Corrs Projects Update

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Welcome to the latest edition of Corrs Projects Update

This publication provides a concise review of, and commercially focused commentary on, the latest major judicial and legislative developments affecting the Australian construction and infrastructure industry.

This edition includes:

- **Feature articles:**
  - Dispute boards and the Olympic Games: A tried and tested method of dispute avoidance;
  - Ensuring effective stakeholder consultation following *Santos v Tipakalippa*; and
  - An historic moment: The HCCH judgments convention to enter into force on 1 September 2023.
- **Concise notes on cases of interest**
- **Other essential reading**

We hope that you will find this edition of *Corrs Projects Update* both informative and thought provoking.

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Editors' note: *The information contained in this publication is current as at May 2023.*

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For an Olympic Games host city, such as Brisbane in 2032, it is imperative that the suite of contracts it enters into to build the venues, facilities, and infrastructure contain appropriate dispute avoidance and resolution mechanisms to manage the risks, and inevitable disputes, as and when they arise.

Based on a history of success, dispute boards, in whichever form, are most appropriate for the avoidance of disputes.

Keywords

dispute avoidance

The Olympic Games are an economic, logistical and legal feat that tests a nation's ability to deliver quality infrastructure in a timely manner on the world stage.

A host city is placed under immense pressure to have all the necessary facilities, venues and other associated construction work completed on time for the sporting events to commence.

Delay is not an option and every government decision is openly scrutinised in the public eye. However, as all in the construction industry know, undertaking major projects is fraught with risk in terms of delay, defects, cost blowouts and a raft of other unexpected consequences.

For an Olympic Games host city, such as Brisbane in 2032, it is imperative that the suite of contracts it enters into to build the venues, facilities, and infrastructure contain appropriate dispute avoidance and resolution mechanisms to manage the risks, and inevitable disputes, as and when they arise.

Based on a history of success, this article proposes that dispute boards, in whichever form, are most appropriate for the avoidance of disputes. They are also useful for resolving disputes that cannot be avoided without the need to have recourse to formal dispute resolution processes such as public litigation or arbitration

Part 1: Introduction

In Australia and internationally, dispute boards (**DBs**) have been used successfully on a number of construction projects. DBs, in their various forms, are an alternative to the standard dispute resolution processes that parties often include in their construction contracts.

Although used less frequently, DBs, when established and utilised appropriately, are a highly effective mechanism for avoiding (and where necessary resolving) disputes, providing a project with the optimal chance of successful completion within time and budget.

Importantly, DBs are a creature of contract. The contract prescribes the number of neutral third-party members on the panel, the rules and procedures the panel will apply and follow, and the scope of their role during the project's lifetime.

In general, members of a DB meet to review the project's progress, provide recommendations to resolve issues (often in an interim and non-binding manner) and proactively assist the parties to avoid formal disputes. As will be discussed in Part 2 of this article, the effectiveness of a DB hinges upon, amongst other things, careful consideration of the structure of the DB, the parties trusting and investing in the DB, and appropriately skilled members being selected to the panel.

An array of different construction projects have utilised DBs. According to the Dispute Resolution Board Foundation (**DRBF**), there have been 107 projects totalling A$59.2 billion in Australia since 1987 that have used a DB in some format.[1]

1 Dispute Resolution Board Foundation, Projects Australia <www.drbf.org.au/projects-members/australia>

Within Australia, use of DBs has increased significantly in the past decade, particularly in New South Wales and Queensland. Internationally, given the popularity of the International Federation of Consulting Engineers (**FIDIC**) contracts, which have DBs in its standard terms, DBs are more commonplace.

Relevantly, for the purpose of this article, DBs were used in the contracts for the London and Rio Olympic Games in 2012 and 2016 respectively. Part 3 of this article details how DBs functioned at those Olympic Games and the unique way that they were designed to be most effective. The use of DBs in London and Rio, and the success achieved, is an appropriate platform against which to consider their continued and future use in the Brisbane 2032 Olympic Games.

Since the International Olympic Committee named Brisbane as the host of the 2032 Olympic and Paralympic Games in July 2021, Queensland has done, and continues to carry out, significant work in preparation for the games. An Olympic Infrastructure Agency is expected to oversee the developments that include rebuilding and improving existing stadiums and constructing five new stadiums.

It is estimated that most of the capital investment will occur in the second half of this decade, averaging A$800 million to A$1.1 billion annually between 2027 and 2030.[2] Further, it will cost almost A$7 billion to run the games, which will be privately funded. On its own, the city's major stadium, the Gabba, will cost A$2.7 billion to be rebuilt so that it is ready for the opening and closing ceremonies. Funding for the Gabba will be paid for by the Queensland State government. There are also plans for a new 'Brisbane Live' entertainment arena at Roma Street that will be built seating up to 18,000 people.

Work is already underway on the Brisbane Metro – a fully electric, high-capacity train network linking the city to the suburbs to make it easier to connect people with the sporting venues hosting events. Victoria Park is also expected to be transformed and a number of 'Green Bridges' will be constructed to improve access and enhance movement around the city. Ultimately, the Brisbane 2032 Masterplan will require cooperation from all levels of government and the private sector to ensure a successful Olympic Games.

Cooperation, collaboration and dispute avoidance in Olympic Games projects is crucial. The Olympic Games are uniquely challenging. They have an immovable deadline, require an inordinate number of people and contractors to ensure completion, and are scrutinised globally.[3] To this point, Anika Wells, the federal Sports Minister, has acknowledged the hard deadline associated with Olympics Games projects.

But, the challenge for Brisbane in 2032 is made more complex by the current climate of the construction industry, which is plagued by global supply chain issues and the rising costs of materials and resources. It is in that context that the developments in Brisbane are primed for disputation.

Accordingly, Part 4 of this article explores the use of DBs as a principal mechanism for dispute avoidance, and where necessary, resolution in the 2032 Olympic Games in the various contracts with the contractors that will ultimately be delivering the projects on the ground.

Part 2: A snapshot of DBs: the 'what', 'why' and 'how'

What are DBs?

A DB is a contractual mechanism for real-time dispute avoidance and rapid dispute resolution. Professor Paula Gerber refers to DBs as a kind of dispute avoidance process, which fundamentally act as a "circuit breaker to prevent escalation of conflicts".[4]

There are various forms of DBs, including Dispute Resolution Boards, Dispute Avoidance Boards (**DABs**), Dispute Adjudication Boards and FIDIC's Dispute Avoidance and Adjudication Boards to name a few. This article refers to the general umbrella term of DBs throughout.

A customary DB comprises a panel, usually three, of neutral third-party experts appointed by the parties at the outset of the contract. The DB members meet regularly during the course of the project, irrespective of whether any dispute has been referred to them, to review project progress and facilitate early resolution of issues as and when they arise before escalation into formal disputes.[5]

Depending on the nature of the role of the DB stipulated in the contract, the parties can request the DB to provide informal decisions during the project. The DB can also be available to provide more formal recommendations, or decisions, on the likely outcome of any dispute. The preference in Australia is for DBs to provide interim binding decisions. (For example, the decision would be binding unless challenged by a party within 30 days of the DB's decision.)

Significantly, a DB's primary focus is on dispute avoidance, which is in contrast to processes such as mediation, expert determination, arbitration, litigation and other forms of alternative dispute resolution — each of these is reactive in nature and deal with the resolution of crystallised disputes.

2 The Urban Developer, *Brisbane Olympics 2032: Development and Infrastructure Guide* <www.theurbandeveloper.com/articles/brisbane-olympics-2032-development-infrastructure-projects>

3 Paula Gerber and Brennan Ong, *Best Practice in Construction Disputes: Avoidance, Management and Resolution* (LexisNexis Butterworths, 2013) 198.

4 Paula Gerber and Brennan Ong, 'Best Practice in Construction Disputes' (2014) 80(3) *Arbitration* 346, 347.

5 Christopher Miers, 'Real Time Dispute Resolution in Rio de Janeiro … Since You Cannot Delay the Olympic Games' (2015) 31(7) *Construction Law Journal* 399, 399.

Why are DBs used?

The principal benefit to be gained from a DB is the avoidance of formal disputes on a project through rapid real-time decision making thereby maintaining project relationships and progress of the works. It is believed that DBs have a positive impact on project budget and timely project completion. This is particularly important on high profile construction and infrastructure projects such as the Olympic Games that have an immovable end date and budgetary constraints.

The DB process may be considered akin to mediation (save for the crystallisation of a dispute) in that the panel members aim to assist the parties in a 'without prejudice' manner to find 'best for project' outcomes.[6] DBs are advantageous in that they can enhance more productive communication between the parties and promote the early resolution of issues before each side becomes entrenched in their positions. The evidence indicates that in the majority of cases, projects with DBs have been completed under budget, finished on or ahead of time, and avoided litigation or arbitration costs.

How can DBs be used most effectively?

The incorporation of a DB on a construction project must be done by carefully considering the nature, size and location of the project, and the parties involved. Only once the specific needs of the project and parties are identified can a DB be properly designed.

In particular, the choice of panel members is often one of the critical factors in a DB's success. It is imperative that the parties have confidence, faith and respect in the panel members and the DB procedures. In order for the DB to have the highest chance of success, all parties must also put any adversarial tendencies to one side and adopt a cooperative approach at the outset.

Depending on where the project is located, it may be necessary for the panel members to have had experience in the particular region and understand the local laws. Further, the panel members may require specific legal or technical skills depending on the nature of the project and the potential issues the parties may anticipate arising.

Accordingly, for a DB to be most effective, the parties must tailor the processes to meet the needs of the individual project.

Part 3: Use of DBs on previous Olympic Games projects

2012 London Olympic and Paralympic Games

The 2012 London Olympic and Paralympic Games (**London Olympics**) involved multiple large-scale projects, comprising venues (including the Olympic stadium, aquatics centre, velodrome and velopark), transportation improvements (including utilities, structures, bridges and highways) and broadcasting and media. In total, the 55 major projects for the London Olympics were completed pursuant to more than 100 contracts and a budget of £9.3 billion.[7]

The chosen form of contract was the New Engineering Contract (**NEC3**). The dispute resolution provisions provided a stepped process which included two DBs in the form of an Independent Dispute Avoidance Panel (**IDAP**) and an adjudication panel (**Adjudication Panel**). There were two separate panels due to concerns around an adjudicator's jurisdiction under the UK's statutory adjudication legislation and issues of enforcement. The Institution of Civil Engineers, and other bodies assisted with appointing the DBs.

The standing panels were funded as a project cost, and the contractors covered the remaining costs associated with formal referrals.[8] If challenged, the final decision-making tribunal was the Technology and Construction Court of England and Wales.[9]

IDAP comprised 11 construction professionals (including the chair, Dr Martin Barnes (President of the Association for Project Management and the original author of the NEC) all with experience in major projects, but with a breadth of varied expertise and skills to address any type of issue.[10] The members were designated to specific projects in which they would dedicate particular attention.

IDAP's focus was on finding practical and logical solutions to problems as they arose before they became time-consuming and costly disputes.[11] Regular meetings were held and there was monitoring of the various projects. The DB process was designed to be flexible so that it could be adapted to suit any particular dispute and there were limited procedural rules.

6 Donald Charrett, *Dispute Boards and Dispute Resolution* (2013) 25(3) *Australian Construction Law Bulletin* 59, 59.

7 Paula Gerber and Brennan Ong, 'Best Practice in Construction Disputes: Avoidance, Management and Resolution' (LexisNexis Butterworths, 2013) 197.

8 Wolf von Kumberg, 'The Use of Conflict Avoidance Boards in Green Projects: A Conflict Avoidance Blueprint for Global Environmental Sustainability' (2022) 23(1) *Business Law International* 45, 55.

9 Richard McLaren, '2012 London Olympics: Dispute Resolution in a Commercial Context' (2012) 13(2) *Business Law International* 123, 135–6.

10 Paula Gerber and Brennan Ong, *Best Practice in Construction Disputes: Avoidance, Management and Resolution* (LexisNexis Butterworths, 2013) 200.

11 Nael Bunni, 'What Has History Taught Us in ADR? Avoidance of Dispute!' (2015) 81(2) *Arbitration* 176, 179.

At the time of implementing the IDAP for the London Olympics, Dr Barnes stated that:

> *"The innovative approach of avoiding rather than resolving disputes is essential given the unique challenges that the [Olympic Delivery Authority] and its contractors face in delivering the London 2012 infrastructure and venues, particularly the immovable end date."* [12]

Disputes not capable of resolution through the IDAP consultation process could be referred to the dedicated Adjudication Panel.[13] There were 12 members (including the chair, Peter Chapman) and the Adjudication Panel was required to comply with the UK statutory adjudication legislation.

It is reported that the DB process on the London Olympics worked exceptionally well and was an effective vehicle for avoiding the majority of disputes.[14] Only two disputes required adjudication, no court actions were commenced and, overall, the London Olympic venues were delivered on specification, ahead of time and within budget.

It was observed that having a dual panel system was particularly effective so that conflict avoidance could be prioritised and left unencumbered by the separate adjudication process.[15] Further, the informal nature of the DB process, inclusion of early warning procedures and real-time decision-making were credited as reasons for the London Olympics' success.

From the London Olympics experience, three trademarks of an effective DB were identified:

- the client's leadership;
- the establishment of two panels beyond reproach, each with set criteria to operate; and
- a proper risk sharing based on appropriate principles.[16]

Ultimately, the success of DBs in the London Olympics justified their subsequent use in the construction contracts for the Rio Olympic Games in 2016.[17]

2016 Rio Olympic and Paralympic Games

Similarly to the London Olympics, the 2016 Rio Olympic and Paralympic Games (**Rio Olympics**) implemented a DB panel for dispute avoidance and resolution across some 35 contracts. The primary justification for embracing DBs for the Rio Olympics was to safeguard the timely completion of installations.[18]

The Brazilian Government was responsible for the delivery of city bid commitments, being the main venues and infrastructure, and Rio 2016 was responsible for delivery of the games, including what are described as the 'overlay' contracts.[19] The overlay contracts for the delivery of the games were mostly temporary constructions such as the media building, pools, an arena, ramps and decking, barriers, lighting and signage, bridges, cranes, water and waste treatment, stands and seating. The DB panel was introduced for the Rio 2016 contracts.

Experience in the implementation and use of DBs in Brazil was limited at this time and importantly there was no established list of local trained DB members. The DRBF was therefore involved in assisting Rio 2016 in the formation and mechanics of the DB. The DRBF created two panels, a panel of DB members from which each party could select one DB member (the third was chosen by the party-selected DB members), and a panel of DB chairs who would chair the three-person DBs.

Bespoke DB rules were drafted based on principles from ConsensusDocs 200.4 and 200.5 and were consistent with local laws. These bespoke rules formed part of the contract between Rio 2016 and the individual contractors.

Key features of the DB panels were:[20]

- a separate DB was established for each contract, which could be permanent or ad hoc with one or three members. The preference was a permanent or standing DB with three members (ultimately budget cuts meant that there was a shift from a standing panel to ad hoc DBs);

12 Richard McLaren, '2012 London Olympics: Dispute Resolution in a Commercial Context' (2012) 13(2) *Business Law International* 123, 135.

13 Nael Bunni, 'What Has History Taught Us in ADR? Avoidance of Dispute!' (2015) 81(2) *Arbitration* 176, 179.

14 Peter Rosher, 'The Application of Dispute Boards in the Field of Satellite Projects' (2016) 2 *International Business Law Journal* 119, 119.
Murray Armes, 'Everybody Has Won and All Must Have Prizes: How the Dispute Board Process Could Improve UK adjudication' (2011) 27(7) *Construction Law Journal* 552, 557.
Nael Bunni, 'What Has History Taught Us in ADR? Avoidance of Dispute!' (2015) 81(2) *Arbitration* 176, 179.

15 Wolf von Kumberg, 'The Use of Conflict Avoidance Boards in Green Projects: A Conflict Avoidance Blueprint for Global Environmental Sustainability' (2022) 23(1) *Business Law International* 45, 56.

16 Nael Bunni, 'What Has History Taught Us in ADR? Avoidance of Dispute!' (2015) 81(2) *Arbitration* 176, 179.

17 Peter Rosher, 'The Application of Dispute Boards in the Field of Satellite Projects' (2016) 2 *International Business Law Journal* 119, 119.

18 Dante Figueroa, 'Dispute Boards for Infrastructure Projects in Latin America: A New Kind on the Block' (2017) 11(2) *Dispute Resolution International* 151, 167.

19 Christopher Miers, 'Real Time Dispute Resolution in Rio de Janeiro … Since You Cannot Delay the Olympic Games' (2015) 31(7) *Construction Law Journal* 399, 400.

20 Augusto Figueiredo, 'Session 6: Evolution of Dispute Board Practices' (Conference PowerPoint) DRBF Annual International Conference, 22–23 May 2015.
Dante Figueroa, 'Dispute Boards for Infrastructure Projects in Latin America: A New Kind on the Block' (2017) 11(2) *Dispute Resolution International* 151, 167.
Christopher Miers, 'Real Time Dispute Resolution in Rio de Janeiro … Since You Cannot Delay the Olympic Games' (2015) 31(7) *Construction Law Journal* 399, 401.

- party-selected DB members were chosen from a list of trained and certified local members. The DB members were required to have undergone training under the Rio 2016 DAB Training Programme (run by the DRBF), be properly certified, and be fluent in Portuguese or Spanish. Either party had the right to reject a party selected member, although grounds for rejection were limited in scope;
- DB chairs were also to be selected from the DB members list. DB members were chosen based on their familiarity with local law, geographic proximity to the Rio Olympics, previous DB experience and fluency in Portuguese or Spanish and English;
- short timetables were in place to accord with the short programs for the procurement of the Rio 2016 projects to ensure that construction timelines were met. This included appointing the DBs at the outset of the contract, setting frequent DB site visits, and requiring rapid delivery of the DB's opinions and decisions;
- the DBs had the power to provide written advisory opinions when jointly requested. A formal referral of a dispute could be made to the DBs to obtain a binding decision. DB decisions were binding until overturned by arbitration;
- operational assistance was provided by a DB Program Manager to help the parties in the initial establishment of the DBs, and thereafter procedural operation of the DBs. This was important given the short timetables and to provide consistency across the 35 DBs; and
- remuneration rates for the DBs were fixed as a daily rate and monthly retainer. DB fees were split equally between the parties and included administration charges and the DB Program Manager fee.

Use of DBs in the Rio Olympics was regarded as successful. Ultimately the DBs were rarely used, however the existence of the DBs motivated the parties to resolve their issues as they arose. Accordingly, the aim of dispute avoidance was realised.[21] By also incorporating a degree of expediency into the process, it gave the Rio Olympics the greatest chance of avoiding delays in construction.

Significantly, use of DBs on the Rio Olympics raised the profile of DBs in Brazil and has been regarded as the catalyst for adoption of DBs into public works contracts.

Part 4: Key issues for the 2032 Brisbane Olympic and Paralympic Games

The 2032 Brisbane Olympic and Paralympic Games (**Brisbane Olympics**) are less than 10 years away. As with any Olympic Games projects, the focus is on building a legacy of success and creating a lasting impact in Queensland following the conclusion of the Brisbane Olympics.

An issue that should be front of mind during the planning and strategic procurement phase is how disputes should be dealt with. Disputes, as we all know too well, have the ability to cause significant cost overruns and project delays. This is of particular importance in the context of an Olympics project involving substantial infrastructure and construction works over numerous contracts, with an immoveable end date (extensions of time beyond that date are not an option) and a limited budget funded from the public purse.

It is against this backdrop that focus should be directed towards dispute avoidance in the first instance. It is evident from the discussion above regarding the London and Rio Olympics, that the DBs established on these projects contributed to the successful completion of these projects through limiting disputation. It is suggested that establishing a DB for the Brisbane Olympics could offer similar substantial benefits.

If the Brisbane Olympics are to follow suit and engage a DB, there are a number of factors that will require careful deliberation.

DB format

Two separate panels were established for the London Olympics, one to deal with dispute avoidance and the other for determining formal disputes. (This was primarily due to issues around compliance with statutory adjudication provisions but is reported to have worked effectively.) In comparison, in the Rio Olympics the established panel had the dual function of dispute avoidance and determination.

There are significant benefits to be gained by a DB adopting a dual function, including expedited high-quality decision making given the DB's intimate knowledge of the project and an element of satisfaction in any DB decisions given the professional relationship, and trust built between the parties and the DB members during the course of the project.

There is also the issue of whether a three-person standing DBs is preferred, or whether one person ad hoc DBs may be suitable for smaller contracts. Save in circumstances where disputes are of limited complexity and value, the preference should be towards three-person standing DBs.

21 Ann Russo, 'The Use of DABs for Olympics and Major Sporting Events' (Conference PowerPoint) DRBF Regional Conference, Brisbane, 3 November 2022.

DB skills and experience

This is a key characteristic in determining the success of a DB. It is imperative that the appointed DB members have the necessary technical and legal skills coupled with practical DB experience. This is vital so that the DB can carry out its duties to a high standard, and that the parties can trust the DB members in their analysis and decision making.

The DRBF is well established and actively involved in Queensland. The DRBF has an established list of experienced DB members from which suitable members could be drawn. This is in contrast with the Rio Olympics where there was a lack of DB experienced candidates in the first instance.

Commitment to the DB process

The Rio Olympics DB process applied to all underlay contracts. In the London Olympics use of the IDAP was recommended, but not mandatory, for all contracts. To facilitate the full potential of the DB, it is important to secure buy-in and participation to the DB process from the key project participants early on. Further, the parties must be confident in the DB and ensure that it has an ongoing working knowledge of the various projects and maintains a detailed understanding of progress and potential issues.[22]

Applicable DB rules

The applicable DB rules will require careful consideration and where appropriate should be modified to suit the specifics of the Brisbane Olympics. Standard DB rules are often based on the FIDIC suite of contracts or the International Chamber of Commerce DB Rules. The DB rules on the Rio Olympics were specially tailored to suit the requirements of local laws.

Early DB involvement

DBs are ordinarily established on execution of the contract. Consideration should be given to whether early appointment/involvement of the DB (or at least some members of the DB) would be beneficial. This may assist in developing the DB rules and the mechanics for the processes to be written into the various contracts.

Form of contract

The London Olympics chose to use NEC3 as its standard form contact. NEC3 has a focus on early resolution of issues and early contractor involvement. Potential options for the Brisbane Olympics could include NEC4 ECC Option W3 which allows for a DAB, or alternatively a bespoke contract.

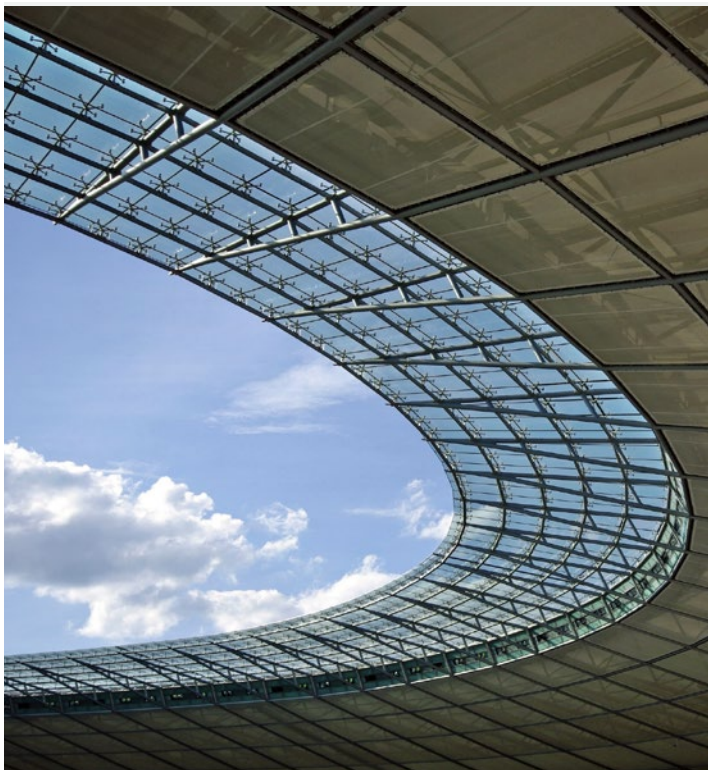
Part 5: Conclusion

Olympic Games projects are often described as accelerated regeneration projects involving complex construction and infrastructure contracts. Given that it is highly likely that disputes will necessarily arise, focus should be directed towards avoiding disputes before they crystallise, and the parties become entrenched in their positions. Drawing from the London and Rio Olympics experience, it is clear that DBs are a vital element of the dispute avoidance framework to prevent disputes derailing the building and construction work required for the Olympics Games.

However, the inclusion of a DB must be done on a project-specific basis. The success of any DB depends on the quality of the members, location, nature and size of the project, the parties involved, the degree of familiarity with DB processes and the particular contractual procedures governing the DB. For the Brisbane Olympics, assistance from local bodies such as the DRBF is likely to be critical for the effective setup and operation of a DB.

In addition to DBs, it is also essential that contracts are set up properly at the outset in terms of commercial risk being owned by the most appropriate party, early engagement of the supply chain and a commitment to fostering a collaborative culture.

Note: this article by Andrew Stephenson, Lucy Goldsmith and Harrison Frith was previously published on the Corrs website.



22 Paula Gerber and Brennan Ong, *Best Practice in Construction Disputes: Avoidance, Management and Resolution* (LexisNexis Butterworths, 2013) 203.

Ensuring effective stakeholder consultation following *Santos v Tipakalippa*

Key takeaways

Appropriate stakeholder consultation is well-known to be a critical part of successfully delivering major projects. The Full Federal Court has recently provided important guidance on the scope of the requirement to consult, including requirements for First Nations consultation for offshore petroleum projects. Its decision could have wide-reaching implications for other resources and energy projects, offshore and onshore.

Keywords

stakeholder consultation

Court proceedings

Tipakalippa v National Offshore Petroleum Safety and Environmental Management Authority (No 2) [2022] FCA 1121 concerned a challenge to the National Offshore Petroleum Safety and Environmental Management Authority's (**NOPSEMA's**) decision to accept an environment plan (the Drilling Plan), which had been prepared by the proponent of an offshore gas project in the Barossa gas field, approximately 300 km north of Darwin.

Mr Tipakalippa, an elder, senior lawman and traditional owner belonging to the Munupi clan on the Tiwi Islands, claimed that he, the Munupi clan and other traditional owners, have traditional connections to 'sea country' and sea country resources extending beyond the project area. In view of these connections, Mr Tipakalippa contended that he and his clan and other traditional owners were required to have been directly consulted in relation to the Drilling Plan in accordance with the requirements of the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* (Cth) (**Offshore Environment Regulations**).

The Court agreed with Mr Tipakalippa's claim, setting aside NOPSEMA's decision to accept the Drilling Plan.

On 2 December 2022, the Full Federal Court, in *Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193 (**Appeal Decision**), dismissed a challenge to the first instance decision. In doing so, the Full Federal Court provided further and more authoritative clarification of the requirements for consultation in the Offshore Environment Regulations.

Regulatory context

The Offshore Environment Regulations impose a duty to consult on the titleholder.

In particular, one of the criteria for acceptance of an environment plan is that the plan demonstrates that the titleholder has carried out the requisite consultation – including with those whose functions, interests or activities may be affected, and any other person or organisation the titleholder considers relevant – and that the measures adopted or proposed because of the consultations are appropriate.

If the titleholder does not discharge their duty and demonstrate the measures (if any) it has adopted or proposes to adopt in its environment plan as a result of the consultation NOPSEMA will not accept the environment plan (regulation 10A).

Who must a titleholder consult with?

The Court construed the requirement to consult with "relevant persons" under regulation 11A of the Offshore Environment Regulations as applying to a broader category than required by the ordinary meaning of "person".

As defined, a "relevant person" includes a number of Departments, agencies, organisations and persons. In particular, it includes "a person or organisation whose functions, interests or activities may be affected by the activities to be carried out under the environment plan, or the revision of the environment plan".

The Court held that "functions, interests or activities" should be broadly construed to promote the objects of the Offshore Environment Regulations, which are to ensure an offshore petroleum project is consistent with the principles of ecologically sustainable development (**ESD**), and that its environmental impacts and risks are as low as reasonably practicable and will be of an acceptable level.

Further, "interests" are not confined to legal interests in land or property. They include the traditional connection of Tiwi Islanders to part of the sea and the marine resources in the environment that may be affected, and which are integral to their culture, customs and connections. The findings of the Court were made notwithstanding the project proponents had identified the Tiwi Land Council and the Northern Land Council as "relevant persons" and had consulted with those representative bodies.

What does consultation require?

According to the Court, the titleholder must:

- give each relevant person "sufficient information to allow [them] … to make an informed assessment of the possible consequences" of the proposed activity on their "functions, interests or activities";
- "be genuine", demonstrated by giving relevant persons a reasonable time to identify the effect of the proposed activity on their functions, interests or activities and to respond to [the titleholder] with their concerns"; and
- "adopt appropriate measures in response to the concerns conveyed to the titleholder" during consultation.

The Court drew on other legislative regimes to show that the non-legal interests of First Nations Peoples have been protected by other statutes. (For example, section 3 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).) This demonstrates the willingness of the Court to recognise First Nations Peoples' cultural connection to sea in the absence of statutory human rights protections or other legally-recognised interests (such as native title) where those interests are capable of being adversely impacted.

While the Court did not expressly refer to international instruments that recognise the cultural and traditional rights of First Nations Peoples, its recognition that cultural connections are an "interest" sufficient to require consultation is consistent with the recognition of the rights contained in the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**).

The Court rejected submissions that this broad interpretation of "interests" is unworkable. It held that there are many ways of contacting First Nations People including through First Nations organisations. The Court noted that it should not be assumed that sending an email with an information package (even if followed up with another email) constitutes adequate consultation.

NOPSEMA response

On 15 December 2022, NOPSEMA released its Consultation in the course of preparing an Environment Plan guideline (**Guideline**), in direct response to the Appeal Decision and a critique made by the Court that further policy guidance on consultation requirements may be needed. Drawing extensively on the Appeal Decision, the Guideline aims to provide clarity on the legal requirements for consultation.

Key takeaways from the Guideline, which will apply to all new and revisions to existing environment plans, include:

- There is no 'one size fits all' approach. The Guideline does not specify what each consultation process should entail, nor how a titleholder should conduct the consultation process.
- Consultation processes must be designed in the context of the objects of the Offshore Environment Regulations.
- Titleholders must engage early with persons and organisations who may be affected, including in the design of the consultation process, and adapt the consultation process to each relevant person and organisation.
- Before accepting an environment plan, NOPSEMA must be satisfied a titleholder has discharged its duty to carry out consultation in an appropriate manner, including provision of sufficient information, a reasonable period for consultation and informing the relevant person that they may request information not be published.
- Environment plans must set out how the titleholder has identified relevant persons and the process for consultation.
- For communally-held interests, consultation should reasonably reflect the characteristics of those interests. Courts have found that there is good reason to adopt a pragmatic and practical approach.
- First Nations groups such as land councils and prescribed body corporates may be relevant persons with a function that may be affected, but such groups may also provide advice in relation to who and how other First Nations groups or individuals should be consulted.
- Titleholders will have some "decisional choice" in identifying which natural person(s) are to be approached and how information will be given to them to allow an informed response.

Implications for proponents

The Appeal Decision concerns only a single offshore gas project. However, it is expected to have wide-reaching implications for significant offshore projects, and potentially even onshore projects where the interests of First Nations people may be affected.

While the Offshore Environment Regulations do not apply to offshore wind and other non-petroleum projects, the Appeal Decision will be closely considered by proponents. For those projects, environmental assessment and approval under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) remains with the Commonwealth Department of Climate Change, Energy, the Environment and Water. However, the Offshore Infrastructure Regulator (which sits within NOPSEMA) has a role in the assessment of management plans required by licence holders under the *Offshore Electricity Infrastructure Act 2021* (Cth) (**OEI Act**), including with respect to environmental management and consultation with other marine users.

In particular, the licensing scheme required under the OEI Act may:

- include consultation requirements for an application for approval of new or revised management plans; and
- require that a management plan include "requirements to consult with any person that may be affected by activities carried out under the licence" and the outcomes of the consultation (sections 115(2)(e)–(f)). The Minister may also require a holder of a feasibility licence applying for a commercial licence to conduct specified kinds of consultation (section 43).

Presently, the licensing scheme prescribed by Part 2 of the Offshore Electricity Infrastructure Regulations 2022 does not expressly address the above matters.

However, in the future NOPSEMA may apply a similar approach to offshore electricity infrastructure as it will now take to the assessment of offshore oil and gas environment plans. In this respect, NOPSEMA has announced that it is working to build internal capacity and resources to address the consequences of the Appeal Decision.

The focus on genuine and informed prior consultation is likely to continue for all projects assessed under the EPBC Act, particularly given the Federal government's recently announced Nature Positive Plan which proposes a range of environmental regulatory reforms. These include the creation of a Federal Environment Protection Authority and the development of national environmental standards to underpin EPBC Act processes. Some of the first standards to be prepared relate to First Nations Peoples' engagement and participation in decision-making as well as more general community engagement and consultation.

The Appeal Decision may also have practical implications for onshore project developments, particularly mining and petroleum projects that may have an impact on First Nations interests given the locations of mineral resources across Australia. However, the direct relevance of the Appeal Decision in an onshore context will depend upon the consultation obligations in State and Territory environmental approvals legislation. It is likely to have most impact in circumstances where there are similarities between the terms of this legislation and the Offshore Environment Regulations.

There is no doubt, though, that all such consultation obligations should now be considered carefully in light of the Appeal Decision, particularly in circumstances where stakeholders – investors, lenders, insurers and activists – are increasingly expecting project proponents to undertake culturally appropriate consultation with First Nations Peoples to achieve free, prior and informed consent to a standard consistent with UNDRIP (which often exceeds current legislative requirements), before the interests of First Nations Peoples are impacted.

All of this suggests a trend for consultation requirements similar to that applied in the Appeal Decision. This will of course depend upon:

- the specific consultation obligations that apply under applicable law; and
- the detail of proposed reforms, once known.

Key takeaways

There are a number of key takeaways from the Full Federal Court's decision for project proponents:

Implement a robust consultation process. Proponents of all types of onshore and offshore projects should review their approaches to consultation processes and de-risk their project authorisations by ensuring:

- the right people are identified as consultees, whether individuals, groups or other organisations. This will involve an assessment of interests potentially affected, beyond legal interests (e.g. of native title holders and claimants), as determined by all current and evolving guidance in relation to the breadth of this obligation;
- the consultation processes reflect the needs of consultees, such as the time required for responding;
- consultees are fully informed of a project's potential impacts and can provide an informed response;
- the consultation process is genuine and allows the proponent and decision-maker to better understand environmental (and social) impacts and risks;
- consultation starts early and continues throughout the life of a project; and
- the consultation process has a clear rationale which is set out for the decision-maker.

Future proof your projects. Conducting genuine and rigorous consultation is increasingly important from both a legal risk and social licence perspective. Project proponents should prepare for increasing expectations from regulators and the community by internally building capacity and processes and staying up to date with evolving legal requirements. Being proactive rather than reactive is key.

Engage with the regulator. NOPSEMA had sought feedback on the Guidelines until 15 March 2023. NOPSEMA will also release changes to other relevant guidelines and policies in due course. Interested participants should take the opportunity to provide input.

Note: this article by Louise Camenzuli, Tracey Greenaway, Rosie Syme, Dr Phoebe Wynn-Pope and Max Newman was previously published on the Corrs website.

An historic moment: The HCCH judgments convention to enter into force on 1 September 2023

Key takeaways

The Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters is set to commence on 1 September 2023.

Australia has not yet joined the Convention but is perhaps likely to do so.

Keywords

international enforcement of court judgements

On 29 August 2022, the European Union (EU) and Ukraine deposited their instruments of accession and ratification, respectively, to the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (**Judgments Convention or Convention**).

As a result, on 1 September 2023, the Judgments Convention will enter into force – just four years after the adoption of the Convention on 2 July 2019.

This article provides a brief overview of the history and principal features of the Convention. It then considers the prospects and implications of Australia ratifying the Convention.

Overview of the Judgments Convention

Origins of the Judgments Project

The Judgments Convention is a long-awaited convention with its origins dating back to the early 1990s. In 1992, the Hague Conference on Private International Law (**HCCH**) commenced work on an instrument to harmonise rules on the jurisdiction of courts and the recognition and enforcement of judgments in cross-border civil and commercial matters.

One of the first outcomes of the project was the Hague Convention of 30 June 2005 on Choice of Court Agreements (the **Choice of Court Convention**), which aims to ensure the effectiveness of choice of court agreements in civil and commercial matters. The Choice of Court Convention entered into force in 2015 and is currently in force as between jurisdictions including the EU (including Denmark), Mexico, Montenegro, Singapore and the United Kingdom. Up-to-date information on the signatories to the Convention can be found in the HCCH's Status Table.[1]

Following the successful conclusion of the Choice of Court Convention, the HCCH established in 2012 a working group to prepare a draft text aimed at facilitating the global circulation of judgments. The first draft of the text was completed in October 2015. Following that, the draft underwent a series of discussions and revisions – leading to the conclusion of the final text on 2 July 2019, at the 22nd Diplomatic Session of the HCCH.

Currently, in addition to the EU and Ukraine, five other states have signed the Convention. They are the United States of America, the Russian Federation, Costa Rica, Israel and Uruguay. Up-to-date information on the signatories to the Convention can be found in the HCCH's Status Table.

1 HCCH Status Table <www.hcch.net/en/instruments/conventions/status-table/?cid=98>

Principal features of the Judgments Convention

The Judgments Convention provides for the recognition and enforcement of judgments in civil or commercial matters (article 1). The Convention has broad scope of application, but excludes certain matters such as the status and legal capacity of persons, family law matters, insolvency matters, privacy matters, intellectual property and certain anti-trust matters (article 2(1)).

- Further, it does not apply to arbitration and related proceedings (article 2(3)) or to interim measures of protection (article 3(1)(b)). (Attorney-General's Department, 'Hague Conference Judgments Project: Recognition and Enforcement of Foreign Judgments' (Public Consultation Paper,[2] March 2018). Contracting Parties to the Convention may also declare that the Convention does not apply to certain other specific matters (article 18(1)).

In determining whether a foreign judgment of a Contracting Party is to be recognised and enforced under the Convention, a court will consider two factors:

- The first is whether a judgment is eligible for circulation under the Convention. To determine this, a court will consider the indirect grounds of jurisdiction listed under article 5(1). These grounds fall into three broad categories based on: the connection between the state of origin and the defendant (e.g. habitual residence in the state of origin): jurisdiction based on consent (e.g. express consent to the court of origin in the course of proceedings); or a connection between the claim and the state of origin (e.g. place of performance of the contract). Additionally, article 6 provides for the circulation of judgments ruling on rights in rem in immovable property – but if, and only if, the immovable property is located in the State which rendered the judgment sought to be enforced.
- Second, a court may consider whether the grounds for refusal under article 7, are applicable. There are two categories of grounds based on the way the proceedings took place in the state of origin (e.g. improper notice); or based on the nature and content of the judgment (e.g. where the judgment is inconsistent with a judgment given by a court of the state in which enforcement is sought). Recognition and enforcement can only be refused based on one of the grounds listed in the Convention.

It is important to note that, with the one exception identified above in relation to judgments ruling on rights in rem in immovable property, the Convention does not prevent or limit the recognition and enforcement of judgments under national law, bilateral, regional or other international instruments (articles 15 and 23).

For a detailed overview and explanation of the provisions of the Convention, see the Explanatory Report available on the HCCH website.

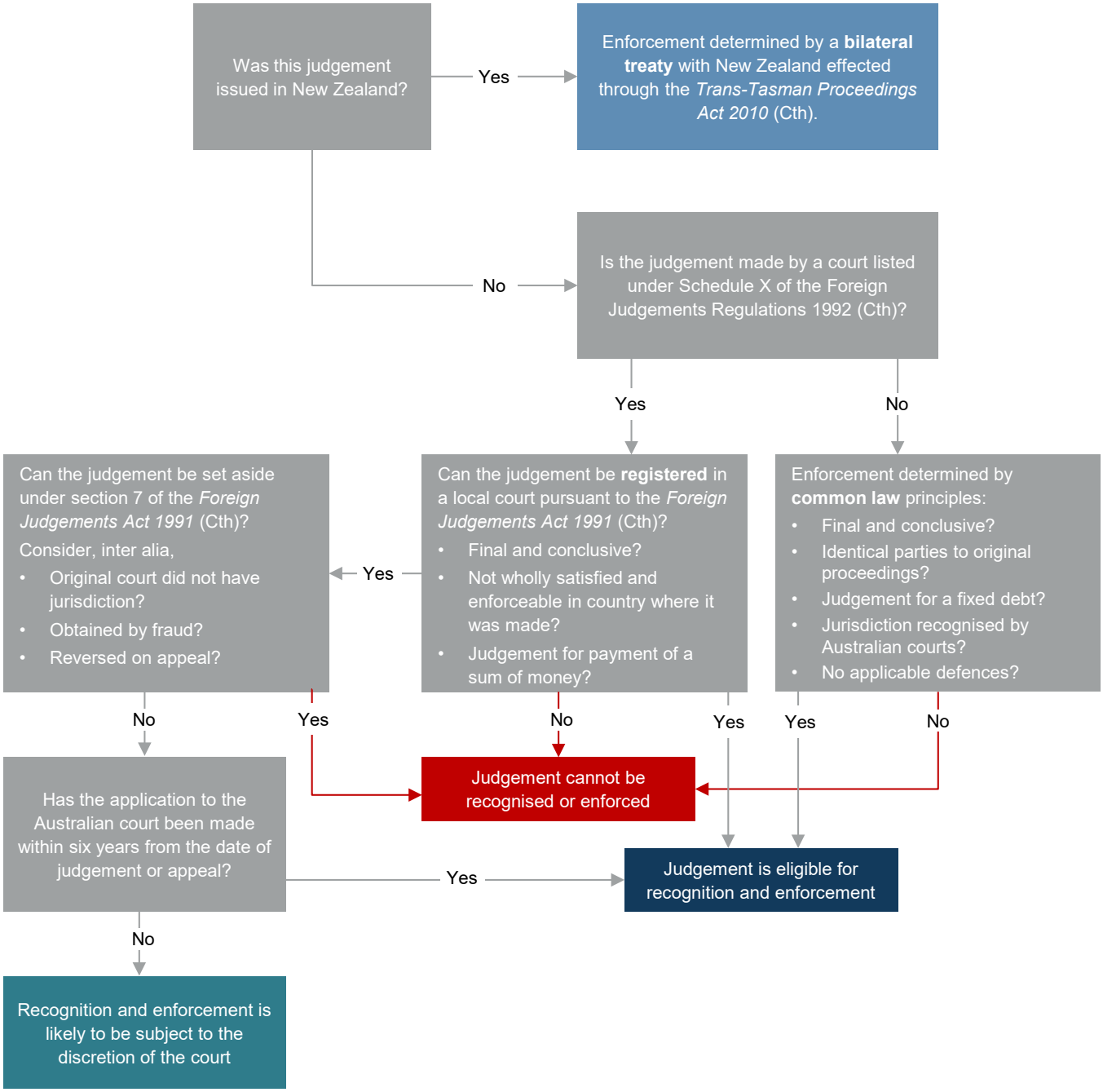
2 Australian Government, Attorney-General's Department, 2018; HAGUE CONFERENCE JUDGMENTS PROJECT - Recognition and enforcement of foreign judgments <www.ag.gov.au/sites/default/files/2020-05/Recognition-and-enforcement-of-foreign-judgments-consultation-paper.pdf>

Would Australia benefit from joining the Convention?

Current framework for enforcing a foreign judgment in Australia

The current framework for enforcing a foreign judgment in Australia involves an overlay of treaties, a statutory regime and common law principles and is, according to the Attorney-General's Department,[3] a "complex process".

Whether a foreign judgment can be enforced in Australia depends on where the judgment was issued and what type of judgment it is. The current regime in Australia is illustrated by following diagram:



For a step-by-step procedure of determining enforcement of foreign judgments in Victoria, refer to the Victorian Supreme Court Practice Note.

3 Australian Government, Attorney-General's Department, E*nforcing a foreign judgment in Australia*, <www.ag.gov.au/international-relations/private-international-law/recognising-and-enforcing-foreign-judgments>

What will it mean for Australia to join the Judgments Convention?

The Judgments Convention aims to establish uniform rules on recognition and enforcement of judgments among Contracting Parties.

For Australia, the benefits of ratifying the Judgments Convention include:

- The Convention expands the grounds for recognising and enforcing foreign judgments in Australia. Most significantly, the Convention provides for the enforcement of non-money judgments and a much broader list of grounds on which recognition and enforcement may be based.
- Assuming widespread ratification of the Convention, Australian judgments will have significantly increased prospects of being recognised and enforced overseas. This means that parties involved in cross-border litigation who obtain an Australian judgment will be able to access meaningful relief in foreign jurisdictions without the need to re-litigate their dispute.
- The Convention will align Australia's private international law with that of other Contracting Parties, leading to greater certainty and predictability for Australian enterprises engaging in cross-border transactions with entities from other contracting states and vice-versa.

Is it likely that Australia will become a party to the Hague Judgments Convention?

Australia has a long history of engaging with the work of the HCCH since it joined the HCCH in 1973. Currently, it has joined 11 HCCH instruments and has implemented these instruments to varying degrees.

Australia actively participated in the negotiations for the Judgments Convention, including at the Diplomatic Session at which the Convention was finalised. In 2018, the Attorney-General's Department conducted a public consultation on the draft text of the Convention. (Recognition and enforcement of arbitral awards is covered by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, more commonly known as the New York Convention.) In addition, the Australian government provided financial support to the continuation of the Judgments Project for a number of years.

While, as at the date of writing, there is no public indication that Australia will join the Convention, against the backdrop of the Australian government's support for and participation in the negotiation of the Convention, and with no perceived disadvantages to Australia joining the Judgments Convention, it seems likely that Australia will follow in the footsteps of the EU and Ukraine.

Note: this article by Charles Scerri KC, Cara North and Betty Choi was previously published on the Corrs website.

Developments

Commonwealth

High Court interprets clause as requiring performance in accordance with law

The sale of a pub business was intended to settle in March 2020 (just as COVID took hold). The NSW Court of Appeal granted the purchaser relief from completion on the basis that the seller had not complied with its express obligation to "carry on the Business in the usual and ordinary course".

In the 4th quarter 2022 edition of *Corrs Projects Update*, we reported that the High Court granted the disappointed seller special leave to appeal this decision. The seller said that while it did not intend to argue that the contract was frustrated in the conventional sense, the Court should recognise a new species of frustration. Regrettably, this tantalising argument faded away and the High Court decided the case as a question of contractual interpretation.

In a unanimous judgment of just 18 pages, Kiefel CJ, Gageler, Gordon, Gleeson and Jagot JJ overturned the Court of Appeal's decision. The Court held that the seller's obligation was to "carry on the Business in the usual and ordinary course" **in accordance with law**. This qualification did not need to be stated or implied, for it simply arose as a matter of construction (at [36]). On this basis, the seller had complied with its contractual obligations despite interruptions to the business caused by COVID regulations.

The case turned on the interpretation of the particular clause in the context of the whole contract. Its precedential value is thus somewhat limited. Despite this, the case is useful in two respects.

First, the case might provide a useful line of reasoning where a counterparty is not complying with all laws, but there is no relevant express term. This is so even though the case does not establish an overarching contractual obligation to comply with all laws.

Second, it serves as a reminder of the benefit of an express clause requiring a counterparty to comply with all laws (broadly defined). On these facts, such a clause might have radically simplified the litigation. A more general advantage of such a clause is that it means that a party that is not complying with laws is also in breach of contract.

Laundy Hotels (Quarry) Pty Limited v Dyco Hotels Pty Limited [2023] HCA 6[1]

1 [2023] HCA 6 <eresources.hcourt.gov.au/showCase/2023/HCA/6>

High Court of Australia gives a masterclass on contract terms

How do courts determine the terms of a contract? To the uninitiated, the question seems straightforward.

In the case of a written contract, the express terms may indeed be evident. Yet those express terms may be supplemented by implied terms to fill gaps in that particular contract ("terms implied in fact"). This raises several questions. Why do courts recognise terms which the parties have left unstated? Should the approach differ for informal contracts? Beyond express and implied terms, may courts also infer terms? The High Court has recently provided guidance on these questions.

The plaintiffs in this case were a photographer and his company. The photographer took photographs of properties that were for sale or lease. Real estate agents engaged his company on an informal basis, often by telephone. ("Can you attend this week to take photos for the campaign?") Both the plaintiffs and the real estate agents knew that the photographs would be uploaded to a website (www.realestate.com.au) and provided to a database service (RP Data Professional). However, there was no express oral agreement on the matter.

The central issue was this. Did the real estate agents' licence to use the photographs (and to sub-license them to the website and the database) expire when the property was sold or leased? Clearly, the limited express terms did not answer the question.

These facts led the Court to analyse the nature of contractual terms. There were three separate judgments: by Kiefel CJ and Gageler J; Gordon J; and Edelman and Steward JJ.

The following principles emerged, especially through the vigorous judgment of Edelman and Steward JJ.

The nature of contractual terms

1. **All contractual terms arise from communication between the parties**: [83]. That communication may be written, oral, or by conduct.
2. **All contractual terms are express or implied**, in Edelman and Steward JJ's view. Despite contrary suggestion in some cases, there is no category of "inferred terms": [84]. Gordon J sought to avoid using the language of "inferred terms", without rejecting it: [73], [75]. The position of Kiefel CJ and Gageler J at [21]–[25] is perhaps unclear.

The relationship between express and implied terms

3. **The first step in determining the parties' bargain is "to identify the express terms and to ascertain their meaning"**: [107].
4. **Once the express terms have been dealt with, the next step is to determine whether there are any implied terms**: [111].
5. **Any implied terms already exist in the contract and the court recognises rather than creates them**: [112].

Terms implied in fact

6. There is one common law of contract. Edelman and Steward JJ held that it flowed from this that informal contracts are not governed by different rules for the recognition of terms implied in fact, although the context may affect the application of those rules: [86]. Whether this is consistent with Gordon J (see [75]) and Kiefel CJ and Gageler J (see [19]–[20]) is not clear.
7. Terms implied in fact are determined based on the BP Refinery criteria: [18] and [114]. Despite agreeing on the orthodoxy of BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266, their Honours seemed to disagree on why the five criteria in the case exist, and on how they apply to informal contracts.

   Edelman and Steward JJ suggested these criteria are "flexible" because they are directed to what a reasonable person in the position of the parties would have understood the contract to mean. This draws on the Privy Council decision in *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988. In informal contracts, in Edelman and Steward JJ's view, the most important criteria will normally be (i) reasonableness and equity, and especially (ii) the term's necessity "to make the contract effective": [117].

   Gordon J rejected the idea of flexibility in the *BP Refinery* criteria, particularly where flexibility might be thought to dilute the requirement of necessity: [75]. However, her Honour seemed to accept that in the case of informal contracts, "automatic or rigid application" of the criteria might be inappropriate.

   Arguably, both approaches to informal contracts could be understood to be consistent with earlier authority such as *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410.

In short, the judgments demonstrate some tension about the "inference" of terms; the philosophical basis for identifying terms implied in fact; and the precise way to go about recognising terms implied in fact by informal contracts.

It may be that these tensions are largely academic. On the facts of this case, each Justice agreed that the licence to use the photographs did not expire when the property was sold or leased, and further agreed with orders proposed by Gordon J.

Realestate.com.au Pty Ltd v Hardingham [2022] HCA 39[2]

High Court refused special leave application on whether issue estoppel applies to security of payment decisions

On 15 December 2022, the High Court refused a special leave application arising from a decision of the Full Court of the ACT Supreme Court.

The central question before the Full Court was whether issue estoppel applies to decisions under the *Building and Construction Industry Security of Payment Act 2009* (ACT). In separate judgments, their Honours all held that it does not. Lee J relied on close analysis of the Act. Elkaim J too preferred this approach. Kennett J agreed that issue estoppel does not apply but based his reasons more closely on the case law.

Harlech Enterprises Pty Ltd as trustee for Harlech Family Trust v Beno Excavations Pty Ltd [2022] ACTCA 42[3]

Statutory authority owed a duty of care to minimise the risk of harm from its assets

A faulty electrical pole caused a bushfire that damaged several properties. The High Court upheld the WA Court of Appeal decision that a statutory authority which operated the electricity distribution system owed a duty of care to minimise the risk of harm to persons and property near its electricity distribution system.

Electricity Networks Corporation v Herridge Parties [2022] HCA 37[4]

Infrastructure Australia Amendment (Independent Review) Bill 2023 (Cth)

The Infrastructure Australia Amendment (Independent Review) Bill 2023 (Cth) has been introduced in the House of Representatives. The aim of the Bill is to strengthen Infrastructure Australia and increase coordination between Commonwealth and State infrastructure bodies.

2 [2022] HCA 39 <www.austlii.edu.au/au/cases/cth/HCA/2022/39.pdf>
3 [2022] ACTCA 42 <https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/act/ACTCA/2022/42.html>
4 [2022] HCA 37 <eresources.hcourt.gov.au/downloadPdf/2022/HCA/37>

Northern Australia Infrastructure Facility Amendment (Miscellaneous Measures) Bill 2023 (Cth)

The Commonwealth government has introduced the Northern Australia Infrastructure Facility Amendment Bill (Miscellaneous Measures) Bill 2023 (Cth) in the House of Representatives.

If enacted, the Bill will increase the capacity of the Northern Australia Infrastructure Facility (**NAIF**) by:

- increasing by A$2 billion (to a total of A$7 billion) the funding that the NAIF can give projects;
- expanding the geographic scope of projects that can receive funding to include those in the Indian Ocean Territories; and
- clarifying that the NAIF's role is to provide support for projects that develop economic infrastructure that will benefit First Nations Australians.

Future regulations to manage respirable crystalline silica?

In the wake of recent high-profile reports concerning the risks of respirable crystalline silica, the Commonwealth, State and Territory Ministers responsible for work health and safety have announced they will cooperate to strengthen regulation across the country.[5]

This will include bolstering training requirements, increasing air monitoring and reporting obligations, and updating Codes of Practice. The Ministers have also instructed Safe Work Australia to report on the potential prohibition of some engineered stone and on a national licensing system for other permitted products. The Safe Work Australia report is expected in August or September 2023. The changes will affect businesses beyond those using engineered stone. Tunnelling, demolition, mining, and construction are all identified as high-risk industries.

Justice Mortimer appointed Chief Justice of the Federal Court of Australia

On 7 April 2023, Justice Debra Mortimer became Chief Justice of the Federal Court of Australia. Her Honour is the first female Chief Justice of the Federal Court of Australia, and only the fifth Chief Justice since the Court was created in 1976. Her Honour took silk in 2003 and has served as a Justice of the Federal Court of Australia since 2013.

The previous Chief Justice, James Allsop AO, held that position since 2013. His Honour was previously President of the New South Wales Court of Appeal, and before that, a Justice of the Federal Court of Australia.

5 The Office of Impact Analysis, 2023; *Managing the risks of respirable crystalline silica at work* <oia.pmc.gov.au/published-impact-analyses-and-reports/managing-risks-respirable-crystalline-silica-work>

New South Wales

Design and Building Practitioners Act 2020 (NSW) section 37 given wide effect

The trial decision in this appeal was the first decision interpreting the statutory duty of care in section 37 of the *Design and Building Practitioners Act 2020* (NSW), although it was far from the first dispute between the parties. At trial, Stevenson J said at [101] that the section "*appears to have been drafted so as to make comprehension of it as difficult as possible*", before holding that the statutory duty extended to a boarding house.

The Court of Appeal agreed with this conclusion, although its method of statutory interpretation differed. Kirk JA and Griffiths AJA's sustained commentary from [179]–[233] provides valuable guidance on the operation of the legislation. The judgments also provide a detailed account of rectification damages in tort and contract.

Roberts v Goodwin Street Developments Pty Ltd [2023] NSWCA 5[1]

Confusion about contracting parties meant adjudication determination was void

The plaintiff, Ratcliffe, argued that an adjudication determination was void for jurisdictional error because there was no contract between the parties. Ratcliffe was the sole officeholder and shareholder of Starfire Windows Pty Ltd, which entered into a partly written, partly oral contract with Horizon Glass Pty Ltd. Numerous text messages between Ratcliffe and Horizon Glass Pty Ltd referred to Starfire Windows Pty Ltd as the contracting entity, and all invoices were issued by Starfire Windows Pty Ltd. However, Horizon Glass Pty Ltd brought the relevant adjudication against Ratcliffe, not Starfire Windows Pty Ltd.

The Court found there was no construction contract between Ratcliffe and Horizon Glass Pty Ltd. The adjudicator therefore lacked jurisdiction and the adjudication determination was void.

Ratcliffe v Horizon Glass & Aluminium Pty Ltd [2023] NSWSC 196[2]

Proportionate liability probably available to defendants under Design and Building Practitioners Act

The NSW Supreme Court has confirmed, albeit in a judgment on a strike-out application, that the proportionate liability regime under Part 4 of the *Civil Liability Act 2002* (NSW) (**CLA**) is available to defendants accused of breaching the duty of care established by section 37 of the *Design and Building Practitioners Act 2020* (NSW) (**DPBA**).

The plaintiff argued that sections 5Q and 39(a) of the CLA prevented the defendants from relying on proportionate liability as this effectively meant that the non-delegable duty of care under section 37 of the DBPA became 'delegable'. Section 5Q of the CLA provides that, in matters of tortious liability, a non-delegable duty is to be treated as a vicarious liability. Further, section 39(a) of the CLA provides that Part 4 of the CLA does not prevent a person being vicariously liable for an apportionable claim.

The Court did not accept this argument. Rees J found that a claim for breach of section 37 of the DBPA is not a tortious claim, but rather a claim for breach of a statutory duty. Accordingly, section 5Q of the CLA did not apply to the claim, and the plaintiff's strike out application failed.

The Owners – Strata Plan No 84674 v Pafburn Pty Ltd [2023] NSWSC 116[3]

1 [2023] NSWCA 5 <www.caselaw.nsw.gov.au/decision/1862436ae3dbe5efd35f1108>
2 [2023] NSWSC 196 <www.caselaw.nsw.gov.au/decision/186c3540095dbc3d33591f70>
3 [2023] NSWSC 116 <www.caselaw.nsw.gov.au/decision/18670eca374ecf6789bd980a>

Deed of company arrangement was not executed to circumvent SOP Act

Kennedy Civil Contracting Pty Ltd (Administrators Appointed) sought to recover money from Richard Crookes Constructions Pty Ltd under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**SOP Act**).

Richard Crookes claimed that the deed of company arrangement (**DOCA**) executed by Kennedy Civil Contracting's creditors was liable to be terminated under section 445D(1) of the *Corporations Act 2001* (Cth) (CA) because it was entered into for a wrongful purpose: to circumvent the operation of section 32B of the SOP Act. Section 32B prevents a company in liquidation from serving a payment claim or taking action to enforce a payment claim, including an adjudication application.

Bell J found that the "question whether Part 5.3A of the CA is being used for an improper purpose is not to be resolved by a careful analysis of whether creditors and the company will be in a better position if the DOCA remains on foot than if it does not". Here, it was apparent that the DOCA was entered into because the creditors accepted the administrator's advice on how to proceed. The creditors reached what appeared to be a reasonable conclusion on an issue they were properly entitled to consider. That was sufficient to make the purpose of the DOCA proper.

Bell J also noted in obiter that it "*seems preferable in principle to seek to achieve the policy behind the SOP Act by a stay of a judgment obtained under it rather than by terminating a DOCA that was entered into for the purpose of maximising the return to creditors*".

Kennedy Civil Contracting Pty Ltd (Administrators Appointed) v Richard Crookes Construction Pty Ltd [2023] NSWSC 99[4]

Defective service of a payment claim to an unauthorised recipient is curable if the proper recipient actually knows of the claim

After the construction contract was terminated, the builder delivered a payment claim to the superintendent, who was not authorised to accept service. Both parties accepted that this did not amount to effective service. The superintendent then forwarded the claim to the principal, which subsequently served a payment schedule on the builder stating that the payment claim did not enliven the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**SOP Act**). On the advice of counsel, the builder did not proceed to adjudication on the first claim but instead made a second payment claim.

Stevenson J held that since the SOP Act is intended to facilitate speedy resolution of disputes and to operate in a realistic fashion:

> "*[a] party that actually receives a payment claim should not be entitled to assert that service did not ever happen because of a shortcoming, perhaps technical, in the manner in which the claimant purported to effect service*".

Furthermore, a payment schedule which asserts that the payment claim was improperly served should be taken as an acknowledgement that the payment claim has come to the attention of the authorised recipient: and so was validly served. His Honour also construed section 13(1C) of the SOP Act to mean that only one payment claim may be served after termination of the construction contract. As the first claim was validly served, the second claim was of no effect and could not enliven the SOP Act.

BCFK Holdings Pty Ltd v Rork Projects Pty Ltd [2022] NSWSC 1706[5]

What's next for infrastructure in NSW?

Following the NSW election, building regulation and the infrastructure pipeline in NSW are set to change. During the election campaign, the new Labor Government committed to:

- reforming building and construction governance by appointing a separate Minister for Building, establishing a NSW Building Commission, streamlining legislation into a single Building Act, and appointing a Strata Commissioner;
- establishing a NSW Energy Security Corporation with A$1 billion of seed funding to accelerate investment in renewable energy by partnering with industry;
- establishing a A$670 million Emergency Road Repair Fund for regional road upgrades;
- building the Parramatta Light Rail Stage 2 project in its first term;
- investing in new and upgraded hospitals, including a A$700 million hospital at Rouse Hill, a A$225 million upgrade to Canterbury Hospital, a A$115 million upgrade to Fairfield Hospital, and A$15 million for the planning of a new Aerotropolis Hospital;
- abolishing the Transport Asset Holding Entity; and
- cancelling a range of projects, such as the Great Western Highway Upgrade and the Beaches Link.

In addition, the NSW government has announced three major reviews.

4 [2023] NSWSC 99 <www.caselaw.nsw.gov.au/decision/1864e2f8442bad69d0e1049b>
5 [2022] NSWSC 1706 <www.caselaw.nsw.gov.au/decision/18509fcb55ad0c32f22758a5>

Review of Sydney Metro projects

The NSW government has announced an independent review of Sydney Metro, and particularly the Sydney Metro City & Southwest and Sydney Metro West projects.

The review will examine value for money, delivery models, project governance and effects on passengers. The review will recommend ways to maximise the projects' value, including through improved land use, urban renewal and integration with the wider transport network. The report is due by the end of 2023.

Review of Sydney Trains rail infrastructure and systems

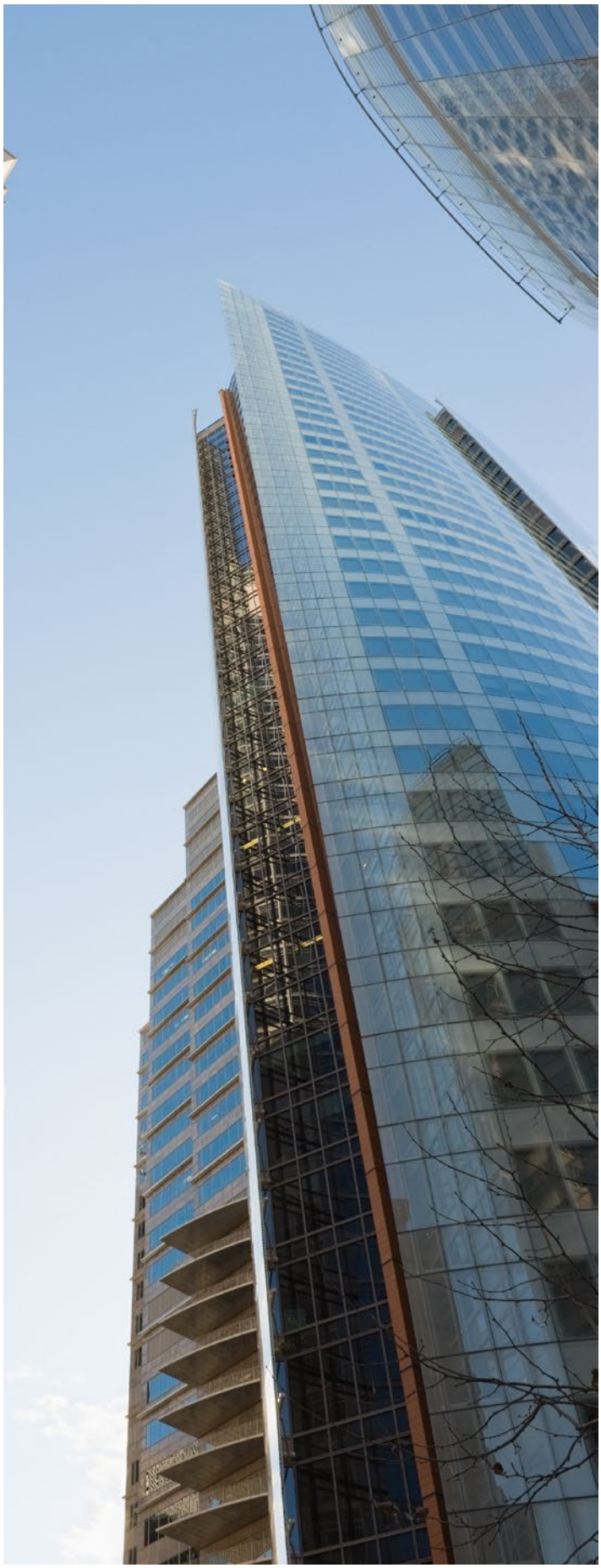
The NSW government has also announced an independent review of Sydney Trains' rail infrastructure and systems. Carolyn Walsh, the National Transport Commission Chair, will conduct the review. It will focus on the reliability and resilience. The review follows an unexpected shutdown in March, which was reportedly caused by IT failures.[6] An initial report is expected on 12 May 2023, with the final report due by 31 October 2023.

NSW announces Strategic Infrastructure Review of significant capital works

NSW Treasurer Daniel Mookhey has announced a Strategic Infrastructure Review of significant capital works, to be led by Ken Kanofski and supported by Infrastructure NSW. Mr Kanofski recently completed a review of Heavy Vehicle National Law for the Commonwealth that is available on www.infrastructure.gov.au.

First prosecution under NSW Residential Apartment Buildings Act

SSC Group Holdings Pty Ltd was the first developer to be prosecuted under the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* (NSW). The developer was fined A$11,000 for failing to give NSW Fair Trading a completion notice in the time required (6 to 12 months before completion). NSW Fair Trading has signalled that it expects "strict compliance" from developers.



6 Chirwig, R. 2023; IT News; *Failed switch caused Sydney Trains network outage* <https://www.itnews.com.au/news/failed-switch-caused-sydney-trains-network-outage-591820>

Queensland

Clear disclaimer meant no duty of care in negligence

Commercial farmers bought a particular type of sorghum seed from distributors. However, the packets also included seeds for shattercane, which is difficult to control and remediate. The farmers sued the manufacturer, Advanta, with whom they had no contract. The farmers argued that Advanta was liable in negligence for their losses, which were purely economic.

Advanta (which was previously called Pacific Seeds) relied on a disclaimer on the seed packet which included this line:

> "*Pacific Seeds will not be liable to you for any loss or damage caused or contributed to by Pacific Seeds, arising out of or related to the use of the product in this bag, as a result of Pacific Seeds' negligence*."

The trial judge and the Court of Appeal held that the disclaimer was clear and prominent enough to deny an assumption of responsibility, meaning Advanta owed the farmers no duty of care.

Mallonland Pty Ltd v Advanta Seeds Pty Ltd [2023] QCA 24[1]

Common drafting allows the superintendent to assess an EOT on a prospective or retrospective basis, and courts have even greater flexibility

The core issues in this case stemmed from a defects notice that required the builder to remove and replace a partly installed air-conditioning system that the owner considered did not comply with the contract. The contractor argued that this was a variation for which it was entitled to extra money and extra time.

The first pressing issue was whether the original work was defective. This generated argument about the express terms and about extrinsic evidence. The main feature of general importance was that, in interpreting the concept of a 'performance requirement', the primary judge consulted dictionary definitions for each word.

The Court of Appeal criticised this approach on the basis it did not reflect the compound nature of the phrase, and also ignored the related concept of a 'performance specification'. Ultimately, the Court of Appeal found that the work was not defective. The parties agreed that if the work was not defective, the defect notice amounted to a variation direction.

A consequent issue was the contractor's entitlement to an extension of time. The contract was an amended version of AS 4902–2000. Clause 34.3 provided that the contractor was entitled to extensions of time assessed by the superintendant

> "if:
>
> (a) the *Contractor* **is** or **will be** delayed in reaching *practical completion* by a *qualifying cause of delay*; … [and]
>
> (e) the *Superintendent* is satisfied that *WUC* was **actually delayed**"[.]
>
> (Bold added.)

The contractor claimed an extension of time on a prospective basis, but the superintendent assessed the claim retrospectively.

The primary judge heard evidence from programming experts, but her Honour's judgment did not include detailed reasoning on the issue. Neither did it find what extension of time would have been warranted (if the work was performed as a variation). This gave the Court of Appeal a special opportunity to consider delay analysis.

Their Honours concluded that the language 'is or will be delayed' allows the superintendent to assess delay claims on either a prospective or retrospective basis. This was consistent with Flanagan J's interpretation of similar language in *Civil Mining & Construction Pty Ltd v Wiggins Island Coal Export Terminal Pty Ltd* [2017] QSC 85 at [657].

It flowed from this that there is no general proposition that where the contractor claims an extension of time on a prospective basis, the superintendent must assess the claim prospectively. That was not required by the language of this contract.

1 [2023] QCA 24 <https://www.sclqld.org.au/caselaw/QCA/2023/24>

Their Honours further elaborated the principle by venturing (at [110]) that:

> 'One can imagine circumstances where, say, a lengthy extension of time was granted on the basis that procurement of relevant equipment would take months but then, by chance, a third party cancelled an order with the same manufacturer, and the equipment became available immediately. It is hard to imagine that the superintendent would not have the right to issue a further assessment of EOT, effectively a negative one.'

Finally, the Court of Appeal rejected the owner's argument that the Court 'stands in the shoes of the superintendent' and must assess the delay accordingly. The Court instead endorsed the expansive powers for courts recognised in *Beaufort Developments (NI) Ltd v Gilbert-Ash NI Ltd* [1984] QB 644. Their Honours outlined the implications:

- 'One result is that if this court finds the superintendent wrongly determined a matter, we are not bound to determine the question only on the basis of material which could have been known to the superintendent.' (At [115].)
- 'if, because of time limitations in the contract, the superintendent had no option but to assess delay on a prospective basis, that does not mean that, years after the relevant events, the court must do the same.'

In short, where a time clause allows an extension of time where the contractor 'is or will be delayed', it is likely that:

- the superintendent may assess the claim on a prospective or retrospective basis (regardless of how the contractor has framed the claim); and
- a court will have even more flexible powers to assess the claim.

Built Qld Pty Limited v Pro-Invest Australian Hospitality Opportunity (ST) Pty Ltd [2022] QCA 266[2]

[Note: the owner sought special leave to appeal to the High Court. Leave was denied.]

2 [2022] QCA 266 <www.queenslandjudgments.com.au/caselaw/qca/2022/266>

Victoria

The date in the certificate of practical completion mattered for a payment claim, not the underlying fact of practical completion

J Hutchinson Pty Ltd was the head contractor. It argued that the payment claims submitted by its subcontractor, Gasfitting Pty Ltd, were not supported by valid reference dates under the Subcontract, as required under the *Building and Construction Industry Security of Payment Act 2002* (Vic).

The head contractor claimed that because practical completion had been achieved, an adjudicator erred in finding that a valid reference date arose under item 37(a)(a) of the Subcontract, which provided for reference dates 'prior to practical completion'.

Stynes J analysed the text and purpose of the subcontract and held that it was the date of practical completion as evidenced in a certificate of practical completion, not the underlying fact of practical completion, which governed item 37(a)(a). Stynes J rejected the head contractor's argument that paragraph (a) of item 37(a) should be construed as referring to the period up until the relevant stage of work had been achieved, regardless of whether a certificate has been issued.

J Hutchinson Pty Ltd v Transcend Plumbing and Gasfitting Pty Ltd [2023] VSC 39[1]

Clear terms in development agreement meant no equitable interest in land

In October 2018, Development Victoria entered into a Development Agreement for the staged development of the Waterfront City precinct. The Development Agreement was not on its face a contract for the sale of land but an agreement to sell the land in future, in stages.

On 30 April 2019, the Governor-in-Council made an order divesting a strip of the land. The Developer argued it was entitled to equitable remedies. The Court disagreed and gave effect to the Developer's acknowledgment in the Development Agreement that until all conditions precedent were satisfied or waived, "it has no right, entitlement or interest in relation to the Land", and to its undertaking that it would not lodge a caveat until sales contracts were executed.

AM HT Development No 4 Pty Ltd v Secretary to the Department of Transport [2023] VSC 3[2]

Building Legislation Amendment Bill 2023 (Vic)

At the time of writing, the Building Legislation Amendment Bill 2023 (Vic) has had its third reading speech in the Legislative Assembly and its second reading in the Legislative Council. If it comes into force, the Bill will:

- strengthen the position of the State Building Surveyor;
- create the new position of a Building Monitor;
- expand the categories of building practitioner that need to be registered;
- require greater information sharing between statutory entities; and
- improve the governance of the Architects Registration Board of Victoria by creating a merits-based appointment process and mandating the development of a four-year strategic plan.

The Bill would thus give effect to substantially the same reforms as were proposed by the now lapsed Building, Planning and Heritage Legislation Amendment (Administration and Other Matters) Bill 2022 (Vic).

1 [2023] VSC 39 <www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2023/39.html>
2 [2023] VSC 3 <www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2023/39.html>

Western Australia

Arbitral tribunal had no jurisdiction to hear an issue

This case arose out of the Gorgon offshore oil and gas project. Put simply, the underlying dispute between the parties was that the appellants (collectively, CKJV) argued that Chevron had underpaid them. Chevron in turn argued that CKJV had overcharged.

The dispute had a long history. The relevant contract provided for disputes to be resolved by arbitration. In 2018, the arbitral tribunal determined that the dispute would be split into two hearings: the first on liability and the second on quantum.

In the second hearing, one pressing issue was "whether CKJV was precluded (by issue estoppel, res judicata or *Anshun* estoppel) from litigating a case, and whether the Tribunal was by the principles of functus officio precluded from hearing a case". CKJV had sought to raise arguments on liability, despite the second hearing being limited to addressing issues of quantum. By majority, the arbitral tribunal held that it was not precluded from dealing with a particular question of liability in the second hearing. (That question of liability had not been argued in the first hearing.)

In reliance on section 34(2)(a)(iii) of the *Commercial Arbitration Act 2012* (WA), Chevron disputed the tribunal's jurisdiction to determine this question of liability.

At trial, Kenneth Martin J held that the tribunal was *functus officio* when purporting to determine this new question of liability. The phrase 'functus officio' simply means that the tribunal's authority had been exhausted.

The Court of Appeal agreed, in a unanimous 105-page judgment. Quinlan CJ, Murphy JA and Bleby AJA heard the appeal. Their Honours' analysis at [85]–[86] (citations omitted) is instructive:

> *"Whilst preclusionary estoppels operate on the parties (and their privies) to preclude the assertion of a right or obligation or the raising of an issue of fact or law, and must, generally speaking, be pleaded, the consequences of finality also directly impinge upon the authority or jurisdiction of the arbitrator. …*
>
> *The consequence of finality insofar as it affects the authority or jurisdiction of the arbitrator is expressed by the common law in the Latin phrase 'functus officio'. The term 'functus officio' in this context is descriptive of the completion or exhaustion of the authority of the arbitrator to decide. As with any conclusion of functus officio, it is reached by close examination of the particular circumstances, and the nature of the power, function or duty in question."*

Their Honours found that there was no suggestion in the first interim award or the procedural orders that the tribunal had reserved the relevant question of liability. Accordingly, the Court agreed with Kenneth Martin J that the tribunal was functus officio, and so lacked jurisdiction to hear the question of liability.

CBI Constructors Pty Ltd v Chevron Australia Pty Ltd [2023] WASCA 1[1]

1 [2023] WASCA 1 <ecourts.justice.wa.gov.au/eCourtsPortal/Decisions/DownloadDecision/c69f4a2d-9c3b-4a27-93cb-3cc89d5c5105>

Other jurisdictions

A room with a view, but the neighbours sue: UK Supreme Court finds that overlooking neighbours may amount to private nuisance

In 2016, the Tate Modern opened a 360-degree "viewing gallery" on the top floor of the art museum. Hundreds of thousands of people visit the viewing gallery each year. These visitors have a clear view of the surrounding buildings. They often take photographs and occasionally use binoculars. Residents of a nearby apartment building (with mostly glass walls) sued the gallery in private nuisance.

By majority, the UK Supreme Court held that the overlooking did amount to private nuisance. Lord Leggatt wrote the majority judgment, with which Lords Reed and Lloyd-Jones agreed. Lord Sales (with whom Lord Kitchin agreed) wrote a lengthy dissent.

The majority seemed at pains to emphasise that the case was unusual, finding at [74] that the viewing "goes far beyond anything that could reasonably be regarded as a necessary or natural consequence of the common and ordinary use" of the Tate's land.

There are several reasons to doubt whether an Australian court would recognise this as private nuisance, even on these unusual facts.

First, the case is not binding on Australian courts. Its persuasive value is perhaps weakened by the fact it was a bare majority decision.

Second, the case raises difficult policy questions. It appears to extend the traditional scope of nuisance. In doing this, it necessarily infringes on rights to build in accordance with the planning process and other laws. (For a recent Australian example of the conflict between planning law and private nuisance, see *Uren v Bald Hills Wind Farm Pty Ltd* [2022] VSC 145, which was the subject of a note in the Quarter 2 2022 *Corrs Projects Update*.)

Further, as the majority make clear (at [42]), a nuisance claim may be open to incoming neighbours who are affected by the way that a longstanding owner uses its land.

Third, it appears difficult to craft an appropriate remedy. The residents sought an injunction, or failing that, damages. In general, an injunction restraining overlooking would often be highly intrusive. Damages would be difficult to assess. Here, the Court invited the parties to agree on a remedy. (If no agreement is reached, the remedy is to be determined by the first-instance court.)

Finally, the case sits uneasily with the High Court of Australia's decision in *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479. In that case, the defendants owned land next to a racecourse. They built viewing platforms to watch and commentate on the races. The racecourse owner's claim in nuisance failed because the defendants had not interfered with the racecourse owner's land or its enjoyment of that land.

Fearn v Board of Trustees of the Tate Gallery [2023] UKSC 4[1]

1 [2023] UKSC 4 <www.supremecourt.uk/cases/docs/uksc-2020-0056-judgment.pdf>

Other essential reading

Other essential reading

Projects-related publications

Trevor Thomas, 'The Doctrine of Prevention and the Doctrine of Penalties: Uniformity and Freedom of Contract' [2023] *International Construction Law Review 1*

Louise Camenzuli, Dr Phoebe Wynn-Pope, Julia Green and Kate Gill-Herdman, 'Biodiversity in 2023 and beyond – What Should Australian Business Expect?' (23 March 2023) (https://www.corrs.com.au/insights/biodiversity-in-2023-and-beyond-what-should-australian-businesses-expect)

Cara North and Harrison Frith, *International Comparative Legal Guide: Enforcement of Foreign Judgments 2023* (8th edition), Chapter 4 (https://www.corrs.com.au/insights/iclg-enforcement-of-foreign-judgements-2023-australia)

Ren Jaw Liew, 'Fit for Green? Contractor Liability for Construction Quality in Green Financed Buildings' 206 (2023) *Australian Construction Law Newsletter*

Alice Hayes, 'Joined at the Hip (and at the Heart) — Managing the Inherent Risks of Joint Ventures in the Australian Construction Industry' (2023) 18(1) *Construction Law International* 47

General interest publications

Jodie Burger and Angela Goggin, 'Is It a Bird, Is It a Plane? Airtaxis Set to Take off in Brisbane' (14 February 2023) (https://www.corrs.com.au/insights/is-it-a-bird-is-it-a-plane-airtaxis-set-to-take-off-in-brisbane)

Rosie Syme, Anna White, Michelle Blackburn and Lewis Page, 'Explainer: Recently Announced Reforms to the Safeguard Mechanism and Implications for Industry' (19 January 2023) (https://www.corrs.com.au/insights/explainer-recently-announced-reforms-to-the-safeguard-mechanism-and-implications-for-industry)

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