



Commercial Property Due Diligence

1. Certificate of Title

- (a) Identify land.
- (b) Obtain current title search.
- (c) Check for any previously unknown interests.
- (d) Obtain and review all documents evidencing: easements, caveats, restrictive covenants, notifications, memorials or other *encumbrances*.
- (e) Request details of any unregistered interests, including car parking arrangements, if any, particularly with local authorities or adjoining owners.
- (f) Get clause 42 Certificate under Metropolitan Region Scheme – check zoning.
- (g) Check with local authority as to any restrictions on land.

2. Restrictions on sale

- (a) Confirm that there are no options granted to third parties.
- (b) Confirm that there are no pre-emptive rights in favour of tenants.
- (c) Confirm that there are no other restrictions in leases likely to affect the sale, or the purchaser's capacity to operate or expand the building.
- (d) Ensure that your key staff are secure in their employment (as best as possible) whilst at the same time not usually advising of any proposed sale until it is a known fact (i.e. just before settlement).

3. Leases

- (a) Locate all lease documents.
- (b) Review signed* lease documents including:
 - (c) Extension and assignment documents
 - (d) Dates of expiry/exercise of options to renew
 - (e) Confirm WAPC approvals were granted prior to entry into lease and endorsed on the lease where necessary.
 - (f) Confirm that there are no 'first rights of refusal' to purchase.
 - (g) Obtain details of any bonds/deposits/bank guarantees held.
 - (h) Obtain details of fit-out.
 - (i) Details of tenant's paint and repair obligations.
 - (j) Check details of any caveats lodged - leasehold interests.
 - (k) Check details of any special access arrangements.
 - (l) Check for any tenants that are in arrears.



- (m) Check if there is a car parking licence.
- (n) Prepare a tenancy schedule setting out all of the above information.
- (o) Check GST position in leases – long term leases may not have GST provisions allowing recovery of GST from tenant. This can have significant ramifications for purchaser.

4. Management

- (a) Maintenance agreements
 - (i) Review all contracts including in respect of the following:
 - (1) cleaning/sanitation
 - (2) physical maintenance
 - (3) lifts
 - (4) escalators
 - (5) plant
 - (6) electrical
 - (7) neon signs
 - (8) background music
 - (ii) Check assignment provisions and expiry date of these contracts.
 - (iii) Prepare a schedule with the relevant details of the maintenance contracts.
 - (iv) Check that owner has certification as to safety facilities (Worksafe requirements).
- (b) Utilities
 - (i) Check for any special arrangements with Western Power and/or Alinta Gas.
- (c) Rates and tax adjustments
 - (i) Confirm what has been paid and what is required to be paid.
- (d) Business Names / Trade marks
 - (i) Confirm whether building name is a registered business name (note: registered trade mark is best).
 - (ii) Check to see whether the building name, if it is used by tenants, is covered by the lease.
 - (iii) Check signage rights in respect of building. There can be complications for a purchaser if the signage rights conflict with the purchaser's requirements for signage.
- (e) Insurance
 - (i) Confirm details of current insurances.



- (ii) Check that insurances conform with lease requirements.
- (iii) Ask for details of any current insurance claims.
- (iv) Title insurance?
- (f) Tax Issues
 - (i) For depreciable items, ask for estimate of proposed written down value. Depreciation can be very important for a purchaser.
 - (ii) GST – consider whether the sale is a sale of a going concern or whether the property will be sold under the margin scheme.
- (g) How Much Funds do you Need?
 - (i) Confirm what chattels (e.g. premises plant & equipment), fixtures and fittings will be included in the sale – conduct a Personal Property Securities Act encumbrance check on the PPSR.
 - (ii) Obtain proof of ownership of chattels if necessary.

5. Physical

- (a) If an identification survey exists, is it current and can the purchaser rely on it?
- (b) Consider whether a new identification survey should be completed.
- (c) Obtain copies of all plans and specifications held by the vendor.
- (d) Boundary (note: watch for 'adverse possession' with old fences/ dividing walls, shed etc).
- (e) Consider whether there are any known or suspected encroachments.
- (f) Consider also undertaking a Property Interest Report from Landgate to identify any unregistered interest that may affect the use of the property.
- (g) State of the property
- (h) For recent buildings:
 - (i) is the 'benefit' of the building contract (e.g. structural warranties) to be passed on to the purchaser?
 - (ii) confirm appropriate certificates for the local authority and DFES have been issued.
- (i) Building and structural report.
- (j) Confirm that no asbestos or 'concrete cancer' exists.
- (k) Consider the need for an environmental audit (e.g. Contaminated Sites Act issues).
- (l) Consider whether any other obvious physical defects should be reviewed by engineers or other experts.
- (m) Review any consultant's report for liability issues.
- (n) Ask for "as-built" drawings to assist the purchaser's inspection of the property.



- (o) Plant and machinery
 - (i) Ask for:
 - (1) plant and machinery permits and certificates
 - (2) warranties and operational manuals
- (p) Ask whether any major maintenance or structural repairs are planned for the sale period and the source of the funds to pay for it.
- (q) Review any consultant's inspection reports for liability issues.

6. Planning, licensing and environment

- (a) Current zoning and use
 - (i) Conduct the usual purchaser's inquiries with local authority, WAPC, etc.
 - (ii) Confirm current zoning and that the use/uses conform with that zoning with the local authority and the WAPC.
 - (iii) Review compliance of the property with original and any recent planning consents/building approvals, especially lettable area limits and car parking requirements.
- (b) Work Orders
 - (i) Check whether any work orders exist (i.e. local authority, DFES, DEP or Worksafe WA).
 - (ii) Enquire of Water Corporation, Main Roads, local authority, Western Power and Alinta Gas if any major works are planned.
- (c) Liquor Licensing
 - (i) Check if any premises in the building has a liquor licence.
 - (ii) Obtain a copy of the liquor licence and approved plans.
 - (iii) Conduct enquiries with the licensing authority – (e.g. disciplinary action, outstanding works orders etc)
- (d) Environmental
 - (i) Search DEP databases and recent environmental assessments.
 - (ii) Obtain permission from vendor to conduct environmental testing if required.
 - (iii) Contamination?
- (e) Heritage and Aboriginal Heritage
 - (i) Conduct searches of:
 - (1) Local Government Municipal Inventory;
 - (2) Heritage Council Register;
 - (3) Register of the National Estate (Australia Heritage



- Commission);
- (4) Fifth schedule of the City of Perth Planning scheme for National Trust of Australia listing;
- (5) Department of Indigenous Affairs Register of significant sites and objects; and/or
- (6) Aboriginal Lands Trust Estate website.
- (ii) Obtain permission of vendor to conduct heritage assessment if necessary.
- (iii) Review any heritage assessment and reports and advise clients.
- (f) Plans
 - (i) Ensure that all plans for the building (e.g. electrical, construction etc) are available. *These are essential for a purchaser.*
- (g) Water Issues
 - (i) Does the purchaser require water to be drawn from a water course or interference with a water course?
 - (ii) Are 'riparian rights' (to draw water) integral to the value of the property?
 - (iii) Is there an existing water licence?
 - (iv) Should the contract be subject to the Department of Water undertaking to grant the appropriate water licence?
 - (v) Performing the Sale Agreement

7. Other Enquiries

- (a) Conduct ASIC, PPSR and court registry searches (including bankruptcy register).
- (b) Trustee?

8. Status of tenants and other contracting parties

- (a) Conduct ASIC, PPSR and court registry searches (including bankruptcy register) of major and other relevant parties.

9. How to avoid unnecessary legal risk, cost and stress

- (a) Don't rely on friends, 'mates', agents or other non-qualified third parties for "advice". They:
 - (i) do not act for you,
 - (ii) do not owe you no fiduciary duty; and
 - (iii) are not qualified (or insured!) to give you proper legal advice.
- (b) Engage a lawyer at the right time – e.g. you do the deal but before you accept a contract, be sure to obtain appropriate legal advice.



- (c) Business lawyers can add value and can be better than warranty/insurance claims or litigation!
 - (d) If a dispute arises, be sure to clarify the issues in writing, keep all material information/documents and seek advice early (also, if applicable, promptly notify your relevant insurer – rights of subrogation).
10. **Seek professional, friendly legal advice so you can make an informed decision.**

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