Corrs Projects Update

Q2 2022

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Welcome to the latest edition of Corrs Projects Update: Q2 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.

As well as case notes on the recent important judicial decisions from across Australia, and this edition also includes articles covering:

- Electronic execution of documents in Australia;
- Marketing off the plan apartments: lessons from *Ripani v Century Legend Pty Ltd* [2022] FCA 242;
- Updates on the rollout of project trust account regime in Queensland;
- 'Quiet Enjoyment': consideration of the case of *Uren v Bald Hills Wind Farm Pty Ltd* [2022] VSC 145; and
- Challenges facing the construction industry in Australia and the impact of the Probuild insolvency.

We hope that you will find this publication both informative and thought provoking.

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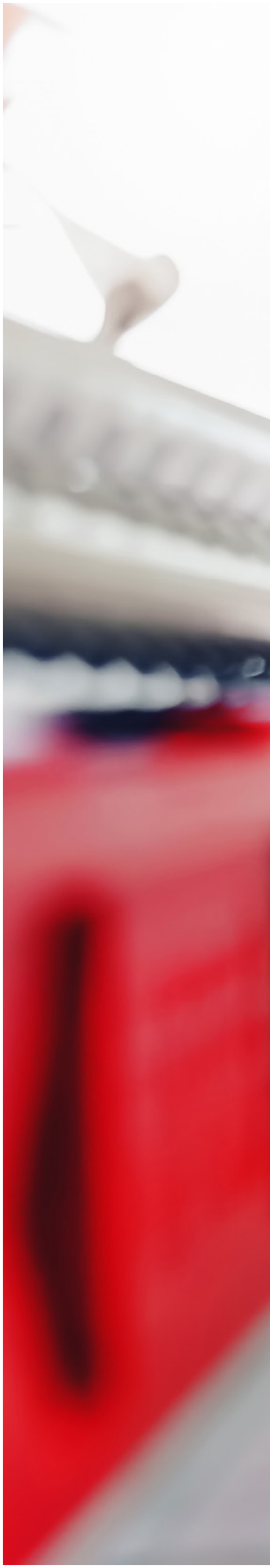
Editor's Note: *The information contained in this publication is current as at April 2022.*



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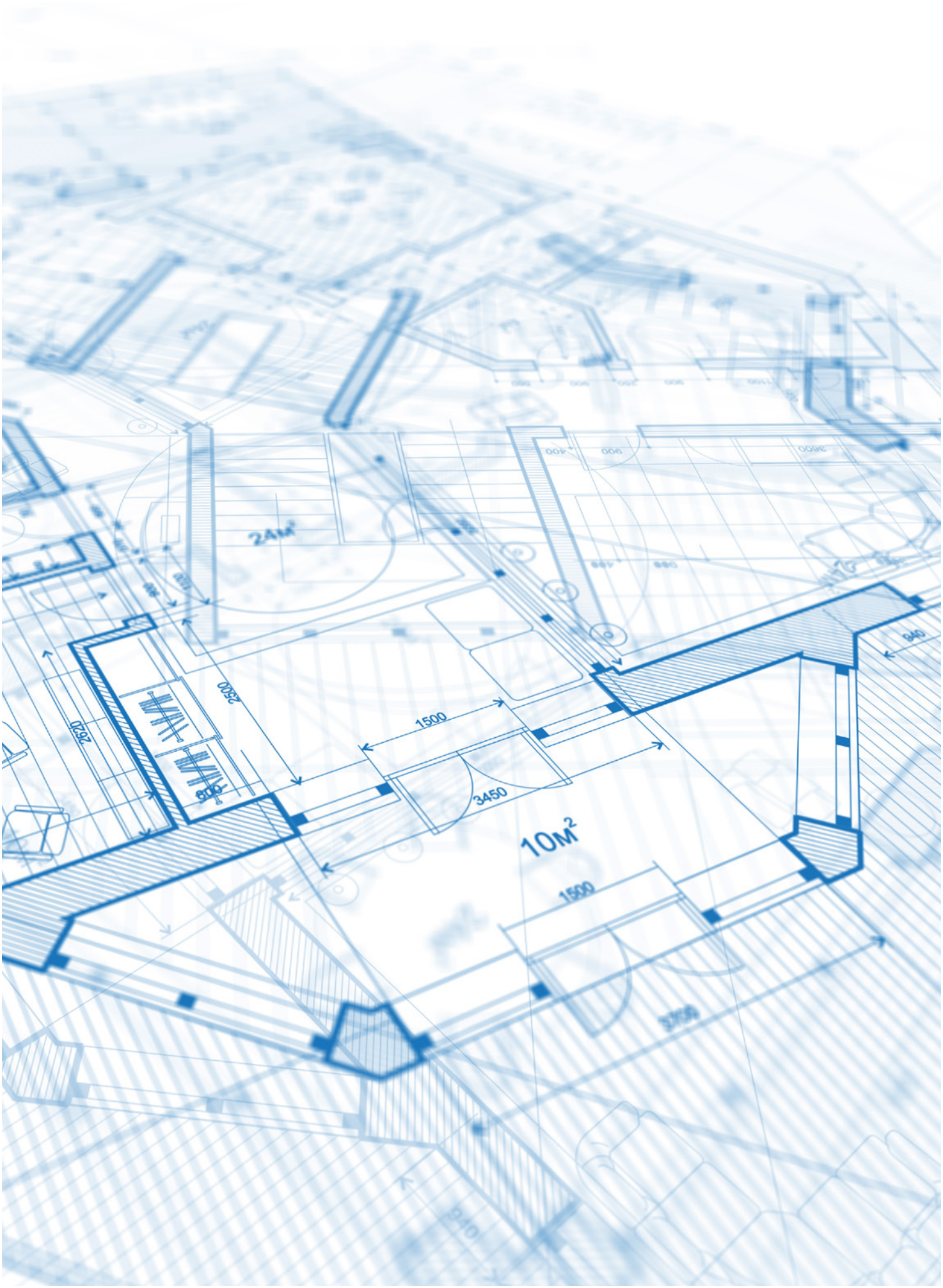
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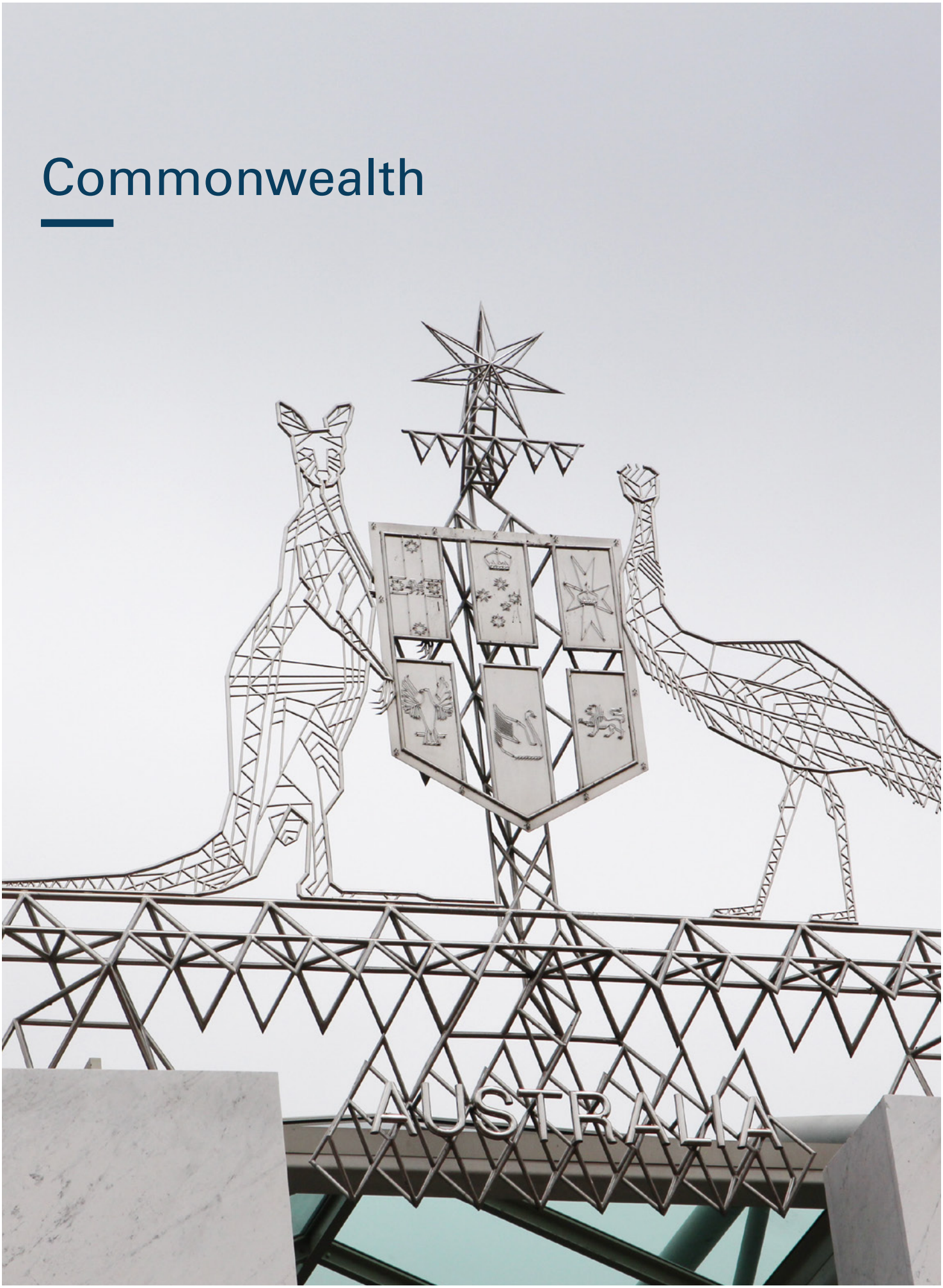

Electronic execution in Australia: a new norm?

Key takeaways

After much delay, the law around electronic execution is set to finally catch-up with the increasingly accepted norm of practice

Keywords

Electronic execution in Australia: a new norm?

Background

The *Corporations Amendment (Meetings and Documents) Act 2022* (**the Act**), now law, has made permanent the temporary relief introduced last year.

The Act allows companies to adopt technology neutral and flexible approaches when executing documents.

Under the new rules, a company may execute a document by using the traditional method of putting ink to paper or by signing an electronic form of the document. The methods a company may use are not limited, provided:

- the method identifies the person signing and indicates their intention in respect of the information in the document; and
- the method is either as reliable as appropriate for the purpose for which the information is recorded, or proven in fact to have indicated the person's identity and intention to sign.

These requirements ensure that the integrity of the signatures is maintained, regardless of the form a document may take, and is included in all past temporary reliefs. It is modelled on the well understood Commonwealth *Electronic Transactions Act 1999* (Cth).

An electronic signing platform such as DocuSign is a prudent method for executing documents electronically given it is able to satisfy the requirements of identification and reliability if set up properly. Other platforms, such as AdobeSign, are also now becoming more common.

When executing documents under the new rules, different signatories are not required to use the same method of signing and documents may be signed in counterparts.

Who may sign documents electronically?

The new rules apply to both agents signing on behalf of companies under section 126 and directors and company secretaries signing under section 127 of the *Corporations Act 2001* (Cth).

Execution under section 126

An agent may now execute documents (including deeds) on behalf of a company with the company's express or implied authority.

The agent does not need to be appointed under a deed to exercise this power. This is a change to the previous requirement under common law for agents to execute deeds on behalf of a company.

Notwithstanding this, counterparties may still require execution under section 127 to take benefit of the assumption of due execution under section 129.

Execution under section 127

A company may execute a document electronically with its directors and company secretaries, or by fixing its common seal. The fixing of the common seal may be witnessed via electronic means provided that it is indicated in the document.

For proprietary companies, a sole director may now also execute a document by themselves where the company has no company secretary.

The new rules also allow a person who is signing a document in more than one capacity to be treated as different persons in each such capacity. This codifies and provides certainty on an already existing practice where one person, if their positions allow, could sign on behalf of multiple entities. In the context of the amendments (and considering section 127(1)(c)), it should not be taken that a document could be signed in satisfaction of section 127 where one director (who is also the company secretary) signs twice, where the company has other directors.

Electronic execution of deeds

The intention of the Commonwealth has been that deeds should be permitted to be executed electronically on the same footing as agreements. Whether this intention manifests through the relief enacted is a different question. The new rules clarify this issue.

Under the Act, deeds may be executed regardless of whether they are in a physical form or electronic form. The Act expressly notes that documents may be executed under the Act without the use of paper, parchment or vellum despite any common law rule.

Separately, the Act provides that deeds may be executed without the need for a witness. Companies should be cautious in adopting this approach in relation to execution by agents as a number of states and territories have legislated requirements for individuals to sign deeds in the presence of a witness.

Ordinarily, a law of the Commonwealth prevails over a law of a state to the extent there is any inconsistency between the two. The Corporations Act, however, is unique in that it contains provisions designed to avoid such inconsistency and, in certain circumstances where this is not possible, the effect of these provisions is that the law of the states and territories prevails over the Corporation Act.

The requirement for individuals to sign deeds in the presence of a witness may, therefore, prevail over the lack of the same in the Corporations Act in relation to agents. Before executing deeds under section 126 without a witness, legal advice should always be sought to ensure it is valid in the relevant state or territory whose laws govern the deed (the cautious approach being to use a witness where uncertain).

Note: this article by Clare Corke and Ken Li was previously published online: https://www.corrs.com.au/insights/electronic-execution-in-australia-a-new-norm

Marketing off the plan apartments: lessons from Ripani v Century Legend Pty Ltd

[2022] FCA 242

Key takeaways

The Federal Court has handed down a decision which is likely to have a significant impact on how developers are able to market apartments being sold on an 'off-the-plan' basis, making it clear that:

- developers must ensure marketing materials issued to potential purchasers of off-the-plan apartments are accurate. Inaccuracies could constitute a misleading or deceptive representation which would entitle a purchaser to rescind a contract of sale;
- exclusion clauses in a contract of sale may not be effective at remedying misleading or deceptive representations made in marketing materials;
- general disclaimers about the adequacy or accuracy of information in marketing materials may not preclude such material from being found to be misleading or deceptive; and
- inscribing 'artist impression' on an image used in marketing materials does not preclude that image from being misleading or deceptive.

Keywords

off-the plan sales; misleading conduct

Background

In 2017, Mr and Mrs Ripani (**Ripanis**), entered into a contract with developer, Century Legend Pty Ltd (**Century Legend**), to purchase a premium apartment in Melbourne's CBD off-the-plan. Under the terms of the contract of sale, the Ripanis agreed to pay $9.58 million subject to finalising a satisfactory floor plan.

In deciding to enter into the contract, the Ripanis relied heavily on marketing materials provided by Century Legend. These materials were important for the purposes of generating sales, given the apartments in question had not yet been built. This included a hard-bound brochure (**the Brochure**) containing various computer-generated images, known as 'renders'. The renders were used to illustrate what the apartment building, and various aspects of it, would look like once constructed.

The Brochure included a render which depicted a large free span opening between the inside of the living areas and the outside terrace of the apartment purchased by the Ripanis.

Despite extensive use of this particular render throughout its marketing campaign, Century Legend was aware it would be impossible to construct the Ripanis' apartment in a way that would bear a reasonable resemblance to the render. In particular, the architect Rothe Lowman had informed Century Legend that the eight-metre free span depicted could not be constructed due to development and structural requirements and would likely need to be closer to three metres.

The Ripanis commenced proceedings against Century Legend in the Federal Court alleging that Century Legend had engaged in misleading or deceptive conduct. The Ripanis sought relief (including rescission of the contract of sale) under the Australian Consumer Law and in equity.

Century Legend contested the claims made by the Ripanis on a number of bases. Notably, these bases were the existence of exclusion clauses in the contract of sale, the inscription of the words 'artist impression' on the render and a disclaimer included in the Brochure.

Decision

Justice Anastassiou found that the renders provided to the Ripanis were misleading or deceptive and in contravention of section 18 of the Australian Consumer Law (ACL).

His Honour, upon reviewing the evidence put forward by the Ripanis and Century Legend, concluded that:

- the render represented that there would be a free span opening and seamless transition between the internal living areas of the apartment and the terrace;
- the Ripanis relied upon the representation conveyed by the render at the time they entered into the contract of sale; and
- the Ripanis would not have entered into the contract had they not believed at the time that the apartment would be constructed in conformity with the render.

In responding to each of the defences raised by Century Legend, the Court held as follows:

- **Exclusion Clause**. As it is well accepted that exclusion clauses are ineffective at excluding the operation of the ACL, Century Legend made the novel argument that the clauses had the effect that no representations were made to the Ripanis. The exclusion clauses, which applied to both pre-contractual information and any representations made by Century Legend, were described by the Court as 'boilerplate' and found to have no corrective or curative effect on the misleading impression created by the render.

  This was ultimately because the exclusion clauses were not expressed in a manner that would make the Ripanis aware the render was not a true depiction of what their apartment would look like when constructed. In reaching this conclusion, it was remarked that the exclusion clause contained an acknowledgment that the Ripanis had entered into the contract following an inspection of the yet-to-be constructed apartment.
- **Artist impression**. In the context of an off-the-plan sale where renders are a proxy for an inspection, the inscription of the words 'artist impression' on the renders did not have the effect of curing the misleading representation conveyed by the render.
- **Disclaimer**. The disclaimer, which was located towards the end of the Brochure, and given no particular prominence, was described as vague, ambiguous and meaningless.

In light of this, and having not been specifically drawn to the Ripanis' attention (ie "… it should not be expected that potential purchasers, like the Ripanis, would study a glossy marketing brochure with an eye to the fine print of a disclaimer at the back of the booklet"[1]), the disclaimer failed to cure the misleading and deceptive representation conveyed by the render.

As a consequence, the Ripanis were entitled to rescind the contract under sections 237 and/or 243 of the ACL and recover their losses from Century Legend. This included recovering interest and bank fees they had paid in connection with a bank guarantee provided to the developer.

A focus on consumer protection

It is instructive to compare some of the conclusions in this case with the position in New South Wales. In 2019, off-the-plan sales marketing was overhauled by the introduction of changes to the *Conveyancing Act 1919* (NSW).

Under this regime, developers must serve a Notice of Changes if there is a change in a material particular that adversely affects the use and enjoyment of the lot. If the purchaser would not have entered into the contract had the purchaser been aware of the inaccuracy and would be materially prejudiced by the change, the purchaser can either rescind the contract or make a claim for compensation.

Importantly, the legislation allows the purchaser to rescind without giving any reasons, and there is no longer a need to bring proceedings in the Supreme Court to rescind contracts for such changes. The onus has shifted to the developer, who would need to incur costs bringing a claim against a purchaser if it considered that a purchaser did not have the right to rescind.

To date, this legislation remains untested in the courts. However, there are likely to be cases that arise as the market shifts.

https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2022/2022fca0242

Note: this article by Jane Hider, Natalie Bryant and Mitchell Francis was previously published online: https://www.corrs.com.au/insights/marketing-off-the-plan-apartments-learnings-from-ripani-v-century-legend

1 Per Anastassiou J, at [77] of the judgment.

New South Wales

Aslan v Stepanoski

[2022] NSWCA 24

Key takeaways

An owner cannot refuse to pay a progress claim merely because the amounts it has already paid exceed the actual value of the work so far completed. The builder may still be contractually entitled to the amount claimed either because the owner struck a bad bargain or because the contract is 'front-ended' so that earlier instalments are disproportionately higher.

A builder will likely not be repudiating its contract if it ceases work because an owner locks it out of the construction site. If an owner does lock a builder out, and subsequently stops doing so, this should be well documented.

Keywords

repudiation; builder locked out of site

Background

Mr and Mrs Stepanoski (**Owners**) initially signed a cost-plus contract with Mr Aslan (**Builder**), for the construction of two residences on the Owners' land. The parties later signed a lump sum contract which had retrospective effect from October 2014 and superseded the cost-plus contract.

On 14 September 2015, the Builder issued a progress claim for $214,000. On 16 September 2015, the Owners locked the Builder out of the construction site. On 21 September 2015, the Builder emailed the Owners a 'Notice of Ceasing Building Works' which stated that he would not recommence work until the progress claim was paid.

The Owners subsequently sued the Builder for breach of contract and argued that the Builder, by ceasing to work, had repudiated the lump sum contract. The Owners sought to recover from the Builder:

- the cost of rectification works;
- the loss of rental income that would have been earned if the works were completed on time; and
- amounts overpaid to the Builder by mistake.

The Owners initially failed to prove their losses. But, after several proceedings, the NSW Supreme Court gave the Owners leave to tender additional evidence concerning their losses and awarded them nearly $2.7 million. The Builder appealed.

Issues

There were three key issues in the Court of Appeal:

- whether the Builder had repudiated the lump sum contract;
- whether the Owners could recover their overpayments; and
- whether the Owners should have been granted leave to reopen their case to tender additional evidence of their losses

Decision

The Court of Appeal decided in favour of the Builder, finding that:

- the Builder did not repudiate the lump sum contract;
- the primary judge did not apply the correct test in assessing whether the Owners overpaid the Builder; and
- the Owners should not have been granted leave to reopen their case.

Did the Builder repudiate the contract?

Repudiation is conduct which demonstrates a party's inability to perform a contract, or their intention not to perform it, or to perform it only in a manner substantially inconsistent with their obligations.

The primary judge found that the Builder had repudiated the lump sum contract, primarily because his Honour believed that the Builder had no contractual entitlement to his progress claims. This was based on expert evidence that the Builder had completed $564,426 worth of work, while the Owners had paid $1,067,094.

The Court of Appeal disagreed, for two reasons. Firstly, the Court held the actual value of the Builder's work was irrelevant. The relevant consideration was the Builder's contractual entitlement. The Builder could be contractually entitled to more than his work was actually worth if the Owners struck a bad bargain.

Alternatively, it could simply be the case that the parties had decided to 'front-end' the payments, so that earlier instalments would be disproportionately higher than later ones.

Secondly, the Court held that even if the Builder was not contractually entitled to his progress claim, his claim was still in good faith. The Builder was not disregarding the lump sum contract, but simply attempting to hold the Owners to their end of the contract. Even if the Builder was mistaken about his contractual rights, this would not by itself constitute a repudiation of the contract.

Furthermore, unlike the primary judge, the Court of Appeal accepted the Builder's evidence that he was locked out of the site. As the Owners prevented the Builder from working on the site, the Builder was clearly entitled to suspend work under clause 24 of the lump sum contract, which expressly gave the Builder that right. There was also no evidence that the Owners ever stopped locking the Builder out of the site.

Could the Owners recover mistaken overpayments?

The Court of Appeal again overruled the primary judge, who had simply compared the total amount the Owners had paid and the actual value of the work completed, then awarded the Owners the difference. As stated above, this approach was incorrect. The relevant amount was what the Builder was contractually entitled to, rather than the actual value of the work completed.

In particular, each payment the Owner made had to be examined to see whether there were corresponding contractual provisions which gave rise to the payments. As the primary judge did not do this, the Court of Appeal held the Owners could not recover any 'overpayments'.

Should the Owners have been allowed to reopen their case to tender additional evidence?

The primary judge initially found that the Owners had only proved they had lost rental income, and not the costs of rectifying works. Subsequently, they sought to reopen their case, and were successful in arguing that they also suffered loss through the difference between the sale price of the property, and the price they would have received if the works had been completed on time.

The Court of Appeal held that the primary judge wrongly exercised his discretion in allowing the Owners to reopen their case. In particular, the Court referred to the principle "that a party is ordinarily bound by its case and a deliberate decision not to call additional evidence will ordinarily … tell decisively against giving leave to reopen." The Court held there were no special circumstances which would justify a departure from this ordinary rule, especially as there was a deliberate decision to argue the case on a limited basis. This decision was made in earlier proceedings when counsel for the Owners expressly stated they would not rely on evidence relating to the property's loss of value.

As is evident, the Owners' claims for damages and restitution failed.

https://www.caselaw.nsw.gov.au/decision/17f25456f79a546d77e1a9d9

Ventia Australia Pty Ltd v BSA Advanced Property Solutions (Fire) Pty Ltd

[2021] NSWSC 1534

Key takeaways

A payment claim made under section 13 of the *Building and Construction Industry Security of Payment Act 1999* (NSW) must concern only one construction contract.

Whether a payment claim is in respect of one construction contract is a jurisdictional issue. An adjudicator has no legal authority to consider disputes about a claim seeking payment under multiple construction contracts.

This case sits uneasily with the recent decision of the Queensland Court of Appeal in *Ausipile Pty Ltd v Bothar Boring and Tunnelling (Australia) Pty Ltd* [2021] QCA 223.

Keywords

payment claim for multiple construction contract

Background

In 2016, NSW Land and Housing Corporation engaged Ventia to perform asset maintenance services for social housing properties. Ventia subcontracted BSA Advanced property Solutions (Fire) Pty Ltd (**BSA**) to maintain fire-related assets.

Under the subcontract, Ventia could issue work orders. The subcontract provided that services were only to be performed in response to work orders, and that a separate agreement would come into existence every time Ventia issued a work order. Each month, Ventia issued over 450 work orders. These work orders did not consistently reflect the services actually provided that month. BSA instead relied on a monthly schedule of upcoming maintenance requirements. Each month, regardless of whether the services provided reflected the work orders, BSA was paid for one twelfth of the total yearly price for maintenance works.

On 8 February 2021, the BSA served a payment claim under section 13 of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**Act**) for $2,979,262. The payment claim referred to seven work orders. In reality, the work arose from over 1,860 work orders. In response, Ventia served a payment schedule valuing BSA's entitlement as $nil because the claim concerned multiple construction contracts.

An adjudicator awarded BSA $2,692,326. Ventia sought to quash the determination.

Issues

The key factual issue was whether the payment claim was made only with respect to the subcontract, or multiple contracts. BSA argued they only supplied, and claimed payment for, services under the subcontract and that the work orders were essentially billing documents. Alternatively, BSA argued that the payment claim was under a single 'construction contract', as defined in section 4 of The Act, because the subcontract and all work orders formed an overarching 'arrangement'. Ventia by contrast argued that each work order constituted a separate agreement.

The key legal issues were:

- whether a payment claim can seek payment in respect of more than one construction contract; and
- if not, whether this issue deprives an adjudicator of jurisdiction, or whether it is a matter to be finally resolved by an adjudicator after it is raised in a payment schedule.

Decision

Rees J declared that the adjudication determination was void in its entirety.

Was the claim under the subcontract or multiple work orders?

Rees J held that the payment claim was made with respect to multiple work orders. Her Honour rejected BSA's claim that the subcontract defined the services to be completed because it specified the regular maintenance requirements. Her Honour instead found that the subcontract only set out how the services were to be performed, rather than what those services were. The work orders identified the specific services to be provided.

Rees J also rejected BSA's contention that whether the work orders formed separate contracts depended on whether there was an objective intention to create new legal relations each time a work order was issued. Her Honour found that there was no need to consider these principles where express terms of the contract removed all doubt as to the parties' intentions.

Rees J found that the subcontract and work orders did not form part of one overarching 'arrangement'. Referring to *Okaroo Pty Ltd v Vos Construction and Joinery Pty Ltd* [2005] NSWSC 45 her Honour determined that 'arrangement' was typically a term used to describe dealings between parties that fail to achieve the precision needed to be recognised as a contract. Her Honour was not willing to overlook the objective intention that work orders constitute distinct contracts.

'One contract' rule

Rees J held that the Act, properly construed, requires a payment claim to be made in respect of only one construction contract. The Act was drafted in the singular — 'a' construction contract — and this singularity of language was significant in prior cases.[1] Furthermore, because the Act only permits payment claims to be made on or after a reference date in a construction contract, there is a simple and singular relationship between one contract, one reference date in that contract, and a person's entitlement to serve a payment claim.

Finally, the object of the Act is to facilitate progress payments and thus cash flow. Allowing one payment claim to cover work done under multiple contracts would compromise the ability to resolve the dispute in the short timeframe imposed by the Act.

Jurisdictional error

Rees J found that whether a payment claim is made with respect to multiple contracts is a matter going to the jurisdiction of the adjudicator. Her Honour declined to follow comments in obiter in *Ausipile Pty Ltd v Bothar Boring and Tunnelling (Australia) Pty Ltd* in which the Queensland Court of Appeal held that if a payment claim, on its face, refers to only one construction contract, the adjudicator has jurisdiction to consider the matter.[2] Her Honour held that this position was plainly wrong. Her Honour instead referred to the reasoning in *Southern Han Breakfast Point v Lewence Construction Pty Ltd* and held that serving a valid payment claim made in respect of one construction contract is an essential precondition for an adjudicator's determination to have legal effect.[3]

Conclusion

This Supreme Court decision departs from the Queensland Court of Appeal's recent decision in *Ausipile*. It provides support for the view that a payment claim must concern only one construction contract, and that this will be construed narrowly. Subcontractors should take care to submit individual payment claims for different work orders, as an adjudicator's determination for a claim canvassing multiple orders may be void.

https://www.caselaw.nsw.gov.au/decision/17d6885a6e8be576ad4449e8

1 See, e.g. *Hill v Halo Architectural Design Services Pty Ltd* [2013] NSWSC 865.
2 At [42]; compare A*usipile Pty Ltd v Bothar Boring and Tunnelling (Australia) Pty Ltd* [2021] QCA 223.
3 At [34], citing *Southern Han Breakfast Point Pty Ltd v Lewence Construction Pty Ltd* (2016) 260 CLR 340.

Crown Green Square Pty Ltd v Transport for NSW

[2021] NSWSC 1557

Key takeaways

Under section 4 of the *Building and Construction Industry Security of Payment Act 1999 (NSW)*, a construction contract as defined can be a contract or an 'other arrangement'. An 'other arrangement' may not need to involve a legally binding obligation. However, an 'other arrangement' should have some element of mutual rights and obligations.

Keywords

'other arrangements'

Facts

The case concerns the development of the Infinity' complex near Green Square railway station in Sydney. In 2016, the defendants (**Rail Entities**) engaged the first, second and third plaintiffs (together, the **Crown Entities**) under the Green Square Railway Station Relocation of Tunnel Entrance Development Agreement (**Development Agreement**). The Crown Entities were required to provide tunnel works for just $750,000.

The fourth plaintiff, Crown Corporation, was not a party to the Development Agreement but was a construction entity related to the Crown Entities. On 26 March 2020, Crown Corporation issued an invoice for $866,530 in relation to the design and installation of some electrical, mechanical and fire safety services in the tunnel (**Link Works**). The relevant defendant did not issue a payment schedule. The Crown Entities applied to the Court for judgment under section 15 of the *Building and Construction Industry Security of Payment Act 1999 (NSW)* (**Act**).

Decision

Henry J held that there was no construction contract for the Link Works. As a result, the 26 March claim was not a valid payment claim under the Act.

Issue 1 — was there a construction contract for some or all of the Link Works?

In order to be a valid payment claim under section 13 of the Act, the 26 March claim must have been served in respect of a construction contract. A construction contract is defined in section 4(1) as "a contract or other arrangement under which one party undertakes to carry out construction work, or to supply related goods and services, for another party". The plaintiffs argued that the construction contract that arose in relation to the Link Works was an "other arrangement" within the meaning of section 4(1) of the Act. The Rail Entities argued that the Link Works were part of the tunnel works required by the Development Agreement and that no such 'other arrangement' existed.

What is an 'other arrangement'?

Henry J referred to competing authorities in relation to whether an arrangement under the Act must give rise to a legally binding obligation. In *Lendlease Engineering Pty Ltd v Timecon Pty Ltd*, Ball J opined that "the relevant arrangement must give rise to a legally binding obligation, although, of course, that obligation need not be contractual in nature."[1] In contrast, in *Machkevitch v Andrew Building Constructions Pty Ltd*, McDougall J held that "what is required is that there be something more than a mere undertaking; or something which can be said to give rise

1 *Lendlease Engineering Pty Ltd v Timecon Pty Ltd* [2019] NSWSC 685 at [87].

to an engagement, although not a legally enforceable engagement, between two parties; or a state of affairs under which one party undertakes to the other to do something; or an arrangement between parties to like effect."[2]

Her Honour preferred McDougall J's approach in *Machkevitch*, subject to the qualification that the relevant arrangement must involve some element of reciprocity or acceptance of mutual rights and obligations.

Was there an 'other arrangement' for Link Works?

Her Honour found that the Development Agreement, Development Approval and the surrounding circumstances reflected the parties' intention that the Link Works be undertaken as part of the Tunnel Works. Even if the Link Works were beyond the scope of the Development Agreement, the dealings and communications between the parties did not support the existence of an 'other arrangement'. For example, the Rail Entities had indicated that they were not prepared to pay more than $750,000 for the works being carried out by the Crown Entities. Accordingly, her Honour held that there was no 'other arrangement' in relation to the Link Works.

Issue 2 — was the 26 March claim a payment claim?

The plaintiffs argued that the 26 March Claim satisfied the requirements of a payment claim under section 13(2) of the Act. The Rail Entities argued that the 26 March Claim was not a new payment claim but a copy of an invoice issued on 26 February 2020 (**26 February Invoice**).

Her Honour found that, although the 26 March Claim comprised an invoice that was almost identical to the 26 February Invoice, it satisfied the requirements of a payment claim under section 13(2) of the Act. This was because the 26 March Claim identified the construction work to which the claim related and was accompanied by a supporting statement that adopted the format approved under the Act. Her Honour also noted that section 13(6)(b) of the Act provides that a payment claim may also include a claim for an amount that has been the subject of a previous claim.

Issue 3 — was the 26 March claim a second payment claim in respect of the same reference date?

The Rail Entities argued that the 26 March claim was invalid under section 13(5) of the Act as it was served in respect of the same reference date as the 26 February Invoice. However, in light of her Honour's finding in relation to Issue 2, Henry J found that the 26 March Claim was not served in respect of the same reference date as the 26 February Invoice.

Issue 4 — did the 26 March Claim seek payment in relation to two construction contracts?

The Rail Entities argued that if there was an 'other arrangement' in relation to the Link Works, the 26 March Claim was invalid as it involved claims under two contracts. This was because the 26 March Claim also related to some works arising under the Development Agreement. The plaintiffs responded that the 26 March Claim was a valid payment claim as no claim for payment was made for works to the extent they fell under the Development Agreement.

Her Honour tentatively opined that "if a payment claim purports to be made and seeks payment under one construction contract but in fact relates to the works under two such contracts, the payment claim is invalid and would not enliven an adjudicator's jurisdiction or the Act."[3]

Conclusion

This case sheds some light on what is required to establish an 'other arrangement' for the purposes of the Act. However, given the competing lines of authority on what constitutes an 'other arrangement', the issue may still be regarded as unsettled.

The case also supports, in obiter, the view that an adjudication would be in jurisdictional error if it concerned one payment claim which purported to be under one contract, but which in fact concerned multiple contracts.

https://www.caselaw.nsw.gov.au/decision/17d73fee94d9013d9db2d693

2 *Machkevitch v Andrew Building Constructions Pty Ltd* [2012] NSWSC 546 at [27].

3 At [262]. As to whether an adjudication based on one payment claim covering multiple contracts would be in jurisdictional error, see also the note on *Ventia Australia Pty Ltd v BSA Advanced Property Solutions (Fire) Pty* Ltd [2021] NSWSC 1534 at [34].

LCT-MRE Nominees Pty Ltd and Anor v Thiess Pty Ltd and Ors

[2022] NSWSC 317

Keywords

court proceedings; new evidence; competing prejudices suffered by defendants; plaintiffs and the public interest

In any dispute that proceeds through a formal resolution process there is a tension between how much evidence the claimant should gather early on in that process (ie for the purposes of defining and proving its case) and to what extent that evidence gathering can be deferred until later in the process.

The tension is resolved by a number of factors, not the least of which is how much money the claimant is prepared to spend 'up front' in assembling and defining its case, and to what extent it would prefer to defer that expenditure until a later date (eg after it sees the evidence of the respondent).

Principles of fairness also inform this issue. While a loosely prepared case, premised on minimal evidence, may be seen by a claimant as strategically advantageous, the claimant may find itself in a position of having to seek the leave of the tribunal to introduce further evidence at later date. At that time the claimant will have to address questions of prejudice that arise by reason of the adoption of this strategy.

These matters have been recently considered in interlocutory decision of the NSW Supreme Court in *LCT-MRE Nominees Pty Ltd and Anor v Thiess Pty Ltd and Ors* [2022] NSWSC 317.

In this matter, the plaintiff held a concession to operate a road tunnel in Sydney. It alleged against the D&C Contractor that the tunnel had defects. The proceedings were at a point where the plaintiff had defined its case through pleadings, evidence and aligned its pleading and evidence by way of particulars. The defendant had denied the case and served evidence in response to that of the plaintiffs' pleading, evidence and particulars.

Under the guise of serving 'reply' evidence, the plaintiff then served further evidence, which the Court found was, in part, evidence in chief and should have been served much earlier in the proceeding.

Having so found, the Court had to grapple with the tension discussed above – ie should the plaintiff be granted leave to rely on the new evidence. The Court weighed the competing prejudices suffered by the defendants (were leave to be granted), the plaintiffs (were leave not to be granted) and the public interest (to allow for the identification of any alleged defects in a piece of public infrastructure) and decided that in this case leave should be granted, but subject to conditions.

The conditions including limiting the ability of the plaintiff to commission any further evidence and costs orders against the plaintiff.

Corrs acts for the defendants in the proceeding.

Queensland

Update on the rollout of project trust account regime in Queensland

Keywords

Project trust accounts

Background

It has been over one year since the first phase of the project trust account (**PTA**) regime under the *Building Industry Fairness (Security of Payment) Act 2017 (Qld)* commenced in Queensland.

The current phase of the PTA regime, Phase 2B, commenced on 1 January 2022. While the rollout of the regime was to be completed in January 2023, the commencement of Phases 3 and 4 has been deferred as follows:

Phase	Old commencement date[1]	New commencement date[2]
Phase 3	1 July 2022	1 April 2023
Phase 4	1 January 2023	1 October 2023

The delay to Phases 3 and 4 is intended to provide extra time for smaller contractors to prepare for the PTA regime as they recover from COVID impacts and recent flood events.[3]

We analysed the PTA regime in detail in our Projects Update special edition: public private partnerships published in May 2021.

Recap - what is a project trust account?

A PTA is a trust account into which a principal pays monies that are owing to a head contractor under a construction contract.

First tier subcontractors (that is subcontractors engaged by the head contractor) are then paid (by the head contractor) directly from the PTA.

The purpose of a PTA is to ensure that the payments to which a subcontractor is entitled are protected, in particular from the risk of insolvency of the head contractor.

What contracts are currently subject to the PTA regime?

The PTA regime currently applies to:

- all eligible State Government and Hospital and Health Services contracts valued at $1 million or more;
- all eligible private sector, local government, state authorities' and government-owned corporations' contracts valued at $10 million or more; and
- all eligible state authorities' and government-owned corporations' contracts valued at $1 million or more if the state authority or government-owned corporation has decided to opt in to the PTA regime.

Phase 3

From 1 April 2023, the PTA regime will apply to all eligible private sector, local government, statutory authorities' and government-owned corporations' contracts valued at $3 million or more.

Phase 4

From 1 October 2023, the PTA regime will apply to all eligible contracts (public or private sector) valued at $1 million or more. Phase 4 will be the final phase to commence.

1 Proclamation No. 159 of 2020 made under the *Building Industry Fairness (Security of Payment) Act 2017* (**BIF Act**), repealed by Proclamation No. 5 of 2022 made under the BIF Act.

2 Proclamation No. 6 of 2022 made under the BIF Act.

3 The Honourable Mick de Brenni, 'Building industry given more time to prepare for remaining phases of trust account framework' (Statement, 26 March 2022) https://statements.qld.gov.au/statements/94817.

Update on the QBCC Act Head Contractor Exemption

Keywords

QBCC Licence; Head Contractor Exemption

Background

In Queensland, the *Queensland Building and Construction Commission Act 1991* (Qld) (**QBCC Act**) requires that all persons who undertake to carry out building work must hold an appropriate contractor's licence unless they have a valid exemption.

One of the exemptions to the licencing requirement, known in the industry as the 'Head Contractor Exemption', effectively provides that an unlicensed person can enter into a contract to carry out building work if:

1. the building work is not residential construction work or domestic building work; and
2. the building work is to be carried out by an appropriately licensed contractor.

In 2020, the Queensland Parliament passed the *Building Industry Fairness (Security of Payment) and Other Legislation Amendment Act 2020* (Qld) (**BIFOLA Act**) to repeal the Head Contractor Exemption in the QBCC Act, with the relevant repealing provision to commence on a date fixed by proclamation.

Although no proclamation has been made to date, the repealing provision was set to automatically commence on 24 July 2022.

Latest development

On 29 March 2022, the Government-sponsored Building and Other Legislation Amendment Bill 2022 (Qld) (**the Bill**) was introduced to Parliament which, among other things, stops the repeal of the Head Contractor Exemption by the BIFOLA Act.

The Explanatory Note to the Bill indicates that the retention of the Head Contractor Exemption is due to further industry consultation since the BIFOLA Act was passed.

One of the Government's reasons for retaining the Head Contractor Exemption is to avoid putting administrative and financial burdens on entities seeking to enter commercial contracts in which building work only forms a small part.

While the Bill proposes to retain the Head Contractor Exemption, it also proposes that the exemption not apply in certain circumstances (to be stipulated by regulation).

The Explanatory Note suggests that regulations may be introduced to prevent the Head Contractor Exemption from being exploited to avoid industry protections provided by the licensing system (eg security of payment requirements) and situations where the head contractor:

> "… may not have sufficient skills and experience to administer and manage the procurement of building work, particularly in complex projects or high-risk work that impacts life safety, such as mechanical services or fire protection."

The Bill is currently before the Transport and Resources Committee for report by 13 May 2022.[1]

1 Transport and Resources Committee, Building And Other Legislation Amendment Bill 2022 (Web Page, 2022) https://www.parliament.qld.gov.au/Work-of-Committees/Committees/Committee-Details?cid=173&id=4160&t=p.

Victoria

‘Quiet enjoyment’: Uren v Bald Hills Wind Farm Pty Ltd

[2022] VSC 145

Key takeaways

Noise levels from a wind farm which comply with the conditions in a planning permit may still constitute a ‘nuisance’ if they substantially interfere with neighbours’ use and enjoyment of their land (especially their ability to sleep).

Noise complaints must be taken seriously. If they are ignored, or remedial action to reduce the noise isn’t taken, extra compensation may be payable.

Keywords

nuisance; noise; windfarm; permit compliance; aggravated damages; high-handed conduct of defendant

Background

In 2015, in the small town of Tarwin Lower, Victoria, the Bald Hills wind farm commenced operation. The wind farm consists of 52 turbines capable of producing up to 380,000 megawatts of electricity each year.

The wind farm was controversial among locals long before it was built. Almost immediately after it commenced operation, neighbours began complaining about the audible sound of the turbines. They felt that the sound seriously impaired their quality of life, especially their sleep.

The operator, Bald Hills Wind Farm Pty Ltd (**Bald Hills**), kept an internal complaints register. By the time of the hearing, this register recorded 50 protests from people living near the wind farm complaining about noise from the turbines.

In response, Bald Hills engaged acoustic consultants, who concluded that the noise levels at the plaintiffs’ properties were consistent with the noise conditions stipulated in the permit.[1] Thus, Bald Hills did not take any remedial action.

In 2016, a group of neighbouring land owners complained to the South Gippsland Shire Council (**the Council**) about the noise, asking Council to take action under the *Public Health and Wellbeing Act 2008* (Vic) (**the Act**).

In March 2019, the Council concluded that noise from the wind farm was causing a nuisance, but the nuisance existed only intermittently, and that the Council would not bring enforcement proceedings under the Act. Instead, the matter should be settled privately.

Despite Council not taking any action, in separate proceedings, Bald Hills challenged the Council’s decision in the Victorian Supreme Court. The case was dismissed.

In February 2020, Mr Uren and Mr Zakula (**the plaintiffs**) sued Bald Hills in private nuisance. Both had lived on their properties near the wind farm before it became operational. Mr Zakula continues to live on his property. Mr Uren sold his house in March 2016, then lived in it as a lessee for nine months, before moving. (This distinction is relevant to the remedies available.)

Richards J heard the proceeding in the Supreme Court of Victoria.

1 The planning permit for the wind farm was granted in 2004, and prescribed noise conditions from the New Zealand Standard 6808:1998 – Acoustics – The Assessment and Measurement of Sound from Wind Turbine Generators (**NZ Standard**).

Issues

The central legal issues are not greatly controversial.

Private nuisance requires substantial and unreasonable interference with another person's use or enjoyment of their land. This is a question of fact and it is assessed objectively.[2]

One contentious aspect is whether, once substantial interference has been established, the evidentiary burden shifts to the defendant to show that the interference was reasonable. It was ultimately not necessary to decide this finally, even though it had been considered in earlier proceedings.[3]

The remedies for private nuisance are also well settled. The ordinary remedy is an injunction to restrain the nuisance. Compensatory, aggravated and exemplary damages are an alternative remedy.[4]

Decision

Her Honour's judgment stretches to 396 paragraphs. Much of the judgment is directed to questions of fact, principally in relation to the nature of the sound at different locations, at different points in time.

Despite the great complexity, her Honour was able to distill the dispute into 23 issues:

Broad issue	Sub-issue	Conclusion
Nuisance	(1) Has noise from wind turbines on the wind farm operated by Bald Hills caused a substantial interference with the plaintiffs' use and enjoyment of their land?	Yes.
	(2) If yes to question 1, does the burden shift to Bald Hills to establish that the interference was reasonable?	Unnecessary to decide.
	(3) What is the nature and extent of the interference?	Substantial but intermittent.
	(4) Has the sound from the turbines received on the plaintiffs' land at all times complied with the noise conditions in the permit?	Bald Hills did not demonstrate compliance.
	(5) If so, what is the relevance of compliance with the noise limits in the permit?	Demonstrated compliance would not necessarily mean intermittent peaks in sound were reasonable.
	(6) What is the social and public interest value in operating the turbines to generate renewable energy?	'a socially valuable activity', but one that should be able to allow neighbours to sleep.
	(7) Is either of the plaintiffs hypersensitive to noise from the turbines?	No.
	(8) What is the character of and the nature of established uses in the locality of the plaintiffs' land?	Quiet and remote. The wind farm did itself amount to an established use, not least because it had not been shown to comply with noise conditions in its permit.
	(9) What precautions has Bald Hills taken to avoid or minimise the interference?	No remedial action.
	(10) Could Bald Hills reasonably have taken any other precautions?	Yes, either by tweaking nearby turbines or by remedying a known tonal problem arising from the gearboxes.

2 See generally [14]–[18].
3 See [42]–[49], and *Bald Hills Wind Farm Pty Ltd v South Gippsland Shire Council* [2020] VSC 512 at [81]
4 See [337]

Broad issue	Sub-issue	Conclusion
	(11) Having regard to the answers to questions 3 to 10, has the interference with the plaintiffs' use and enjoyment of their land been unreasonable?	"Yes. Noise from the wind turbines on the wind farm has amounted, intermittently at night, to a substantial and unreasonable interference with the plaintiffs' enjoyment of their land. The wind farm noise has been a common law nuisance at both properties."
	(12) If yes to question 11, will noise from the turbines continue to cause a substantial and unreasonable interference with Mr Zakula's use and enjoyment of his land?	Yes.
Injunction	(13) If yes to question 12, should an injunction be granted restraining Bald Hills from continuing the nuisance?	Yes. Damages would not be an adequate remedy.
	(14) If so, in what terms?	"… an injunction restraining Bald Hills from continuing to permit noise from wind turbines on the wind farm to cause a nuisance at Mr Zakula's house at night, and requiring it to take necessary measures to abate the nuisance." Stayed for three months.
Damages	(15) Is Mr Uren entitled to damages in respect of the alleged decline in value of his share of the Uren properties?	No.
	(16) If so, what is the quantum of that loss and damage?	Unnecessary to decide.
	(17) Is Mr Uren entitled to any remedy in respect of nuisance after 18 March 2016?	Yes. Compensation for the period he was a lessee.
	(18) If an injunction is not granted to restrain the defendant from continuing the nuisance, is Mr Zakula entitled to any damages in respect of the alleged diminution in value of his land attributable to the nuisance, or the cost of abating the nuisance?	If no injunction had been awarded: yes, damages for the fall in the property's value.
	(19) If so, what is the quantum of that loss and damage?	$200,000, based on the property's reduced value.
	(20) Is either plaintiff entitled to damages for distress, inconvenience and annoyance, and if so in what amount?	Yes: $12,000 each, for each year, amounting to $46,000 for Mr Uren and $84,000 for Mr Zakula.
	(21) Should aggravated damages be awarded to either plaintiff, and if so in what amount?	"Yes. Bald Hills' conduct towards both Mr Uren and Mr Zakula was high-handed and warrants an award of aggravated damages." Mr Uren was awarded $46,000 and Mr Zakula was awarded $84,000 (matching the compensatory damages).
	(22) Should exemplary damages be awarded to either plaintiff, and if so in what amount?	No. No conscious wrongdoing or contumelious disregard.
	(23) What is the proper measure of each plaintiff's loss and damage, having regard to the answers to questions 15 to 22 above?	In total, for: • Mr Uren – $92,000; and • Mr Zakula – $168,000.

In finding there was a nuisance, her Honour determined the plaintiffs were not hypersensitive to noise from the wind farm, and that Bald Hills could have taken steps earlier to minimise the noise. This could have involved 'noise optimisation' at night by selectively shutting down relevant turbines, or implementing solutions to reduce the 'tonal audibility' of the turbines' gearbox.

Her Honour awarded the plaintiffs an injunction requiring Bald Hills to:

- stop emitting noises at night which would cause a nuisance; and
- take necessary measures to abate the nuisance.

The injunction was stayed for three months to provide Bald Hills with some time "to work out an effective solution, which minimises the burden on it and allows the wind farm to continue to generate as much electricity as possible".

Her Honour also awarded damages of:

- $92,000 for Mr Uren (which includes $46,000 for aggravated damages); and
- $168,000 for Mr Zakula (which includes $84,000 for aggravated damages).

Was compliance (or non-compliance) with the noise conditions in the planning permit relevant?

Richards J determined that Bald Hills had not proved it had at any point complied with the noise conditions in the planning permit (despite Bald Hills providing evidence that it had from its acoustic consultants) and that Bald Hills had employed incorrect methodologies in assessing noise levels.

Her Honour also commented that even if Bald Hills did comply with the noise conditions in the permit, such compliance would not necessarily mean the wind farm's noise levels were reasonable. Her Honour found that the NZ Standard (referred to in the planning permit) set a limit on continuous wind turbine noise over weeks or months, but was not directed to the issue of intermittent loud noises, on particular nights, in certain weather conditions.

Her Honour also accepted the plaintiffs' argument that the NZ Standard was not a universal standard for noise emissions from wind farms, particularly as Victoria recently adopted a lower noise limit for newly approved wind farms.

Her Honour also referred to authority from the UK Supreme Court,[1] which held that planning permission only removed a bar imposed by planning law to a development. The UK Supreme Court held that whilst planning authorities are concerned with the public interest, they could not override private rights in respect of land use, and planning permission would have limited relevance to the question of private nuisance.[2]

Did the public interest value of the wind farm justify the nuisance?

Whilst Richards J didn't engage in an extensive discussion regarding the public interest, her Honour accepted "without reservation" that the renewable energy generated by the wind farm was socially valuable and it was in the public interest for it to continue operating. However, her Honour found that it should be possible for both the wind farm to generate clean energy and for its neighbours to achieve a "good night's sleep".

Her Honour again referred to the planning permit, which contemplates how - in certain weather conditions - the wind farm may have to selectively shut down some turbines to reduce noise to an acceptable level.

Was the noise produced by the wind farm reasonable?

Richards J found that the plaintiffs' properties were in a rural locality, in which sounds associated with stock rearing, grazing, and other farming activities are typical during the day. But, there was no evidence that those activities caused intrusive noises at night. Accordingly, her Honour found that noises from the wind farm (which did cause intrusive noises at night) were unreasonable.

Bald Hills also argued (unsuccessfully) that the wind farm was an established use of the land, and therefore the noise generated from it was reasonable. There is some uncertainty regarding the extent to which a defendant's own activities can be relied on to prove the established uses of land. Nevertheless, Justice Richards held that even "the approach most favourable" to a defendant required Bald Hills to comply with the noise conditions in the planning permit and in environmental protection regulations. As Bald Hills did not comply with these noise conditions, the wind farm could not be taken into account as an established use of the land.

Were the plaintiffs entitled to aggravated damages?

Richards J awarded aggravated damages because Bald Hills acted in a 'high-handed' manner. This included:

- denying the plaintiffs had any cause for complaint, minimising their experience of the noise, and treating them as hypersensitive trouble-makers;
- relying on "patently absurd" conclusions provided by acoustic consultants, asserting that it was quieter at both the plaintiffs' properties after the wind farm began operating;
- "flooding" the Council with submissions and reports from lawyers and consultants, that did not engage with the complaints the plaintiffs made to the Council;
- unsuccessfully seeking judicial review of the Council's resolution that the wind farm was causing an intermittent nuisance; and
- their largely unexplained delay in finding a solution to the gearbox tonality issues, which were first identified in December 2016.

Richard J considered these factors "at least doubled the impact of the loss of amenity" that each plaintiff suffered.

Conclusion

The decision is highly significant, but it is vital to note that questions of fact underlie private nuisance claims. As here, these facts are likely to be vigorously contested in similar claims.

The decision is a reminder to wind farm operators and developers (or developers of similar projects) that they must seriously consider the effect of noise emissions on individual landowners.

In developing the business case for a project, developers will not only need to consider the costs of complying with government regulations, but also the risk of nuisance complaints from private stakeholders. This could add to the commercial attractiveness of offshore wind farms as they are, quite obviously, less likely to interfere with anyone's 'quiet' enjoyment of their land.

5 *Lawrence v Fen Tigers Ltd* [2014] 1 AC 822.

6 *See also Seidler v Luna Park Reserve Trust* (Supreme Court of NSW, Hodgson J, 21 September 1995, Unreported).

V601 v Probuild

[2021] VSC 849

Key takeaways

A contractor may be able to claim the costs of accelerating the works if:

- the superintendent wrongly denies extension of time claims; and
- on its own initiative, the contractor accelerates the work to meet the unadjusted date for practical completion.

However, the superintendent's decision must generate a breach of the construction contract by the principal. In this instance, that breach arose because of the collusion between the principal and the superintendent.

Keywords

collusion between principal and superintendent; constructive acceleration

Background

This case concerned a major development in Abbotsford, Victoria, known as 'The Precinct'. It consists of five separate buildings featuring 467 apartments, along with retail and commercial areas.

In 2011, V601 Developments Pty Ltd (**V601**) engaged Probuild Constructions (Aust) Pty Ltd (**Probuild**) to design and construct the project. The contract was an amended form of AS4902–2000 with an initial contract sum of nearly $116 million.

Issues

Digby J's primary judgment stretches to 1,451 paragraphs and 1,120 footnotes. The most interesting aspects of the case stem from time-related disputes. V601 sued for liquidated damages. Probuild made several counterclaims, including for damages for what was effectively constructive acceleration.

Formulation of constructive acceleration claims

Broadly, constructive acceleration claims rarely succeed outside the USA. The claim arises when:

- the contractor seeks an extension of time that is wrongfully not granted;
- without an express instruction to do so, the contractor accelerates the works to try to meet the unadjusted date for practical completion; and
- the contractor later seeks to recover the extra expenses it incurred in accelerating the works.

This summary raises a question: what cause of action could entitle the contractor to recover damages to compensate for the extra expenses of acceleration? It may seem that the obvious answer is 'breach of contract'. Where there is an independent superintendent, however, it will typically be difficult to identify a breach of contract by the principal.

Probuild's constructive acceleration claim

Probuild's case summary for an expert helpfully distills its case:

> "33 Probuild asserts that it 'accelerated' the performance of WUC [the work under the contract] in an attempt to reduce or overcome one or more of the delay events the subject of Probuild's EOT claims … or alternatively in an attempt to achieve Practical Completion by the Date for Practical Completion certified by the Project Manager.
>
> 34 Probuild claims to be entitled to recover from the Plaintiff the costs that Probuild incurred in accelerating the performance of the WUC by reason of (amongst other things) the Project Manager:
>
> 34.1 failing, refusing or neglecting to approve updated versions of programs submitted by Probuild to the Project Manager during the course of the Project; and/or
>
> 34.2 failing to grant in full extensions of time to the Dates for Practical Completion which Probuild was entitled to receive."

To understand how a right to damages might arise, it is necessary to consider the role of the Project Manager (conventionally, the superintendent).

Clause 20 prescribed the Project Manager's roles as agent of the principal in some respects and as an independent certifier in others. While the entire clause was relevant, it is critical to note that in certifying extensions of time (among other things), clause 20.2(b) provided:

- "the Project Manager shall act independently of the parties and neither party shall be entitled to give Directions to the Project Manager;
- the Project Manager is entitled to consult with either one of or both parties but is not obliged to consult with both parties; and
- the Project Manager shall act reasonably in exercising the identified functions and shall have regard to the express requirements of the Contract and not the commercial interests of either party."

Probuild argued that the Project Manager's independence had been compromised.

Decision

His Honour interpreted clause 20 in "a broad and facilitative way" and in the context of authority to the effect that there may be an implied term that the principal not interfere with the superintendent's duties.[1]

The evidence showed:

> "… collusion and co-operation between the Proprietor [that is, V601] and the Project Manager to work in unison and deploy their strategy and tactics to manage the Contractor's claims … [and] … Project Manager's willingness to obtain V601's input and approval of the Project Manager's draft extension of time assessments and determinations, before they were communicated to Probuild."

His Honour concluded that:

> "V601, and its agent, the Project Manager, breached their obligations in relation to the proper administration of the Contract time extension assessment and determination process; and in addition were in breach by failing to award Probuild the extension of time to which it was entitled".

The breach of contract by V601 opened up the possibility of compensation. Probuild claimed its acceleration costs on three alternative bases.

Argument	Result
The acceleration costs were recoverable expenses of mitigating loss arising from V601's breach	Accepted
The acceleration costs were losses flowing from V601's breach	Accepted
The failure to grant extensions of time amounted to an indirect direction for which it was entitled to be compensated	Did not amount to a direction, but the costs of "necessary and reasonable measures to accelerate" were recoverable.

Ultimately, in subsequent proceedings, Probuild was awarded $1,346,799 in costs for acceleration.

Conclusion

Probuild was wrongly denied extensions of time. It chose to accelerate the works to try to meet the unadjusted date for practical completion and so incurred extra costs.

Here, the collusion between the principal and the Project Manager meant that it was possible to identify a breach by the principal, V601. That breach of contract allowed Probuild to recover the costs of acceleration, on several plausible grounds.

Similar arguments may succeed where the superintendent acts solely as agent of the principal. If the superintendent wrongly denies extensions of time, the principal would be responsible for the actions of its agent.

More commonly, though, an independent superintendent simply makes a bad decision. In that situation, a constructive acceleration claim will be difficult to mount because it will typically be hard to identify any breach of contract by the principal.

http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2021/849.html

See also the final orders handed down on 12 January 2022:

http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2022/3.html

1 At [258], citing *Perini Corporation v Commonwealth of Australia* [1969] 2 NSWR 530, at 543 and 545 (Macfarlan J).

Western Australia

Electricity Generation and Retail Corporation Trading as Synergy v EIT Kwinana Partner Pty Ltd

[2022] WASCA 3

Key takeaways

This case will be of specific interest to anyone concerned with wholesale electricity markets.

For other readers, the central lesson is about contractual interpretation. When interpreting a contract, courts will sometimes make substantial use of statutory materials where they establish background facts known to the contracting parties.

Keywords

wholesale electricity market

Background

This case concerns the Western Australian electricity network and features a large cast of parties.

Two respondents, EIT Kwinana Partner Pty Ltd (**EIT**) and Summit Kwinana Power Pty Ltd (**SKP**), carried on business through the NewGen Power Kwinana Partnership (**IPP**).

IPP operated a natural gas-fired power station in Kwinana that was connected to the system that distributes electricity through Western Australia's southwest. The power station was built under an agreement between IPP and Western Power Corporation. Western Power has since devolved into Synergy, which was the appellant in this case.

In November 2005, Western Power and the IPP entered into another agreement, the WPC Tradable Purchase Agreement (**TP Agreement**). Under it, IPP provided electricity to Western Power.

Issues

A dispute arose regarding clause 7 of the TP Agreement, which required Western Power to make a 'Spinning Reserve Capacity Payment'. The principal question of contractual construction on appeal was whether Western Power (now Synergy):

- was only obliged to pay the Spinning Reserve Capacity Payment in relation to 1-megawatt 'Slices' of energy generation capacity that Western Power had nominated to be held by the IPP as 'Spinning Reserve Slices' during a relevant Trading Period (as Synergy argued); or
- was obliged to pay the Spinning Reserve Capacity Payment in relation to Slices deemed to be Available for Spinning regardless of whether Western Power had nominated those Slices to be held as Spinning Reserve Slices (as the IPP argued).

Put simply, the question was whether obligation to pay turned on Slices having been nominated as being for IPP. This was critical because neither Western Power, nor its successor Synergy, had ever nominated that a Slice be held by the IPP as a Spinning Reserve Slice. Therefore, if Synergy's construction of clause 7 was correct, neither Western Power nor Synergy had incurred a liability for the Spinning Reserve Capacity Payment.

Decision

Much of the case relied on The Wholesale Electricity Market Rules (**Market Rules**). In fact, their Honours stated that: "A proper understanding of the Market Rules was essential to the task of construing the TP Agreement. Not only were the Market Rules undoubtedly part of the background known to the parties, a great many of the concepts in the TP Agreement are taken directly from the Market Rules."

For this reason, it is necessary to rely on some terminology from the Market Rules.

Issue 1 — construction of the Spinning Reserve Capacity Payment

The IPP argued that Western Power was required to pay the Spinning Reserve Capacity Payment for all 'Original FC Slices', other than some that were specifically excluded by clause 7.1(a)(i), (ii) and (iii). According to this construction, the defined term 'Available for Spinning' was determinative and referred to all such Original FC Slices.

Conversely, Synergy contended that the Spinning Reserve Capacity Payment was only payable with respect to those Original FC Slices that Western Power had nominated to be held as Spinning Reserve Slices for the relevant Trading Period under clause 7.1(e) of the TP Agreement. On that construction, if no FC Slices were nominated by Western Power, Western Power was not liable to pay the Spinning Reserve Capacity Payment for that Trading Period.

The trial judge had found that the Spinning Reserve Capacity Payment under clause 7 of the TP Agreement was payable in respect of Slices of energy deemed to be available for nomination by Western Power to be held as Spinning Reserve Slices, regardless of whether Western Power had nominated those Slices as Spinning Reserve Slices or directed the IPP to provide a Spinning Reserve Service.

The Court of Appeal disagreed, holding that clause 7 of the TP Agreement did not oblige Western Power to make a Spinning Reserve Capacity Payment in relation to a Slice of energy unless Western Power had nominated that Slice as a Spinning Reserve Slice for the relevant Trading Period. Therefore, the four appeal grounds referring to payment of the Spinning Reserve Capacity payments were upheld and the TP Agreement obliged Western Power to pay only if Western Power had nominated that the Original FC Slices be held for a relevant trading period. The spinning Reserve Capacity Payment was required to be paid only with respect to nominated Slices.

Issue 2 — Actual Spinning Reserves Costs

The second issue on appeal concerned this aspect of clause 7.2: "the average charges imposed by System Management on the IPP's spinning reserve in respect of the Power Station". These words were relevant to the definition of 'Actual Spinning Reserve Costs'.

Synergy contended that these words referred to the charges imposed with respect to Spinning Reserve provided by the IPP: that is, when the IPP holds energy in reserve because of a nomination by Western Power.

The IPP, by contrast, contended that the definition of Actual Spinning Reserve Costs referred to the charges imposed on the IPP under the Market Rules for the provision of Spinning Reserve (provided by System Management under the Market Rules).

Due to the findings in relation to Issue 1, the issue of construction raised in relation to charges fell away. The consequence of their Honours' preferred construction of clause 7 was that neither Western Power nor Synergy had at any time incurred a liability for the Spinning Reserve Capacity Payment.

Conclusion

The appeal was ultimately allowed. As a result, the primary judge's findings in relation to Issues 1 and 2 were set aside by way of a declaration as to the proper construction of clause 7.

The case reinforces basic principles of contractual interpretation, namely that a contract must usually be interpreted by reference to its text, context and purpose. Sometimes, understanding the context requires reference to statutory materials.

Here, the Market Rules were instrumental in interpreting the TP Agreement, as a source of knowledge "reasonably available to the parties at the time the contract was made."

https://ecourts.justice.wa.gov.au/eCourtsPortal/Decisions/DownloadDecision/79ab0674-935b-40a3-9029-f055decf6764?unredactedVersion=False

Other

Construction industry is not 'broken'

Key takeaways

The current challenges are similar to those which have been faced in the construction industry for decades. Change can be slow to implement but should be accelerated if further insolvencies are to be prevented.

Keywords

the construction industry

Background

On 24 February Probuild's owners, WHBO, released a statement which provided some context around the decision the previous day to appoint administrators to Probuild. Amongst other matters, WHBO pointed to repeated and lengthy lockdowns and ongoing business uncertainty in Australia. Many may have found this surprising, given the construction industry was largely exempt from restrictions in the states with the longest lockdowns, Victoria and New South Wales.

At Corrs, we have advised on many projects where extensive COVID relief has been granted to contractors, generally on the basis of force majeure or change in law.

But in many instances, COVID relief is not enough.

Challenges for the industry

As pointed out by James Thomson in the AFR, there are a number of other factors contributing to the challenges faced in the construction industry including rises in professional indemnity premiums and a reluctance by owners and developers to take on any risk. Challenges faced by contractors in certain sectors of the market as a result of the increasingly risk averse contracting models adopted by owners and government agencies have been widely reported and have given rise to a number of significant disputes. It remains to be seen if these disputes will provide an impetus for a shift in risk allocation.

But 'fixed price' or 'one sided' contracts are just one factor.

Project problems often arise even before a contract is signed. For instance:

- there is immense pressure on government agencies and private developers to select the tenderer with the lowest price. The 'value for money' test rarely looks beyond cost. Robust evaluation criteria which provide weight to resourcing, procurement strategies and other matters should and can override cost;
- the old adage 'time is money' means projects may be rushed to tender without being properly scoped or detailed, with drivers ranging from political convenience to external property market conditions. In conventionally funded projects, the design and construct model is blamed but in fact it is an effective mechanism for single point responsibility. However it is not suited to every project, and careful pre-project analysis is often not undertaken;
- there is a significant lack of capability and depth in some layers of the construction market. Many contractors have made express strategic decisions not to participate in particular sectors (for example, PPPs or tunnelling) which causes further market challenges; and
- the regulatory burden faced by construction industry participants should not be underestimated. It remains unclear why there need to be eight different Security of Payment Acts in Australia, or why the occupational health and safety legislation is still not harmonised.

No counterparty to a building contract wants a contractor to lose money. However the adversarial structure of these arrangements rarely support a win/win outcome.

How can we do better?

For many industry participants, it can be a difficult path to navigate. When it comes to formulating a contract, it is worth keeping in mind the following:

- price escalation is a fact, and should be allowed for in contracts, as was the case in the 1990s when 'rise and fall clauses' were common. These clauses, which allowed for the cost of materials, wages or others matters to increase or decrease as a result of market fluctuations, fell out of favour (and are prohibited in some jurisdictions) as owners sought price certainty on as many components of building work as possible. A more limited type of rise and fall clause may have a role to play today;
- early contractor involvement, in which the contractor is paid to assist with innovation, buildability and design review is rarely anything other than money well spent;
- flexibility in contract drafting is key, with significant consideration required to build a regime which enables known and unknown risks to be allowed for; and
- supply chain issues can be managed, whether by early procurement and storage of plant and equipment, careful procurement planning with fall back options, or simply granting an entitlement to recover time if issues arise (as some Victorian government standard forms do).

Note: this article by Jane Hider was previously published online:

https://www.corrs.com.au/insights/construction-industry-is-not-broken

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Senior Legal Counsel, property client

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Australasian Lawyer, February 2014

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"Clients describe him as a sensational negotiator and fantastic at complex structuring acquisitions, or rather, at simplifying them."
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"It's great to get this transaction across the line and I just wanted to thank all of you for your contribution over the last year – including all those who worked so tirelessly over the last few days and especially Nick Thorne who has provided fantastic support from the very beginning."
Oil and Gas client

"Provided outstanding support on the deal ."
Oil and Gas client

"Responsive, commercial and a pleasure to work with." Corporate client

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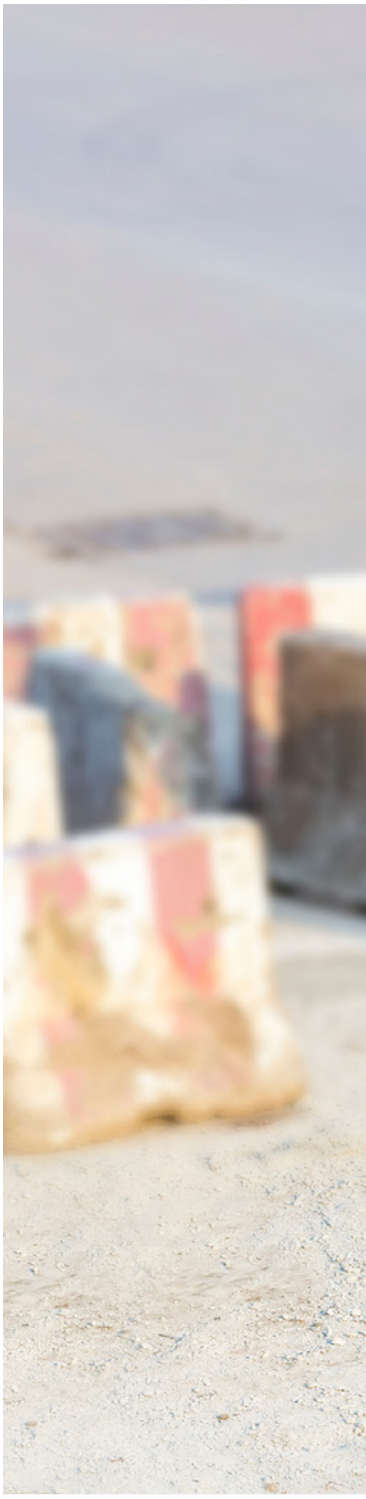

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