Corrs Projects Update

Q4 2022

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Welcome to the latest edition of Corrs Projects Update: Q4 2022

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:

- **Four feature articles:**
  - Builders beware: how amendments to the unfair contract terms regime will affect the construction industry;
  - Trailing liability for asset decommissioning in Australia;
  - Investment treaties: a tool for mitigating sovereign risk on major projects; and
  - Addressing embodied carbon: five steps for developers.
- **Concise notes on cases of interest around Australia**
- **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 December 2022.*

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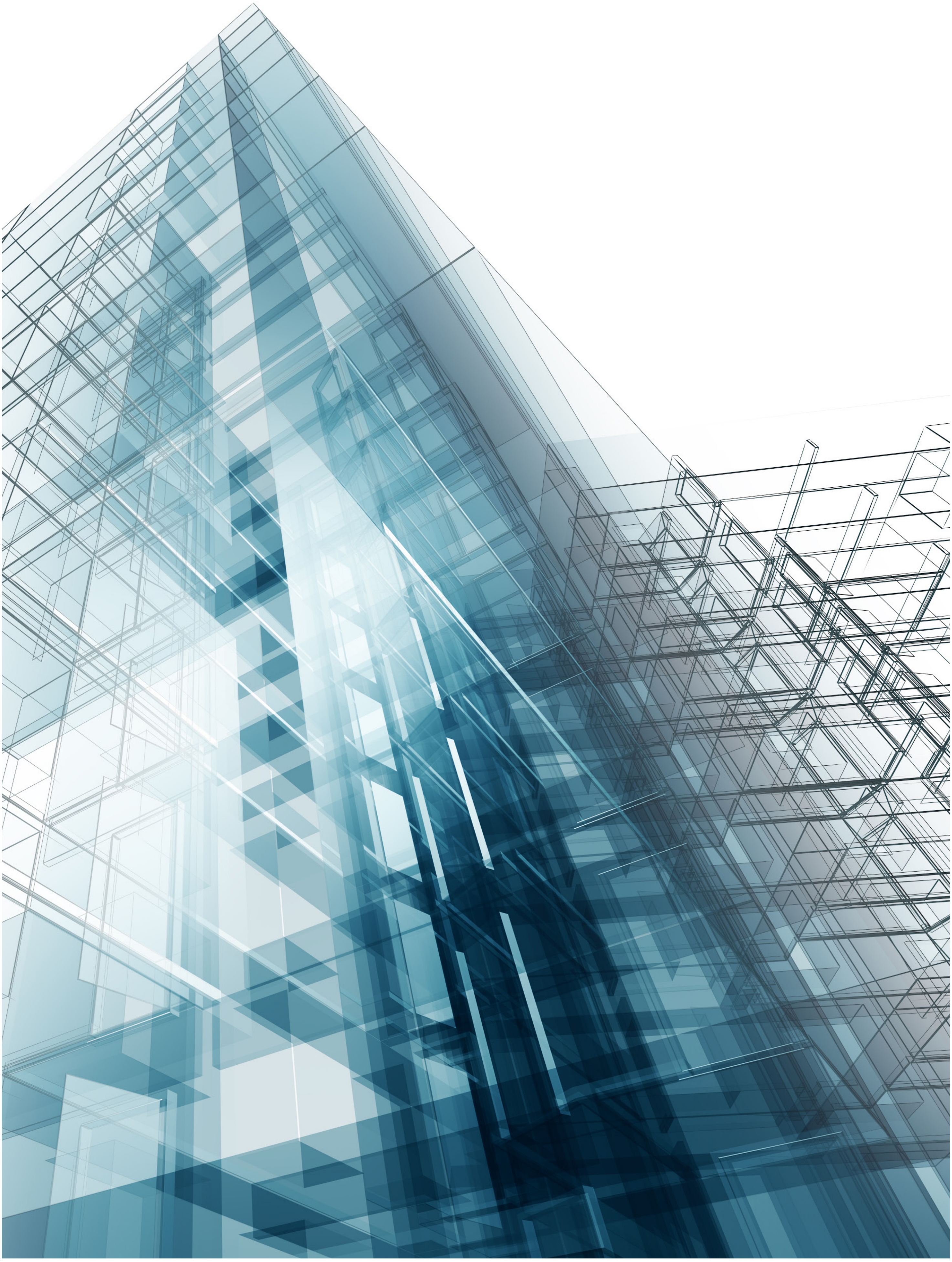

Feature articles

Builders beware: how amendments to the unfair contract terms regime will affect the construction industry

Key takeaways

From 10 November 2023, the *Treasury Laws Amendment (More Competition, Better Prices) Act 2022* (Cth) will effect sweeping amendments to the unfair contract terms regime in the Australian Consumer Law (the **UCT law**). These amendments will not only greatly increase the number of contracts entered into within the construction and building services industries likely to be subject to the UCT law, but introduce significant penalties and grant additional powers to the courts to enforce compliance with the amended regime.

Keywords

unfair contract terms

In advance of the amendments to the UCT law coming into effect in 2023, participants in the construction and building services industries should take time to:

- become familiar with the UCT law;
- carefully consider how the amendments to the UCT law will affect their contracting approach; and
- take steps to review, assess and amend their contract templates and contracting processes (even if they have already been subject to an earlier UCT review).

Corrs considered the amendments to the UCT law in detail in a previous Insight, available here.

What contracts will be subject to the amended UCT law?

The UCT law applies to 'consumer contracts' and 'small business contracts' that are 'standard form contracts'.

Even though the amendments to the UCT law will not change the definition of 'consumer contract', changes to the definitions of 'small business contract' and 'standard form contract' could result in a larger number of public and private sector construction contracts, subcontracts, supply agreements and services agreements becoming subject to the UCT law. This will create risks that principals, contractors and subcontractors may not have considered or accounted for.

The amended UCT law will apply to:

- contracts made on or after the commencement of the relevant amendments on 10 November 2023;
- existing contracts that are renewed on or after that date; and
- terms of an existing contract that are varied on or after that date.

Amendments to definition of 'small business contract'

As amended, a 'small business contract' is a contract for a supply of goods or services, or a sale or grant of an interest in land, where at least one party satisfies either or both of the following conditions:

- a party makes the contract in the course of carrying on a business and at a time when the party employs fewer than 100 persons (excluding casual employees, unless employed on a regular and systematic basis); and/or
- a party's turnover for the party's last income year that ended at or before the time the contract is made, is less than A$10 million.

In the construction and building services industries, this amended definition of 'small business contract' may capture works contracts, consultancy agreements, supply agreements and subcontracts entered into by public and private sector entities carrying on a business, including government departments and entities (within all three tiers of government) and small to medium sized Australian subcontractors, consultants (including architects and engineers), tradespersons and suppliers.

Amendments to scope of 'standard form contracts'

To date, when determining whether a contract is a 'standard form contract', courts have been required to consider whether one party was required to reject or accept the terms of a contract in the form it was presented, and whether they were given an opportunity to negotiate the terms of the contract. There is also a statutory presumption that a contract is a 'standard form contract' unless the respondent to any claim under the UCT law proves otherwise.

The amendments to the UCT law provide that a contract may be determined to be a 'standard form contract' despite there being an opportunity for a party to:

- negotiate minor or insubstantial changes;
- select a term from a range of options; and/or
- negotiate terms of another contract.

In addition, the amendments will require the courts to take into account how often a party has used contracts containing substantially the same terms. Essentially, the more often a party uses contracts with terms that are substantially the same (for example, Australian Standard contracts), the more likely a court will consider that contract to be a 'standard form contract'.

Standard form contracts are widely used throughout the construction and building services industries, including by government and industry associations. Any template contracts that are used on a take it or leave it basis (or with which one party uses its bargaining power to reject departures to the terms of template contracts) are likely to be 'standard form contracts' for the purposes of the UCT law.

When is a contract term 'unfair'?

The UCT law states that a term is 'unfair' if it:

- would cause a significant imbalance in the parties' rights and obligations arising under the contract;
- is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
- would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

The UCT law provides some guidance and lists examples of terms that may be unfair. These include, but are not limited to, terms that permit or have the effect of permitting a party to unilaterally:

- vary the terms of the contract;
- avoid or limit performance of the contract;
- assign the contract to the detriment of another party without that other party's consent;
- vary the upfront price payable under the contract without the right of another party to terminate the contract; and
- vary the characteristics of the goods or services to be supplied, or the interest in land to be sold or granted, under the contract.

This list of examples is not exhaustive and only provides a guide to the types of terms that may be unfair. Such terms may or may not be found by a court to be unfair depending on a range of matters, including consideration of the contract as a whole. A thorough analysis of the relevant contract term (having reference to the test in the UCT law) will be required to determine if it is unfair.

Against this context, a range of terms commonly seen in contracts entered into in the construction and building services industries should be carefully considered. These could include:

- automatic renewal clauses;
- time bars on claims;
- liquidated damages regimes;
- assignment without consent clauses; and
- termination for convenience without compensation clauses.

If such clauses are used in a manner that creates significant imbalances in the rights and obligations of the parties, and go beyond what is reasonably necessary to protect the legitimate interests of the party seeking to rely on the clause, these could be considered to be unfair by the courts.

What are the consequences of proposing, applying or relying on unfair terms?

Private disputes

Given that the main consequence of a term being declared unfair is that it is rendered void (that is, unenforceable), a party in a distressed project may seek to rely on the UCT law as a basis to obtain a declaration that an unfavourable term is void as an unfair term. This may be done strategically in respect of variation or extension of time regimes in circumstances where parties seek to claim relief.

Similar arguments have been made in respect of security of payment regimes. For example, where a term prescribing a process for payment is found to be inconsistent with the time periods for provision of payment claims and payment schedules under a security of payment regime, that term may be found to be void.

Penalties and declaratory relief

The amendments to the UCT law will also introduce significant penalties for breaching the UCT law that substantially increase the risk of non-compliance with the UCT law. Further, under the amended law, a court may make declaratory orders to:

- redress, in whole or in part, loss or damage that has been caused, or to prevent loss or damage that is likely to be caused;
- on application by the ACCC, prevent a term that is the same or substantially similar to an unfair term from being included in future contracts; or
- on application by the ACCC, prevent or reduce loss or damage which is likely to be caused to any person by the unfair term.

A court may also order injunctions restraining parties from:

- entering into any future contract that contains a term that is the same or substantially similar to an unfair term; or
- applying or relying on a term in any existing contract that is the same or substantially similar to an unfair term (whether or not the contract is before the court).

These are significant new powers which could affect the use of particular types of terms in future standard form contracts. For example, the ACCC could apply to a court to prevent particular time bars in standard form construction contracts (whether applying to entitlements to claim extensions of time, cost relief or otherwise) from use in standard form contracts not yet entered into.

Compliance with the Australian Consumer Law

Importantly, parties are not able to contract out of the UCT law or the Australian Consumer Law. It is therefore not open to parties to simply dispose of risks arising under the UCT law by including a broad-brush exclusion or limitation of liability in relevant contracts. In particular, careful consideration should be given to how common terms restricting reliance and limiting liability are impacted by the UCT law.

Where to next?

As mentioned earlier, the amendments to the UCT law will commence on 10 November 2023. This provides a critical window for participants in the construction and building services industries to review their current contract templates and contracting processes.

To do so, collaboration between commercial and legal teams is desirable to ensure a common understanding is reached on:

- when the UCT law will and will not apply to a contract;
- what terms can and cannot be included in standard form contracts so as to ensure compliance with the UCT law; and
- appropriate conduct of procurement processes to ensure compliance with consumer laws more generally.

Note: this article by Melanie Bond, Jodi Gray, James Cameron, Matthew Judkins and Ashleigh Gray was previously published online here.

Trailing liability for asset decommissioning in Australia

Key takeaways

Australia's total asset decommissioning liability is estimated to exceed $60 billion between 2020 and 2050. This issue is particularly acute with many fossil fuel assets facing early retirement as a result of the clean energy transition. Consequently, decommissioning stranded or end-of-life assets is becoming an increasingly significant consideration for businesses across a wide range of industries.

Keywords

decommissioning

Australia's piecemeal legislative framework for dealing with decommissioning is, in many respects, confusing and inconsistent. Presently, the framework consists of an industry-specific array of federal and state-based legislation and regulations. For example, the *Offshore Electricity Infrastructure Act 2021* (Cth) regulates decommissioning of offshore wind farms and associated electricity transmission infrastructure, while the Water Act 1989 (Vic) regulates decommissioning of public and private dams.

Until recently, this legislative framework rarely extended decommissioning liability beyond the asset's current titleholder. For example, the *Petroleum (Onshore) Act 1991* (NSW) holds the current titleholder of onshore petroleum assets in NSW responsible for decommissioning but does not provide any safeguards against the titleholder's insolvency or inability to decommission the asset.

The dangers of such a regulatory framework are obvious and were highlighted by the collapse of the Northern Oil and Gas Australia Pty Ltd (**NOGA**) corporate group in February 2020. One of the NOGA companies, Timor Sea Oil & Gas Australia Pty Ltd (**TSOGA**) held a petroleum title in the Timor Sea and owned and operated the Northern Endeavour floating production, storage and offtake (**FPSO**) facility.

TSOGA had acquired the FPSO from Woodside Energy Ltd (**Woodside**) after Woodside had decided that the asset and the field had reached the end of their commercial operating period.

NOGA intended to extend the life of the FPSO, however, a number of technical and commercial issues arose (including concerns with corrosion and operational safety issues), resulting in the National Offshore Petroleum Safety and Environmental Management Authority (**NOPSEMA**) issuing a Prohibition Notice on 10 July 2019 and, ultimately, a General Direction requiring the FPSO to cease production on 18 July 2020.

As a consequence, the group entered into voluntary administration in September 2019. When it subsequently entered into liquidation on 7 February 2020, it was left unable to decommission the FPSO and the field. The $250 million decommissioning liability eventually fell upon the Commonwealth government, which will recover the costs of decommissioning through a temporary levy on offshore petroleum production (under the *Offshore Petroleum (Laminaria and Corallina Decommissioning Cost Recovery Levy) Act 2022* (Cth)).

In response to the NOGA liquidation, on 2 September 2021 the Federal Parliament passed the *Offshore Petroleum and Greenhouse Gas Storage Amendment (Titles Administration and Other Measures) Act 2021* (Cth) (the **Act**), which came into force on 2 March 2022. The Act introduces a trailing liability mechanism for decommissioning offshore oil, gas, and carbon capture and storage assets.

The Act only applies where the current titleholder is unable to meet its decommissioning obligations or where previously completed decommissioning work is defective. Trailing liability is intended to be a last resort; the primary obligation to decommission the asset still falls upon the current titleholder.

The Act permits NOPSEMA to issue remedial directions extending liability to former titleholders, their related bodies corporate and any other person who, on or after 1 January 2021:

- has or could have significantly benefited from the operation of the asset;
- has been in a position to influence the extent of another person's compliance with the Act; or
- has acted jointly with a titleholder in operating the relevant asset.

The scope of NOPSEMA's power is broad enough to potentially capture a wide range of non-titleholder parties, including joint venture partners, secured financiers and royalty holders. This provides a stark contrast to the broader national decommissioning liability framework, which does not impose decommissioning liability on any parties beyond the current titleholder.

Similar trailing liability legislation already exists in international jurisdictions including Norway, the United Kingdom and the United States (see pages 71–84 of the Department of Industry, Innovation and Science's Discussion Paper – Decommissioning Offshore Petroleum Infrastructure in Commonwealth Waters).

Whilst the NOGA collapse may have prompted the introduction of the Act, there is no conceptual reason why trailing liability should be limited to offshore oil, gas and carbon capture and storage assets.

Certainly, the potential cost exposure for these assets is considerable and the immediate environmental risks from a catastrophic failure makes their safe decommissioning a priority. However, the fundamental issue of an insolvent or incapable titleholder ultimately passing a 'clean-up bill' back to the taxpayers is something which one may expect to have broader application than just under the Act.

Consequently, having regard to the very significant pipeline of decommissioning activities noted above, we may well see the introduction of State or federal trailing liability legislation which extends decommissioning liability to a far wider class of assets. For example, the Victorian government has already announced an intention to introduce trailing liability for decommissioning coal mines under the *Mineral Resources (Sustainable Development) Act 1990* (Vic).

As such, it will become increasingly important for parties to consider their potential decommissioning liability exposure and structure transactions accordingly. This may include a consideration of a variety of risk mitigation measures such as security arrangements, indemnities in favour of prior asset holders, and cross guarantees. Such exposure may also have an effect on the commercial value of assets which are close to the end of their life, which will also become an increasingly important consideration for parties dealing with these assets.

Note: this article by Trevor Thomas and Thomas Milner was previously published online here.

Trevor and Thomas also discussed these issues in a recent High Vis podcast.

Investment treaties: a tool for mitigating sovereign risk on major projects

Key takeaways

Australian companies involved in infrastructure and construction projects overseas should be aware of investment treaties and the opportunities they present to receive compensation from the foreign state in which the project is located for breaches of investor protections contained in those treaties – in particular where contractual relief is limited or unavailable.

Keywords

sovereign risk; investment treaties; investor-state dispute settlement

Picture this scenario – a company entered into a contract with a government agency of Country X, to renovate, construct and operate two airport terminals for 12 years, with a possible extension for another six years. Two years after construction was complete and the company had begun operating the airport, Country X issued a decree which resulted in all activities related to the operation of the airport terminals being taken from the company. The company had lost a major benefit of its investment, being payment for operation of the terminals into the future.

This is what happened to two Cypriot companies who invested in Hungary. It led to an International Centre for the Settlement of Investment Disputes case in 2006, which was decided in favour of the companies, which were awarded US$76.2 million in compensation, plus legal costs and interest until payment.

Australian companies involved in projects overseas should strongly consider the capacity for investment treaties to protect against the sovereign risk inherent in all foreign investments.

What are investment treaties?

International investment treaties are agreements between two or more states that give investors from one state certain legal protections when investing in another state which is party to that treaty. Investment treaties are intended to promote cross-border direct investment by giving investors greater certainty in their investments and reducing the risk involved in investing in foreign countries.

Investment treaties are generally either standalone Bilateral Investment Treaties (**BITs**) or found within multilateral free trade agreements (**FTAs**).

BITs are typically agreements between two or more countries where each country agrees to protect the investments of investors from the other countries, with the primary focus being the protection of private direct investment. BITs tend to give investors from a participating state protection from unfair, inequitable or discriminatory treatment by the state where their investment is located.

FTAs are agreements between two or more countries and have a wider focus of reducing or eliminating barriers to trade and investment, and typically include a chapter on investment which has a similar reach to BITs.

Many BITs and FTAs allow foreign investors who qualify for protection to bring a claim directly against the state in which the investment is located (that is, the ‘host state’) for breaches of treaty provisions. These treaties contain a legal mechanism which see such disputes heard before an independent international arbitral tribunal which can order remedies in favour of the foreign investors, in a process known as Investor-State Dispute Settlement (**ISDS**).

These treaties provide foreign investors who qualify for protection a unique opportunity to bring a claim against a state outside of that state’s court system and before an independent body. The arbitration is typically before a panel of three arbitrators, one selected by each party and the president of the tribunal selected by the party-appointed arbitrators or an arbitral institution.

How common are investment treaties?

Australia is currently party to a number of international investment treaties. In terms of BITs, Australia is party to five in Asia, with China, Laos, Papua New Guinea, the Philippines and Sri Lanka. Australia is also party to a number of bilateral FTAs, including with New Zealand, Singapore, the United States, Thailand, Chile, Malaysia, Korea, Japan, China, Peru and Indonesia. Australia is party to four multilateral FTAs, including the recently-ratified Regional Comprehensive Economic Partnership. ISDS provisions may also be found in other treaties which are not BITs or FTAs.

Australia's wide participation in investment treaties means that Australian companies with overseas projects may be able to bring an ISDS claim under one of these treaties. If there is no investment treaty between a company's home state and the state where their investment is located, the company should consider structuring their investment to allow access to an investment treaty.

It is important to bear in mind that globally there is estimated to be more than 2,600 investment treaties presently in force, with some countries such as the United Kingdom having more than 100 treaties.

How are disputes resolved under an investment treaty?

The provisions of investment treaties provide foreign investors who qualify for protection a legal mechanism to seek redress against a state before an independent international arbitral tribunal. Investment treaty protections do not apply to commercial disputes entirely within the private sphere.

How does a construction company qualify for protection?

A precondition to bringing a successful claim is to overcome two key jurisdictional hurdles. First, the party to be afforded protection must be an 'investor' and second, there must be a protected 'investment'. With respect to the first, there is no generally applicable definition of an investor. However, treaties ordinarily define the term as an individual or an entity that is a national of a state party to the treaty that is not the host state (that is, not a domestic investor).

In the case of companies, nationality is typically determined by the place of incorporation, which is often satisfied by having a holding company incorporated within the relevant jurisdiction. However, the exact criterion for determining 'nationality' depends on the individual treaty.

With respect to the second hurdle (having a qualifying 'investment'), there is also no universal definition of an 'investment'. Rather, treaties often contain a broad definition of what constitutes an investment that is not limited to ownership of an enterprise or shares in an enterprise but includes a range of tangible and intangible property rights, contracts, debt instruments and the like. Additional requirements may apply depending on the chosen dispute resolution rules, including that:

- a claimant has made a substantial economic contribution to the host state;
- the investment was made for a particular duration;
- the investment involved some risk taken by the claimant;
- the claimant received regular profit and return from the investment; and
- the investment significantly contributed to the economic development of the host state.

What types of claims might be available for government acts or omissions?

Once the jurisdictional questions are satisfied, a claimant may be entitled to draw upon a smorgasbord of protections from the applicable treaty. These include claiming that the host state has:

- expropriated their investment (directly or indirectly);
- engaged in unfair, arbitrary or discriminatory treatment (in breach of the 'fair and equitable treatment' standard), or acted in a way that is contrary to a commitment made by the host state (in breach of the investor's 'legitimate expectation');
- discriminated against the investor (in breach of a 'national treatment' standard or 'most-favoured nation' standard); or
- failed to carry out contractual undertakings (pursuant to an 'umbrella clause').

A helpful illustration of the above kinds of claims can be drawn from the decision in *ADC Affiliate Limited and ADMC Management Limited v Hungary*,[1] the case highlighted in the introduction, in which the Cypriot companies made several successful claims against Hungary.

The companies claimed that Hungary had expropriated their investment by taking over all airport operations, in violation of their contract.

The companies argued that this expropriation was unlawful because:

- it was not in the public interest;
- the companies had been denied the standard of treatment required under the BIT, including "fair and equitable treatment" and 'full security and protection';
- the taking over of the investment was discriminatory; and
- there was no payment of just compensation.

The companies argued that Hungary's conduct disentitled them to dividends from the project company and management fees payable under the contract. Additionally, the companies argued that the project company would have been given the opportunity to be involved in the financing, building and operation of a new proposed airport terminal, which had now been denied.

The Tribunal rejected Hungary's argument that the companies' losses were just part of the risk of doing business in a foreign state and found that Hungary's decree constituted expropriation of the investment.

Regarding the lawfulness of the expropriation, the Tribunal first held that Hungary failed to establish that the expropriation was in the public interest. Second, the Tribunal found that Hungary did not afford the companies due process, by giving no reasonable advance notice and no fair hearing to assess the claims. Third, Hungary's conduct was found to be discriminatory. Finally, it was obvious to the Tribunal that the companies had not been fairly compensated.

The Tribunal also agreed with the companies that Hungary failed to accord their investments the standard of treatment required under the treaty (including fair and equitable treatment and full protection and security).

The Tribunal awarded the Cypriot companies US$76.2 million, calculated as the fair market value of the investments at the time of the award. In doing so, the Tribunal declined to value the investments as at the date of expropriation (which would have produced a lesser amount) and instead considered it right to account for the significant increase in the value of the investments after the date of expropriation.

What type of relief can a construction company get?

In the event an investor is successful in a claim under an investment treaty, a tribunal ordinarily is empowered to compensate the investor for any losses suffered as a result of the purported breach. Importantly, the award issued by the tribunal is final and binding on all parties to the dispute.

Depending on the terms of the applicable treaty, a tribunal may be entitled to order restitution of property or some other form of non-pecuniary relief.

1 ICSID Case No ARB/03/16.

Can the host state raise defences and counterclaims? If so, what are they?

A host state may raise various defences and counterclaims in response to a claim under an investment treaty. Common defences include jurisdictional challenges, admissibility objections, and claims of necessity or force majeure. It is also possible for a host state to make a counterclaim that the claimant has caused environmental damage, breached human rights or that it was not entitled to act as it has pursuant to the terms of the applicable treaty.

It is therefore important to understand possible any defences and counterclaims that may be available to the host state before going down this path.

How common are investment treaty cases in the construction context?

ISDS is on the rise in the global construction industry: 16% of new cases registered with the International Centre for the Settlement of Investment Disputes (the leading institution for the resolution of investor-state disputes) in 2021 concerned the construction sector, second only to oil and gas. It is likely that this trend will continue as governments increase foreign investment into infrastructure projects, as access to ISDS is made easier and as litigation funding becomes more widely available. Further, construction projects are increasing in size and complexity and more frequently require collaboration between companies with expertise across the globe.

Australian companies (and individuals) would be remiss to ignore this possible avenue for protecting their profits generated on projects overseas where the host state's actions impinge on their rights or impact the economic value of their foreign investments.

What are the key benefits?

ISDS should be used by Australian companies in the construction sector because it gives companies (and individuals) involved in overseas projects the opportunity to seek relief against the host state where they are unable to do so under domestic law. For example, a claim under an investment treaty can arise where no contractual relief is available or a limitation period has expired. Accordingly, protections in investment treaties offer a safety net for contractors and have the capacity to form an important part of an investor's toolkit for mitigating foreign investment risk.

Australian companies may also be drawn to the fact that awards of damages under an investment treaty may be higher than those under domestic law. For example, ISDS tribunals are increasingly willing to award damages for profits lost as a consequence of the contract not being performed, in contrast to local domestic courts.

The compensation awarded in ISDS cases is often large and it is increasing, with many awards in the billions. Therefore, the ability to invoke treaty protections can be a powerful negotiating tool for construction companies in early settlement discussions.

Note: this article was written by Nastasja Suhadolnik, Cara North, Eleanor Clifford and Harrison Frith.

Addressing embodied carbon: five steps for developers

Key takeaways

Five steps for developers to address embodied carbon:

1. Appoint a carbon planning consultant
2. Consider embodied carbon in site selection and early stage feasibility and design processes
3. Find the right contractors and brief the construction team
4. Consider how to market the project
5. Manage embodied carbon throughout the building life cycle

Keywords

embodied carbon; building materials

With a growing list of corporations making a commitment to net-zero and to decarbonising their footprint, property developers have increasingly been considering how to reduce the emissions associated with built form, such as those arising from the production of building materials and the performance of construction work. Known as 'embodied carbon', these emissions are estimated to account for 35-45% of a standard building's lifecycle carbon emissions.

To take just one example, most buildings will incorporate steel and concrete, two materials which are traditionally energy-intensive and therefore are considered to have high embodied carbon.

There are a range of initiatives underway that are seeking to drive change towards lower embodied carbon outcomes, including the work (and resources) of the Materials and Embodied Carbon Leaders' Alliance (**MECLA**) and the Green Building Council of Australia (**GBCA**).

Even so, there is some uncertainty about when (and if) tangible embodied carbon benchmarks for construction will be prescribed and regulated for future property development. There is also no official or accepted industry-wide method for measuring embodied carbon in construction projects.

So, for a developer who wants to take immediate steps towards reducing embodied carbon in their developments, it is not as simple as prescribing compliance with a single standard, and passing that risk down through the contractual chain.

However, there are some steps that developers can take today towards addressing embodied carbon issues in their developments.

1. Appoint a carbon planning consultant

Developers can initially set a carbon budget for their development with the assistance of a carbon planning consultant. Consultants can help developers to set appropriate carbon budgets based on their experience with similar projects and drawing from the growing body of resources published by MECLA, GBCA and others.

Once the carbon budget for a project has been determined, it can then be used as a reference point throughout the development process. A carbon budget, like any budget, will be subject to adjustment during this process.

After a developer has measured carbon on one project, it is able to use that data as a benchmark to measure carbon outcomes and set target for other projects. In that way, developers can demonstrate and develop processes for continuous improvement in reducing embodied carbon emissions in their projects.

2. Consider embodied carbon in site selection and early stage feasibility and design processes

By engaging with the issue of embodied carbon early in the site selection and feasibility process, developers will be able to identify embodied carbon "hot spots" and take steps to change the embodied carbon footprint of the development via site selection, design refinement, materials selection and procurement processes. For example, using the foundations and structure of an existing building is likely to significantly lower embodied carbon compared to the development of a new building.

Material selection is another key issue, particularly given the current significant pressures on material supply chains. Finding the right materials for a project requires consideration – not just of the embodied carbon associated with the manufacture of the materials selected, but also whether those materials will be available as and when required, and the distance and method of transporting the materials to the project site.

Of course, cost is another important consideration, as lower embodied carbon materials may be more expensive in the short term.

As with the carbon budget, this is an iterative process and may be subject to change. Careful contract drafting will be required to give a contractor sufficient flexibility to achieve the embodied carbon outcomes without sacrificing other key requirements such as time and quality.

3. Finding the right contractors and briefing the construction team

The developer's project team will need to be briefed on the embodied carbon objective and their role in achieving the embodied carbon targets.

When going to market for contractors, developers will need to articulate their carbon objective and how the terms for engagement of contractors will address and facilitate the achievement of that objective.

A building contract for a project with an embodied carbon objective must carefully consider a number of contract terms, including:

- how the embodied carbon targets for the project will be articulated, and how compliance with those targets will be measured, monitored and reported on during the build phase;
- how embodied carbon will be considered in the context of any variations to the project brief (for example, when and what substitute materials can be used where low embodied carbon materials are unavailable? How are cost adjustments managed?);
- the consequences of a builder failing to satisfy its obligations associated with the embodied carbon targets and objectives. Because a requirement to re-do work would generally be inconsistent with an objective of reducing embodied carbon, it is more likely that an abatement or liquidated damages regime will be imposed: for example, the builder may be required to contribute to the cost of buying carbon offsets as a consequence of a failure to meet the relevant target.

4. Consider how to market the project

Given the uncertainties outlined above, a developer may face challenges in marketing its project. If there is no widely accepted standard to be adhered to, and if the supply chain challenges might put at risk use of materials which might reduce embodied carbon emissions (in spite of everyone's best endeavours), how can such a project be positioned?

One option is to express the developers' objectives in terms of targets or objectives (as Dexus has done in relation to Atlassian's new HQ in Sydney), which must be carefully formulated to ensure transparency and accountability, and to minimise the prospect of greenwashing allegations later being made.

5. Manage embodied carbon throughout the building life cycle

Embodied carbon issues remain relevant during the building life cycle and consideration should be given to the impact of embodied carbon on how the building is managed and maintained. For example, through minimising the need for repair, replacement or refurbishment, and where such works are required, through consideration of the embodied carbon matters discussed above at steps 2 and 3.

At a time when investors and other development stakeholders are prioritising how to address their carbon footprint, considering embodied carbon in construction and building projects presents both challenges and opportunities for developers.

By taking steps today towards better understanding and reducing embodied carbon in construction, developers will gain valuable lived experience with embodied carbon issues and position themselves as industry leaders in this space for the years to come.

Note: this article by Jane Hider, Rosie Syme and Eleanor Kwak was previously published online here.

Developments

Commonwealth

New life for the Murray Review?

John Murray AM's *Review of Security of Payment Laws* was published in December 2017. The aim of the Review was to "identify a best-practice legislative model to overcome the current fragmented nature of the security of payment laws".

The Australian Labor Party's *2021 National Platform* states in relation to the Review that "The recommendations … including in relation to the implementation of statutory trusts, must be implemented immediately". The Prime Minister has given a fresh commitment to "consider and respond" to the recommendations of the Review during the current Parliament. It appears that Senator David Pocock extracted the commitment as a condition of supporting the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* (Cth).

The frustration you have when it is not frustration

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 vendor had not complied with its express obligation to "carry on the Business in the usual and ordinary course".

The High Court has now granted the disappointed vendor special leave to appeal this decision. The vendor has said it intends to invite the Court to revisit the law in relation to the effect of supervening illegality on contractual obligations. The vendor says it does not intend to argue that the contract was frustrated in the conventional sense, but to argue that the Court should find that a new species of frustration can exist.

Laundy Hotels (Quarry) Pty Limited v Dyco Hotels Pty Limited ATF the Parras Family Trust
[2022] HCATrans 136

Justice Jayne Jagot appointed to the High Court of Australia

Justice Jayne Jagot of the Federal Court of Australia joined the High Court of Australia on 17 October 2022. Before her appointment to the Federal Court, Justice Jagot was an Additional Justice of the Supreme Court of the ACT; Deputy President of the Copyright Tribunal of Victoria; a Judge of the Land and Environment Court of NSW; a barrister; and a partner of a law firm. For more information, see the Prime Minister's press release. Justice Jagot is only the seventh woman appointed to the High Court. However, most Justices of the newly composed Court are women.

Justice Jagot replaces Justice Keane, who retired after nine years of service to the Court. The next vacancy is expected to arise with Chief Justice Kiefel's retirement by 17 January 2024.

New South Wales

NSW Reconstruction Authority Act 2022 (NSW)

The NSW has passed an Act to establish the NSW Reconstruction Authority. The Authority will coordinate the recovery, planning and rebuilding of communities affected by natural disasters, including repairing and rebuilding land and infrastructure.

No payment where all project management work needed to be done to trigger payment

In this case relating to project management fees, the Supreme Court had previously rejected the plaintiff's claim. The Court of Appeal agreed. Under the parties' agreement, there was no entitlement to fees until the development had been completed. As the development had not been completed and security of payment legislation did not apply, no proceeds were available for distribution. The NSWCA dismissed the plaintiff's appeal and so reinforced the importance of the express terms.

Alora Property Group Pty Ltd as trustee for Alora Property Group Trust v Henry McKenna (as Liquidator of Alora Davies Development 104 Pty Ltd [2022] NSWCA 197

Exchange of inconsistent terms and alleged acceptance by conduct land parties in the Court of Appeal

A dispute arose over what terms constituted the parties' agreement where both parties exchanged their own inconsistent terms. This dispute, which could easily have been resolved at the time of contracting, ended up in the Court of Appeal. Ward P (with Meagher and Gleeson JJA agreeing) found that a 'Revised Tender Quote' had not been accepted by conduct through the performance of works. Ward P determined that the terms of the offer at tender had been rejected by the provision of a subcontract which contained inconsistent terms.

Forte Sydney Construction Pty Ltd v N Moit & Sons (NSW) Pty Ltd [2022] NSWCA 186

Assessing when a payment schedule is provided requires the Court to take a 'real world view'

At 6.30 pm on the 10th business day after service of the payment claim, the developer emailed the builder a payment schedule. The builder's representative read the payment schedule that night. The contract provided that any notice electronically delivered after 4.30 pm was deemed to be given at 9.30 am on the next business day. The builder argued that the payment schedule was late.

Stevenson J concluded that the developer did provide its payment schedule on the 10th business day. His Honour held that, if a document delivered electronically is accessed and viewed on the day it is sent, it should be seen as being 'provided' on that day for the purposes of section 14 of the *Building and Construction Industry Security of Payment Act 1999* (NSW). In short, "regard must be had to the realities of what has occurred so as to avoid coming to a legal conclusion which is divorced from what actually happened". Further, his Honour held that, if the deeming provision was to be read in the manner proposed by the builder, its effect would be to restrict the operation of the Act and the clause would be void.

Piety Constructions Pty Ltd v Hville FCP Pty Ltd [2022] NSWSC 1318

Queensland

Court gives effect to expert determination clause

A tiered dispute resolution clause was said to apply to "all disputes or claims arising out of or relating to this Deed and the alleged breach, termination or claimed invalidity of this Deed". One critical tier was expert determination. One party objected to a referral to an expert, arguing that the clause did not apply, that third parties were affected and that the dispute involved mixed questions of fact and law. The trial judge rejected these and other arguments and declined to stay the expert determination. In the Court of Appeal, Bond and Dalton JJA and Boddice J similarly gave effect to the expert determination clause.

Mineralogy Pty Ltd v Adani Mining Pty Ltd
[2022] QCA 206

Wide grounds of compensation for renewal of a mining lease

This case concerned compensation for the renewal of a mining lease. The compensation awarded was based on a wide range of grounds: diminution of the use which may be made of the land, biosecurity management, grid and camera security, fencing, rehabilitation and additional amounts due to the compulsory nature of the payment.

Osborne v Bethel
[2022] QLC 17

Victoria

Vale The Honourable Robert Brooking AO KC

Justice Brooking died peacefully on Sunday 11 September, aged 92. He was a foundation judge of the Court of Appeal in Victoria and served as a judge in Victorian courts for 25 years, after a glittering career at the Bar. He was expert in land law, defamation and the common law generally. In construction law, however, his wisdom was unsurpassed. His 1974 book, *Brooking on Building Contracts*, now in its sixth edition, did much to systematise the law. His later judgments in the Supreme Court and Court of Appeal remain the last word in many areas.

Beyond the law, Bob Brooking was a man of the highest principles. He was devoted to his family, including his wife of 64 years, Joan. In his retirement, he continued his interests in chess and in Sherlock Holmes. His 2002 speech 'Reflections and Reminiscences of a Building Judge' showed his great wisdom about the law and the world but also revealed his humour and generosity.

VCAT cannot decide matters in federal jurisdiction

Much of the work of the Victorian Civil and Administrative Tribunal concerns domestic building disputes. Many of those disputes involve Commonwealth laws in some way, perhaps because of the claims or counterclaims (especially those under the Commonwealth application of the Australian Consumer Law) or perhaps because corporations are involved. Does VCAT have jurisdiction to hear these disputes?

The Court of Appeal held that VCAT cannot decide matters in the federal jurisdiction. This will have dramatic implications for the conduct of domestic building disputes and beyond. The central reasoning of McLeish, Niall and Walker JJA (at [41]-[46]) was that:

- under section 77 of the *Constitution*, the Commonwealth Parliament may invest State courts with federal jurisdiction;
- VCAT is not a "court of a State" under section 77 of the *Constitution*; and
- "The conferral of jurisdiction on VCAT by the State Parliament is therefore required to be read down so as to deny VCAT judicial power in respect of any such matter".

The consequences of this reasoning are summarised at paragraph five. Here, the mere fact that a party was a corporation did not prevent VCAT from hearing the matter. However, because the defendant relied on an apportionment argument under the old *Trade Practices Act 1974* (Cth), VCAT lacked jurisdiction to hear and decide the matter.

In this situation, VCAT may refer the matter to the Supreme Court under section 77 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic).

Thurin v Krongold Constructions (Aust) Pty Ltd
[2022] VSCA 226

Western Australia

Well established legal principles for assessment of contractual damages reiterated

The Court of Appeal rejected a Master's assessment of the loss flowing from a wrongful refusal to continue to perform contractual obligations. The Court reiterated the foundational principle that damages for breach of contract are calculated to put the aggrieved party in the position in which it would have been had the contract been fully performed. This ordinarily involves a comparison between the hypothetical situation of perfect performance and the aggrieved party's actual position after the breach.

Netline Pty Ltd v QAV Pty Ltd
[2022] WASCA 131

Failed attempt to seek court injunction to avoid arbitration

An arbitration agreement permitted a party to apply to a court for urgent declaratory relief. The plaintiff sought a declaration that the defendant had breached a gas sale agreement. The plaintiff was required to show why the matter needed to be dealt with immediately by urgent declaratory relief rather than by proceeding to arbitration. The plaintiff was unable to prove that the relief it sought was urgent. Its evidence did not indicate how it would be materially affected by any difference between the relative ability of the Court and a single arbitrator to resolve the dispute quickly. Accordingly, no injunction was granted.

Power and Water Corporation v Eni Australia B.V
[2022] WASC 376

Principal may retain performance bond after termination

The parties' construction contract did not expressly require the principal to return a performance bond on termination of the construction contract. The Court held that there was no implied obligation to return the bond on termination, in part because of the purpose of the security, which was expressly described in the construction contract. In the absence of any relevant express or implied term, the principal did not need to return the bond immediately.

Perkins (WA) Pty Ltd v Weston [No 2]
[2022] WASCA 111

Other jurisdictions

UK Supreme Court split on fundamentals of proprietary estoppel

In the UK, a farmer had told his son, "One day, this will be yours." His son spent much of his life working on the farm, until the relationship broke down and the father reneged on the promise. Could the son succeed in proprietary estoppel? If so, what is the proper remedy? In answering these questions, the UK Supreme Court extensively considered Australian case law.

Lord Briggs (with Lady Arden and Lady Rose agreeing) allowed the parents to choose between either holding the farm on trust in favour of their children or compensating the son now (but with a reduction to reflect his earlier-than-anticipated receipt).

Lord Briggs held that the purpose of proprietary estoppel is to prevent or compensate for the unconscionability of a person going back on a promise upon which another person has relied to their detriment. Lord Briggs rejected the idea that the aim of a remedy for proprietary estoppel is based on compensating for the detriment suffered by the promisee. The remedy should not be out of all proportion to the detriment suffered without good reason, but this only serves as a useful cross-check for potential injustice.

Lord Leggatt (with Lord Stephens) disagreed, holding that the core principle underpinning relief for proprietary estoppel is to prevent a party going back on a promise without ensuring that the party who relied on that promise will not suffer a detriment because of that reliance.

Guest v Guest
[2022] UKSC 27

Uncertainty over approach to analysing concurrent delay in UK

Concurrent delay is notoriously complex and contested, with differing approaches in Scottish and English law. While the English position is not settled, the bulk of authority seems to favour the 'first-in-time' approach. Here, however, Judge Stephen Davies seemed to prefer the 'effective cause test'. This warrants two observations. First, some of the leading authorities do not seem to have been cited in the present case. Second, his Honour reached this position with the agreement of counsel. Regardless, the law governing concurrent delays remains contested.

Thomas Barnes & Sons plc (in administration) v Blackburn with Darwen Borough Council
[2022] EWHC 2598 (TCC)

Other essential reading

Other essential reading

Projects-related publications

Trevor Thomas and Thomas Milner podcast, Trailing Liability for Asset Decommissioning.

Thomas, James Ye and Wayne Jocic, 'Quiet Enjoyment versus Public Interest: The Application of Private Nuisance to Wind Farms', *Building and Construction Law* Volume 38 No 1.

Andrew Stephenson, Louise Camenzuli and Nastasja Suhadolnik, Subsea Cable Interconnector Projects: An Introduction to Risks and Opportunities

Arbitration-related publications

Nastasja Suhadolnik, Joshua Paffey, Cara North and Eleanor Clifford, "Australia Q&A" chapter in *International Comparative Legal Guide Investor-State Arbitration 2023*.

Corrs Chambers Westgarth, Introduction to Arbitration: A User's Guide (7 November 2022).

Andrew Stephenson and Jey Nandacumaran, 'Australia' chapter in *Global Arbitration Review: Know-How Construction Arbitration* (September 2022).

General interest publications

Rhys Jewell, Simon Mifsud, Mark Payne and Hugh Riisfeldt, October Federal Budget: Key Takeaways (including detailed commentary on housing and infrastructure).

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