the introduction of a more nationally consistent SOPA will bring certainty and regularity Australia wide. In the meantime we recommend the following practical tips:

- Ensure you have a template payment claim which (subject to the state requirements) clearly:
  - identifies and describes the work to which the claim relates;
  - indicates the amount to be claimed;
  - includes the relevant wording "*this is a payment claim made under the Building & Construction Industry Security of Payment Act*". Check the precise wording of the act relevant in your state;
  - is issued on or after a reference date (or milestone as governed by a contract);
  - is served on the correct party under the contract; and
  - includes a supporting statement, where the claim is served by a head contractor.
- If you're issued with a payment claim, diarise the deadline and ensure you respond with a written payment schedule within ten business days (or the applicable timeframe depending on where the claim is made).

Understandably, recourse to adjudication under such legislation is a last resort (usually signaling the end of a commercial relationship), however preserving your strongest position by issuing compliant payment claims will ensure if it comes to adjudication, you are well protected.

In terms of changes to the law, keep an eye on the Hamilton Locke website for regular updates and analyses of policy reform and the legislative agenda.

Should further Murray recommendations be implemented, reach out to the Hamilton Locke construction team who will be happy to assist in a review of your payment claim procedures.

Know your options if facing financial distress

If your company is facing financial distress, or you become aware that one of your head- or sub-contractors are, it pays to know what options are out there to assist the company, its directors and its creditors. It is also helpful to know how to best position yourself in case you become a creditor of a company in financial distress.

There are various tools businesses and their directors can use when a company is in financial distress.

Safe harbour

The safe harbour regime is designed to provide directors from relief from potential insolvent trading liability whilst they are actively working toward a plan to achieve a better outcome for their company and its creditors than an immediate liquidation. The entry hurdles to safe habour eligibility are ensuring that the company is meeting its employee entitlements (including superannuation) and that its tax reporting obligations are up to date.

Safe harbour requires active engagement with advisors and for the board to remain informed of the financial position of the company. Further detail can be found here.

Voluntary administration

Where a company is insolvent or it is likely to become insolvent, the directors can appoint a voluntary administrator. Once an administrator is appointed the directors are no longer liable for insolvent trading of the company from that point onwards and their powers are suspended. During the administration there is a moratorium on claims against the company and secured creditor rights are generally curtailed. The administration process importantly allows for a proposal to be put forward to either restructure or recapitalise the business through a deed of company arrangement or 'DOCA'. The aim of the administration regime is to achieve either (or in the best case both) an outcome for creditors better than placing the company into liquidation or one that maximises the chance of the company continuing as a going concern. The creditors decide on the future of the company at a meeting of creditors and will have the benefit of a report to creditors which will, amongst other things, summarise the reasons for failure, potential causes of action, explain the likely outcome for creditors in a liquidation and any DOCA proposal should one be put forward.

Brit Ibanez can assist businesses and directors dealing with disputes concerning both construction and insolvency. Nicholas Edwards is a pre-eminent restructuring & insolvency lawyer with experience advising construction and property development companies and Grant Parker and Veno Panicker will guide companies with everything from construction contracts, project delivery, variation, EOTs, Delay Costs, adjudication, litigation and arbitration.



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ESG Guide for Property Fund Managers: Part 2

Author: Nick Huett

Legal imperatives

In the Autumn edition of the Real Estate Markets Quarterly we discussed the drivers and opportunities that exist for property fund managers looking to take advantage of growing trends in ESG. This edition considers the legal imperatives that property fund managers should consider in the face of these trends.

Australia is one of the most active jurisdictions for climate change related litigation activity.[1] The primary threats to property fund managers are actions that allege misleading and deceptive conduct when offering products for investment (i.e. greenwashing) or that challenge investment decision-making processes and risk assessments.

Greenwashing

Property fund managers should expect scrutiny of ESG disclosures and avoid exaggerating the ESG credentials of their investments. ASIC have highlighted the growing role of sustainable finance and the importance of enforcing governance, transparency and disclosure standards as key regulatory focus areas over the next two years.[2]

We have previously written about ASIC's greenwashing guidance, that can assist fund managers comply with their obligations not to mislead investors. In short, fund managers should be mindful of the accuracy and integrity of any ESG measures used in promotional material for their products, and develop robust reporting regimes to test them from time to time.

Required ESG disclosure for registered schemes

Registered schemes offered under a PDS must make ESG disclosures, including the extent to which labour standards or environmental, social or ethical considerations are taken into account in the selection, retention or realisation of investments.[3] ASIC regulatory guide (RG) 65 sets out principled guidelines to assist registered scheme operators meet this disclosure requirement.

Towards standardised disclosure

Australia is yet to mandate standardised disclosure of climate-related financial risks for financial products. However ASIC continues to the adoption of the framework developed by the Taskforce for Climate-related Financial Disclosures (TCFD) as the basis for climate disclosure and risk assessment.

The TCFD framework sets out disclosure recommendations that cover governance, strategy, risk management, and metrics and targets, to standardise climate related disclosures so investors can make meaningful comparisons. ASIC have flagged an eventual shift to mandatory climate related disclosures, following suit with the US, UK, New Zealand, and the EU.

Trustee duties to consider ESG issues

Professional fund operators will be well aware of the fiduciary obligations that apply to their management of trust assets. Though the content of these duties will differ under the terms of each trust instrument, at general law trustees are required to exercise a reasonable standard of care in making investment decisions and to act in the best interests of investors.

Given the acceleration and mainstream adoption of ESG trends, it would be difficult to argue that a trustee had acted reasonably if it failed to consider ESG factors. At minimum, a trustee should identify and manage climate risks, and design and implement strategies to make accurate assessments and disclosures.

In the Federal Court case of McVeigh v REST, breaches of a superannuation trustees' obligation under the *Superannuation Industry (Supervision) Act 1993* (Cth) were alleged for failing to obtain information about climate risks and not complying with the TCFD framework.

While the case ultimately settled, it brought about acknowledgements from REST in the settlement statement that:

> 'climate change is a material, direct and current financial risk to the superannuation fund across many risk categories'; and
>
> 'REST, as a superannuation trustee, considers that it is important to actively identify and manage these issues.

The case is significant because the obligations of superannuation trustees under the SIS Act broadly mirror the obligations of trustees under general law.



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[1]Second for overall number of climate change related cases (behind USA), first per capita: NSW Law Society, *BRIEFING PAPER: CLIMATE CHANGE LITIGATION TRENDS, CASES, AND FUTURE DIRECTIONS*, November 2021

[2]ASIC Corporate Plan 2022–26: Focus 2022–23

[3]Section 1013D(1)(l).

[4]Speech by ASIC Chair Joe Longo at the AICD Australian Governance Summit, Thursday 3 March 2022.

[5]Cowan v Scargill [1985] Ch. 270; s 601FC of the Corporations Act 2001 (Cth).



Greenwashing: 9 Questions to Help Issuers Air Out their Dirty Laundry!

Authors: Brendan Ivers and Erik Setio

Background

The Australian Securities and Investments Commission **(ASIC)** has recognised there is rising demand for environmentally friendly, sustainable or ethical investment options from investors in Australia, particularly those in a younger demographic.

There is increasing global unease about the risks of greenwashing of financial products, which may be partly driven by a lack of clarity about labelling or a single generally accepted taxonomy in this area. This has been recognised by international regulators as well as the International Organization of Securities Commissions, which has established a Sustainable Finance Task Force that covers greenwashing and other investor protection concerns (including ASIC as a participant).

The European Union recently adopted a legal framework introducing a taxonomy seeking to define which investments or economic activities can be considered sustainable or climate friendly. The US Securities and Exchange Commission has also announced a task force to identify gaps or misstatements in environmental, social and governance **(ESG)** disclosures, as well as compliance issues relating to the ESG strategies of funds.

It is in this context that ASIC has issued a new information sheet – **(INFO 271)** How to avoid greenwashing when offering or promoting sustainability-related products. INFO 271 Is directed at issuers (i.e., responsible entities of managed funds, corporate directors of corporate collective investment vehicles **(CCIVs)**, and trustees of registrable superannuation entities).

Interestingly, while INFO 271 focusses on sustainability-related products issued by funds, ASIC notes its principles may be applicable to other entities that offer/promote financial products that consider sustainability-related considerations, such as listed companies or entities issuing green bonds.

What is 'Greenwashing', and Why is it an Issue?

In INFO 271, ASIC defines greenwashing in relation to investments as "the practice of misrepresenting the extent to which a financial product or investment strategy is environmentally friendly, sustainable or ethical".

ASIC believes greenwashing distorts relevant information that a current or prospective investor might require to make informed investment decisions. ASIC believes it can erode investor confidence in the market for sustainability-related products and poses a threat to a fair and efficient financial system.

Current Regulatory Framework and Applicability to Greenwashing

The Corporations Act 2001 (Corporations Act) and the Australian Securities and Investments Commission Act 2001 (ASIC Act) contain general prohibitions against a person making statements (or disseminating information) that are false or misleading, or engaging in dishonest, misleading or deceptive conduct in relation to a financial product or financial service.

ASIC expressly reminds issuers of the need to comply with these existing prohibitions when promoting sustainability related products, and specifically notes the particular risks associated with representations made about future matters unsupported by reasonable grounds. ASIC notes that whether a particular statement or conduct is misleading or deceptive will depend on all of the circumstances of the particular case, and the overall impression created for an investor.

To help improve the quality of disclosure, ASIC recognises the recommendations by the Financial Stability Board's Task Force on Climate-related Financial Disclosures (TCFD) and encourages voluntary disclosure that is in accordance with the TCFD framework.

9 Questions for Issuers to Consider

To reduce the risk of greenwashing and avoid misleading or deceptive greenwashing practices, INFO 271 provides a list of nine key questions (together with illustrative examples) which issuers should consider when preparing communications about sustainability-related products.

The 9 questions are designed to facilitate 'truth in promotion' by using clear labels and defining sustainability-related terminology. In addition, the 9 questions facilitate 'clarity in communication' by providing clear explanations of how sustainability-related considerations are factored into investment strategies.



Question	Comment and Information	Example(s) Provided
1. Is the product 'true to label'?	Financial product labels guide investors about what they will be investing in, and investors have commensurate expectations about a product's label to align with the underlying investment strategy. Given the lack of standardised labelling for sustainability-related products, issuers need to exercise particular care to ensure that the product labels they use are not misleading. ASIC emphasises that issuers should "think carefully about using absolute terms in a product label".	ASIC provides examples ranging from the straightforward to the more nuanced. For the former, labelling a product as a *"No Gambling Fund"* where, under its terms, the product may nonetheless invest in companies that earn less than a certain percentage of their revenue from gambling activities (e.g., less than 30%), is an example of not being 'true to label'. For the latter more nuanced example, ASIC references a *"Social Investing Fund"* which balances different factors when considering an investment, including social matters such as labour practices and gender targets. However, in practice, the sustainability-related considerations (i.e., the social matters) are not significant in the manager's investment decisions. This, in ASIC's view, is also an example of not 'true to label'. In addition, ASIC provides an example where a sustainability-related product is labelled as the *"Stewardship Equity Fund"*. However, the issuer is not actively involved in stewardship activities. This is also not 'true to label'.
2. Does the issuer use 'vague terminology'?	Issuers should avoid using broad, unsubstantiated sustainability-related statements or 'jargon' without providing clarifying information. Therefore, sustainability-related terminology (including in a product label) should be adequately explained in the PDS or other promotional material. In this regard, ASIC noted that terms such as 'socially responsible' or 'ethical investing' or 'impact investing' can mean different things to different people and can vary across products or issuers.	ASIC provided the following examples of vague terminology requiring further clarifying disclosures: • Commitments or disclosure such as *"contributing towards positive impacts for investors and the world"* will require issuers to also elaborate and disclose what it considers to be *"positive impacts for its investors and the world"* or how its investments contribute to those stated outcomes. • Statements relating to an issuer's investment managers focusing on sustainability-related factors that have *"a material financial impact on investments"* will require the issuer to also clarify how it defines the concept of *"material financial impact"*.
3. Are 'headline claims' potentially misleading?	If an issuer's communications or disclosures contain a headline claim about sustainability-related matters, the headline claim should not itself be misleading and exceptions and qualifications should not be used to rectify an otherwise misleading impression. If exceptions and qualifications are required, they should not be inconsistent with other content in the disclosures, including any headline claims. Also, the more that a qualification is required to balance the information contained in the headline claim, the more prominently placed the qualification should be. ASIC suggests that promotional statements that are designed to be read as headline claims in absolute terms – are unlikely able to be rectified by further disclosure.	For example, if an issuer makes a headline claim in its promotional statements that it does *"not invest in tobacco products"* (however, the issuer under the relevant terms of the product is allowed to invest in companies involved in the manufacture, sale and distribution of tobacco products under certain circumstances), then the headline claim is likely to be misleading (and unable to be rectified by further disclosure).
4. Has the issuer explained how sustainability-related factors are incorporated into investment decisions and stewardship activities?	Issuers should disclose and clearly explain their methodology or policy for integrating sustainability-related considerations into investment decisions and stewardship activities. Where a weighting system is used to evaluate certain sustainability-related considerations and/or to prioritise certain sustainability-related considerations over others, issuers must consider whether to provide a description of the weighting system (in order to better inform a retail investor's decision to acquire the sustainability-related product). This includes providing a description on how the weighting system or approach is applied by the issuer's investment managers. In addition, when describing the issuer's stewardship approach, an issuer should be careful to not overstate the level of influence they have over the companies targeted or selected by the issuer.	ASIC provides an example where an issuer's disclosure states that it 'considers', 'integrates' or 'takes into account' sustainability-related factors when assessing new and existing investments. Here, the issuer would need to explain clearly what these terms mean and use specific and clear language to help investors understand the product's sustainability-related investment strategy.

Question	Comment and Information	Example(s) Provided
5. Has the issuer explained investment screening criteria? Are any criteria subject to exceptions or qualifications?	Disclosures should enable investors to fully understand the product's sustainability-related investment screening criteria. It should be clear whether the particular investment screen applies only to a certain product offering or to the issuer as a whole. Where a screen applies to part of the portfolio, the percentage covered by the screen should be disclosed. Any screening exceptions or qualifications, including thresholds, should also be disclosed. ASIC expects issuers to provide enough information to enable investors to understand any screen exceptions or qualifications.	ASIC provides two examples in INFO 271 to demonstrate inadequate disclosure regarding sustainability-related investment screens: • The first example covers an issuer making the following promotional statement about its sustainability-related product: *"We target investments in companies that have robust plans to manage cybersecurity and data privacy risks (depending on the nature of their business)"*. However, the issuer's terms state that this screen only applies in relation to technology companies. In this example, ASIC is of the view that this qualification has not been prominently disclosed in the respective communications and disclosures. • The second example covers a circumstance where a sustainability-related product applies a revenue-based exclusionary screen that excludes investments in companies earning *"more than 10% of their revenue from providing palm oil as an input ingredient"*. In these circumstances, ASIC would generally expect the issuer to disclose what 'revenue' means in this context (for example, whether 'revenue' refers to a company's gross or net revenue, or whether this is based on revenue as reported by the company in its audited financial statements).
6. Is the issuer's level of influence over the benchmark index for the sustainability-related product clearly and accurately explained?	If issuers are able to influence the composition of an index against which portfolio composition is determined or performance is measured, then they should disclose their level of influence. In addition, if an issuer has in substance some degree of active management over an investment decision-making process (for example, as a result of its ability to influence the composition of a benchmark index), then it should not state that the process is passively managed.	In relation to the first point, ASIC states that, for example, an issuer should disclose if it has any influence over the investment screens applied by the index provider when constructing the index. Otherwise, investors may be misled to believe that the product issuer has little or no involvement in the development of the product's underlying investment screens when the issuer actually has some involvement. In relation to the second point, ASIC provides the following example: A sustainability-related product adopts a passive investment strategy by tracking a combination of sustainability-related indexes administered by third-party index providers. However, the PDS does not disclose that the product issuer has active input on any adjustments to the negative or exclusionary screens applied to the underlying indexes. In ASIC's view, this example shows an issuer failing to disclose relevant influence over the composition of a benchmark index.
7. Has the issuer explained how it uses metrics related to sustainability?	If issuers rely on sustainability-related metrics (such as ESG scores) to assess whether an investment aligns with their products stated objective/strategy, then issuers should disclose the following: • The extent to which the metrics are used to evaluate new and existing investments in implementing the investment objective or strategy. • The sources of the sustainability-related metrics, including whether these are based on proprietary methodologies or from certain third-party providers. • A description of the underlying data used to calculate the sustainability-related metrics, as well as the calculation methodologies for those metrics. • Any limitations arising from reliance on the metrics (where applicable).	See ASIC's guidance on applicable disclosure relating to sustainability-related metrics in the previous column.
8. Are there 'reasonable grounds' for stated sustainability targets? Has it been explained how this target will be measured and achieved?	ASIC expects that where products have a certain sustainability target, issuers should explain the following: • What the target is. • How and when the issuer expects to meet the target. • How it will measure progress or milestones. • Any assumptions the issuer has relied on when setting that target or when measuring progress. Where an issuer has adopted a stewardship investment approach to achieve its target, then issuers should: • explain the rationale for engaging with particular companies to influence changes in their corporate behaviour; and • provide regular updates on their progress with those companies, including stewardship activities and outcomes, such as voting and engagement activities.	ASIC provides an example where an issuer prominently states on its website that it is committed to reaching net zero carbon emissions across all of its investment portfolios. However, the issuer does not provide investors with information about how and when it expects to achieve this target. Instead, the issuer has only made a general statement in its latest annual report that the issuer remains committed to *"driving real positive changes for our environment"*. ASIC views that this level of disclosure does not provide investors with adequate information about the issuer's strategy or progress towards achieving its 'net zero' objective. Accordingly, this is an example of a failure to disclose how and when an issuer expects to meet a sustainability target.

Question	Comment and Information	Example(s) Provided
9. Is it easy for investors to locate and access relevant information?	ASIC reiterates that when an issuer offers a financial product to a retail investor, the general disclosure obligations for a PDS apply to any offer of financial products to those investors. Consistent with these requirements, the issuer should provide investors with adequate information that is concise and clear enough for investors to understand the sustainability-related considerations incorporated into the product being offered. This information should be consistent across all mediums' including regulatory documentation, voluntary disclosures (e.g., sustainability reports by the issuer) and social media platforms. ASIC emphasises that where an issuer's approach to investing is guided by third-party frameworks (e.g., UN Sustainable Development Goals or the UN Principles for Responsible Investment), issuers to disclose of this fact.	In this regard, ASIC states that issuers should ensure that all information that they publish that is relevant to a retail investor's (or their adviser's) investment decision regarding a particular sustainability-related product is easy to locate and readily available, particularly when this information is made available through their website. Issuers should also be conscious that providing significant volumes of sustainability-related information in numerous online documents and/or dispersed across various platforms may not be particularly helpful for an investor deciding whether to invest in the issuers' sustainability-related product.

Greenwashing is a Current Focus Area for Regulators

ASIC has observed that greenwashing is, and will remain, a priority area of focus. ASIC is continuing to monitor the market and will be looking for misleading claims about ESG and sustainability.

ESG assets are growing at a rapid rate. ASIC have noted that, in our region alone, sustainability labelled investments have more than doubled between 2019 and 2021, and, globally ESG assets are projected to exceed US$53 trillion by 2025 (which represent more than a third of total assets under management). In this regard, transparency and trust are paramount as the market for these products continues to develop and grow. Accordingly, the issue of greenwashing will be a relevant consideration for Australian regulators, not only for ASIC but also for the Australian Prudential Regulation Authority (APRA) and the Australian Competition and Consumer Commission (ACCC). This means there will likely be increased regulatory focus and engagement in relation to ESG in general, and greenwashing in particular.

It is worth noting the 'true to label' aspect referenced in INFO 271 is in line with ASIC's current focus on this area, as evidenced by its recent (and continuing) surveillance into the marketing of managed funds, to identify the use of misleading performance and risk representations in promotional material. For further information, please see our article ASIC scrutinizes marketing of managed fund performance and risk.

How We Can Assist

Issuers will need to comply with existing requirements when promoting or offering sustainability-related products. Such requirements include the prohibitions against misleading and deceptive statements and conduct, as well as disclosure obligations. Accordingly, issuers will need to carefully assess the terms of its products and relevant disclosure to ensure that it is not engaging in 'greenwashing' that results in consumer harm.

We can assist issuers to ensure that any disclosure (provided in relation to products) matches what it is actually doing. We can also assist in ensuring that issuers meet their obligations under the various requirements to disclose how ESG considerations are taken into account in investment decision making. In this regard, it is important to note the following, amongst other requirements:

- The Corporations Act and the ASIC Act contain general prohibitions against a person making statements (or disseminating information) that are false or misleading, or engaging in dishonest, misleading or deceptive conduct in relation to a financial product or financial service. For example, see requirements in sections 1041E, 1041G and 1041H of the Corporations Act, and sections 12DA and 12DB of the ASIC Act.
- Risks of breaching the misleading statement prohibitions may arise in relation to representations made about future matters that are not supported with reasonable grounds (see requirements in section 769C of the Corporations Act and section 12BB of the ASIC Act).
- Disclosure obligations include section 1013D(1)(l) of the Corporations Act (which states that where a financial product has an investment component, its issuer must include in the PDS the extent to which labour standards or environmental, social or ethical considerations are taken into account in selecting, retaining or realising an investment). In addition, it is important to consider the guidelines contained in Regulatory Guide 65: Section 1013DA disclosure guidelines.
- For shorter PDSs:
  - See also Schedules 10D(7), 10E(7) and 10F(7) of the Corporations Regulations -which sets out the content requirements for shorter PDSs, in particular, the extent to which labour standards or environmental or ethical considerations are taken into account in selecting, retaining or realising investments relating to the product.
  - See also INFO 155 - Shorter PDSs: Complying with requirements for superannuation products and simple managed investment schemes.



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ASIC Putting Compliance Under the Microscope

Authors: Erik Setio and Brendan Iver

Highlight of ASIC recent enforcement activities

ASIC has undertaken a number of enforcement actions in the last month or so putting compliance under the microscope and subjecting financial service providers under increased scrutiny to get things right.

It has taken various actions ranging from **issuing** civil penalty proceedings, placing stop orders on product disclosure statements (**PDS**) and advertisements extending to placing its first DDO stop orders. We highlight a few of those enforcement activities below.

The Lanterne Enforcement Activity

On 6 July 2022 ASIC commenced civil penalty proceedings in the Federal Court against Lanterne Fund Services Pty Ltd (**Lanterne**) alleging multiple failures to meet the obligations of its AFSL. ASIC alleges that Lanterne, under a "licensee for hire" business model, failed to:

- have in place adequate risk management systems;
- have adequate resources (including financial, technological, and human resources) to provide the financial services and carry out supervisory arrangements;
- maintain competence to provide its financial services;
- ensure that its representatives were adequately trained;
- take steps to ensure that its representatives complied with the financial services laws, and
- do all things necessary ensure that the financial services were provided efficiently, honestly, and fairly.

Some interesting information surrounding ASIC enforcement against Lanterne:

- Lanterne has over 200 authorised representatives (**ARs**) and over 60 corporate authorised representatives (**CARs**) operating under its AFSL. The businesses of its ARs and CARs included venture capital funds, managed investment schemes, agricultural advisory services, wholesale funds management services, corporate advisory services, wholesale property funds, digital asset funds, and climate change advisory services. These representatives operated in various industries including renewable energy, technology, healthcare, real estate, and biotechnology and agriculture.
- Lanterne's ARs and CARs are responsible for over $1 billion in funds and collectively paying monthly fees of around $180,000 to Lanterne. However, it appears to ASIC that Lanterne operated a wholly deficient business, with no compliance staff and almost no risk management processes in place.
- ASIC is seeking declarations, pecuniary penalties from the Court and orders that an independent expert be appointed to review and report on Lanterne's systems, processes and controls (including relevant implementation). This is on the basis that ASIC expects all wholesale AFSL holders to reduce risk by ensuring their businesses develop, implement and maintain robust risk and compliance procedures and ASIC views Lanterne's business to have deficient risk management processes.

On 7 July 2022, ASIC issued a Media Release (22- 174MR) in relation to civil penalty proceedings against Lanterne for risk and compliance failures.

The First DDO Enforcement Activity

ASIC has now placed interim stop orders on three financial firms in response to deficiencies in the target market determination (TMD) for their products. These actions are ASIC's first employment of the stop order powers under the DDO regime.

On 28 July 2022, ASIC issued a Media Release (22- 194MR) in relation to these stop orders.

Refresher on the DDO regime

On 5 October 2021, the product design and distribution obligations (DDO) regime commenced. DDO obligations require issuers and distributors of financial products to consider the design of the product, including its key attributes, and to determine the appropriate "target market" for the product (i.e., a class of consumers for whom the product would likely be consistent with their likely objectives, financial situation and needs). If an appropriate target market cannot be identified for a product, then the product cannot be offered by the issuer.

On 11 December 2020, ASIC issued Regulatory Guide 274 – Product design and distribution obligations, the purpose of which is to explain ASIC's interpretation of DDOs, its expectations for compliance, and its general approach to administering the DDO obligations.

What is a DDO stop order?

The DDO stop order power is contained in Part 7.8A of the Corporations Act 2001 (Cth) (Act), and is an administrative mechanism that allows ASIC to prohibit entities from engaging in specified conduct when ASIC is satisfied that there has been a breach of Division 2 of Part 7.8A or section 994E of the Act. Examples of breaches include when an entity has:

- failed to make, review, make public or otherwise satisfy the requirements for a TMD;
- distributed a financial product when a TMD has not been made for the product or is no longer appropriate; or
- failed to take reasonable steps that will, or are reasonably likely to, result in distribution of the product being consistent with the TMD.

Before ASIC makes a stop order, it is obliged to hold an administrative hearing and give a reasonable opportunity for any interested persons to make verbal or written submissions to us on whether the order should be made.

However, ASIC has the power to make an interim stop order without a hearing if it considers that a delay would be prejudicial to the public interest. Such an interim stop order lasts for 21 days, unless revoked earlier by ASIC. In the below scenarios, ASIC has made interim stop orders, and the relevant issuers will have an opportunity to make submissions before any final stop order is made by ASIC.

DDO Case Study: Responsible Entity Services Limited

ASIC issued an interim stop order preventing Responsible Entity Services Limited (RES) from issuing units in the RES Investment Fund (PPM Units), giving a product disclosure statement (PDS) for PPM Units or providing general advice to retail clients recommending investment in PPM Units. The stop order is valid for 21 days unless revoked earlier.

ASIC noted that that the sole underlying asset of the PPM Unit class is a loan for development of a sandstone quarry, characterised as a high-risk, illiquid, unlisted single asset investment. The return of an investor's funds and any interest payable under the loan is wholly dependent on the ability of the borrower (a related party of RES) to repay the loan.

ASIC considered that, given the product's features, RES's TMD included two categories of retail investors for whom investment in PPM Units would not have been consistent with their likely objectives, financial situation and needs. These categories comprised investors intending to use an investment in PPM Units as a core component of their investment portfolio, and investors with an objective of high capital growth or a mixture of capital growth and income.

DDO Case Study: UGC Global Companies

ASIC made interim stop orders preventing two companies in the UGC Global Group, UGC Global Alpha Limited and UGC Global Alpha Fund Limited, from dealing in shares in relation to retail investors, providing a disclosure document or providing financial product advice in relation to the shares to retail investors.

In May 2022, the two companies lodged prospectuses seeking to raise $100 million each through the offer of ordinary shares, for the purpose of investing in the UGC Alpha Global Fund. ASIC extended the exposure period for these prospectuses because of concerns that the disclosure was defective and placed interim stop orders on offers made under the prospectuses.

When the prospectuses were made publicly available during the exposure period, a TMD was not made available, and the prospectuses provided that applications to invest would be processed on a "first come, first served " basis.

ASIC was concerned that the UGC Global Group companies may have engaged in retail product distribution before preparing a TMD for their high risk offers. Therefore, ASIC also made orders for non-compliance with obligations under DDO in relation to the shares of these companies, which lasted for 21 days. On 11 July, further DDO orders were made (for an indefinite period) to give the companies additional time to respond to ASIC concerns.

DDO compliance is likely to be a focus area for ASIC

According to ASIC Deputy Chair Karen Chester, ASIC's focus has now shifted to compliance. ASIC believes industry has had sufficient time to bed down its implementation of the DDO regime. Ms Chester has highlighted that ASIC has targeted surveillance underway to check whether product issuers and distributors are complying with DDOs. She has also identified the following focus areas for ASIC in relation to DDO:

- Defective TMDs, and issuers who have failed to make TMDs or to make them publicly available.
- How product issuers interact with their distributors, to confirm they are not straying beyond their target market.
- How product issuers monitor and review consumer outcomes to ensure consumers are receiving products that are consistent with their likely objectives, financial situation and needs.

Other disclosure enforcement action

ASIC has demonstrated a heightened scrutiny of PDSs and ancillary marketing material. In this context, ASIC's concerns have focussed on potentially misleading or deceptive statements in a fund's marketing disclosure. ASIC has recently issued several interim stop orders in this respect, including an interim stop order preventing advertisements containing certain misleading or deceptive statements about PPM Units in the RES Investment Fund (prior to the DDO stop order).

ASIC has highlighted the requirement for compliance with the following:

- ASIC's Regulatory Guide 234 Advertising financial products and services (including credit): Good practice guidance - which assists fund managers and others in the industry to comply with their legal obligations not to make false or misleading statements or engage in misleading or deceptive conduct; and
- ASIC's Regulatory Guide 168 Disclosure: Product Disclosure Statements (and other disclosure obligations) - which sets out guidance to product issuers on preparing compliant disclosure documents that promote product understanding and comparison.

How we can assist

The DDO regime imposes obligations on both product issuers and distributors, and it is clear ASIC intends to scrutinise and enforce compliance with these obligations, including through issuing stop orders and/or enforcement action in court.

Amongst other things, DDO requires consideration of the design of a product (including its key attributes) and to determine an appropriate "target market" for the product, including whether one exists, and preparing an appropriate TMD in relation to it. This must involve careful and appropriate consideration on the part of the product issuers and distributors, to ensure consumers are receiving products that are likely to be consistent with their likely objectives, financial situation and needs.

Our funds and financial services team can assist product issuers and distributors with their compliance obligations in relation to DDOs, including in relation to implementation, maintenance and documentation of product governance arrangements and preparation of TMDs.

Further, we are able to assist with ensuring disclosure in PDSs and ancillary marketing material is otherwise in accordance with the Act and ASIC policy.



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A Return to Normal?

– What does the Return to Office and Return to Retail Look Like in the Post-Lockdown Era

Authors: Edwina Renshaw and Lily Cox





Over the past two years, COVID-19 has caused a fundamental shift in what is considered 'normal' in terms of how people work, shop, live and interact with each other.

As COVID-19 restrictions across Australia almost entirely lift, Hamilton Locke's Real Estate Team look at what the new 'normal' looks like as employees continue to make their long-awaited return to their office spaces and consumers return to brick & mortar retail.

Returning to the CBD

Whilst protracted lockdowns and the popularity of working from home lead some to lament that the office as we once knew it was a thing of the past, the CBD occupancy rates would indicate otherwise.

The Property Council of Australia (**PCA**) has tracked a significant upturn in CBD occupancy rates over the first half of 2022, with a doubling in occupancy rates Australia-wide between February and April 2022. Growth remained strong into May; however, the June data indicates a stall in CBD occupancy rates. PCA's Chief Executive Ken Morrison attributes the June 2022 stall to the continued spread of COVID-19 and other illnesses as well as extreme weather conditions on the east coast and ongoing industrial action in NSW, rather than reflecting employees not wanting to be in the office.

Market	Melbourne CBD	Canberra CBD	Sydney CBD	Brisbane CBD	Perth CBD	Adelaide CBD
Jan-22	4%	7%	7%	13%	66%	11%
Feb-22	15%	21%	18%	41%	55%	47%
Mar-22	32%	45%	41%	48%	45%	61%
Apr-22	36%	39%	42%	51%	50%	59%
May-22	48%	60%	55%	64%	63%	71%
Jun-22	**49%**	**53%**	**55%**	**64%**	**65%**	**71%**

Source: Property Council of Australia

Unsurprisingly, the overall CBD occupancy rates has helped strengthen the recovery of demand nationally for Australia's CBD office market. The Q1 2022 Office Market Overview Report published by JLL outlined that the recovery of demand for Australia's office market nationally has remained consistent, although demand recovery in specific CBD markets such as Sydney, Melbourne and Brisbane remains patchy. That said, the outlook remains positive, with the lead indicators for office demand such as rising headcount across a range of industries and strong growth in job advertisement surveys remaining promising.

Changing expectations

Rather than signalling a return to the pre-Covid status quo, the uptick in CBD occupancy rates highlights the extent to which employees are embracing flexibility through a hybridised working model. Notably, over half of the respondents to PCA's May Office Occupancy Survey stating that they believe the primary occupancy driver is demand for flexible working arrangements.

As a corollary to the emergence of hybrid work patterns, expectations of what the in-office workplace experience looks like are rapidly evolving as organisations seek to entice their employees back into the office.

A modern office space now needs to focus on corporate wellbeing rather than just functionality. With growing demand for lavish end of trip facilities, onsite dry-cleaning services, wellness centres and fitness classes, online community building portals, access to nature and greenspaces as well as retail, food and beverage services, the pendulum has swung from office spaces being designed to promote productivity to office spaces being drivers of corporate culture and collaboration.

Changing tenant expectations are pushing developers and investors to look beyond the traditional office grades and take a more holistic view towards what makes a good office building in the CBD.

Return to retail

Complimenting the return to office, is the return to physical retail stores, known as brick-and-mortar retailers, despite the entrenchment of online shopping habits over the past two years.

The Australia Bureau of Statistics reported a 0.6% fall in seasonally adjusted online sales ($21.8m) for May 2022, representing the fifth monthly fall in online sales since the widespread cessation of lockdowns in October 2021 as spending continues to move back to brick-and-mortar stores.

Whilst consumers have demonstrated an eagerness to return to in-store shopping, a strong correlation can be drawn between the changing expectations of office spaces and those of retail shopping centres. In a survey undertaken by Epson, up to 75 percent of respondents showed a willingness to change their shopping habits if retail outlets offered more immersive or experiential elements.

The Commonwealth Bank of Australia, in their Retail Pathways: Reshape and Recover series, outlines some of the strategies that retailers should employ to facilitate the return to retail, including, having less stock on display, clarity and consistency around hygiene and distancing policies, and better integration of digital and physical channels are now essential to delivering a positive in-store experience.

Key Takeaways

- CBD occupancy rates have stalled because of the continued spread of COVID-19, extreme weather conditions on the east coast and ongoing industrial action in NSW, rather than workers not wanting to be in the office
- To entice workers a modern office space now needs to focus on corporate wellbeing rather than just functionality
- Despite the entrenchment of online shopping habits over the past two years, consumers have demonstrated an eagerness to return to in-store shopping



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Hamilton Locke's Real Estate team's extensive experience in commercial and retail acquisitions together with high volume commercial and retail leasing means that it is uniquely attuned to the changing expectations and demands of commercial and retail clients alike.



Something Different



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Favourite book, podcast, movie or musical artist

Iggy Pop – I saw Iggy play his 'Real Wild Child' tour with guitarist Steve Jones from the Sex Pistols when I was a young teenager. I was in the front row in a smallish venue and the energy just could not be beat.

In terms of books, like most lawyers, I don't have much time for fiction reading any more but most recently I really enjoyed Elena Ferrante's 'My Brilliant Friend' series of books. Set in Naples, Italy post World War 2, I love the emotionally intelligent story of the friendship of two girls and the challenges of breaking through expectations as the protagonists grow up.

If you could invite anyone to dinner, who would it be and why?

Andy Warhol – I would love to hear about the New York art scene in the 1960s and his thoughts on the future now that his famous quote has come true - 'in the future, everyone will be world famous for 15 minutes'.

A song that described your life – explain why

Edith Piaf – 'je ne regrette rien' – No, I don't regret anything.

I have taken quite a winding road in life so far, there have been some wrong turns, but also some lucky stretches. The wrong turns have lead me to the person I am now, each person has the own unique experience of life and that is valuable.

Plus, I just love the inspirational opening orchestral piece at the start, Edith Piaf's diction, the feeling that she has suffered but has so much courage and resilience, it is like a national anthem, but for life, it is so stirring.

If I weren't a lawyer I'd be…

A permaculturist. I love gardening, growing edible things organically, nurturing the soil and creating a sustainable garden eco system. I find the physical activity and 'hands in the dirt' is a great stress reliever.

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

I especially have enjoyed seeing Barangaroo South come to fruition after working on that project for five years. But for me, the best moments have been times shared with my colleagues and being part of the profession - helping a whip smart young graduate develop into a great lawyer, hiking up Vitosha mountain with colleagues in Sofia, Bulgaria, dissecting the global financial crisis with leading professors at Oxford. I also feel grateful for the opportunities that my career has given me to travel the world and learn different things.



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Favourite book, podcast, movie or musical artist

Split Enz

Favourite cuisine/meal

Eggs Benedict

If you could invite anyone to dinner, who would it be and why?

Other than my wife, who would be invited … Al Gore and Hillary Clinton, how did it go so wrong?

Three things you can't live without?

A. Cheese, coffee and newspapers

B. Skiing at Whistler/Blackcomb, Canada

Fun fact about yourself

Apart from losing teeth bar diving at 23, I stood for the New Zealand Parliament at 19

Top 3 bucket list items

The Cape Town Minstrel Carnival (because I got the date wrong the first time), Boxing Day cricket test in Durban and an Australian republic

A song that described your life – explain why

Isabelle by the Greg Johnson Set, because I changed the title to the name of someone I then fancied

Tips for aspiring lawyers seeking partnership?

Seek out all opportunities, persistence, make the clients feel uplifted

If I weren't a lawyer I'd be…

A journalist

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

Currently I'm proud of the work that I have been doing recently with various clients in relation to carbon emissions reduction. It's been quite a ride from being a keen environmentalist before heading to university, though to becoming a construction lawyer and learning enough by being involved in green building projects to consequently learning about the National Greenhouse and Energy Reporting Scheme. From there it was but a short step to advising on the carbon tax and projects under the Carbon Farming Initiative, now the Emissions Reduction Fund. We are seeing significant activity in a great variety of sectors in this area, which aligns closely with our New Energy practice.

I'm also proud of having been involved with a number of significant public private partnership projects in the United Kingdom and Australia. I have been involved with these since the late 1990s, when the first job that comprised my work on the UK government's Private Finance Initiative projects was contingent on the incoming Blair government continuing with the outgoing Major government's PFI scheme. While there are differences of opinion over the worthiness of PPP projects, they have enabled much needed infrastructure to be brought forward earlier than might otherwise have been possible. I have been involved with the development of new hospital facilities (including, memorably, in Northern Ireland), new schools, school meals, new roads, new railcars and associated facilities and new student accommodation.

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

I grew up on a farm in New Zealand. Other than knowing that there was a lawyer for my family, and that he was the trustee of my father's estate, I had no exposure to what the life of a lawyer was like. When I was deciding what to study at university, I was concerned that I would not spend enough time outdoors if I studied law. The other options on my shortlist were becoming a vet or a journalist. I can't say I miss not having chosen either of those. Law suited me given English was a strength and that the degree didn't mean that I had to end up as a lawyer. It did compromise the time outdoors, although that might have been a blessing when I worked as a lawyer in New Zealand and London. I met my now wife in London (she grew up in South Africa to English parents) and we moved to Sydney in 2000, just after getting married and in time to miss the Olympics.



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Favourite book, podcast, movie or musical artist

I am a huge horror buff so my favourite thing to read or watch is horror. I have a horror novel which I always read on the plane/airports when I go overseas. It's called The Ruins by Chris Carter and it's a story about a bunch of young Americans who go to Mexico for a holiday only to be eaten up by carnivorous vines (the book reads much better than this, I promise!). Unfortunately for me, the writer only wrote this one book but I never get tired of reading this book. I haven't read this book for 3 years now given I haven't gone overseas due to lockdowns but I will be sure to pack it when I head off for my next overseas adventure!

Favourite cuisine/meal

I am Malaysian background and grew up eating rice 2 times a day surrounded by Malaysian/Chinese dishes. So it's no surprise my favourite cuisine is Malaysian and Cantonese and rice is my comfort food! I tried to wean myself off rice for a few years (was trying to cut off carbs) but rice and I are best friends again.

Fun fact about yourself

I am one of six daughters (No 2 in the chain). Mum and dad were chasing a boy and decided to give up after six girls. The age difference is 11 years between me and my youngest sister, and I was playing nanny to her growing up (I taught her to read). I am very close to all my sisters and we have a group chat on Whatapps and it's common for us to exchange dozens of texts every day.

Tips for aspiring lawyers?

Don't have an ego or be afraid of menial tasks! I first started out as a conveyancing clerk in Box Hill (one of Melbourne's eastern suburb) and I did nothing but conveyancing for three months until I landed a job at a city law firm and even then, I was still running around attending settlements, lodging documents at ASIC, titles office or the State Revenue Office. I learnt so much from low end tasks and this knowledge has helped me in the bigger transactions!

If I weren't a lawyer I'd be…

Operating some kind of food business. I love cooking and feeding people and I am a pretty good cook! I love cooking elaborate meals (usually Asian cuisine). One of my specialty is lobster noodles with ginger and spring onions.

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

I was admitted in Victoria but after that, I actually went back to Malaysia to clerk with my dad for six months and then I came back to Melbourne to settle down and found my first job (as a conveyancing clerk). I have been practising for more than 25 years now and what I like most about this job is the relationships I have formed with clients and colleagues. When I first started working, some people thought I was arrogant and standoffish (but that was just me being introverted!) and I used to shun away from attending client events or functions as I always felt I awkward and didn't know what to say. I have polished my skills over the years and can say I actually enjoy business development and meeting new people. My kids sometimes wonder about my ability to talk to strangers about anything.

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