

Construction law around the world—Australia

Mini Summary

Construction analysis: Over the last ten years, Australia has seen a significant rise in major projects in the energy and resources sector. As these projects near their completion, Andrew Stephenson, construction, infrastructure and international arbitration lawyer, and partner in the Melbourne office of Corrs Chambers Westgarth, predicts an increase in contentious work and warns that competition is likely to be fierce for new projects.

What are the key differences between UK construction law and the law in Australia?

Construction law in the UK and Australia is, as a general matter, not significantly different. English precedents are not binding in Australia but provide persuasive authority for Australian courts. In construction law in particular, there are relatively few cases which proceed to full judgment and so Australian lawyers also look to other common law countries, including England and Wales, for developments in construction law. There are, however, some important differences that have developed between Australian and UK construction law. Four examples are set out below.

First, there are differences in the forms of contract which are used in projects. Australian projects tend to use standard forms which have been developed in Australia. These are similar in concept to English standard forms, but differ in the detail.

Secondly, there are differences in the legislation which provides for adjudication of construction contract disputes. The ‘security of payment’ legislation in Australia varies from state to state and is generally narrower in scope than the scheme under the Housing Grants, Construction and Regeneration Act 1996 (UK).

Thirdly, a complicating factor for construction law in Australia is that all Australian jurisdictions have in place schemes for proportionate liability. The schemes again vary from state to state and federally. In identified circumstances, the proportionate liability regimes replace the concept of joint and several liability with the concept that a wrongdoer’s liability is limited to a proportion of the loss or damage claimed having regard to the extent of the wrongdoer’s responsibility for the loss or damage. The precise application of the various proportionate liability schemes are yet to be determined by Australian courts.

Fourthly, there are differences in the resolution of construction disputes. Most construction disputes in Australia are dealt with by arbitration rather than litigation. Unlike the Arbitration Act 1996 (UK), Australia has adopted the UNCITRAL Model Law (with minor amendments) for domestic and international arbitration. Those familiar with international arbitration will understand the broad framework of the Model Law in Australia.

What are the challenges to doing business in Australia?

In the past decade, the Australian economy has benefited from significantly elevated commodity prices over a prolonged period. This led to the development of very large projects in the energy and resources sector. Many of those projects are now nearing completion and so the supply of commodities is increasing significantly. In more recent times, demand for these commodities has dropped. As a consequence, commodity prices have dropped. This will see a reduction in the number of new major projects in the short to medium term. It can be expected that demand for construction law services will follow. For

construction lawyers, much will depend upon governments' capacities to promote significant new infrastructure projects, probably under public-private partnership (PPP) models which see the private sector finance, build and operate public infrastructure in return for long-term public funding.

Are there any particular opportunities in this jurisdiction?

In the short term, there is contentious work arising from the large projects in the energy and resources sector which are now nearing completion. Likewise, there will be some opportunities in the PPP projects, but that space is serviced by highly qualified specialists and competition is stiff.

Are there any considerations around dispute resolution that are particular to Australia?

Australia's federal model complicates dispute resolution in comparison with the UK. In Australia there are six state supreme courts and one federal court. These jurisdictions are ultimately subject to appeal to the High Court, but the High Court rarely decides construction matters. Each jurisdiction has different procedures, although all the jurisdictions broadly follow the common law adversarial system. Building from court reforms in the UK, some state jurisdictions have in recent years instituted fast-track commercial lists or specialist lists which have improved the speed with which disputes can be resolved. Nevertheless, arbitration continues to generally be a speedier method than litigation for resolving construction disputes.

Interviewed by Jenny Rayner.

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