

Real Estate Markets Quarterly

Summer 24-25



Foreword

Welcome to the summer edition of our Real Estate Markets Quarterly. We hope you and your families are well. We certainly live in interesting times.

On 18 February 2025, the Reserve Bank finally cut its cash rate by 25 basis points to 4.1%, bringing much needed relief to Australian mortgage holders. This cut was the RBA's first since November 2020.

While the RBA will remain cautious about future cuts, the initial cut may be enough to provide a psychological boost to reignite the real estate sector.

In this edition, we cover a range of topics including:

1. A spotlight on Teresa Pang, Director of Legal at Waveconn who provides an insight into her legal career to date.
2. Flagging recent changes to the Environmental Protection Act 1994 (Qld) (EP Act) that have an impact on a Landlord's duty to notify the Department of Environment, Science and Innovation (DESI) in specific circumstances.
3. An update on contamination warranties and disclosure obligations.

We hope you enjoy our summer edition!



John Frangi
Partner, Co-head of
Real Estate Markets
[+61 417 252 203](tel:+61417252203)
 



Sarah Roettgers
Partner, Co-head of
Real Estate Markets
[+61 438 727 382](tel:+61438727382)
 

Contents

Foreword	ii
Industry Spotlight - Teresa Pang	1
Landlords beware: Amendments to the Environmental Protection Act and the duty to notify of environmental harm	3
Proposed changes to Victoria's Security of Payment Act set to revolutionise the State's construction industry	5
Money does grow on trees: the forestry rights and carbon credits investment opportunity (and the legal considerations investors need to know)	9
Yours or mine: Who bears the onus of proving unreasonableness in failure to mitigate arguments between builders and owners?	11
Landlords take note: Queensland's rental laws are changing	15
Do your diligence: recent case timely reminder for contamination warranties and disclosure obligations	21
New ruling on rent review caps will have knock-on effects for tenants and landlords	23

Industry Spotlight - Teresa Pang



Teresa Pang

Director of Legal
Waveconn



Please provide an overview of your career to date.

My legal journey has been a good mix of private practice and in-house roles! I spent six years in private practice before diving into the in-house world at a digital infrastructure tower company for nearly a decade. Then came an unexpected encore in private practice for 4.5 years, where there was an opportunity to join one of my clients as Director of Legal. Now, I've been back in-house for over a year, in the telecommunications and digital infrastructure industry, and I couldn't be happier.

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

The constant evolution! Between technological advances and regulatory changes, there's never a dull moment. Plus, the sector is filled with brilliant, collaborative minds who make every day exciting.

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

It was a stroke of luck – my first in-house role was with a digital infrastructure tower company. I loved the variety and complexity of the legal work, and I've never looked back.

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

My versatility is my superpower! Having substantial experience in both private practice and in-house roles has given me the ability to adapt my approach and find creative solutions that truly serve my clients' needs.

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

Navigating the technology tool maze has been quite the journey – there are so many options out there! Perhaps even more challenging is bringing

everyone along on this digital transformation, especially those who might be a bit hesitant about embracing change.

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

Keep your options open! Try everything that comes your way – it's the best way to develop a well-rounded skill set and avoid getting boxed into one specialty.

What do you think are potential issues and opportunities prevalent in the sector over the next 12 months?

Like many sectors, we're closely monitoring the rapid advancement of technology and its impact on traditional infrastructure models. The key opportunity – and challenge – lies in ensuring our business models remain adaptable and future-ready while continuing to deliver value to our stakeholders.

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

Like many legal teams, we're embracing emerging technologies to enhance our efficiency and service delivery. Our focus has been on understanding and carefully implementing new tools that complement our expertise while maintaining the high quality of our legal services.

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

At Waveconn, we believe diversity strengthens our capability to innovate and serve our stakeholders. Our diverse legal team reflects this commitment through our inclusive workplace practices, which accommodate different working arrangements.

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

The future General Counsel will need to be part technologist, part innovator. Leveraging AI and automation, while still ensuring the accuracy and quality of the output, will be key to delivering efficient legal solutions – it's about working smarter, not harder.

What are your top reading/listening/watching recommendations?

I recently watched 'Wicked' the movie after seeing the musical years ago – absolutely loved it!

"My versatility is my superpower! Having substantial experience in both private practice and in-house roles has given me the ability to adapt my approach and find creative solutions that truly serve my clients' needs."

Landlords beware: Amendments to the Environmental Protection Act and the duty to notify of environmental harm

Author: Amelia Prokuda, Sarah Roettgers, Matthew Butchard and Faye Winterflood

Landlords should be aware of the recent changes to the *Environmental Protection Act 1994* (Qld) (**EP Act**) that have an impact on their duty to notify the Department of Environment, Science and Innovation (**DESI**) in specific circumstances.

Section 320DA of the EP Act (Duty of owner, occupier or auditor to notify the administering authority) now requires a person, including an owner or occupier of land who becomes aware, or ought reasonably to have become aware, of:

- 1. the presence of, or happening of an event involving, a hazardous contaminant in the local government area that is causing, or is reasonably likely to cause, serious or material environmental harm; or
- 2. if the land is contaminated land – a change in the condition of the land that is causing, or is reasonably likely to cause, serious or material environmental harm; or
- 3. a notifiable activity having been carried out, or being carried out, on the land,

to, within 24 hours after becoming aware of the matter, or the time when the person ought reasonably to have become aware of the matter, give the administering authority written notice of the event, unless the person has a reasonable excuse. The Courts have not considered the meaning of 'reasonable excuse in the context of section 320DA of the EP Act. However, the term is generally understood as a situation where the person took steps that a reasonable person would consider justified in the circumstances, based on necessity, urgency or unavoidable circumstances.

The amendment expands the duty to notify to not only when a person becomes directly aware of an event but also where they ought to have been aware of an event that triggers the duty.

Next steps for landlords

In light of the broader duty and as environmental regulations continue to tighten, landlords must take proactive measures to protect themselves from potential contamination risks including:

- 1. Landlords should ensure any relevant leases contain a requirement for a tenant (as the occupier) to notify the landlord (and the administering authority) of a contamination incident immediately upon the tenant becoming aware of the incident.
- 2. Consideration should also be given to whether the landlord's preferred form of lease extends to any liability incurred by the landlord resulting from the tenant failing to notify the administering authority within the required timeframe.
- 3. Conversely, before entering into a lease, a tenant (particularly of industrial premises) should make enquiries as to whether the subject land is contaminated, or may become contaminated, due to a previous occupant's use of the land.

Landlords need to stay informed and act swiftly to mitigate risks arising from these new environmental obligations. For tailored advice or more information, reach out to Sarah Roettgers and Amelia Prokuda.



Amelia Prokuda
Partner
[+61 410 032 358](tel:+61410032358)



Sarah Roettgers
Partner
[+61 438 727 382](tel:+61438727382)



Matthew Butchard
Senior Associate
[+61 7 3036 7886](tel:+61730367886)



Faye Winterflood
Consultant
[+61 7 3036 7886](tel:+61730367886)



Proposed changes to Victoria’s Security of Payment Act set to revolutionise the State’s construction industry

Author: Elena Stojcevski and Sinead Kelly

It’s been a long wait, but proposed changes to the *Building and Construction Industry Security of Payment Act 2002* (Vic) (**SOPA**) will finally align Victoria with other legislation around the country. Anticipated for early 2025, the changes will create a more predictable and fair payment system for the state’s construction sector, and potentially set the stage for improving housing supply. We take a look at the recommendations and industry impact.

Need to know:

- The Victorian Government has indicated its support for amendments to the *Building and Construction Industry Security of Payment Act 2002*.
- The Inquiry into the Act has identified significant payment problems and recommended 28 specific amendments to improve the situation.
- Key proposed changes include the removal of ‘Excluded Amounts’, allowing for comprehensive progress claims for all types of construction work.
- The recommendations suggest abolishing reference dates to enable contractors to make payment claims monthly and after contract termination.
- There’s a call to redefine ‘business days’ to align with other jurisdictions by excluding weekends, certain public holidays, and an end-of-year period.
- Unfair time-bar provisions may be deemed ineffective if found unfair.
- There is a proposed prohibition on respondents introducing new reasons for non-payment that were not previously specified in their payment schedules.
- The amendment looks to accelerate the adjudication process, requiring determinations to be completed within 10 business days.
- There is a suggestion to streamline the enforcement process, allowing adjudication certificates to directly convert into court judgments for debt recovery.
- Anticipated for early 2025, the reforms would revolutionise Victoria’s construction industry by creating a more predictable and fair payment system.

Over multiple decades, research has emerged that highlights the poor payment practices that plague the Australian building industry. These practices see financial risk passed down from owners and principals to contractors and subcontractors, increasing the levels of financial insecurity that contractors and subcontractors face, and causing the rates of insolvency to skyrocket.

In Victoria, the SOPA legislation has remained unchanged since 2006. This contrasts with many other legislations around Australia and especially the equivalent legislation in Western Australia and New South Wales. Both state’s legislation has undergone progressive reviews and reforms to ensure the legislation remains fit for purpose and achieves its goal as an interim payment mechanism allowing for necessary cashflow. In contrast, Victoria’s SOPA is carved out for ‘Excluded Amounts’ and non-claimable variations are difficult to utilise in the same way.

In a bid to mitigate poor payment issues, the Victorian Legislative Assembly launched an Inquiry into SOPA. The Inquiry aimed to not only align Victoria with other states’ Security of Payment Legislation, but to also remove the unfairness and convolusion preventing contractors and subcontractors from recovering payments.

Background information

In early 2023, the Victorian Legislative Assembly initiated an Inquiry into the payment sector of the Victorian construction industry to be undertaken by the Environment and Planning Committee (**Committee**). The Committee examined the processes in place and investigated potential improvements that could be made to ensure that contractors and subcontractors were paid correctly and timely for the work they had performed under the contract. The findings were published in November 2023 in the *‘Employers and contractors who refuse to pay their subcontractors for completed works’* report (the **Report**).

The Report outlined nine factual findings and 28 recommendations for reform that would positively contribute to the needs of the Victorian construction industry and better align Victoria with other Security of Payment regimes.

Findings

The Committee found that poor payment practices were extremely prevalent in the construction industry. Poor payment in Victoria’s industry was found to be partially due to the hierarchical nature of construction. It found that many payment delays occurred when a head contractor used funds that would have otherwise been used to pay subcontractors as capital to finance their other business projects.

The Report’s recommendations outlined the need for certain provisions to be repealed, amended, and for the Government to examine other prevalent issues. The recommendations aimed to strengthen the statutory right for parties to claim payment, improve the adjudication process, and combat insolvency within the industry.

The key recommendations in the Report are: *Recommendation 2 – Excluded Amounts and non-claimable variations*

This recommendation removes the concept of ‘Excluded Amounts’ and ‘non-claimable variations’, allowing contractors to claim progress payments based on the value of the construction work performed. This would mark a very significant change to the existing legislation and would align Victoria with other Australian jurisdictions.

Recommendation 3 – Reference dates

The removal of the concept of reference days and the enabling of one payment claim per calendar month and a payment claim to be made on/ following contract termination. It would also ensure contracted days that are longer than what is stipulated in SOPA be overridden.



Recommendation 4 – Business days

The definition of business days is to be amended so that Saturdays, Sundays, Victorian public holidays, and days between 22 December to 10 January would now be excluded from the meaning of business days. This would reflect what is practiced in other Australian jurisdictions.

Recommendation 5 – Time bars

Allowing notice-based time bars to be declared as unfair by an adjudicator, court, or arbitrator. If declared unfair, the time bar would be deemed to have no effect on the payment claim. It should be noted that this would not apply to other situations arising under the contract.

Recommendation 6 – Unfair terms

This would prohibit unfair construction contractual clauses from arising in contracts and would nullify their effect. This would ensure that Victoria’s SOPA is aligned with other jurisdictions.

Recommendation 9 – Retention monies claimable

This recommendation provides an entitlement to claim retention money. It provides the adjudicator with powers to determine whether the retention money shall be returned and the date at which it should be returned.

Recommendation 15 – New reasons

If implemented, this would prohibit respondents from including reasons in their response to an adjudicator that they had not previously provided for in their payment schedule. Currently, no other jurisdictions in Australia allow a respondent to include a new reason for not paying a subcontractor that had not been raised in the payment schedule.

This would also remove the requirement for adjudicators to identify these reasons as this can run the risk of reasons being incorrectly identified, providing an opportunity for a court to set aside the determination.

Recommendation 17 – Extending time for determination

This amendment would state that an adjudication must be made within 10 business days of either the respondent providing a valid adjudication response, or the date that the response becomes due. This also aims to reduce complexity when interpreting legislation.

Recommendation 26 – Simplifying enforcement process

This would allow for an adjudication certificate to be filed as a judgment for debt in court and enforced accordingly. Historically, compliance with adjudication outcomes is low, which can mean that certain subcontractors do not receive payment even if a decision has been handed down in their favour.

While the Government’s Report does not state when certain amendments will be made to SOPA, the Government has committed itself to making them, and the changes are likely to be implemented early in 2025.

Impact on the construction industry

Once these changes are enacted, the current construction payment practices in Victoria will be revolutionised. Given the changes will mean that the Victorian SOPA will be aligned with other legislation around the country, it is almost certain that many more contractors and subcontractors will elect to utilise the statutory adjudication pathway. Critically, the proposed amendments will also reduce the chance of adjudication applications being rejected on a purely technical legal basis.

The Victorian Government’s support and pledge to build a more stable and fair construction industry comes at a critical time. In particular, better payment practices are essential in ensuring the construction industry is well placed to improve housing supply and assist in working effectively towards Victoria’s Housing Statement.

If you require construction or infrastructure legal advice, Hamilton Locke can help. We draw on decades of experience to help bring market leading projects to fruition. [Find out more](#), or contact us directly.



Elena Stojcevski
Partner
[+61 434 501 344](#)



Sinead Kelly
Paralegal
[+61 386 767 735](#)



Money does grow on trees: the forestry rights and carbon credits investment opportunity (and the legal considerations investors need to know)

Author: John Frangi, Nick Knowlman and Tina Kameas

In 2025, the buzzwords for diversifying income streams sound straight out of a sci-fi novel: crypto, share portfolios, and the ever-elusive metaverse. These concepts, while seemingly just a click away, often leave the average person scratching their head. How do you even begin to wrap your mind around a virtual token being worth as much as a car? It's absurd, yet here we are.

Amid all this digital dazzle, it's easy to overlook a far more grounded investment opportunity: trees (pun intended).

The enduring property law principle of *'cuius est solum, eius est usque ad coelum et ad inferos'* (whoever owns the soil, owns from the heavens to the depths below) historically implied that landowners held rights to everything above and below their land. However, forestry rights challenge this traditional notion. This means that someone can own land whilst an entirely separate party has rights to the trees on that land, whether for timber, carbon sequestration, or other purposes. This separation offers both environmental and financial returns, creating a compelling intersection between sustainability and profitability.

Forestry rights and the law in NSW

Under the *Conveyancing Act 1919* (NSW), forestry rights are distinct from the land itself and can exist as separate legal interests. Section 87A of

the Act grants the holder the entitlement to enter the land, establish and maintain a crop of trees, and construct necessary facilities for these purposes. These rights can also extend to carbon sequestration, allowing the holder to claim the legal and commercial benefits associated with carbon absorption from the atmosphere. Furthermore, Section 88AB recognises forestry rights as a form of *profit à prendre*, ensuring they are legally recognised as a legitimate interest in land.

What makes this market particularly interesting for investors is the demand for carbon credits, which depends on factors like location, size, and quality of the carbon project. As governments and corporations ramp up their environmental commitments, the value of these credits continues to rise. For clients, this represents an emerging opportunity to integrate sustainable practices with a solid return on investment.

Why should you care?

If you're a landowner, investor, or even just someone with an interest in diversifying your financial portfolio, forestry rights and carbon credits can offer unique advantages:

- Environmental impact:** Investing in forestry rights supports global climate change mitigation efforts by promoting carbon sequestration.

- Financial returns:** As demand for carbon credits increases, landowners and investors can generate revenue by selling these credits or leveraging them for commercial benefits.
- Asset diversification:** Forestry rights provide a tangible and sustainable asset class that diversifies your investment portfolio beyond traditional stocks or real estate.

Legal considerations for clients

Navigating the legal landscape of forestry rights and carbon credits requires careful consideration. Engaging legal practitioners familiar with these areas can ensure that your interests are protected and that you maximise the potential of your investments.

Key legal services to consider:

- Property due diligence:** Assessing whether a property is subject to a registered forestry right or carbon project and advising on the implications for purchase, sale, or development.
- Contract drafting and negotiation:** Drafting and negotiating agreements for the sale or transfer of carbon credits, including rights assignments and *profit à prendre* agreements.
- Registration services:** Assisting clients with registering forestry rights and related covenants with NSW Land Registry Services to ensure their interests are protected.
- Compliance and risk management:** Advising on the ongoing obligations tied to forestry rights, such as maintenance, carbon sequestration reporting, and environmental compliance.

- Dispute resolution:** Handling disputes related to the interpretation or enforcement of forestry rights, carbon credit agreements, or land use restrictions.
- Corporate and investment advisory:** Assisting investors and companies in navigating the carbon market, evaluating the viability of forestry projects, and structuring investment deals.

A sustainable and profitable future

As the world moves toward a greener and more sustainable future, forestry rights present an exciting, albeit complex, opportunity for clients who wish to combine environmental stewardship with financial growth. While money might not grow on trees it can certainly lead to a profitable race for those willing to invest strategically.

If you're exploring forestry rights and carbon credits as a potential investment opportunity, the team at Hamilton Locke can help you navigate your legal considerations. For more information, reach out to John Frangi.



John Frangi
Partner,
Head of Real Estate Markets
[+61 417 252 203](tel:+61417252203)





Nick Knowlman
Senior Associate
[+61 434 433 731](tel:+61434433731)





Tina Kameas
Paralegal
[+61 448 633 342](tel:+61448633342)





Yours or mine: Who bears the onus of proving unreasonableness in failure to mitigate arguments between builders and owners?

Author: Hamish Geddes and Nicholas Achurch



Buildings often have issues that arise once the building is completed. These issues are commonly identified as “defects”, and often require work to ensure that they are rectified. When approaching this common scenario, often the most cost-effective way to have the issues rectified is to have the party (the builder), fix the issues.

But what happens if the parties do not agree to that process?

Does an owner of a property who has lost confidence in their builder to rectify its defective work have to let them rectify it?

Is a builder entitled to an opportunity to undertake those works?

Need to know

- In building disputes regarding the rectification of defects, **the defendant builder bears the burden** of proving that the owner acted unreasonably in refusing access to rectify defects, as affirmed by the court in *The Owners – Strata Plan No 89074 v Ceerose Pty Ltd*.
- **Plaintiff Owners are obliged** not to act unreasonably when denying builders the opportunity to rectify issues, but do not need to prove the reasonableness of their actions unless the defendant builder disputes the reasonableness of an owner’s conduct.
- Court considerations for reasonableness include, but are not limited to, the seriousness of defects, builder qualifications and responsiveness (including suitable qualifications to perform the work), with each case assessed on specific circumstances.
- **Both builders and owners** should keep thorough records of communications and actions taken concerning defect rectification to support their case in potential disputes.

While these are often issues that arise prior to court proceedings, it is important that builders and owners are aware of the extent of the owner’s duty to mitigate their loss, in the circumstances in which it is appropriate for a builder to be refused reasonable access to rectify defective works and who bears the onus of proving whether the owner acted reasonably in refusing the builder the opportunity.

The Courts’ position on these issues has recently been affirmed in the decision of *The Owners – Strata Plan No 89074 v Ceerose Pty Ltd & Anor* [2024] NSWSC 1494 (**Ceerose**).

It is generally accepted that, for an owner, developer or principal to mitigate its loss arising from defective works, they must not act unreasonably in giving (or refusing) a builder a reasonable opportunity to rectify its defective works.

In circumstances of residential building work in New South Wales, section 18BA of the *Home Building Act 1989* (NSW) provides that an owner is subject to a statutory duty to allow reasonable access to builders to rectify defects. This section not only codifies an owner’s general obligation to not act unreasonably, but also imposes the statutory duty on non-contracting owners of residential dwellings.

In *Ceerose*, the Court clarified that an owner is under an obligation not to act unreasonably and, where a builder alleges that an owner has failed to mitigate its loss by acting unreasonably, the onus will be on the builder to prove that the owner did act unreasonably. This is consistent with previous decisions of the Court in *Di Blasio*¹ and in *MD Constructions*².

The Court furthered that a plaintiff is free to act as they wish, however, the requirement of reasonableness is added to the formulation of damages to be awarded, citing Heydon JA in *Sherson & Associates Pty Ltd v Bailey* [2000] NSWCA 275 at [77], which relevantly reads:

“A plaintiff ‘cannot be said to have really incurred any loss which might have been avoided by his taking such steps as a reasonably prudent man in his position would have taken to avoid further loss to himself’”.

The Owners submitted that, as a matter of clarification, the defendants’ reliance on the principles in *Di Blasio* as a basis to assert, in essence, that a plaintiff has a general positive obligation to minimise the damages payable by a defendant, was not correct and should not be accepted. The Court confirmed that it did not take the decision in *Di Blasio* to have asserted that a separate duty, as alleged by the defendant, is placed on a plaintiff.

The Court did not depart from the principles in *Di Blasio* or in *MD Constructions* and otherwise agreed that, if a plaintiff (including the Owners) is under any ‘duty’ to mitigate, it is to the extent that it must not act unreasonably.

To successfully defend the defendant’s argument that the owners acted unreasonably, the owners were required to prove in chief that their refusal of access to the defendants to rectify defective works was reasonable.

The Court relevantly agreed with the Owners and did not depart from the principles set out in *Di Blasio* and *MD Constructions*, as the Court found:

- a. it is a matter for the defendants to prove that the Owners acted unreasonably and not for the Owners to prove that it acted reasonably; and
- b. the proposition proffered by the defendants would, practically, require a plaintiff to bear the onus of proof of a defendant’s pleading of a failure to mitigate in defence of a claim.

The Owners obtained a judgment against the defendants in the amount of \$1,952,984 (ex. GST).

Background – Ceerose

In 2010 and 2012, the builder and the developer (**defendants**) entered into a contract to construct a 16-storey, mixed use building that contained 19 residential apartments (**Building**). The Building is situated in Sydney NSW.

In 2013 the strata plan was registered and ownership of the Building was vested in the Owners. A final occupation certificate was issued in 2014.

In 2016, the Owners commenced proceedings against the defendants, seeking to recover loss and damage arising from the defendants’ defective works.

In October 2018, whilst the proceedings were on-foot, the parties engaged in settlement negotiations including the terms of a draft deed, where the defendants would agree to carry out certain works. In November 2019, the Owners declined to allow the defendants access to carry out rectification works – at that time, the deed had not been finalised and the defendants had not completed other rectification works that the Owners considered urgent. The Owners cited a loss of confidence in the defendants’ ability to carry out rectification works.

The defendants contended that the Owners would have avoided any loss if they had been reasonable

and allowed the defendants to rectify the defective works. The defendants’ contention omitted the delay between the commencement of the negotiations and the Owners’ refusal of access.

The Court ordered that the matter was to be determined by a referee, who would then prepare a report on their findings. The referee found that the Owners had not acted unreasonably, and that the onus on proving the unreasonableness of the Owners was, and remained, the onus of the party making the allegation, being the defendants.

Ultimately, the referee and, in adopting the referee’s report, the Court did not agree with the defendants.

The Court awarded judgment for the Owners in the amount of \$1,952,984 (ex. GST) and ordered the defendants to pay the Owner’s costs of the motions heard by the Court.

Takeaways – considerations to be made in building disputes

In dealing with the question of whether an owner/developer/principal has acted unreasonably in mitigating its loss, the Court will consider the following:

- An allegation that a plaintiff has acted unreasonably is a defence made by a defendant and so the evidentiary onus is on the defendant to prove that a plaintiff has acted unreasonably – not for the plaintiff to prove that it has acted reasonably; and
- once a defendant contends that a plaintiff has failed to mitigate its loss, the plaintiff is entitled to have that question tested in court and the mere fact that the question is tested is not itself evidence that the plaintiff has failed to act reasonably.³

It is only when the question of whether a plaintiff has acted unreasonably is raised by the defendant that a plaintiff may be required to demonstrate the reasonableness of its actions in response to the defendant’s contentions. In considering the reasonableness of a plaintiff’s actions, the Court will have regard to:

- the extent and seriousness of the defects;
- whether or not the builder is appropriately licenced, qualified and insured;
- the quality of any repairs effected by the builder;

- the practicality of continuing to negotiate with the builder; and
- the builder’s engagement with the owner in respect of the defects and proposed method of rectification, in short, has the builder responded in a timely manner, taken the complaints seriously and acted fairly in the circumstances?

If you are a builder, this decision reinforces the importance of being proactive to ensure that any defective work is rectified in accordance with your contract or that reasonable attempts are made to do so (and keep records of those attempts!). The simple fact that an owner/developer/principal has denied you access will be insufficient to demonstrate to a court or tribunal that an owner/developer/principal has acted unreasonably or failed to mitigate its loss.

If you are an owner, this decision affirms your obligation to not act unreasonably when engaging with builders in relation to defective works. Although the onus will be on a builder to prove that you have acted unreasonably, it is prudent to ensure that, if you have refused a builder access to rectify defects, that such refusal is justified, and records are kept to support your position.

Need assistance?

If you find yourself dealing with defects, whether as a builder or owner, and require assistance on managing this issue and any claims that arise from the defects, then get in contact with Hamish Geddes for bespoke advice and assistance.



Hamish Geddes
Partner
[+61 416 017 941](tel:+61416017941)



Nicholas Achurch
Senior Associate



¹Owners SP 76674 v Di Blasio Constructions Pty Ltd [2014] NSWSC 1067
²Owners Strata Plan 78465 v M D Constructions Pty Ltd [2016] NSWSC 162
³Di Blasio at [47].



Landlords take note: Queensland’s rental laws are changing

Author: Sarah Roettgers and Annabel Ryan



New tenancy rules are once again on the horizon for landlords. From 1 May 2025, the reformed *Residential Tenancies and Rooming Accommodation Act (Qld)* introduces further updates that landlords and providers in Queensland will need to be across. We break down the changes and what you can do to stay compliant.

Need to know

- New Queensland rental obligations come into effect on 1 May 2025
- To ensure compliance with the changes, landlords and providers should review their residential tenancy agreements and rooming accommodation agreements and practices regarding receipt of applications (including information requests), issuing entry notices, approval process for fixtures and structural changes, and the collection, storage and destruction of personal information

The *Residential Tenancies and Rooming Accommodation and Other Legislation Amendment Act 2024 (Qld)* received proclamation on 15 August 2024 and makes a series of changes to the *Residential Tenancies and Rooming Accommodation Act 2008 (Qld)*.

A number of changes came into effect on [30 September 2024](#) in relation to the payment of rent and service charges, bond claims and reletting costs. As of 1 May 2025, a new round of rights and responsibilities will kick in, this time focused on the receipt of applications (including information requests), issuing entry notices, the approval process for fixtures and structural changes, and the handling of personal information.

Application process for residential tenancy or rooming accommodation

Residential tenancies and rooming accommodation		
Object	Current position	New position
Application for residential tenancy or rooming accommodation	N/A	If a landlord/provider (or their agent) requires a prospective tenant/resident to apply for a residential tenancy/rooming accommodation, the prospective tenant/resident must use the required application form, which is an approved form and only requires the following information of the prospective tenant/resident: - their name and contact details; - details of any residential tenancy agreements or rooming accommodation agreements they have been party to previously; - their current employment; - details of their income; - their referees; - the intended term of the tenancy/residency interest; and - any other information prescribed by regulation. The landlord/provider (or their agent) must nominate two ways in which the prospective tenant/resident may submit the application, noting that no more than one of these ways is a <i>restricted way</i> (such as an online platform to give personal information to a person other than the landlord/provider who collects the information on behalf of the landlord/provider and who is not a real estate agent). Limitations These requirements do not apply to landlords of a residential tenancy (or agents of landlords) who: - receive funding for the premises under the <i>Housing Act 2003</i> (Qld) or the <i>Community Services Act 2007</i> (Qld); or - is the chief executive of the housing department acting on behalf of the State; or - is the State in circumstances where the tenant is an officer or employee of the State; or - is a replacement landlord under a community housing provider tenancy agreement; or - a landlord otherwise prescribed by regulation.
Information requests	N/A	Permitted information A landlord/provider (or their agent) may request information about a prospective tenant/resident only if the information: - is limited to that required in the application form; or - comprises no more than two documents in each of the following categories: - documents that verify the identity of the prospective tenant/resident; - documents which reveal the prospective tenant's/resident's financial ability to pay rent; - documents about the suitability of the prospective tenant/resident for the tenancy/rooming accommodation. Restricted information A landlord/provider (or their agent) cannot request information about a prospective tenant/resident if that information relates to: - legal action taken by the prospective tenant/resident (including dispute resolution or tribunal matters); - a notice to remedy breach given to the prospective tenant/resident by a landlord/provider or vice versa; - the prospective tenant's/resident's history with respect to rental bonds (including any claim on a rental bond); or - statements of credit accounts or bank accounts belonging to the prospective tenant/resident which details transactions.
Verification of identity of prospective tenant or resident	N/A	A prospective tenant/resident may verify their identity by: - providing the landlord/provider (or their agent) with a copy of an original identity document; or - allowing the landlord/provider (or their agent) to access or sight the original identity document, in which case, the landlord/provider (or the agent) is unable to keep a copy without the prospective tenant's/resident's consent.

Timing for entry notices

Residential tenancies		
Object	Current position	New position
Notice required before landlord may inspect premises	If a landlord (or their agent) seeks to enter premises for a reason other than to inspect the premises, they must give the tenant at least 24 hours' notice before entry.	If a landlord (or their agent) seeks to enter premises for a reason other than to inspect the premises, they must give the tenant at least 48 hours' notice before entry.
Restriction on number of entries to premises	N/A	A landlord (or their agent) cannot enter premises more than two times in any 7-day period if: a. the landlord has given the tenant a notice to leave the premises; or b. the tenant has given the landlord a notice of intention to leave the premises. However, this restriction does not apply if: a. the entry is required to comply with the <i>Fire Services Act 1990</i> (Qld) in relation to smoke alarms or <i>Electrical Safety Act 2002</i> (Qld) in relation to approved safety switches; b. the tenant agrees to the entry; c. there is an emergency; or d. there are reasonable grounds to believe that entry is necessary to protect the premises from imminent or further damage.
Rooming accommodation		
Notice required before provider may enter resident's room	Single room A provider must give a resident at least 24 hours' written notice before entering the resident's room. Multiple rooms If the notice relates to entry of more than one room, notice may be given by posting it at least 24 hours before the entry.	Single room A provider must give a resident at least: a. 24 hours' written notice before entering the resident's room to clean it; or b. 48 hours' written notice before entering the resident's room for any other reason. Multiple rooms If the notice relates to entry of more than one room, notice may be given by posting it at least 48 hours before the entry.
Notice of entry to resident's agent	A provider or selling agent must give the agent to whom the resident normally pays rent at least 24 hours' written notice before entering the resident's room.	A provider or selling agent must give the agent to whom the resident normally pays rent at least: a. 24 hours' written notice before entering the resident's room to clean it; or b. 48 hours' written notice before entering the resident's room for any other reason.
Restriction on number of entries to room	N/A	A provider (or their agent) cannot enter a resident's room more than two times in any 7-day period unless the resident agrees, if: a. the provider has given the resident a notice to leave the rental premises; or b. the provider or the resident gives notice terminating the rooming accommodation agreement on a specified day. However, this restriction does not apply if: a. there is an emergency b. the provider reasonably believes the room has been abandoned; c. entry is required to carry out urgent repairs to the rental premises or a facility in the premises; d. the resident has agreed to the entry; or e. the provider has agreed to provide a service (other than accommodation) to the resident.

Fixtures and structural changes

Residential tenancies and rooming accommodation		
Object	Current position	New position
Fixtures and structural changes	A tenant/resident may attach a fixture or make a structural change to premises only if the landlord/provider agrees. a. agreement: the agreement must be in writing, describe the nature of the fixture or change, and outline the terms of the agreement (e.g. whether the tenant/resident may remove the fixture, how and when the fixture may be removed, and where removal is not allowed, the landlord's/provider's obligation to compensate the tenant/resident for the improvement to the premises). b. without agreement: if the tenant/resident attaches a fixture or makes a structural change without the landlord's/provider's agreement, the landlord/provider may waive the breach and treat the fixture or change as an improvement to the premises for its benefit.	The process depends on whether the premises is part of a body corporate scheme and the approval of the body corporate is required for the attachment of a fixture or making of a structural change to premises. If body corporate approval is required a. approval: if a tenant/resident seeks to attach a fixture or make a structural change to premises that are part of a body corporate scheme and the fixture or change requires body corporate approval, the tenant/resident may make a request, in the approved form, to the landlord/provider for approval. b. timeframe: the landlord/provider has 28 days to decide the request and, if approved, state that its approval is subject to agreement by the body corporate and the landlord/provider must give the request to the body corporate within 28 days of receipt. If body corporate approval is not required a. approval: if a tenant/resident seeks to attach a fixture or make a structural change to premises where approval of a body corporate is not required, the tenant/resident may make a request, in the approved form, to the landlord/provider for approval. b. timeframe: the landlord/provider has 28 days to decide the request, or a longer period as otherwise agreed between the tenant/resident and the landlord/provider. The landlord's/provider's agreement may be given subject to conditions. c. breach of agreement: if the tenant/resident does not attach the fixture or make the structural change in accordance with the landlord's/provider's agreement, the landlord/provider may waive the breach and treat the fixture or structural change as an improvement to the premises for its benefit. In each case, the landlord's/provider's agreement to the attachment of a fixture or making of a structural change must be in writing, describe the nature of the fixture or change, and state any conditions of the agreement (e.g. maintenance obligations, whether the tenant/resident may remove the fixture, how and when the fixture may be removed, the landlord's/provider's obligation to compensate the tenant/resident for the improvement to the premises).
Tribunal orders	N/A	If the landlord/provider refuses a tenant's/resident's request to attach a fixture or make a structural change to premises, the tenant/resident may apply to QCAT which may make an appropriate order as to the fixture or structural change. In deciding the application, the Tribunal may have regard to: a. the potential for the fixture or change to improve safety, security and accessibility of the premises; b. the likelihood that the fixture or change may be removed at the end of the tenancy/agreement or the premises can be restored to its original condition; c. whether the fixture or change would add value to the premises and whether the landlord/provider may treat the fixture or change as an improvement to the premises; d. whether building approvals are required; e. whether the fixture or change would need to be installed by a qualified tradesperson; f. if the premises are part of a body corporate scheme – whether body corporate approval is required; g. for a proposed structural change – the extent to which the change will modify the premises; and h. any other matter the Tribunal considers relevant.

Information about tenants and residents

Residential tenancies and rooming accommodation		
Object	Current position	New position
Protection of personal information	N/A	Applicants a. collection: a person may collect personal information about an applicant only for the purposes of assessing the suitability of that applicant as a tenant or resident. b. storage: the relevant person must store the personal information in a secure way and only access it for the purposes of assessing the applicant's suitability as a tenant or resident. c. destruction: if the applicant does not become a tenant or resident, their personal information must be destroyed in a secured way within three months of the commencement of the agreement for which they applied, or a longer period as agreed by the applicant. Tenants and residents a. collection: a person may collect personal information about a tenant or resident only if the information relates to the management of the agreement. Photographs taken of a rental property during inspections are considered information relating to the management of the agreement. b. storage: the relevant person must store the personal information in a secure way and only access it for the purposes of managing the premises. c. destruction: their personal information must be destroyed in a secure way within seven years after the end of the agreement to which the information relates.

For guidance on navigating these updates and ensuring your agreements and practices align with the latest legal requirements or to learn more about how these changes might impact your tenancy management, get in touch with Sarah Roettgers.



Sarah Roettgers
Partner
[+61 438 727 382](tel:+61438727382)



Annabel Ryan
Consultant
[+61 730 367 886](tel:+61730367886)



Do your diligence: recent case timely reminder for contamination warranties and disclosure obligations

Author: Margot King, Jennifer Dabire, Janice Lau and Ching Yee Tan



The recent NSW Court of Appeal case, *191 Bells Pty Ltd v WJ & HL Crittle Pty Ltd* [2024] NSWCA 221, is a reminder that buyers should actively seek specific information from sellers during the due diligence process. Sellers do not have a positive obligation to ‘guess and disclose’ what may be relevant for a buyer to complete its due diligence.

An obligation on the seller to assist “*as far as possible*” in the due diligence process does not impose a positive obligation on the seller to voluntarily disclose everything that may be relevant to the due diligence process, including any contamination of the land being sold. In this case, non-disclosure of known contamination did not amount to misleading and deceptive conduct under section 18 Australian Consumer Law (**ACL**).

Background

191 Bells Pty Ltd (**Buyer**) and WJ & HL Crittle Pty Ltd (**Seller**) entered into a put and call option deed for a property located in Meroo Meadow, NSW (**Property**) (**Option Deed**).

Prior to entering into the Option Deed, the parties were subject to a 3-week due diligence period under an exclusivity agreement (**Exclusivity Agreement**) during which draft environmental reports were obtained and annexed to a draft contract of sale in the Option Deed.¹

Clause 3 of the Exclusivity Agreement contained provisions for the Seller to support the Buyer’s due diligence efforts. These provisions required the Seller to:

- Allow the Buyer access to such information held by the Seller necessary for completing due diligence in relation to the proposed purchase.
- Assist the Buyer “*as far as possible*” in the due diligence process.
- Ensure that information provided to the Buyer for the purpose of auditing and enquiries was accurate and not misleading.
- Allow the Buyer access to the Property to carry out on-site due diligence and land investigations.²

After the Option Deed was signed, the final environmental reports identified significant contamination of the Property including waste burial pits containing asbestos, tyres and deceased animals.³ These items were buried in the pits by a director of the Seller, though the primary judge accepted that the director had no knowledge of the extent of contamination caused by (or the presence of asbestos in) those items.

The Buyer claimed that the Seller’s failure to disclose the land contamination identified in the finalised reports, some of which the Seller was aware of, amounted to misleading and deceptive conduct under section 18 of the ACL⁴ and sought to have the Option Deed declared void.

The Buyer contended that:

- The obligation imposed on the Seller to assist “*as far as possible*” meant it should have voluntarily disclosed the contamination; and
- The disclosures in respect of the condition of the Property contained in a draft sale contract annexed to the Option Deed amounted to a positive misrepresentation and gave rise to a ‘reasonable expectation’ that there were no other matters affecting the Property which needed to be disclosed.

The claim was dismissed at first instance, with the primary judge concluding that the Seller had not engaged in misleading or deceptive behaviour, nor did the provisions impose any obligation on the Seller to disclose such contamination.⁵

The Court of Appeal upheld the primary judgment and reiterated that no clause in the Exclusivity Agreement mandated the Seller to inform the Buyer of the contamination.⁶ The Court of Appeal found that the disclosures in the draft sale contract did not create a reasonable expectation of disclosure, and did not amount to a ‘half truth’ concerning the presence of contamination on the Property. That is, there was no conduct which was misleading or deceptive under section 18 of the ACL.

Other notable takeaways

1. A seller’s obligation to disclose contamination hinges on the transaction documents’ explicit language. In the absence of any clear contractual obligation, the Courts are less willing to intervene to imply terms into contracts. Agreements should be drafted with clauses that explicitly define the scope and requirements for disclosure.
2. Offering assistance with due diligence “*as far as possible*” does not create a positive obligation for the Seller to voluntarily disclose information. Buyers need to actively seek the information required to complete their due diligence.
3. The transaction documents should include appropriate warranties and clear language on what constitutes true and fair disclosure.

4. Buyers are ultimately responsible for the thorough vetting of the property. This emphasises the need for rigorous, timely due diligence and specialised environmental assessments. Experts should be engaged early on to ensure all potential issues are identified and provided for in transaction documents, prior to execution.
5. The mere absence of disclosure does not inherently constitute misleading or deceptive conduct under the ACL. Intentional concealment or purposeful misrepresentation must be established for such a claim. Parties should ensure that all actions and communications during property transactions remain transparent and defensible.

We are committed to delivering outcomes that matter to you. If you have any further questions or require assistance with issues on contamination warranties, due diligence, or disclosure obligations, do not hesitate to reach out to Margot King.



Margot King
Partner
[+61 406 056 651](tel:+61406056651)



Ching Yee Tan
Senior Associate
[+61 863 119 160](tel:+61863119160)



Janice Lau
Lawyer
[+61 863 119 160](tel:+61863119160)



¹191 Bells Pty Ltd v WJ & HL Crittle Pty Ltd [2024] NSWCA 221 [34]-[35].
²191 Bells Pty Ltd v WJ & HL Crittle Pty Ltd [2024] NSWCA 221 [31].
³191 Bells Pty Ltd v WJ & HL Crittle Pty Ltd [2024] NSWCA 221 [44].
⁴191 Bells Pty Ltd v WJ & HL Crittle Pty Ltd [2024] NSWCA 221 [2].
⁵191 Bells Pty Ltd v WJ & HL Crittle Pty Ltd [2024] NSWCA 221 [48]-[80].
⁶191 Bells Pty Ltd v WJ & HL Crittle Pty Ltd [2024] NSWCA 221 [18].

New ruling on rent review caps will have knock-on effects for tenants and landlords

Author: Sarah Roettgers, Faye Winterflood and Annabel Ryan

On 20 December 2024, the Supreme Court of Victoria handed down its decision in *ALDI Foods Pty Ltd v Northcote Shopping Centre Pty Ltd* [2024] VSC 799 where it found that rent review caps do not contravene section 35(2) of the *Retail Leases Act 2003* (Vic).

In doing so, the Supreme Court overruled a previous order of the Victorian Civil and Administrative Tribunal (**VCAT**) and set a new precedent that favours the interests of tenants in retail leasing arrangements.

Need to know

- The Supreme Court of Victoria has validated rent review caps on retail leases, marking a significant decision that supports tenants.
- This judgment overturns a previous VCAT decision, changing the legal landscape by asserting that rent review caps are not void.
- Tenants now have greater financial security, with confirmed legal backing for capped increases in their leases.
- Landlords should anticipate increased tenant requests for rent caps and may need to adjust their lease negotiation and rental strategies in response.

Background

In Victoria, rent reviews in respect of retail leases are governed by section 35 of the *the Act 2003* (Vic). The so-called ‘ratchet clause’ is regulated by section 35(3) of the Act which operates to void any clause that does not allow rent to be reduced following a rent review.

Importantly, however, there is no equivalent provision in respect of rent increases and as such, the lack of clarity on this issue has been the subject of various cases to date. The recent Supreme Court decision assists in clarifying the position for both landlords and tenants going forward.

An exercise of statutory interpretation

In 2023, the VCAT resolved this uncertainty. In making its determination on *Q St Kilda Tenancy Pty Ltd v Kane (Building and Property)* [2023] VCAT 75, VCAT found that the prescription of an upper limit was prohibited by section 35(2) of the Act by reason that it constitutes a second method of review in circumstances where only one method is permitted under the statute.

Over the past 18 months, VCAT has applied this logic in holding that caps on rent reviews are void. As a result, parties have been forced to determine rent by way of agreement or, in the absence of such agreement, market review in accordance with section 35(7) of the Act. This was reflected in the VCAT order granted to ALDI in the earlier decision of *ALDI Foods Pty Ltd v Northcote Shopping Centre Pty Ltd* [2024] VSC 799 in which VCAT held that any cap on rent reviews was void under section 35(2) of the Act.

However, this is no longer the case following the decision of the Supreme Court.

The decision

ALDI sought to rely on a rent review mechanism in the lease agreement which capped the consumer price index (**CPI**) review at 6%. Naturally, the landlord relied on previous decisions handed down by VCAT to argue that the mechanism was void on the basis that it was not contemplated by section 35(2) of the Act. In response, ALDI argued that the 6% cap should be interpreted as being a limit on a rent review method, rather than being a second method. ALDI based its argument on the following grounds:

1. Section 35(2) of the Act does not contain an express prohibition on rent review caps.
2. In the absence of any direct conflict with the Act, the court should uphold the contract as agreed between the parties.
3. By failing to impose a prohibition on cap clauses in circumstances where such a prohibition existed in respect of ratchet clauses, the legislature clearly intended for rent review caps to be permissible.

4. The Act, which is designed to provide avenues for remedial action, should be construed in favour of tenants (especially in the context of section 35).

The Supreme Court agreed with the arguments put forward by ALDI and decided that rent review caps do not conflict with the object and purpose of section 35 of the Act.

Significance

The decision not only overturns the order previously issued by VCAT but sets a new precedent for retail leasing arrangements in Victoria. Importantly, the decision demonstrates that the Supreme Court is willing to interpret the Act in a manner which encourages fairness between landlords and tenants.

It is yet to be seen whether the landlord will appeal the Supreme Court’s decision.

What does this mean for you?

For tenants, this decision provides greater certainty and financial predictability by confirming that rent review caps are valid under the Act. This means tenants may have stronger grounds to negotiate capped increases in their leases, offering protection against unexpected rent increases.

For landlords, the ruling may prompt increased tenant requests for rent caps, potentially limiting rental growth in high-inflation environments. Landlords should carefully review their leases and consider how this decision might affect future negotiations and long-term rental strategies.

If you have any queries or require assistance with your leasing negotiations, please contact Sarah Roettgers.



Sarah Roettgers
Partner
[+61 438 727 382](tel:+61438727382)



Faye Winterflood
Consultant
[+61 7 3036 7886](tel:+61730367886)



Annabel Ryan
Consultant
[+61 730 367 886](tel:+61730367886)



Key Contacts



John Frangi
Partner and Co-Head of
Real Estate Markets
[+61 417 252 203](tel:+61417252203)



Sarah Roettgers
Partner and Co-Head of
Real Estate Markets
[+61 438 727 382](tel:+61438727382)



Brit Ibanez
Partner - Head of Litigation
[+61 421 355 503](tel:+61421355503)



Veno Panicker
Partner - Construction
and Infrastructure
[+61 409 495 242](tel:+61409495242)



Tricia Moloney
Partner - Banking
and Finance
[+61 434 154 180](tel:+61434154180)



Erik Setio
Partner - Funds and
Financial Services
[+61 434 651 167](tel:+61434651167)



Margot King
Partner - Real Estate
[+61 434 154 180](tel:+61434154180)



Seema Sandhu
Partner - Tax
[+61 434 603 391](tel:+61434603391)



Paul Chambers
Partner - Property
[+64 21 996 455](tel:+6421996455)



Andrew Vincent
Partner - Banking and
Finance
[+61 417 544 925](tel:+61417544925)



Amelia Prokuda
Partner - Planning
and Environment
[+61 410 032 358](tel:+61410032358)



Clementyne Rawlyk
Partner - Corporate,
M&A, Private Equity
[+61 412 034 116](tel:+61412034116)



Elena Stojcevski
Partner
[+61 434 501 344](tel:+61434501344)



Hamish Geddes
Partner
[+61 416 017 941](tel:+61416017941)

