

Real Estate Markets Quarterly

Spring 2024



Foreword

Spring is here, and so is your latest Real Estate Markets Quarterly!

As the days get longer and the weather warms up, we are excited to welcome you back for a fresh look at the key trends shaping the real estate market this spring. To our new readers, a special hello to you and your families — you are in for an insightful read with the latest developments across the real estate sector in Australia and New Zealand.

Spring is not just a time for blossoming gardens – the Australian housing market continues to bloom as well! August marked the 19th consecutive month of rising property values nationwide, with Perth, Adelaide and Brisbane leading the way. Although we are continuing to see steady growth, it is beginning to slow. This presents promise to those who are feeling the pressure of high interest rates and inflation.

In the office sector, after a few years of work-from-home habits, we are seeing a comeback for prime office space, especially in Brisbane, where office vacancy rates have dropped to a decade low of 9.5%. It is clear that the ‘flight to quality’ trend continues, and the demand for premium offices is holding steady.

On the monetary front, the Reserve Bank of Australia’s cash rate holds firm at 4.35%, and unfortunately Australians are unlikely to see a reduction any time soon, at least not until inflation eases back towards its 2%-3% target. Although, government policies are offering some relief, with new reforms aimed at easing the cost-of-living pressures. The federal government recently implemented a roll out of tax cuts on 1 July 2024, which has seen an increase in the spending power of many Australians.

We elaborate on further developments in the real estate sector in this edition of the Real Estate Markets Quarterly. We hope you enjoy the read and thank you for your ongoing support as we embrace another exciting season together.



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Industry Spotlight - Richard Winter



Richard Winter
General Counsel
May Brothers Holdings Pty Ltd



Please provide an overview of your career to date.

I started practising as a lawyer in 2000 with Clayton Utz in Sydney, quickly moving into a finance speciality.

Since then, I have worked in London for Freshfields, spent many years at Mallesons (now KWM) in both Sydney and Perth, and interspersed during those 24 years I also worked in house for a number of banks including Westpac and Investec Bank (where I first met Jason).

Please tell us a bit about your current role at May Brothers Holdings.

I am General Counsel and co-founder along with Jason May, and I have both a director and company secretary role. At a high level, I jointly direct the strategy of the business with Jason and oversee all legal and compliance matters for the group.

What do you like most about working in the Renewables sector?

It is great working in an industry and contributing so much to the world through added employment, especially in rural areas, reduction of pollution and carbon into the atmosphere and providing a source of energy which only lightly touches the environment it is in.

For us personally, we love being able to partner up with landholders to achieve “agrivoltaics” that enables farmers to keep farming with the plant in place and our ability to help each other. For example, our panels provide shade for sheep and cattle and their grazing provides a natural means of weed control and grass maintenance.

It is just great to be in an industry that can help so many aspects of life.

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

I was first exposed to it in Investec Bank and for many of the reasons set out above I was hooked - after doing finance deals for mines and oil production facilities.

Among other things, I always felt my skills could one day be used to not only help the industry but also the wider world. Seeing the benefits that could come from renewables (I was working on a wind farm at the time), I always wanted to take that interest to a higher level.



“It is just great to be in an industry that can help so many aspects of life.”

There was also a level of frustration that more was not being done – so how better to fix that issue than by eventually becoming a developer yourself?

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

I have now directly and indirectly worked on many wind and solar farms. I'm very proud of the environmental improvements achieved from those projects, but what I am most proud of is our commitment to locals.

In particular, we take it very seriously not just because we are working with farmers and rural landholders but because a number one priority is to work closely with First Nations, acknowledge their importance and history with the land and learn from their experience. We engage early and sincerely and consequently

have helped recover and preserve a lot of Indigenous artifacts and helped fund cultural centres to display these priceless items.

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

Changing regulations and policies from the Federal and State governments. Projects are very long-term undertakings and the political cycle is short. Being able to bring in investors who are confident in long term government support has been a real challenge, and the sector really needs a bipartisan approach to build out the Australian renewable sector.

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

There are so many opportunities within the renewables sector for young lawyers. Having



wide exposure to the many aspects of projects will certainly assist in having a career in renewables. Some areas that are of major importance are property law, corporate law (including finance) and environmental and energy regulation, to name a few. Be open to learning because having a working knowledge of the different moving parts is both very interesting but also very valuable - so even if it is a small role or outside of your ultimate practice area, just get the exposure.

The second part is to keep up to date with the sector in terms of news about deals, policies, regulatory changes and so on. Subscribe to industry newsletters and alerts - you will have knowledge that a lot of practitioners don't bother learning but is so important.

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

Nothing in the renewables industry directly, however I am both a PhD Candidate and a unit coordinator and lecturer for Company Law at UWA. Through both, I teach but I stay on the cutting edge of legal technology, and this plays a significant part in ensuring my role of General Counsel is robust and also shows to our investors and partners the level of excellence that we have as professionals which we bring daily to the business.

Apart from that I also hold a directorship in a charitable organisation. The teaching at UWA came about 7 years ago when I left private practice and was keen to pursue a goal of mine to take my education further and teaching became available. I am always so happy to see the new students and help them on their way, and in my own little way, expose them to the world of renewable energy. The charity is a long time connection through a former client of mine - as a trusted advisor I was asked to join and any chance I can give back I try. In that case, it is to assist and raise funds for sick and disabled children in Australia.

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

The major opportunities in the current sector are in the energy storage space - there is a massive disconnect between projected storage needs and the projects coming through. Going a few years into the future (not too long from now), we are definitely seeing Hydrogen come into its

own and there is already a lot of international interest in Australia for green hydrogen.

From an individual point of view, the sector is crying out for more engineers of all types and from a legal perspective, anyone that can get their head around energy regulations, property rules applying to projects, government approval processes, environmental legal requirements - those lawyers will have their pick of jobs in the sector.

Can you share any recent legal trends or developments impacting the Renewables sector and how your team has adapted to these changes?

The market has become very competitive for land acquisition with a lot of new parties coming into the sector and land banking. We have become more discerning about our arrangements with landholders and are much more interested in partnering with those who want a long-term arrangement and are in the sector to improve the world as well as their position. We think this will continue for a couple of years but will settle down once a lot of promises being made of quick cash are dashed - we know how long it takes to get these projects into operation.

From a policy perspective, there is also change but luckily the major parties are closer now than they have ever been. Nuclear is a big topic but its impact on the sector is minimal so we expect to see a lot of wind, solar and hydrogen in the future even if there is a nuclear component.

The biggest change will come with the advancement of storage technologies with batteries soon to become cheaper and use more readily recyclable materials - this will tip the energy sector into much more renewables and will also reduce the need for substitute baseload power facilities like nuclear.

How do you approach issues related to diversity, equity and inclusion (DEI) in the Renewables sector and from a legal perspective?

From a legal perspective, the approach is about risk mitigation balanced with sustainable growth. DEI has a very important part to play as it creates a much more robust business providing multiple different perspectives which helps to identify more risks and uncover greater opportunities. On a wider scale, inclusivity for us includes understanding the importance of the rural, farming and indigenous voices who are all part of the journey - these are stakeholders that

need to be part of any discussion involving the sector. DEI and other ESG principles (including equator principles) are not just front of our mind but a very important focus for our investors, in particular foreign investors, so being on top of these ideas (not just from a compliance point of view but as part of the business DNA) is also critical in bringing in and maintaining our investor base.

How do you see your role evolving in the future, particularly in light of technological advancements and shifting societal norms?

My role will morph more into the strategic (for the business), but I can also see an opportunity for thought and action leadership in the renewables industry. I think our commitment to local stakeholders and values is something not seen in many other developers, and I would like to bring those principles, values and learnings to the wider community.

Technology will play a massive part in the efficient running of businesses but also in how power can be distributed across the network, particularly balancing the intermittent generation of solar and wind and effective use of energy storage. These are all critical to advance the EV industry and electrify many other project sectors such as in the mining space.

I believe that the more we can include various stakeholders into the journey the easier it will be for them all to see how much they can all benefit personally and help move the world to a much better, safer and cleaner place.

What are your top reading/listening/watching recommendations?

I always check Renew Economy as that is the beating heart of topical news on renewables.

AEMO webinars, white papers and reports are also essential to keep on top of - you can start with their basic summaries and guides but to get an idea of where energy requirements and supply is coming from in Australia, you can't go further than the source.

International conferences on technology advances are also critical to stay connected with as it provides a lens into the near future - as we work on long time scales, we need to know what is happening and when to achieve maximum efficiency.

Other than that, a great source is AFR.

As you can tell I read a lot! Not so much into videos or podcasts.



Expanding the Landholder Duty Net – Victorian Court of Appeal Confirms Decision in Oliver Hume Case

Author: Catherine Nufer

The Victorian Court of Appeal handed down judgement in *Oliver Hume Property Funds (Broad Gully Rd) Diamond Creek Pty Ltd v Commissioner of State Revenue* [2024] VSCA 175 (**Oliver Hume decision**) last week, upholding the previous decision of the Victorian Civil and Administrative Tribunal (**VCAT**).

The Oliver Hume decision found that shares issued under an information memorandum (**IM**) to unrelated investors raising funds for property development in Victoria were aggregated for the purposes of Victorian landholder duty on the basis that the “*acquisitions form, evidence, give effect to or arise from substantially one arrangement, one transaction or one series of transactions*”.

Although *Oliver Hume* is a Victorian decision, due to the similar wording adopted in landholder duty provisions in other Australian jurisdictions, this decision raises questions about the potential expansion of the landholder duty net to capital raisings and other transactions involving unrelated parties, particularly in the real estate funds industry.

What happened?

The Oliver Hume decision involved 18 independent unrelated investors who subscribed for shares in Oliver Hume Property Funds (Broad Gully Rd) Diamond Creek Pty Ltd (**ProjectCo**) under an IM which was offered to ‘sophisticated investors’ under the Corporations Act 2001 (Cth) (**Corporations Act**). Investors were sourced through the Oliver Hume database, as well as circulated through a third party to its list of subscribers. The IM was not required to be lodged with ASIC as there was no disclosure required under the Corporations Act.

The land had already been acquired prior to the release of the IM and the issue of the subscription shares, and the IM stated that if the target of 1.8 million shares were not subscribed for, the investors’ application funds would be returned to them. On the issue of the subscription shares, the investors collectively acquired a 99.99% interest in ProjectCo (which was previously a wholly owned subsidiary of the Oliver Hume Group).

No landholder duty was paid on the issue of the shares on the basis that the investors were unrelated, independent parties and no investor acquired an interest in ProjectCo of more than 50% (i.e. a significant interest in a private landholder).

The Victorian State Revenue Office later commenced an investigation and issued landholder duty assessments on the basis that the aggregated 99.99% interest acquired by the investors was an associated transaction under the Victorian Duties Act.

What did the Court decide?

Although the Court noted that Oliver Hume made a number of valid arguments and granted leave to appeal, the appeal was ultimately dismissed (upholding the earlier VCAT decision) on the basis that there were a number of interconnecting factors present which exhibited a ‘oneness’ or ‘unity of purpose’ and therefore suggesting an associated transaction. These factors included that:

- the acquisitions were interconnected as no acquisition could go ahead under the IM unless the subscription target was reached and, if this condition was not satisfied, the application monies would be returned;
- the acquisitions were interconnected on the basis that it was the intention of ProjectCo to raise the funds and this could exist unilaterally even where the investors were unrelated parties and had never met or interacted with each other;
- the investors bound themselves together by subscribing for shares and therefore agreeing to the statutory contract represented by ProjectCo’s Constitution, which set out the terms and conditions to which shareholders were agreeing to be bound by; and
- the fact the acquisitions of the shares occurred on the same day, and in the same way, with the purpose of substantively altering the shareholding in ProjectCo (which went from 100% owned by the Oliver Hume Group to being owned nearly entirely by private investors).

Application to other jurisdictions

Generally, the aggregation provisions may apply where “*acquisitions form, evidence, give effect to or arise from substantially one arrangement, one transaction or series of transactions*”, or where acquirers are considered ‘related parties’ or ‘acting in concert’. Although there are significant differences which exist between landholder duty provisions in each of the States and Territories, there are similarities across jurisdictions which could potentially lead to a similar interpretation as in this case.

Although some Revenue Authorities have a published view that public offerings will not be considered to be aggregated where shareholders are unrelated, it cannot be assumed that this position will be automatically adopted in non-public transactions.

Interestingly, the Member in VCAT commented on the fact the Victorian Commissioner’s Public Ruling DA.057, which states the Commissioner’s position that discretion may be exercised to treat a transaction as not an ‘associated transaction’, introduced a concession which the Member was of the view that the legislation did not provide.

Whilst most Revenue Authorities have similar publications (for example, public rulings, practice directions, circulars or guidelines) providing guidance as to how the Commissioner will interpret a particular section or meaning under the legislation, it is important to remember that, in contrast to the rulings published by the Australian Tax Office, these publications are not binding and only provide guidance as to

the Commissioner’s view on a particular topic at a given point in time. To the extent there is a change to legislation or the case law, this will override the publication.

What happens now?

The Oliver Hume decision confirms the importance of advisors and clients obtaining specialist duty advice when dealing with capital raisings or structuring proposed transactions, particularly in circumstances where interests may be acquired by parties – whether related or unrelated – in a company or unit trust which holds land.

As the complexities of the landholder duty regime continue to grow, expanding to include items fixed to land, land under uncompleted contracts, and in some jurisdictions, land subject to put and call options, it is critical that duty issues are considered and advice obtained in the early stages of planning and structuring of a transaction to avoid any unexpected duty surprises (or at the least ensure these are factored into the overall costs of the transaction).

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Recent Developments in Competing Land Use Issues in Resource Rich States

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Recent Developments by State

Western Australia

- A 'diversification lease'³ was introduced about 1 year ago to allow for multiple concurrent uses on Crown land. There has been some uptake of this new category of lease.
- The State can grant access licences for feasibility studies (often 2 years plus 2 years)⁴ and an option to lease (5 years)⁵ and exclusive use leases.⁶
- Proponents competing for the same land can request a 'highest and best use assessment'. This remains untested.

South Australia

- The HRE Act brings significant changes to the sector.
- The Minister may declare 'released areas' for tender over pastoral land, crown land and state waters.
- There is also a direct licensing regime from the State to the developer.
- Rent is paid to the State.
- A security bond regime is introduced.

Queensland

- The MEROLA Act recently commenced.¹
- Coexistence Queensland established to support and facilitate private negotiations between competing land users.² This is a softer approach compared with South Australia.

Competing land use and securing tenure for projects on crown land continue to be key issues in early stage development of renewables projects. States are adopting different policy approaches to this issue and this will be a key policy area to evolve over the next 5 years. The issue is particularly important in the resource rich states of South Australia, Queensland and Western Australia in which renewables projects compete with mining projects, carbon projects and pastoral use. Native title holders also have existing rights and interests over large parts of crown land in those States.

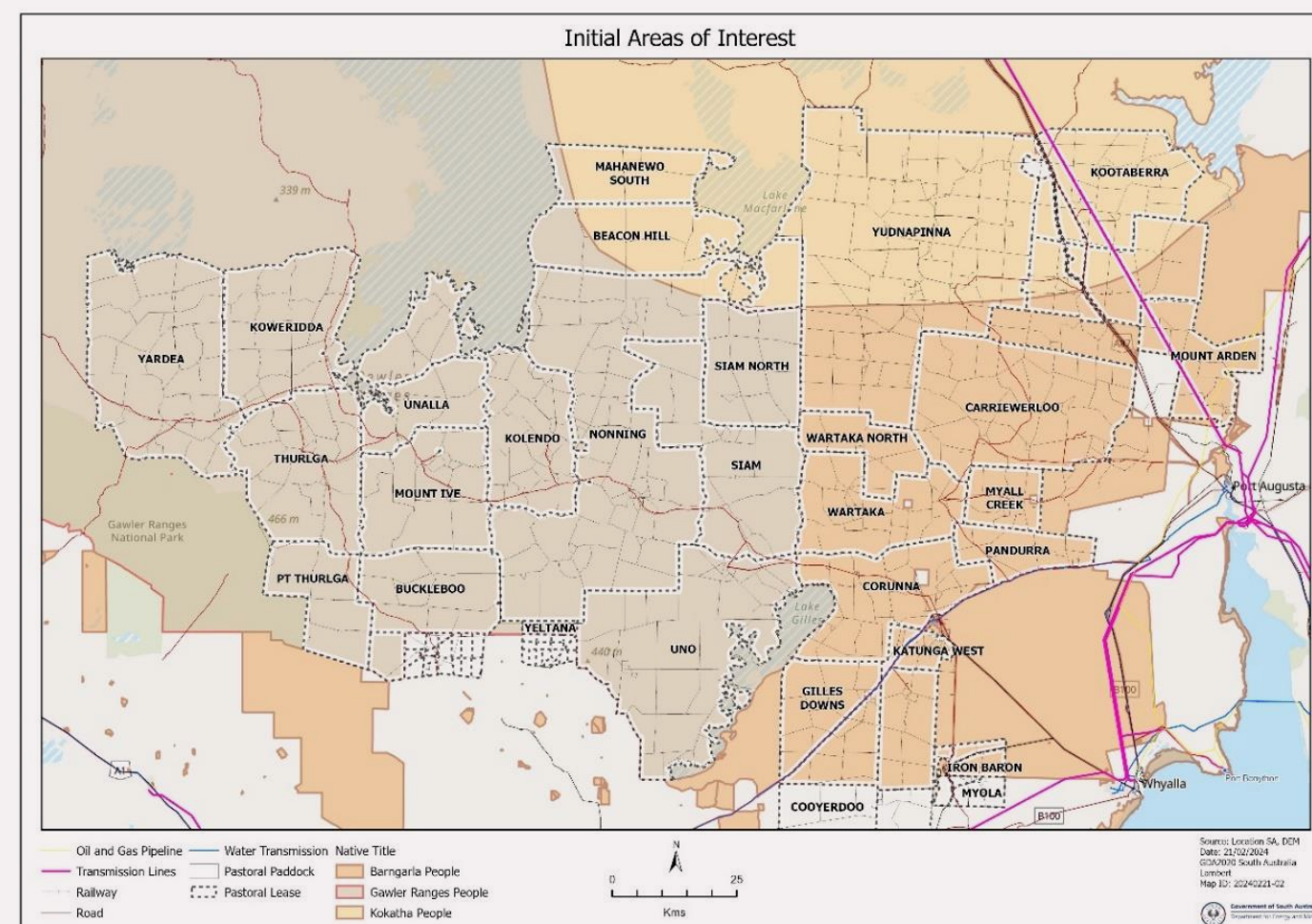
In this article, we compare the recent initiatives in South Australia and Queensland with the framework in Western Australia which commenced about 1 year ago.

South Australia

SA Government takes an active role, also includes private negotiation

The Hydrogen and Renewable Energy Act 2023 (SA) (HRE Act)⁷ aims to 'facilitate the grant of licences that enable hydrogen and renewable energy projects to co-exist, so far as possible, with other land uses'.⁸

The SA Government has identified areas as potential 'release areas'⁹ which will be open to competitive tender. Currently, the areas of highest stakeholder interest and viability include the Gawler Ranges, Upper Eyre Peninsula and Upper Spencer Gulf.¹⁰



Source: Release Areas – Consultation Draft on Hydrogen and Renewable Energy Regulations Information Sheet, p 3. (undated, released in the context of consultation on the regulations)¹¹

Some of the key features of the HRE Act are:

- **Tender for optimal land:** The introduction of a competitive tender process for 'release areas'. The release areas will generally be pastoral land, crown land or state waters where large-scale wind and solar resources can be developed.
- **New licensing regime:**¹² There is a new licensing regime in which the State grants licences directly to developers that authorise certain activities:
 1. Rent is payable directly to the State on 'Designated Land' and on a special enterprise land¹³ (instead of rent being payable to the pastoral leaseholder). Owners may be entitled to compensation through access agreements. Designated Land is pastoral land, crown land or state waters (with exceptions for national parks/marine reserves).
 2. Available licences include:
 - a) Renewable Energy Feasibility Licence – to conduct feasibility activities;
 - b) Renewable Energy Infrastructure Licence – authorising the construction and operation of renewable energy infrastructure (term is **50 years** – or another term the Minister determines); and
 - c) Associated Infrastructure Licence – authorising ancillary infrastructure for storage and transmission.¹⁴
- 3. A Special Enterprise Licence (**SEL**) may be granted if the project is of major significance to the State economy and must be ratified by the Governor.¹⁵
- 4. The process to grant an SEL is more onerous and expensive as it provides the licensee with a right to enter and use freehold or crown land. It comprises two stages:
 - a) Concept Phase – Prior to applying for an SEL, a proponent must apply to consult with the Minister. Before agreeing to consult with the proponent, the Minister:
 - may consult with relevant owners (including any native title claimant); and
 - must be satisfied that the proponent has taken reasonable steps to obtain consents from the relevant owners.¹⁶
 - b) A proponent may only apply for an SEL if the Minister consents to the proponent doing so after the Concept Phase. The Minister must consult with the owners when considering the application.

5. An owner cannot object to the entry of a SEL
However the owner:

a) is entitled to compensation for any economic loss, hardship or inconvenience they suffer in consequence of authorised operations.¹⁷

b) may apply to the Environment, Resources, and Development Court (**ERD Court**) for an order for the licensee to acquire the owner’s interest in the land at market value if the licensed activity substantially impairs the owner’s use and enjoyment of the land and compensation for disturbance.¹⁸
6. **Access agreements:** Unless an SEL is granted, a developer must enter into an ‘access agreement’¹⁹ with the owners of the land prior to commencing operations.

‘Owners’ include registered interest holders, occupiers, native title holders, pastoralists, persons holding resource tenements, holders of an aquaculture lease or any persons prescribed by the regulations.

Negotiations follow this framework:²⁰

- All parties must negotiate in good faith. If negotiations do not reach a resolution within a specified timeframe, the Minister may intervene to mediate, or the matter may be escalated to the ERD Court.
- Compensation is assessed by reference to the economic loss, hardship or inconvenience suffered by the owner because of the developer’s operations.
- Any access agreement entered into will bind successors in title to the parties of the agreement and all subsequent holders of a licence to which the agreement relates.
- **Bond and security regime:** The Minister may require a licensee to provide a bond for liability during operations and rehabilitation.²¹ We suggest that developers bear this new statutory requirement in mind in negotiating indemnities and remediation/decommissioning clauses in options and leases to avoid duplication of obligations/liability.

This model echoes the Queensland system of Conduct and Compensation Agreements.²² However, a key difference is that the system provides for the licensing system directly from the State, putting proponents on a better footing to negotiate with other interest holders.

Queensland

‘Coexistence Queensland’ – emphasis on private rights and negotiation, no specific renewables tenure from the State

The [Mineral and Energy Resources and Other Legislation Amendment Act 2024 \(Qld\)](#) expanded the roles of institutions to support co-existence between stakeholders.²³ For instance:

- The remit of the Gasfields Commission Queensland (renamed as Coexistence Queensland) has been expanded to include the renewables sector.²⁴ Its role is to facilitate relationships, act as a central point of contact, advise the minister, partner with entities and publish resources rather than determine, decide or intervene.²⁵
- The Land Access Ombudsman’s functions now include investigating breaches of access agreements and providing alternative dispute resolution services for parties negotiating make good agreements, conduct and compensation agreements, and other access agreements.

In addition, Queensland has recently enacted legislation for Renewable Energy Zones through Part 6 *Energy (Renewable Transformation and Jobs) Act 2024* (Qld).²⁶

These recent legislative changes follow policy papers and plans over recent years including The [Queensland Resources Industry Development Plan](#)²⁷ and the [Renewable Energy Zone Roadmap](#).²⁸

The emphasis in the amended legislation remains on private negotiation between the parties for access and compensation through Conduct and Compensation Agreements (**CCA**) and the mandatory provisions of the [Land Access Code](#).²⁹ CCAs offer limited certainty for early stage renewables proponents during an option period, especially if a CCA is already in place, as an option-holder is unlikely to be a ‘landholder’ and does not have rights to negotiate at this stage.

There is no specific category of leasing or licensing from the State for renewables projects.³⁰ Instead, typically the proponent negotiates for a sublease or licence from the pastoral lease holder – Ministerial consent can be sought for the production of renewable energy to be added as an additional purpose to the lease.³¹

Western Australia

Diversification Leases permit concurrent use, private negotiation with the highest and best use circuit breaker

A new category of lease on crown land called a ‘diversification lease’ was introduced approximately 1 year ago.³² Diversification leases grant non-exclusive tenancy, allowing for multiple concurrent uses and co-existence with certain mining tenements and native title rights.

This tenure is the State’s preferred approach for large scale wind and solar projects due to the size of the land required for those projects. Diversification leases can be used in conjunction with exclusive tenure for specific infrastructure.

The Minister may grant a diversification lease by private treaty or competitive process.³³ An option to lease may be granted which includes conditions precedent to the grant of a long-term

lease tenure. The conditions precedent can include negotiation and registration of an Indigenous Land Use Agreement, approval of the Minister for Mines under section 16(3) of the [Mining Act 1978 \(WA\)](#), and obtaining planning and environmental approvals.

The tenure pathway in WA is somewhere between the South Australian and Queensland system.

- Like South Australia, the Minister may grant directly to proponents licences, options, and leases for renewable and hydrogen projects. There is no need to take an access licence or sublease from the pastoral lease holder.
- Like Queensland, the framework prefers parties to negotiate privately on co-existence arrangements. By comparison, CCAs in Queensland give rights to existing owners and occupiers to negotiate compensation from mining parties for access (rather than shared use specifically). In WA, negotiations between private parties can be supported by the Senior Officers Group.³⁴
- In WA, there is a distinction between co-existence arrangements at the feasibility stage (eg sharing of infrastructure) and at the implementation stage when constructed and operational – at this later stage exclusive lease tenure may be needed for some infrastructure.

The WA framework also includes a third party circuit breaker. The ‘highest and best use assessment’ policy allows the Senior Officers Group to assess the highest and best use if more than one proponent expresses an interest in the same land and cannot reach an agreement. The policy is developed in relation to hydrogen projects but we understand it can also be applied to renewables projects.³⁵

This ‘highest and best use’ mechanism has the potential to be a useful pathway for renewables proponents with competing proposals but as far as we are aware this mechanism is currently untested.

Proponents will be cautious in adopting this mechanism – there is always risk in any mechanism that sends control of the outcome to a third party and negotiation will be a preferred first pathway.

Final thoughts

Competing land use remains a difficult issue. Governments need to balance the interests of traditional landowners, resources parties, carbon project proponents, pastoralists and renewables and hydrogen proponents. Without tenure certainty for renewables and hydrogen proponents at an early stage, proponents will be hampered in investment and finance decisions. States that have clear frameworks to ensure that tenure certainty is available early in project will see faster development of projects and more investment.



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¹This legislation was given assent on 18 June 24. Some parts of the [Mineral and Energy Resources and Other Legislation Amendment Act 2024 \(QLD\)](#) are yet to commence: s 2. ('MEROLA')

²Ibid pt 4,

³*Land Administration Act 1997* (WA) pt 6A. ('LAA')

⁴Ibid s 91.

⁵Ibid s 88.

⁶Ibid s 79.

⁷The HRE Act commenced on 11 July 2024.

⁸[Hydrogen and Renewable Energy Act 2023 \(SA\)](#) s 3(j). ('HRE')

⁹Ibid s 10.

¹⁰Government of South Australia, 'Consultation on draft Hydrogen and Renewable Energy Regulations', *Hydrogen and Renewable Energy Act* (Information Sheet) p 3 <https://www.energymining.sa.gov.au/_data/assets/pdf_file/0008/989333/Release-areas-information-sheet.pdf>.

¹¹Department of Energy and Mining, 'Hydrogen and Renewable Energy Regulations 2024', *Release Areas* (Web Page) p 3 <https://www.energymining.sa.gov.au/_data/assets/pdf_file/0008/989333/Release-areas-information-sheet.pdf>.

¹²Ibid *General Licensing and Permits* <https://www.energymining.sa.gov.au/_data/assets/pdf_file/0005/989330/General-licensing-and-permits-information-sheet.pdf>.

¹³HRE (n 7) s 45.

¹⁴Ibid pt 4.

¹⁵Ibid s 26.

¹⁶Ibid.

¹⁷Ibid s 79.

¹⁸Ibid s 81.

¹⁹Ibid s 41.

²⁰Ibid s 42.

²¹Ibid s 43.

²²[Mineral and Energy Resources \(Common Provisions\) Act 2014 \(Qld\)](#) s 43.

²³Department of Resources, The MEROLA Amendment Act Explained (Web Page) <<https://www.resources.qld.gov.au/qridp/actions/action-updates/the-merola-act-explained>>.

²⁴Coexistence Queensland, *About us* (Web Page) <<https://www.cqld.org.au/about-us/>>. ('Department of Resources')

²⁵MEROLA (n 1) s 16.

²⁶Legislative assent 26 April 2024: [Energy \(Renewable Transformation and Jobs\) Act 2024 \(Qld\)](#).

²⁷Queensland Government, *Queensland Resources Industry Development Plan* (Web Page, June 2022) p 29 <https://www.resources.qld.gov.au/_data/assets/pdf_file/0005/1626647/qridp-web.pdf>. This plan outlined the government’s commitment to creating a clear framework for coexistence and updating regional plans to capture the changing and competing demands for land use (some of which pre-date the emergence of the renewable energy industry).

²⁸This Roadmap (updated in March 2024) does not address conflicting land use in any detail but envisions that these conflicts would be managed as part of the process of identifying Renewable Energy Zones.

²⁹The Queensland system also includes a ‘Deferral Agreement’ and an ‘Opt-out Agreement’.

³⁰There is a lease of Crown land available for a significant development – [Land Act 1994 \(Qld\)](#) s 129 ('Land Act').

³¹Ibid s 154.

³²LAA (n 3) s 92B.

³³Department of Planning, Lands and Heritage, 'Policy Framework', *Guiding the use of Diversification Leases on Crown land under the Land Administration Act 1977* (Web Page) p 2 <<https://www.wa.gov.au/system/files/2023-08/policy-framework-diversification-leases.pdf>>.

³⁴The Senior Officers Group comprises officers from officers from Department of Planning Lands and Heritage (DPLH), the Department of Mines, Energy, Industry Regulation and Safety (DEMIRS), and the Department of Jobs, Tourism, Science and Innovation (JTSI).

³⁵Western Australian Government, 'Western Australian Renewable Hydrogen Policy: consideration of highest and best use', *Policy: Process for managing competing projects proposed for the same area of land* (Web Page) p 2 <https://www.wa.gov.au/system/files/2022-12/21205_RenewableHydrogen-Policy_DIGITAL.pdf>. This policy was published in 2022 and contemplates updates to reflect the amendments introducing diversification leases.

Insolvent Tenants? Landlords Beware: When a Court Will Stop You From Taking Possession of Your Property

Author: Brit Ibanez and Hugh Farquhar



If a tenant appoints a voluntary administrator, the *Corporations Act 2001* (Cth) (**Corporations Act**) protects the administrator from landlords who would otherwise be able to re-enter the premises.

It is important to act decisively to recover possession of your premises before an administrator is appointed.

A standard administration period lasts for 25 business days. Oftentimes, in complex administrations (like the Virgin Australia administration for example), the administrators can ask the court for an extension and that extension can last for months if not years. The moratorium on taking possession will exist for that entire period.

If the administration comes to an end through a Deed of Company Arrangement (**DOCA**), then in certain circumstances, the administrator can apply to the court for an order that the landlord cannot take back possession for the length of the original lease on foot prior to the appointment of administrators.

Deed of Company Arrangement

During an administration period, there are a number of legislative provisions which prevent a landlord from enforcing its rights to recover possession of property, even if the lease has been terminated.

Once an administrator is appointed, one of the options they will consider in order to restructure the company, is whether to enter into a “Deed of Company Arrangement” (**DOCA**). A DOCA is a binding arrangement between the company in administration and its creditors governing how the company’s affairs will be dealt with. A DOCA will aim to maximise the chances of the company, or as much as possible of its business, continuing, and/or provide a better return for creditors than an immediate winding up of the company.

One of the ways in which a DOCA may maximise the chances of the company, or as much as possible of its business, continuing, may be by including a condition in the DOCA requiring the company to continue to occupy its existing premises. This is particularly so where the nature of the company’s business requires specialised equipment which can be found in the existing premises.

Such a proposal in the DOCA is likely to cause tension in circumstances where the lease for the existing premises has previously been terminated and the landlord would otherwise be entitled to take back possession of the property. Section 444F(4) of the Corporations Act (**Section 444F(4)**) is designed to deal with these circumstances.

Section 444F(4)

Section 444F(4) provides where a company has executed (or resolved to execute) a DOCA which contemplates continued possession of the existing premises; the Court may order the landlord not to take possession of the property or otherwise recover it (notwithstanding the fact the landlord may otherwise be entitled to do so).

In other words, if:

- a tenant company is in administration, and
- it has executed (or resolved to execute) a DOCA which contemplates the continued occupation of the landlord’s property; and
- the landlord is entitled to take possession of the property at the end of the administration period because the lease had previously been validly terminated (**Original Lease**) (generally due to the prior defaults of the company subject of the DOCA);
- the administrators/deed administrators may apply to the Court seeking orders restraining the landlord from exercising its rights to take possession of the property for the length of the Original Lease (**Section 444F(4) Order**).

Relevant considerations for the Court

S 444F(5) of the Corporations Act (**Section 444F(5)**) sets out the two key considerations that Courts are required to take into account in determining whether to make a Section 444(F) (4) Order:

1. **First**, whether if the Section 444F(4) Order was *not* made, it would have a “material adverse effect” on achieving the purposes of the DOCA; and
2. **Second**, whether the landlord’s interests would be “adequately protected” by the terms of the DOCA and/or the terms of the Section 444F(4) Order and/or any other relevant matter.

The answer to the first question is typically self-evident. Where Section 444F(4) orders are sought, one of the purposes of the DOCA will be to allow the company (or the company’s business) to trade on. In those circumstances if Section 444F(4) orders are not made it would mean the company (or the company’s business) would be unable to trade on. Such a consequence will satisfy the “material adverse effect” requirement.¹

The answer to the second question is determined by reference to the interests the landlord had under the Original Lease. Those interests will typically include receiving amounts due under the terms of the Original Lease and

ensuring compliance with the terms of the Original Lease.² Such interests are distinct from, for instance, the landlord’s interest in exploiting a default under the Original Lease.³

The onus on establishing that the interests of the landlord are adequately protected falls on the deed administrator. In determining whether this criteria has been satisfied, a Court will consider factors including:

- whether there are any funds outstanding under the Original Lease, and if so, whether it is proposed those funds be repaid;
- the timing of the termination of the Original Lease relative to the appointment of Administrators;
- whether the conditions proposed by those seeking the Section 444F(4) Order would facilitate compliance with the Original Lease; and
- evidence concerning the financial capacity of the DOCA proponent to meet the obligations of the Original Lease.

Takeaways

If you are a landlord who wishes to terminate a lease and take possession of your property – you should do so as quickly as possible and before the appointment of Administrators.

If you are an insolvency practitioner appointed to a company occupying a property in respect of which the lease has been terminated – you are able to continue to occupy the property and consider a DOCA which contemplates continued occupation provided certain conditions are met.

In either situation, Hamilton Locke is well placed to assist and advise both landlords and administrators in relation to the above circumstances. For more information, contact Brit Ibanez.



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¹See for instance *Vincent Cold Storage Pty Ltd v Centuria Property Funds No 2 (Limited)* (No 2) [2023] VSC 314; *Strazdins v Birch Carroll & Coyle Ltd* (2009) FCR 300.
²*Re Hi-Fi Sydney Pty Ltd (admin apptd)* [2015] NSWSC 1312.
³*Ibid.*

New Zealand’s 2024 Tenancy Reforms and Key Changes for Landlords and Tenants

Author: Paul Chambers and Luke Simperingham



Key Takeaways:

- The Residential Tenancies Amendment Bill 2024 was introduced to the New Zealand Parliament on 16 May 2024.
- The stated aim of the Bill is to “remove barriers to rental supply and incentivise property owners to rent their properties via the private rental market”. The changes will apply to all tenancies regardless of when they commenced.
- Most notably, it will reintroduce the right of a landlord to terminate tenancies “without cause” and introduces significant changes regarding tenants keeping pets in rental properties.
- A Select Committee is yet to report following public submissions having closed in July.
- The Government expects most of the changes to come into effect in early 2025.

The Residential Tenancies Act 1986 (the **Act**) governs residential tenancies in New Zealand as a code. From 2018 to 2020 the previous Labour-led government made a number of changes to the Act to tilt the balance in favour of tenants. With the change of government to the National Party-led coalition, many of these changes are now being reversed. The stated aim of these changes is to “remove barriers to rental supply and incentivise property owners to rent their properties via the private rental market.” Key changes included in the Residential Tenancies Amendment Bill 2024 (the **Bill**) which is currently before Parliament are:

- Reintroduction of “no cause” terminations by landlords;
- changes to rules around notice periods for terminations and fixed term tenancies;
- introduction of a ‘pet bond’ and pet consent rules; and
- minor and technical amendments to improve the clarity and effectiveness of the law.

The Bill passed its first reading in May 2024 and public submissions closed on 3 July 2024. We now await the Select Committee’s report due on 21 November 2024. The Government expects most of the changes to come into effect in early 2025.

Notice Periods, Periodic Tenancies and Tenancy Terminations

The major change effected under the previous Government was to remove “no cause” terminations by instead introducing various lawful reasons upon which a tenancy may be terminated. These lawful reasons are the following:

- the landlord or member of their family requires the premises to live in; or
- the property is needed for occupation of the landlord’s employees/contractors (and this customary use of the premises is recorded in the tenancy agreement);
- The landlord wishes to put the property on the market for sale or has contracted to sell the property with vacant possession;
- The landlord wishes to carry out extensive alterations, refurbishment, repairs, or redevelopment to the property and it is not practicable for the tenant to remain in occupation while the work is undertaken or the property is to be demolished.

Depending on the reason for terminating, between 63 and 90 days’ notice must be given to the tenant.

Additionally, the landlord cannot prevent a fixed-term tenancy from automatically rolling over into a periodic tenancy unless the landlord has good cause to terminate.

Under the Bill, “no cause” terminations will be reinstated provided 90 days’ prior notice is given. Fixed term tenancies will also automatically terminate at the expiry of the fixed term, unless a party gives prior notice for the tenancy to continue.

On the tenant side, coinciding with the increased restrictions on a landlord’s ability to terminate under previous legislation, the notice period for termination by a tenant had been increased from 21 days to 28 days. As the Bill has broadened a landlord’s right to termination, the Bill also reverses this change with tenants only being required to give 21 days’ prior notice of termination.

Pet bond and pet consent rules

The Bill introduces significant changes regarding tenants keeping pets in rental properties. Currently, the Act is silent as to a tenant’s right to have a pet or pets and this has led to uncertainty around the enforceability of pet prohibition clauses in tenancy agreements.

To regularise the parties’ respective rights and obligations with regard to the keeping of pets, the Bill would have the effect of:

- Allowing the landlord to require an additional rental bond equal to two weeks’ rent in consideration for allowing a tenant to keep a pet. This is in addition to the maximum bond of four weeks’ rent as otherwise permissible.
- Clarifying that the keeping of a pet is only by agreement with the landlord, but prohibiting a landlord from unreasonably refusing consent to the keeping of a pet. The Bill provides some examples of grounds which would be considered reasonable for consent to be refused. These include:
 - The premises not being suitable for the pet or vice versa due to the size, type or breed of the pet or its propensity for causing damage or disruption to neighbours; or
 - A relevant bylaw or body corporate rule preventing the pet from being kept on premises.
- Confirming tenants’ liability for all pet-related damage beyond normal wear and tear.

Minor and technical amendments to improve clarity

The Bill also proposes a range of changes to clarify certain issues which have been the subject of some doubt. These include:

- Clarifying that clauses in tenancy agreements prohibiting smoking inside a rental property are enforceable;
- Removing barriers to a tenant leaving an unsafe situation by confirming that the tenant can leave a tenancy at short notice if their child or dependent is subject to family violence; and
- Clarifying that parties to a tenancy can give documents and notices by way of text or instant messaging.

Controversy

The Bill is not without its critics, with the reintroduction of “no cause” terminations and “pet bonds” being particularly controversial. Age Concern New Zealand is strongly opposed to “no cause” terminations citing that these will “cause significant health and social risk to tenants”.¹ Similarly, the Salvation Army (Te Ope Whakaora) believes “no cause” terminations will “increase rental housing insecurity for low-income renters and contribute to increasing homelessness”.²

The new provisions regarding pets are contentious with the Salvation Army believing that the approach taken “will disadvantage renters especially those on low incomes who will face higher bond payments and unlimited liability for pet damage”.³

It remains to be seen what changes – if any – the Government will be prepared to make to the Bill in response to these criticisms or whether the coalition partners will prefer to push it through in its current form.



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¹<https://www.ageconcern.org.nz/Public/Public/Submission/2024-Submissions/Residential%20Tenancies%20Amendment%20Bill.aspx>
²<https://www.salvationarmy.org.nz/article/submission-residential-tenancies-amendment-bill-2024>
³<https://www.salvationarmy.org.nz/article/submission-residential-tenancies-amendment-bill-2024>

Caution to Lenders: Real Property Mortgage Successfully Challenged as Unreasonable Director Related Transaction

Author: Andrew Vincent and Peter Mutema



Key takeaways

1. Financiers must be careful when taking securities from related entities, and should consider whether the mortgagor receives a benefit from such transaction (and whether the directors indirectly receive a benefit).
2. Liquidators may rely on section 588FDA to claw back assets arising from potentially voidable transactions, including the grant of securities to financiers. Notably, this provision does not require proof that a company was insolvent at the time of the transaction, or that its counterparty was on notice that it benefited the director.
3. When considering the “benefit” of a transaction, it is the benefit that existed at the time of entering into the transaction that is relevant. If a benefit materialises subsequently by coincidence, that will not be sufficient.

Real property mortgages, whether freehold mortgages or leasehold mortgages, are a ubiquitous feature of a real property financing deal. However, like any other transaction, they are subject to claw-back risk in a liquidation scenario, where a liquidator may challenge the validity of previous transactions.

In *Cooper as Liquidator of Runtong Investment and Development Pty Ltd (In Liq) v CEG Direct Securities Pty Ltd [2024] FCA 6*, the Federal Court found that a real property mortgage was an unreasonable director related transaction under section 588FDA of the *Corporations Act 2001* (Cth) (the **Corporations Act**). Consequently, the mortgagee was required to pay some of its enforcement proceeds to the liquidator.

In this article, we highlight the key lessons, facts and findings from this case.

The facts

Runtong Investments and Development Pty Ltd (the **Mortgagor**) granted a mortgage in favour of CEG Direct Securities Pty Ltd (**Mortgagee**) over certain of its freehold land (the **Runtong Land**).

The mortgage was not security for a debt of the Mortgagor. Rather, it was security for the Mortgagee’s loan to certain related entities of the Mortgagor – namely, Australian Datong Investment & Development Pty Ltd (**Datong**) and Futong Investment and Development Pty Ltd (**Futong** and, together with Datong, the **Borrowers**). In the parlance of Finance lawyers, this is what is known as a “third party security” – i.e., a security provided for the debt of a third party, rather than the direct debt of the security provider.

The security package of the Mortgagee also included, among other things, *personal guarantees from certain natural person directors*. This included two directors who were common directors of the Mortgagor and the Borrowers.

In February 2018, the Mortgagee enforced its mortgage in relation to the Runtong Land and, ultimately, sold that land in accordance with that process. In October 2018, the Mortgagee received approximately A\$12 million in accordance with the settlement of that sale.

In the meantime, in March 2018, the Mortgagor appointed administrators and, three months later, the Mortgagor’s creditors resolved to liquidate the Mortgagor. The liquidator brought proceedings challenging the Mortgagee’s mortgage as an unreasonable director-related transaction.

The statutory regime

Section 588FDA of the Corporations Act sets out a three-stage test to determine whether a transaction is an unreasonable director-related transaction.

A transaction of a company is an unreasonable director-related transaction if, and only if:

- a) there is a “transaction” (namely, a payment or a share issue by the company, or some other disposition of the company’s property);
- b) the payment, issue or disposition is made to a director of the company or a close associate of a director of the company *or for the benefit of any such person*; and
- c) a reasonable person in the company’s circumstances would not have entered into the transaction.

Findings

Was there a transaction?

The parties to the proceedings agreed that the entry into the mortgage was a “transaction” – namely, a disposition of the Mortgagor’s property, being the Runtong Land.

Was that transaction for the benefit of a director of the Mortgagor?

- a) The plaintiff argued that the mortgage created a contingency which benefited the directors of the Mortgagor because the liability of the directors under their personal guarantees would be reduced as a result of any sale of the Runtong Land.
- b) The defendant argued that there was no unreasonable director-related transaction because:
 - i) the mortgage was granted for the benefit of the Mortgagee;
 - ii) it was a transaction between the Mortgagor and the Mortgagee; it was not a transaction made on behalf of, or for the benefit of, any director; and/or
 - iii) the mortgage was granted *in exchange for an increase* to the total secured liabilities, *and therefore an increase to the total liability of the directors under the personal guarantees*, therefore, it could not be said to benefit the directors.

The court accepted the plaintiff’s argument, and rejected the defendant’s submissions. The Federal Court noted that the fact that, although the mortgage directly benefited the Mortgagee, the directors received an indirect benefit which was sufficient to engage section 588FDA.

Would a reasonable person in the Mortgagor’s circumstances have entered into that transaction?

In considering this question, the court had regard to the factors set out in the legislation – namely:

- a) the benefits (if any) to the company from entering into the transaction;

- b) the detriment to the company from entering into the transaction;
- c) the respective benefits to other parties to the transaction; and
- d) any other relevant matter.

The court held that, at the time the Mortgagor entered into the mortgage, *“there is no evidence to suggest it was to [the Mortgagor’s] benefit to encumber the [Runtong Land] whether for cash flow purposes or otherwise, [nor was there] any adequate commercial explanation [for the transaction]”*.

The fact that, nearly a year after the mortgage was executed, the Mortgagee provided certain financial accommodation to the Mortgagor for the purposes of a separate project on the Runtong Land (the **Runtong Development**), did not alter this conclusion. The relevant assessment under section 588FDA is carried out at the time of entry into the transaction.

Conversely, the court noted that the *“detriment to the [Mortgagor] is obvious and substantial”*. Essentially, the Mortgagor had offered its only asset as collateral if the Borrowers did not pay its loans. The court concluded that a reasonable person in the Mortgagor’s circumstances would not have entered into the mortgage.

Although the benefit the Mortgagee received from the mortgagee-in-possession sale was around \$12 million, the court did not require the Mortgagee to pay that amount back to the Mortgagor in full. Rather, the Mortgagor was permitted to partially reduce that payment by an amount equal to the advances subsequently provided to it for the purposes of the Runtong Development, on the basis that the value of the Runtong Land increased as a result of that work done on the Runtong Development and a reasonable person would have provided security up to the value of those advances.

What next?

In light of this ruling, it is imperative for lenders and financiers to carefully assess the potential risks associated with taking securities from related entities, especially in transactions involving directors. Ensuring that all parties receive a clear and direct benefit from the transaction is crucial to mitigate the risk of future claw-back claims. For more detailed guidance on navigating these complex legal landscapes and protecting your interests, get in touch with Andrew Vincent and Peter Mutema.



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