



## Ashurst's Hotel Check-in

### Heads of Terms

- Key commercial terms
- Timetable
- Ensure alignment

### Structuring

- Key commercial terms
- Timetable
- Ensure alignment

### Management Contract?

- Assignment or vacant possession?
- Termination fee liability on VP
- Steps and process for transition and de-identification on VP

### FIRB approval

- Condition Precedent
- Complexities if vacant land or sensitive land
- Critical to timing

### Liquor licence transfer

- Effect on timing
- Regulator liaison

### Due Diligence

- Critical
- Financial, technical, environmental and legal due diligence
- Benefits of Seller due diligence

### Period between exchange and completion

- Critical approvals
- Timing to complete

### Adjustments

- Cut off time
- Stocktake
- FF&E Fund

### Incoming financing

- Non disturbance agreement with operator

### Employees

- Due Diligence
- Reputational risk
- Effective transfer
- Proper communication

# Top 10 Tips for Hotel Deals

The Ashurst Hotels Team has been Australia's market leading hotel transactional practice for almost 3 decades. Over these years and the vast number of hotel transactions we have acted on we have gained a wealth of insights that we would like to share with you.

Here is a 5 minute read on the top 10 key issues for both sellers and buyers to consider in any hotel transaction.

## 1. Heads of Terms

The heads of terms provides confirmation on the agreed key commercial terms and ideally also sets out a clear timetable to keep the parties and the deal on track. Getting this right ensures key alignment on the fundamental points at the outset, providing a strong platform for the success of the deal. It is imperative that your lawyers are involved to ensure you have all points covered.

## 2. Structuring

The buyer needs to get on top of its incoming ownership structure early – identifying the buyer entity, how/where it will be set up and completing any establishment logistics. It is critical that the buyer gets the right advice on structuring so that it can maximise the value of its investment, ensure it is bankable for financiers and provide flexibility on exit. A buyer will also need to consider whether an Opco/ Propco structure is required.

## 3. Management Contract Assignment or VP?

It is fundamental to determine early on if the existing management contract is to be assigned or terminated on sale. In either case, you need your legal advisors to understand what's required and to manage this process so this does not disrupt completion timing. In the case of vacant possession - be clear on who is liable for any termination fees and who is responsible for branding de-identification steps and costs and when.

## 4. Foreign Investment Review Board (FIRB) approval

As more and more offshore capital is being invested into the market, FIRB approval is an increasingly common condition precedent to hotel deals. Hotels are considered by FIRB to be developed commercial real estate, meaning transactions under \$289 million will not typically need FIRB approval.

A buyer will still need FIRB approval for a transaction under \$289 million where for example the buyer is considered by FIRB to be a foreign government investor, the property includes a vacant lot or if the hotel has certain characteristics, such as heritage listing, certain telecommunications towers, underground rail infrastructure or certain types of substations.

Where transaction timing is critical, applications for FIRB approval can be lodged prior to signing of the sale contract to seek to remove FIRB conditionality pre-signing or alternatively reduce the timeframe to reach completion. There are however application fees involved and so not all buyers may be prepared to do so. We have a longstanding and good relationship with FIRB that can assist in managing this process.

## 5. Liquor licence transfer

Each Australian state and territory jurisdiction has a different liquor licensing regime bringing with it a different transfer process. Both sellers and buyers need to understand what is required in the relevant jurisdiction and how this timing may impact the transaction. Getting this right is critical to keeping the transaction on course and preventing unnecessary delay. We are one of the few major firms that has a national liquor licensing practice and good relationships with regulators throughout Australia.

## 6. Due Diligence

Due diligence is key. In addition to the usual financial, technical and environmental due diligence, legal due diligence needs to focus on a number of areas – including employment, material contracts, insurance, litigation and claims, liquor licence and intellectual property, title and planning. Retail leasing due diligence is also required for many hotel assets with retail leases – noting that retail leasing legislation can give rise to specific rights and obligations on owners.



Any warranty regime will be limited by what has been disclosed so understanding what has been disclosed and making sense of these risks is key.

Seller due diligence is becoming increasingly popular - this allows sellers to enter into the sale process aware of any issues and limits the risk of subsequent price chip or other deal stumbling blocks. It can also enhance price and reduce transaction timeframes.

#### 7. Period between exchange and completion

There is an important balance to be achieved in determining the buyer consents required in connection with the operation of the hotel business after exchange of contracts and before closing. The seller needs to be able to continue to run its business, and the buyer needs to protect its incoming asset. We recognise the importance of a fair, workable regime for the benefit of all parties involved in a transaction and in the best interests of preserving value of the hotel asset and hotel business.

#### 8. Adjustments

Hotel revenue comes in daily which makes the adjustment process on hotel transactions more complex than on a straightforward property sale. Clear agreement on the cut off time for each party's entitlement to revenue and expenses is necessary, as well as the process for any stocktake and the approach taken to adjustments for any transferring employee entitlements. Getting the proper allocation right will avoid disputes down the track. As part of this process, it is key for a buyer to assess early on any current balance in the FF&E Fund, how any existing FF&E account is to be treated under the sale documents and what amount the buyer could be required to fund on completion.

#### 9. Incoming financing

If a buyer has incoming financing, you must bed down early any requirement to have a non disturbance agreement with the incumbent manager as part of the completion deliverables. Although it is a buyer issue - if completion funding is coming from debt financing, the seller has a vested interest to ensure this is progressing well so that the transaction timeframes are not compromised.

#### 10. Employees

Employees are the backbone of hotel operations and the smooth transfer of employees is critical for all hotel transactions. The underpayment of employees in the hospitality industry is headline news - and so understanding any risks identified by due diligence is key from both a financial and reputational perspective. Specialist employment expertise is needed for this, as well as to advise on employee offer letters so that they comply with the strict requirements of employment legislation. Agreement between the parties on the communications and messaging with employees during the process to ensure a smooth transition also cannot be understated. Ashurst have a market leading Employment Practice that can assist with this process.

Just like each hotel is different and brings with it its own unique charm, each hotel transaction has its own specific issues – whether it be a cladding issue, a key material contract, an outstanding claim, insurance requirements or a restriction on title.

With the right advice, and the right team on your side, most issues can be managed and addressed so that the deal can get done. Our hotels team, from our partners to our lawyers, from our intellectual property team to our employment team, all live and breathe hotels and would love to team up with you on your next deal.

# Ashurst's dedicated hotels team



**John Stawyskyj**

Head of Hotels and Leisure  
T +61 2 9258 6567  
john.stawyskyj@ashurst.com



**Pauline Tan**

Head of Real Estate, Australia  
T +61 2 9258 5638  
pauline.tan@ashurst.com



**Lindy Randall**

Partner  
T +61 2 9258 6565  
lindy.randall@ashurst.com



**Emmy Ko**

Senior Associate  
T +61 2 9258 6224  
emmy.ko@ashurst.com



**Alana Eyles**

Senior Associate  
T +61 2 9258 6630  
alana.eyles@ashurst.com



**Joy Yi**

Senior Associate  
T +61 2 9258 5930  
joy.yi@ashurst.com



*"A client praises the team's "sensitivity and adaptability to configure transaction documentation to meet commercial outcomes whilst delivering risk-managed legal outcomes." Another client highlights: "They have a really nice culture; consistently all the people we work with are just very pleasant and capable people, from partners down to junior associates."*

**CHAMBERS ASIA-PACIFIC**



*"At Ashurst, areas of strength include the hospitality sector, where John Stawyskyj and Pauline Tan are considered by one client to be the "best hotel advisers in the market".*

**LEGAL 500 ASIA-PACIFIC**

This publication is not intended to be a comprehensive review of all developments in the law and practice, or to cover all aspects of those referred to. Readers should take legal advice before applying the information contained in this publication to specific issues or transactions. For more information please contact us at [aus.marketing@ashurst.com](mailto:aus.marketing@ashurst.com).

Ashurst Australia (ABN 75 304 286 095) is a general partnership constituted under the laws of the Australian Capital Territory and is part of the Ashurst Group. Further details about Ashurst can be found at [www.ashurst.com](http://www.ashurst.com).

No part of this publication may be reproduced by any process without prior written permission from Ashurst. Enquiries may be emailed to [aus.marketing@ashurst.com](mailto:aus.marketing@ashurst.com).

© Ashurst 2022

[www.ashurst.com](http://www.ashurst.com)