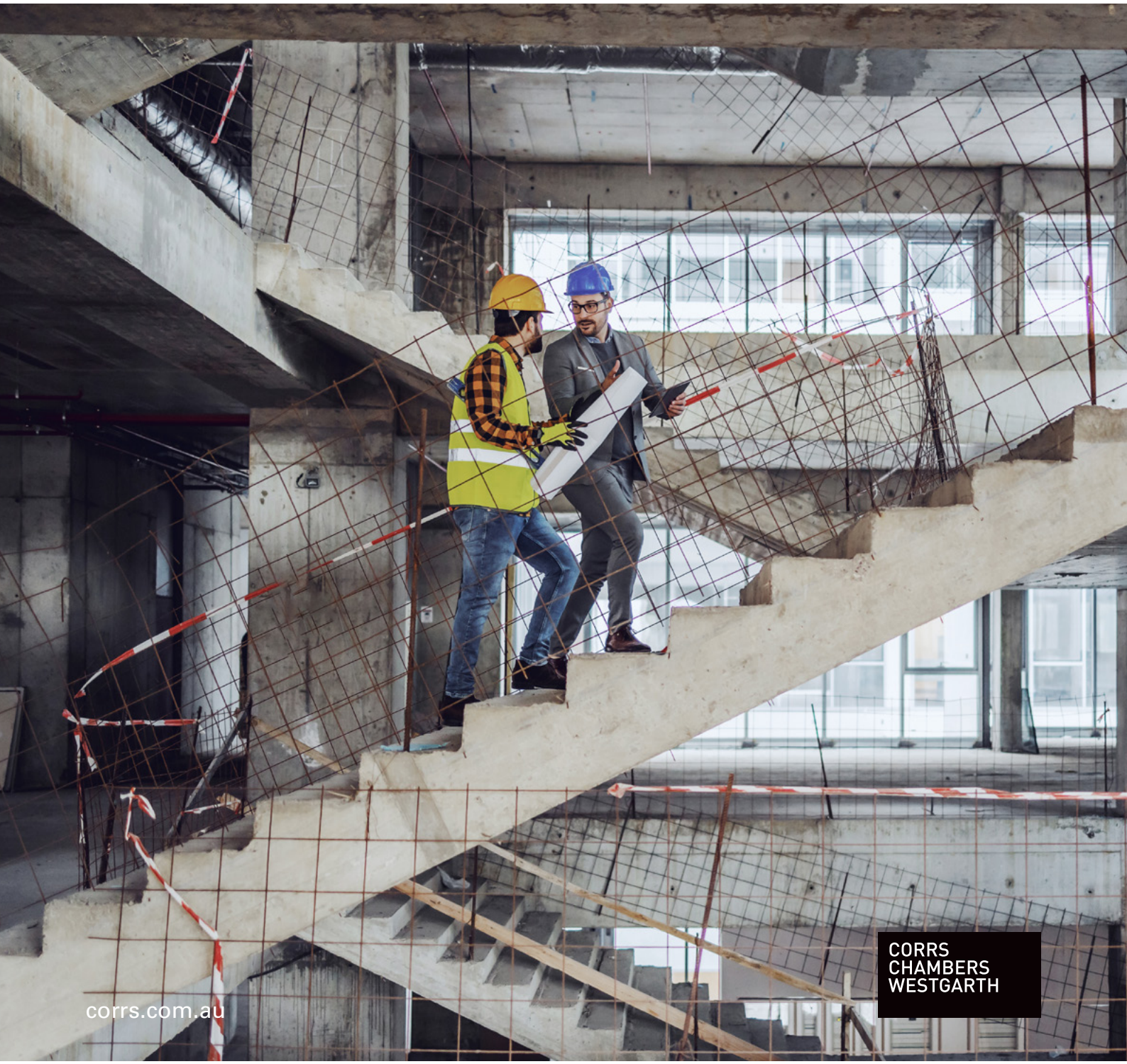
# Corrs Projects Update

Special Edition: ESG – environmental, social and governance

Q4 2021



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# Welcome to the latest edition of Corrs Projects Update: Special Edition: ESG – environmental, social and governance

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.

In this special edition, we have a particular focus on ESG.

The rise of ESG over the last 12 months has been driven by five major trends: the accelerating capital flows to ESG funds and businesses, the global drive to net zero, a move from voluntary principles and guidelines to mandatory regulation, shifting investor expectations and increasing shareholder activism, and a heightened customer and employee sensitivity to environmental and social issues.

As capital and business opportunities are increasingly flowing to responsible businesses that are seen to hold themselves accountable by considering their environmental and social impacts, and governing with integrity and transparency, we continue to work with clients to build the best ESG risk frameworks across their operations and supply chains.

This edition of the Corrs Project Update includes the usual case notes on important judicial decisions from across Australia, and also a focus to some of ESG issues as we explore:

- the dangers of greenwashing – as regulators shareholders and activists increasingly use litigation to hold companies to account;
- whether arbitration may provide the answer to ESG disputes in the future; and
- a practical guide to key climate change considerations for supply chains.

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

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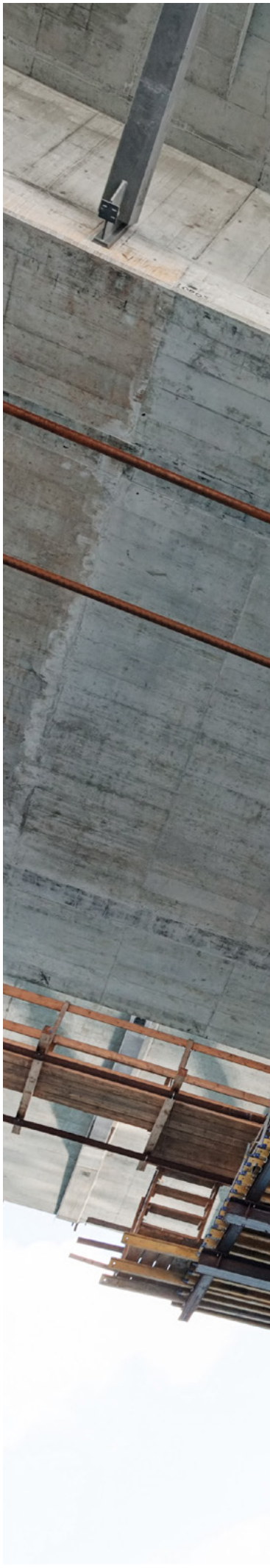
### Insights

Corrs regularly publishes insight articles which consider issues affecting various sectors of the domestic and global economies. We have included at the end of this Update links to some of our recent articles on issues affecting the construction industry.

The information contained in this publication is current as at December 2021.



# Contents

Feature article

# ESG disputes: is arbitration the answer?

To say that businesses are witnessing an 'ESG revolution' is not hyperbole. Active engagement with ESG issues is no longer a choice; ESG impacts are increasingly permeating public and private decision making across all sectors of the economy, as recent discussions around the COP26 climate change conference have shown. As outlined in Corrs' ESG Guide for General Counsel,

> "The message from corporate stakeholders is clear: companies must rise to meet demands for ESG accountability and transparency with proper risk management, due diligence and reporting, or risk shareholder and employee activism, investor divestment and exclusion."

Those demands are producing new forms of risk (requiring allocation) that businesses need to grapple with in their operations and contractual relationships. In turn, these new forms of risk are and will continue to give rise to disputes. In that context, we ask: what role can arbitration play in resolving ESG-related disputes?

In this Insight, we explore this question from two perspectives. We first consider contractual disputes and the extent to which arbitration is suitable for resolving such disputes on projects overlaid with ESG requirements. Second, we discuss the evolving ESG considerations that businesses engaged in projects overseas should bear in mind to ensure that they are able to protect their interests through arbitration.

## The role of commercial arbitration in resolving ESG-related contractual disputes

Contracts are the ultimate risk allocation device. ESG risk allocation too can be provided for by contract. Parties are increasingly asked to warrant that their activities will be responsible, that they will take steps to eliminate any modern slavery in their supply chains, and that they will conduct their operations in line with emissions reduction commitments. At the same time, some financiers are insisting on conditions precedent to finance requiring that the financier be satisfied with the borrower's ESG compliance.

Just as the uptake of ESG requirements in commercial transactions increases, so does the risk of dispute involving those requirements. That risk is particularly pronounced because of the tension between certainty and breadth in drafting ESG clauses.

The concept of an 'ESG risk' is an umbrella term used to describe environmental, social or governance factors which may impact on (or present an opportunity for) the entity.[1] What falls inside or outside of the umbrella is not clearly defined. As a result, any clause using the umbrella term is ripe for dispute.

On the flip side, as clauses become more particular, the risk that factors will be missed increases. One way drafters are managing this risk is to use a broad term and then give one party a contractual discretion. For example, one party may need to satisfy the other 'acting reasonably' about its ESG compliance. Risk lurks in these clauses too. A dissatisfied party may challenge the exercise of the contractual discretion, including by saying that, for example, the decision maker had regard to irrelevant material.

If the parties fall into dispute on these issues, those disputes can be dealt with through arbitration. Arbitration provides a private and confidential way to resolve disputes. Administered properly, it can be quicker and more efficient than other methods of dispute resolution, including by bringing proceedings in court. The parties can moreover appoint arbitrators who are specialists in the issues in dispute. For example, if the dispute is environmental or if it involves new technology solutions, an arbitrator with expertise in the technical issues can be appointed to hear the dispute and bring their specialist knowledge to its resolution. Moreover, arbitration can produce a final resolution faster than the time it ordinarily takes to litigate a complex technical dispute in court.

With the commitments flowing from COP26 fresh in mind, many expect to see States' climate policies attempt to reshape the global energy industry. We may see an increase in disputes under 'change in law' clauses, as law and regulation change to meet new climate policies. Given the appreciation of different legal systems that comes with international arbitration practitioners, they are well suited to grappling with these disputes.

Arbitration is also well suited to dealing with disputes that give rise to high-tech and complex engineering issues on major projects because it allows parties to agree on procedures tailored to each individual dispute.

There are some risks involved in taking disputes involving ESG clauses to arbitration. The strategic imperative behind some ESG action is to attract attention or public scrutiny, and plaintiffs see open court as a better way to achieve that end. This has in turn driven some large entities to introduce arbitration clauses in their consumer contracts to preserve confidentiality. Recent US experience shows that this approach runs the risk of plaintiff law firms 'book building' (that is, signing up individual claimants) and commencing mass arbitrations, and it may also incite a public backlash against what some see as a business using the confidentiality of arbitration to hide its misdeeds.

That backlash may be warranted where public policy concerns are in play but it is unlikely to detract from the appeal of arbitration for resolving the majority of ESG related disputes. The qualities of confidentiality, party autonomy and efficiency of arbitration mean that it will continue to be the forum of choice for many contracts that include ESG clauses. There will be an accordant rise in expertise that arbitrators can bring to resolving ESG-related disputes and from which parties can draw when selecting arbitrators to hear their disputes.

1 In Corrs' *ESG Guide for General Counsel*, we note that the concept of an 'ESG risk' is an umbrella term used to describe environmental, social or governance factors which may impact on (or present an opportunity for) the entity.

## ESG considerations relevant to cross-border projects

Contractors involved in cross-border projects should be mindful of how the increase in focus on ESG is changing their risk exposure when operating overseas, and how a failure to comply with ESG requirements may come to affect their rights, in particular rights afforded under international investment agreements.

By way of context, many Australian companies with assets overseas benefit from legal protections available under investment agreements between Australia and countries across Africa, South America, Europe and South-East Asia. These treaties protect individuals and companies from certain kinds of government-mandated measures, typically in the form of changes in laws or regulatory action, that may affect their assets - including contractual rights. Often these treaties allow companies to commence arbitration proceedings directly against the government of the state in which the asset is located (i.e. the 'Host State') to seek damages for unlawful government action.

The ability to invoke investment treaty protections can be a meaningful risk mitigation tool for Australian companies undertaking commercial activities overseas. Indeed, there have been hundreds of arbitrations commenced by individuals and corporations under various investment treaties worldwide and across a range of sectors – including resources and construction – in circumstances where their cross-border investments of capital and resources are adversely affected by action taken by the Host State.

These protections are increasingly being interpreted through the ESG lens and newly-negotiated investment treaties are re-allocating the risk of foreign business operations that are not conducted responsibly. We note here a few ways in which this shift manifests itself.

As an example, companies and individuals that otherwise meet the requirements to be afforded protection under investment treaties may lose the ability to rely on those protections if they fail to respect ESG requirements. One reason for this is that there is either an explicit or an implicit 'legality requirement' in investment treaties that conditions a party's right to seek compensation on its compliance with the Host State's domestic legislation, which increasingly mandates compliance with components of ESG.

Further, on a number of recent occasions investment treaties have been interpreted to allow the Host State faced with a treaty claim by a foreign corporation to raise a counterclaim and seek compensation for ESG-related harm done by the corporation.

In one case involving an arbitration commenced by Spanish company Urbaser S.A. against Argentina, that arose out of Argentina's termination of a concession for water and sewerage services, Spain was allowed to pursue a counterclaim against the claimant alleging that the claimant's administration of the concession had breached international human rights obligations.[2]

While the counterclaim was not ultimately successful, the case signals the willingness of tribunals to entertain ESG-related counterclaims.

Parties that fail in their ESG-related obligations can also face a reduction in damages to which they may otherwise be entitled – for example, if by failing to comply with social and human rights obligations their ability to generate future income on a project is seen as too uncertain, or even if their conduct is seen as having contributed to their losses.

In an arbitration between the Canadian mining company Bear Creek and Peru over a silver ore project that was unable to proceed to the exploration phase due to local community opposition, the tribunal awarded a significantly reduced quantum of damages because the manifest failure to obtain a social license to operate (among other things) made it impossible to assess expected profitability of the project.

Moreover, one of the arbitrators considered that the damages award should have been further reduced on account of the claimant's contributory fault, concluding that the community opposition to the project was the result of the claimant's failure to engage in public consultations.[3]

Additionally, states increasingly see investment treaties as policy tools that can contribute to their ability to meet emissions reduction targets and promote responsible business conduct. Some newly negotiated and model investment treaties already require investors to comply with human rights due diligence obligations and conduct their business responsibly. For example, the Morocco-Nigeria Bilateral Investment Treaty (**BIT**) requires projects to be assessed for their environmental and social impacts and to comply with international environment protection standards. The Netherlands Model BIT requires that individuals and companies comply with the laws and regulations on human rights in force in the country in which they invest, and the Indian Model BIT expressly contemplates a reduction in damages payable where the foreign investor has caused harm to the local community or environment.

Australian companies operating overseas that rely on investment treaty protections to de-risk their cross-border operations and investments should follow these developments closely. We expect that international treaties will increasingly mandate that business is done responsibly before individuals and corporations can benefit from the protections they afford.

2 *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26.

3 *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/2, Award of 30 November 2017, Partial Dissenting Opinion by Philippe Sands.

Feature article

# The dangers of greenwashing: it's not easy being green

With widespread consensus on the need to reach net zero by 2050, companies have come under increasing pressure from regulators, investors and consumers to embed more robust environmental risk management and disclosure practices and to progressively 'green' their business and supply chains.

Demands for stronger corporate action on climate change are likely only to increase into the future. And, with mounting evidence of the material financial risks posed by climate change, the business case for going green could not be clearer. It is no coincidence that the number of major companies that have committed to reaching net zero has more than trebled in the past year alone.

There are clear commercial benefits to 'going green', from both a financial and reputational perspective. But such moves are not without risk. Companies that exaggerate or misrepresent their 'green' credentials expose themselves to the risk of 'greenwashing' claims under the *Australian Consumer Law*, the *Australian Securities and Investments Commission Act 2001* (Cth) and financial reporting rules.

## What is 'greenwashing'?

'Greenwashing' is a term used to describe a wide range of actions which exaggerate or misrepresent a company's 'green' credentials.

The following types of company communications are particularly susceptible to claims of 'greenwashing':

- Climate-related disclosures – financial and other disclosures regarding exposure to climate risk;
- Broad corporate goals – representations in relation to drivers such as:
  - alignment with Paris Agreement goals;
  - achievement of net zero or other emissions reductions targets by a specified date; and
- Green marketing – product and brand marketing which makes representations about products or practices being environmentally friendly, sustainable or ethical.

If not carefully managed, such communications have the potential to become misleading or deceptive, or a breach of relevant reporting obligations under securities law.

## The rise of 'greenwashing' claims

Legal challenges to corporate 'greenwashing' are already afoot.

In December 2019, in response to action by the Australian Competition and Consumer Commission, the Federal Court ordered the highest penalty on record against Volkswagen ($125 million) for false representations about the compliance of 57,000 vehicles with Australian diesel emissions standards. On 12 November 2021, the High Court denied Volkswagen leave to appeal the penalty. Late in 2021, the Australasian Centre for Corporate Responsibility filed a greenwashing claim, under the Australian Consumer Law, against a major oil and gas company in Australia in relation to its representations of producing clean energy and pathway to reach net zero.

Overseas, a number of proceedings have been brought against Exxon Mobil Corp (in Massachusetts and more recently, in New York), Shell Oil Company, BP America Inc and Chevron on the basis of misleading climate-related representations. More recently, in September this year, shareholders launched a class action in the US against one of the world's largest oat milk companies, Oatly, seeking damages said to result in part from misleading statements about sustainability. These include that the conversion from cow's milk to Oatly results in 80% fewer carbon emissions, 79% less land usage, and 60% less energy use.

## Risks

As regulators, investors and consumers become more environmentally sophisticated, such liability risks are only likely to grow.

ASIC has acknowledged that climate change is a systemic risk for the financial system and that it will play a role in ensuring that what companies say about their plans to manage climate change matches what they do in practice.

More than ever, it is important for companies to assess climate risks, how their business will manage those risks to ensure compliance with all legal obligations and carefully manage communications about those risk management plans and broader 'green' credentials.

Feature article

# A practical guide to key climate change considerations for supply chains

Climate change has rapidly transformed supply chains and project management. To address supply chain risk and build resilience, organisations need to understand and consider the key risks to supply chains and be proactive and innovative in their approach going forward.

Whilst it remains unclear where this transformation will ultimately lead, organisations need to consider that a traditional approach to supply chain arrangements may not be adequate into the future, particularly for arrangements over the medium to long term. New approaches should be explored, with careful consideration given to legal and contractual, technical, financial, policy and risk issues.

Supply chains are also increasingly affected by changing stakeholder requirements and expectations relating to climate change and environmental factors. This is often driven by customer, consumer and supplier concerns relating to their own environment, social and governance (**ESG**) objectives. Australia's commitment to the Glasgow Breakthroughs on near zero emission steel will increase this momentum.

These new pressures being applied by climate change impact key contractual matters in many different supply arrangements, including products and materials, and services ranging from professional services, to design, construction, operation and maintenance. These arrangements require the consideration from the perspective of both the suppliers, contractors and sellers (Sellers), as well as principals, customers and clients (Purchasers).


Corrs has published **A practical guide to key climate change considerations for supply chains** to help organisations determine if a new approach to supply chain arrangements is needed. Key factors for consideration include: the nature of the product supplied, the value at risk, and the time frames over which particular contracts operate. If an organisation decides that no change is required, this decision must be made consciously, rather than by default.

As we move into a future where the legal approach to supply chain arrangements remains unclear and it is essential for organisations to maintain open communication between the legal and non legal areas of their business. Organisations will need to work collaboratively with contract counter parties and the industry to develop solutions, as the ability to think creatively, respond adroitly, acknowledge mistakes and reflect on lessons learned will be important for long term success.

You can access a copy of the Guide here.

Feature article

# Termination for convenience: when and is it free?

## Key takeaways

Termination for convenience clauses have drawn significant media attention given the Commonwealth's decision to terminate the Future Submarine Program contract with the Naval Group.

A poorly drafted termination for convenience clause has the potential to be unenforceable. Potential traps include unfair contract terms legislation, lack of consideration, good faith and the calculation of compensation.


## Keywords

termination for convenience clauses


## Background

As the name suggests, exercising a termination for convenience clause does not require the terminating party to prove any breach of obligation by the terminated party.

These clauses are common in contracts, especially in large procurement projects involving governments.

Despite the common nature of such clauses, there is limited guidance as to whether the terminated party must be compensated and the amount of compensation (if any) on a termination for convenience is also often unclear.

A poorly drafted termination for convenience clause has the potential to be unenforceable.

We take a look at the most recent commentary and judicial considerations and set out some matters that are relevant to the negotiation of a termination for convenience clauses.

## Should the other party be compensated where a right to terminate for convenience has been exercised?

While parties are generally free to strike whatever bargain they choose, there are some limitations on the enforceability of contracts in circumstances where a contract contains a right to terminate for convenience.

## Unfair contract terms

Particular caution should be taken when negotiating an exclusive right to terminate for convenience without compensation being payable where the unfair contracts regime applies.[1]

1 The current regime applies to standard form contracts entered into or renewed on or after 12 November 2016, where:
- it is for the supply of goods or services or the sale or grant of an interest in land;
- at least one of the parties is a small business (employs less than 20 people, including casual employees employed on a regular and systematic basis); and
- the upfront price payable under the contract is no more than $300 000 or $1 million if the contract is for more than 12 months.

In *ACCC v Servcorp Ltd*,[2] one party could terminate for convenience without paying compensation while the other party had no such rights at all. This gave rise to a significant imbalance in the parties' rights and obligations and the clause was deemed to be an unfair contract term and was void.

Although the regime does not apply to all contracts, upcoming amendments will broaden the scope of the unfair contract term provisions and introduce civil penalties and further remedies.

## Consideration

There is a difference between an agreement that provides an obligation to compensate for work done up until termination, from an agreement that does not provide for any compensation at all.

To ensure formation and enforceability of a contract, obligations must be supported by 'consideration' (which usually takes the form of an obligation to pay money and provide products or services in return).

Courts in the United Kingdom have taken the view that a termination for convenience clause that does not provide compensation for losses (including loss of profit and overheads) "risk[s] being treated as … unenforceable as unconscionable."[3] However, the Australian Federal Court in *Anderson Formrite Pty Ltd v Baulderstone Pty Ltd (No 7)*,[4] held that a $1 termination fee ensured the contract was supported by consideration.

Consequently, inclusion of a termination payment obligation will help avoid a dispute as to whether an agreement containing a termination for convenience clause is void for a lack of consideration. In some circumstances, payment for work completed up to termination may be sufficient consideration.

## Good faith

The law in Australia is unsettled as to whether a duty of good faith can be implied into a contract. Some contracts expressly include such an obligation.

The duty of good faith can be relevant in the context of a termination for convenience.

The NSW Supreme Court has taken the view that a breach of the duty of good faith would be unlikely to occur where an entitlement to terminate for convenience is accompanied by an obligation to pay fair (as agreed between the parties) compensation.[5]

## Calculation of compensation

If it is agreed that compensation is to be payable in the event of termination for convenience, the next question is how that compensation is calculated.

There are many possibilities, including compensating the terminated party for one or more of the following:

- works completed up to termination, including works that have not been invoiced for;
- demobilisation costs;
- contribution to overheads and profit margin;
- compensation for lost profit; and
- compensation for a forward commitment or liability to third parties (including, for, example subcontractor break costs).

## Conclusion

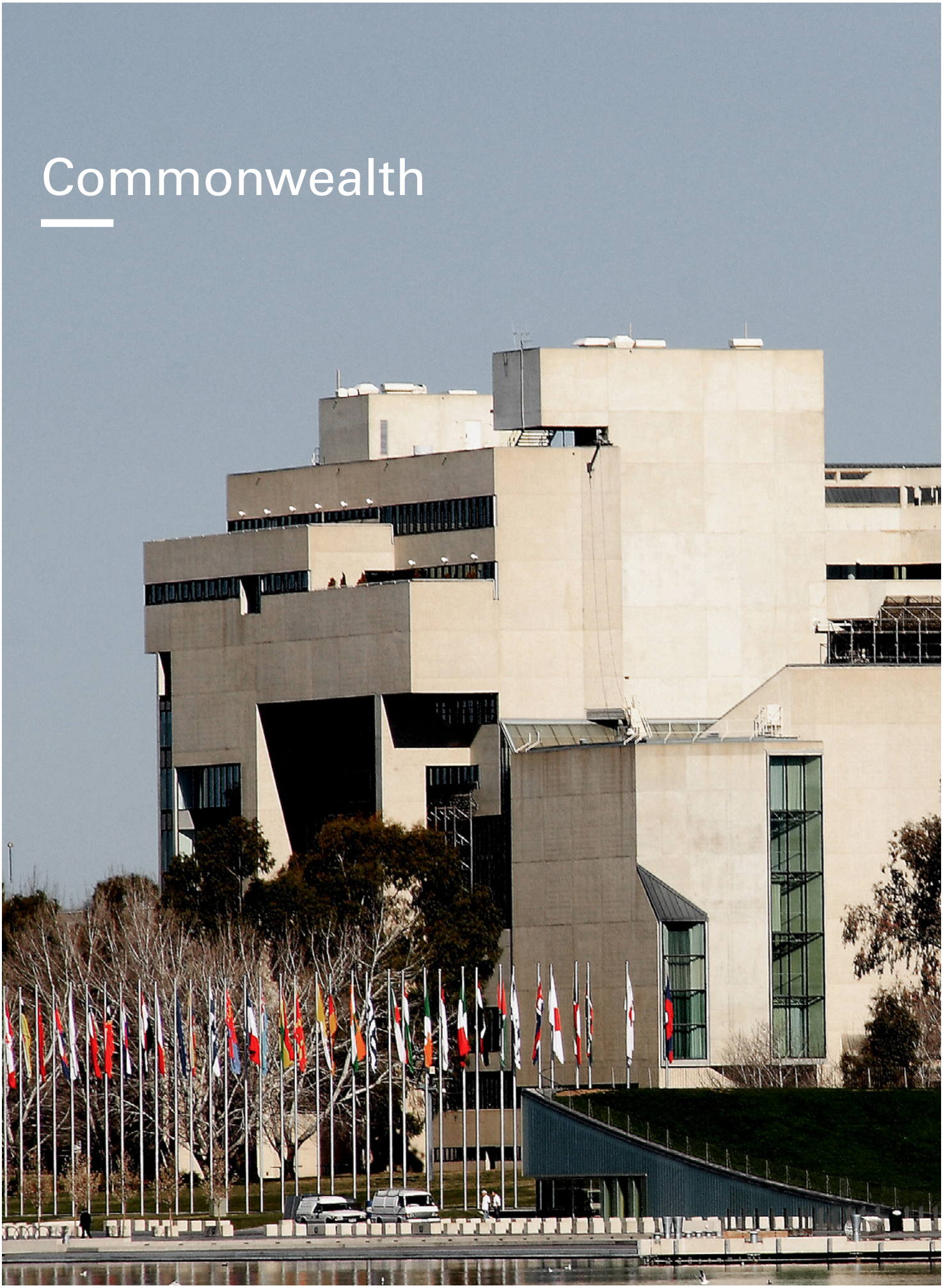
Ultimately, the commercial viability of the agreement will likely depend on whether the parties are prepared to accept the risk of potential termination without fault, and an entitlement to compensation may reduce the risk of loss.

However it is a balancing act, as the compensation should be proportionate to the potential benefits of being able to terminate for convenience. Therefore, parties should carefully consider the drafting of termination for convenience clauses to ensure they reflect the commercial bargain and are enforceable. Clarity as to the losses to be covered through the compensation mechanism is critical.

Note: this article was first published on the Corrs website on 21 October 2021: https://www.corrs.com.au/insights/termination-for-convenience-when-and-is-it-free

2 *Australian Competition and Consumer Commission (ACCC) v Servcorp Ltd* [2018] FCA 1044.
3 *Abbey Developments Limited v PP Brickwork Ltd* [2003] EWHC 1987 (TCC).
4 [2010] FCA 921.
5 *Leighton Contractors Pty Ltd v Arogen Pty Ltd* [2012] NSWSC 1370.

# Commonwealth



# High Court News

## Key takeaways

In recent months, the High Court of Australia has declined to hear appeals in two construction cases. One related to the 'excluded amounts' regime under Victoria's security of payment legislation. The other concerned the prevention principle.

## Keywords

special leave determinations

## Background

Litigants do not have an automatic right of appeal to the High Court of Australia. The High Court sifts cases to determine whether to grant special leave to appeal. In recent times, most applications for special leave have been rejected on 'the papers', without oral argument.

In the cases discussed below, a small bench of the High Court heard oral argument to determine whether the matters should proceed to a full hearing.

### Yuanda Vic Pty Ltd v Façade Designs International Pty Ltd [2021] VSCA 44

The Victorian Court of Appeal held that courts could not give judgment where the relevant payment claim contained an 'excluded amount'. This relied on a strict interpretation of section 16(4)(a)(i) of the *Building and Construction Industry Security of Payment Act 2002* (Vic).

The High Court has previously decided security of payment cases on reference dates[1] and on rights to judicial review of adjudication determinations.[2] The central issue in this case, while important, was perhaps more parochial.

Keane, Gordon and Edelman JJ declined to grant special leave to appeal, reciting a familiar formulation:

> "The appeal foreshadowed by this application for special leave does not enjoy sufficient prospects of success to warrant the grant of special leave to appeal. The application is dismissed with costs."

Our Insight on the Court of Appeal's decision can be found here and the special leave transcript here.

### Bensons Property Group Pty Ltd v Key Infrastructure Australia Pty Ltd

In *Bensons Property Group Pty Ltd v Key Infrastructure Australia Pty Ltd [2021] VSCA 69*, the Victorian Court of Appeal held that:

- the prevention principle is only enlivened where the alleged act of prevention is a breach of an express or implied contractual term; and
- a party that seeks to rely on the prevention principle on the basis the other party has breached an implied duty to cooperate must establish, on the balance of probabilities, that it would have been able to perform its obligations but for the wrongdoing party's uncooperative conduct.

The High Court has not heard a case concerning the prevention principle. Arguably, this case provided a rare opportunity to explore not only the operation but the juridical foundation of the prevention principle.

Keane and Gleeson JJ disagreed, holding:

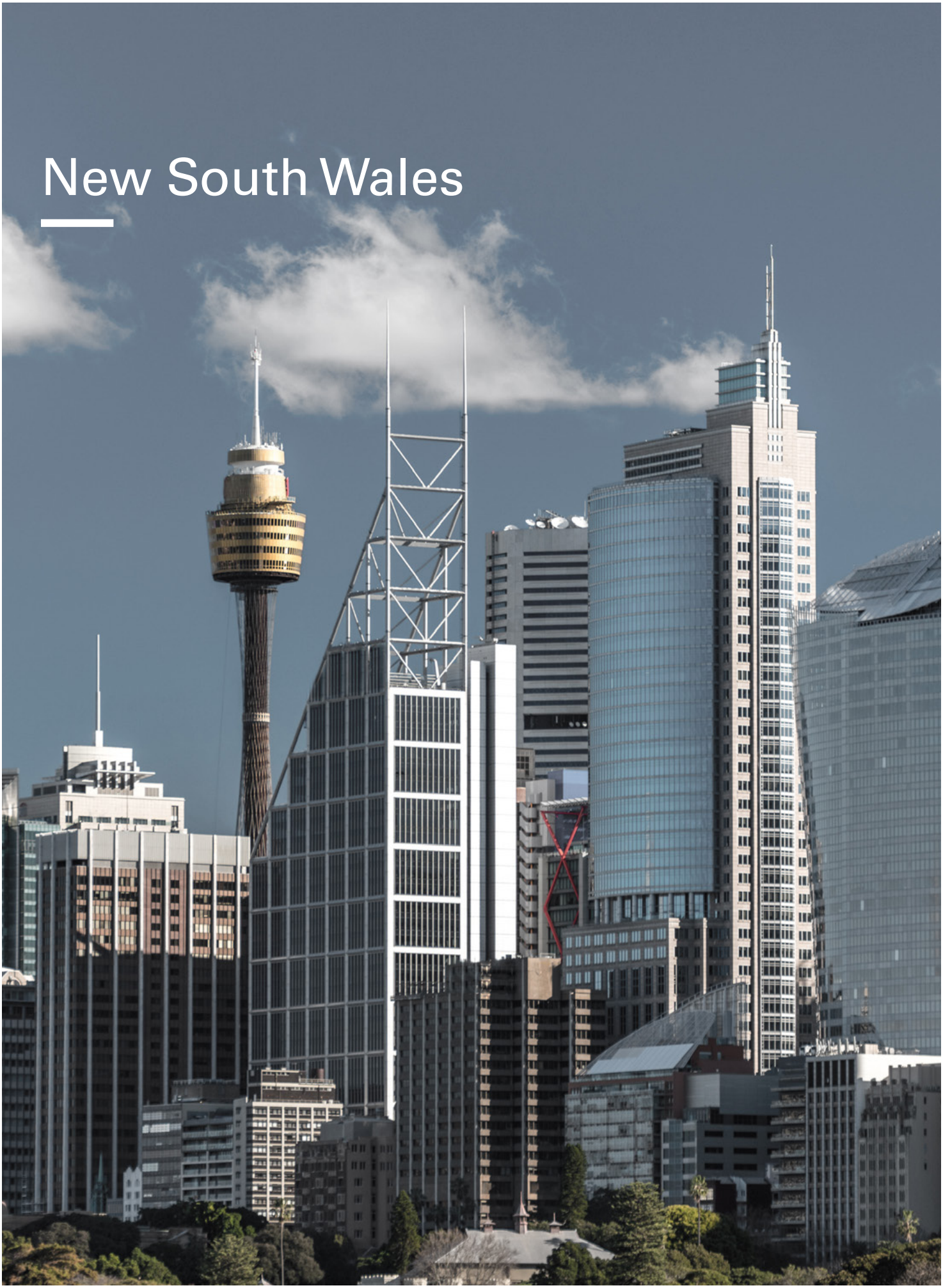
> "The appeal foreshadowed by this application for special leave to appeal is not a suitable vehicle for consideration by this Court of the prevention principle and, further, it does not enjoy sufficient prospects of success to warrant the grant of special leave to appeal. The application is dismissed with costs."

Further information on the Court of Appeal's decision is provided in our podcast and in the special leave transcript.

1 *Southern Han Breakfast Point Pty Ltd (in Liquidation) v Lewence Construction Pty Ltd* [2016] HCA 52.

2 *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2018] HCA 4; *Maxcon Constructions Pty Ltd v Vadasz* [2018] HCA 5.

# New South Wales



# Jabbcorp (NSW) Pty Ltd v Strathfield Golf Club

## [2021] NSWCA 154

### Key takeaways

Clauses dealing with excluded works must be carefully drafted for certainty in determining what work falls outside the contract sum.

### Keywords

excluded works

## Background

In late 2016, Strathfield Golf Club (**Club**) engaged Jabbcorp (NSW) Pty Ltd (**Jabbcorp**) to design and construct a new clubhouse, access road and associated works on land owned by the Club. A dispute arose about "drainage, pavement and other works near the greenkeeper's shed" and "works on golf course and outside the construction boundary".

Jabbcorp claimed that these works were 'Excluded Works' as that term was defined in the parties' contract and that Jabbcorp was therefore entitled to an extra $700,000. The Club argued the works were covered by the contract sum.

### Relevant clauses of the contract

The relevant construction contract provided that:

**Clause 4**: Contract sum means the sum set out in the Formal Instrument of the Agreement but excluding: …

> (b) The cost of the Excluded Works and works associated with the Excluded Conditions …

**Excluded Works**: Notwithstanding any other clause means the following works which do not form part of the Contract Sum and if required to be carried out, will constitute a variation under this Contract: …

> (u) Any works required on the golf course and outside the construction boundary of the Site, including if those requirements are pursuant to the Development Consent …

The question to be answered was: did the relevant work fall within the definition of Excluded Works, and is Jabbcorp entitled to a variation?

## Decision

In the Court of Appeal, Leeming JA gave the principal judgment, with which Basten JA agreed. Emmett AJA also agreed, providing supplementary reasons.

Their Honours concluded that the works in question were outside the construction boundary of the 'site' (as that term was defined in the Contract) for the purposes of paragraph (u) under the definition of Excluded Works. When interpreting the ambit of the term Excluded Works, the Court followed the approach taken in *XL Insurance Co SE v BNY Trust Company of Australia Ltd*:

> "… the starting point … must be the literal or grammatical meaning of the exclusion. It is then necessary to consider the legal meaning of the exclusion, and then apply the legal meaning to the facts".

The Court also noted that the headings under Excluded Works refer explicitly or implicitly to the possibility of doing something extra. Jabbcorp relied on the word 'including' in paragraph (u) of the definition of Excluded Works to argue that since the variations were both "on the golf course" and "outside the construction boundary of the Site", they should be characterised as Excluded Works.

The key requirement of the definition of Excluded Works was that the works must "not form part of the Contract Sum" and "if required to be carried out, will constitute a variation under this contract".

Leeming JA (with whom Basten JA and Emmett AJA agreed) concluded that the works in question did not constitute Excluded Works, and therefore the Club's interpretation was correct.

## Reasoning

The Court followed the objective test set out in the High Court's decision in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*, by determining how a reasonable person would understand the language in which the parties had expressed their agreement.

First, the Excluded Works clause must be read as a whole. Many of the other Excluded Works paragraphs referenced Jabbcorp completing work over a specific measurement, or doing "something extra", indicating that a clear variation was central to work being classified as Excluded Works. The Court found that Jabbcorp was attempting to take the words in paragraph (u) and extrapolate them to all 37 paragraphs under Excluded Works, instead of reading the paragraphs as a whole and applying the broader interpretation to paragraph (u).

Second, it was held that the works in question were always required to be done. Therefore, Jabbcorp's construction was problematic, as it would impute the parties to have agreed that the works in question could constitute both 'works undertaken for a fixed price' under clause 2 of the contract and Excluded Works.

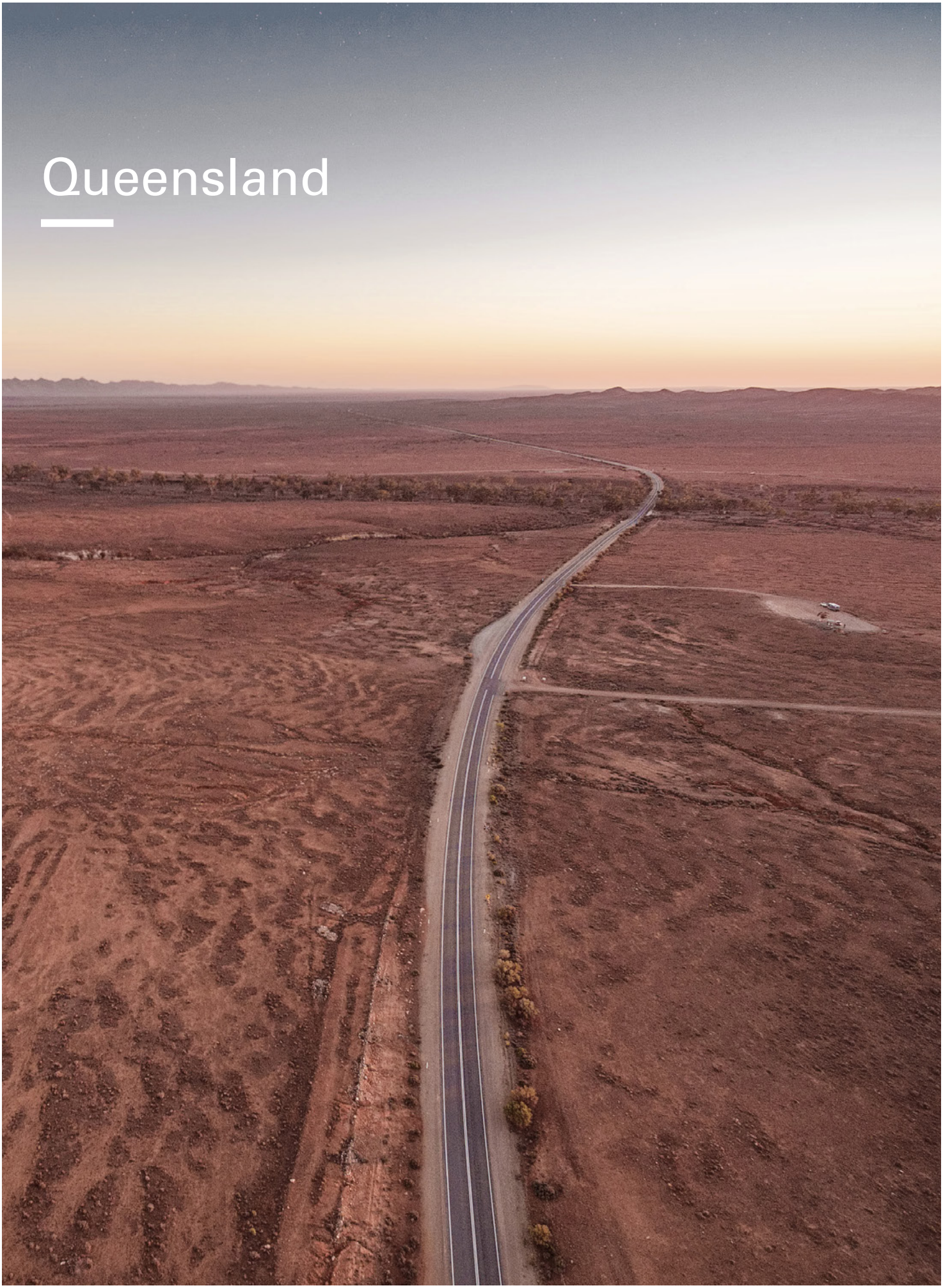
Third, the disputed works specifically referenced work required by the Development Consent (relating to included works) pursuant to conditions which were not Excluded Conditions. Therefore, they could not be considered Excluded Works.

Finally, Jabbcorp was not entitled to additional payment for these works, as a reasonable person would interpret the Contract Sum to mean "the maximum the Club would have to pay for Jabbcorp performing the works it had promised".

Their Honours dismissed the appeal with costs.

https://www.caselaw.nsw.gov.au/decision/17ad1871762dfec34ca52f07

# Queensland



# Cheshire Contractors Pty Ltd v Civil Mining & Construction Pty Ltd

## [2021] QCA 212

### Key takeaways

An arbitration agreement included in a contract need not exhaustively spell out the defined legal relationship to which it applies. On ordinary principles of contractual interpretation, the arbitration agreement will be interpreted in its contractual context.

Needless to say, precision in the drafting of arbitration agreements can help to avoid disputes.

### Keywords

arbitration agreements

## Background

This dispute arose out of a roadworks project in Queensland. The Queensland Department of Transport and Main Roads engaged Civil Mining & Construction Pty Ltd (**CMC**). CMC in turn subcontracted some of the works to Cheshire Contractors Pty Ltd (**Cheshire**).

The subcontract included a page-long dispute resolution clause. Ultimately, 'disputes or differences arising between the parties' were referred to arbitration. Typically, such disputes or differences are qualified, for example as disputes or differences arising out of or in connection with the contract or the project. Here, there was a bare reference to 'disputes or differences arising between the Parties'.

## Issues

The central issue was whether there was an arbitration agreement in respect of a 'defined legal relationship'?

Section 7(1) of the *Commercial Arbitration Act 2013* (Qld) defines arbitration agreements as:

> "… an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not."

Cheshire argued that there was no arbitration agreement because the relevant clause did not define the legal relationship to which it applied. To be clear, Cheshire's position was that the definition of the legal relationship:

> "… requires - literally - a level of precision and specificity within the language of an otherwise compliant arbitration agreement that cannot be satisfied by mere implication or 'vague allusion'."

This argument seemed to require interpretation of the dispute resolution clause in isolation, without considering the contract as a whole.

## Decision

The Court of Appeal rejected Cheshire's argument and upheld the decision of the trial judge, Henry J. In the Court of Appeal, Bowskill SJA gave judgment, with Morrison and Mullins JJA agreeing. Her Honour's 24-paragraph judgment was unambiguous:

> "… there must be a defined legal relationship - in the sense of an identifiable legal relationship giving rise to legal remedies - but it strains the language of section 7(1) to construe the words as requiring that the [arbitration] agreement itself must define that legal relationship."

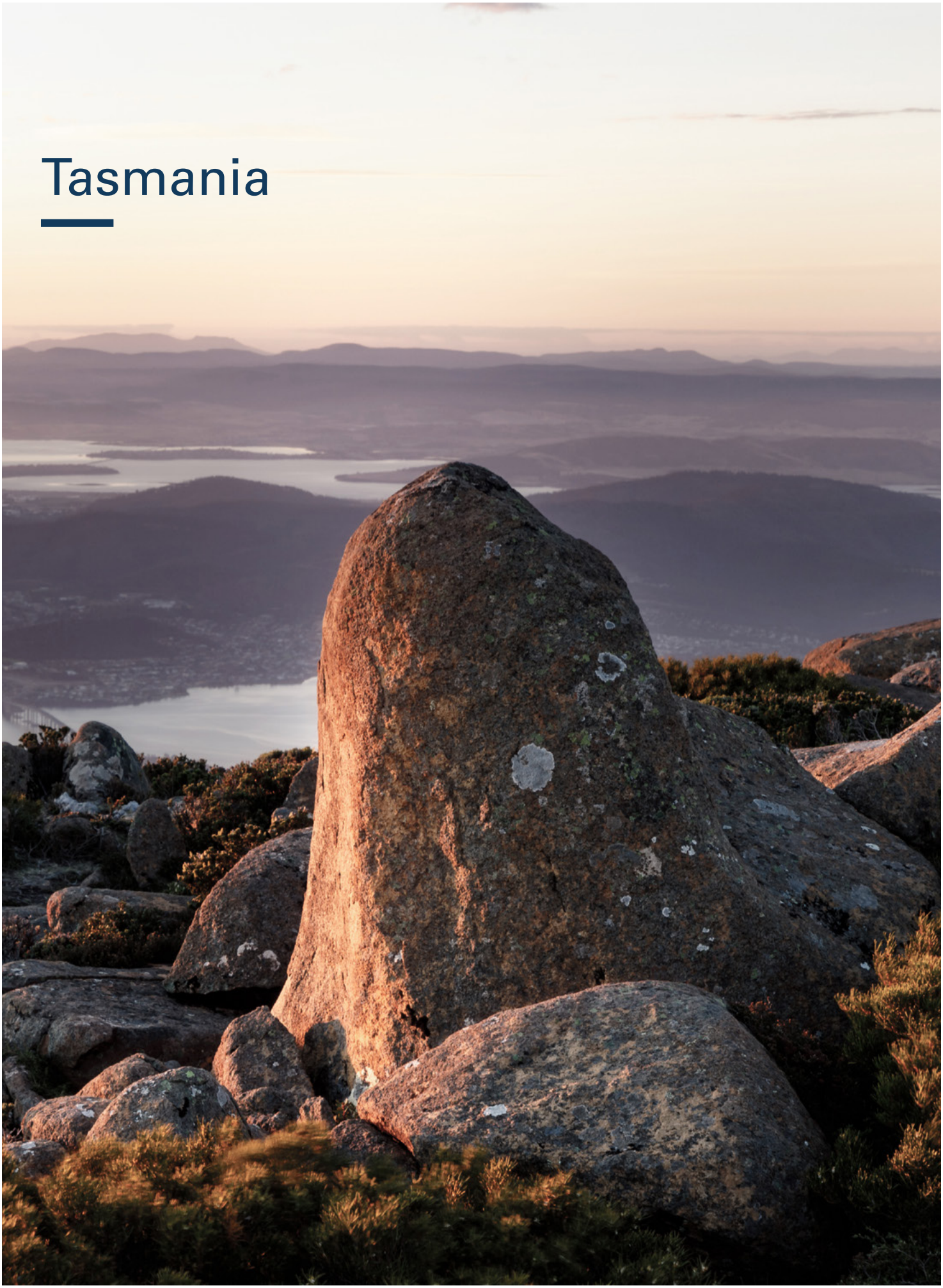
As is clear from this quote, Bowskill SJA supported authority to the effect that the language in section 7(1) is directed to excluding disputes in which no legal remedy is available. It does not require express definition of the legal relationship.

Even if it were required, the legal relationship in question could be discerned from the arbitration agreement, which was contained in the dispute resolution clause in the subcontract.

The Court of Appeal, and the trial judge, swiftly rejected Cheshire's central argument. Nonetheless, it might have been possible to avoid the argument entirely if the arbitration agreement had expressly specified the scope of 'disputes or differences' to which it applied.

https://www.queenslandjudgments.com.au/caselaw/qca/2021/212/pdf

# Tasmania



# Hansen Yuncken Pty Ltd v Parliament Square Hobart Landowner Pty Ltd

[2021] TASFC 11

### Key takeaways

This case supports the view that a party may call on an unconditional performance bond even where the underlying contract - typically a construction contract - does not provide an express right to call on the performance bond. The question remains controversial.

### Keywords

performance bonds

## Facts

This dispute arose out of the Parliament Square development in Hobart. Parliament Square Hobart Landowner Pty Ltd (**Principal**) engaged Hansen Yuncken Pty Ltd (**Contractor**) to build one stage of the works.

The contract required the Contractor to provide security. The arrangements were a little more complex than usual.

### Construction-phase bonds

Before financial close, the Contractor was required to provide:

- a performance bond from a bank (i.e. a 'bank guarantee') for 5% of the contract sum; and
- a performance bond from an insurance company for 2.5% of the contract sum.

Clause 6.4 of the contract gave the Principal an express entitlement to call on these performance bonds in four situations, including where the Principal had a bona fide 'claim' against the Contractor. The word 'claim' was defined very broadly.

When the Contractor reached practical completion of its stage, the Principal was required to:

- return the bond provided by the insurance company; and
- exchange the performance bonds provided by the bank for a defects bond for 2.5% of the contract sum.

### Defects bond

The defects bond was dealt with separately in subclause 6.6. Clause 6.4, which gave the Principal an express entitlement to call on the construction-phase bonds, did not expressly cover the defects bond.

At trial, the Contractor unsuccessfully sought an injunction to restrain the Principal from calling on the defects bond.

### Could the Principal call on the defects bond?

Martin AJ gave judgment for the Full Court, with Wood and Geason JJ agreeing. The Court dismissed the Contractor's appeal.

### There was an express contractual right

Martin AJ emphasised that the issue was ultimately an exercise in contractual interpretation. His Honour concluded that:

> "Although clause 6 does not, in specific terms, apply the provisions in clauses 6.4 and 6.5 to the operation of the Defects Bond, no reason is apparent from the terms of the contract, or the commercial purposes of the contract and the guarantees, why the parties would have intended to treat access to the Defects Bond in any manner different from access to the Performance Bond. The contract as a whole, and in particular the exchange process in clause 6, suggests otherwise."

On this interpretation, the Principal had express rights to call on the defects bond in specific circumstances, including where it had a bona fide 'claim', which was defined very broadly.

This aspect of the decision is a good reminder about fundamental principles: the care needed when drafting security clauses, and the need to interpret a contract as a whole.

Nonetheless, Martin AJ's more significant comments concern whether the Principal could have called on the defects bond without the support of clause 6.4.

### Could the Principal call on the defects bond without an express contractual right?

This question has been controversial since Mossop M's judgment in *Walton Construction Pty Ltd v Pines Living Pty Ltd*, where his Honour held:

> "… when dealing with an application for an injunction directed to the beneficiary of the guarantee (as opposed to the financial institution providing it) the starting point must be the terms of the contract between those parties that permit recourse to be had to the security. It is the terms of that contract which will define the scope of the entitlement to call upon the security and any constraints upon that entitlement.
>
> "In a case where the contract does not expressly deal with the circumstances in which the guarantee may be called upon, any capacity within the contract that would permit the defendant to have recourse to the security must, if it exists, be implied."

This decision contradicted the commonly held view that a construction contract did not need to provide an express or implied right to call on performance bonds, since that right rested in the bonds themselves (this view was manifest in the drafting of the owner-focused Property Council 1 contract before Mossop M, which was silent on rights to call on the performance bonds).

It is regrettable that Mossop M's judgment was not cited in the present case.

Despite this, Martin AJ's position is clear:

> "In these circumstances, it is not appropriate as contended by the plaintiff, to approach the issue by first asking where the right of recourse to the Defects Bond is identified in the contract, and then ask whether the first defendant has complied with any condition precedent to the right to recourse. The unconditional right of access is found in the terms of the guarantees, and the correct approach is to identify any term in the contract (negative stipulation) which qualifies the right of recourse in particular circumstances."

Whether this forms part of the binding reasoning in Martin AJ's judgment is probably debatable.

Further disputes in the area seem certain.

http://www7.austlii.edu.au/cgi-bin/viewdoc/au/cases/tas/TASFC//2021/11.html

# Western Australia

# Chevron (TAPL) Pty Ltd v Pilbara Iron Company (Services) Pty Ltd

## [2021] WASCA 193

### Key takeaways

In price review clauses or the like, courts will not presume that notice requirements are inessential.

While the interpretation of notice requirements always turns on the precise language, courts will generally enforce contractual requirements and will bar rights if notices or claims are late.

### Keywords

time is of the essence; time bars

## Background

The full facts of this case are complex. These are the critical details: the appellants (**Sellers**) agreed to sell gas to the first respondent (**Buyer**) for a number of years. The gas supply contract allowed either party to initiate a review of the gas price. To do this, a party needed to give notice 90-120 days before a price review date.

In 2020, the Buyer gave a notice before the price review date but three weeks after notice was required.

### Was timely notice essential?

The central question was whether the notice was ineffective because it was given late. In the Court of Appeal and at trial, this was framed as whether the parties objectively intended the time stipulation to be essential. This question is usually associated with whether "time is of the essence" in the sense that late performance might allow the aggrieved party to terminate the contract. That was not the issue in this case. Rather, the issue is directly equivalent to time bars, which the Western Australian Court of Appeal has previously enforced strictly.[1]

The price review clause, even in redacted form, stretches to eight pages. The most important aspect is subclause 14.3, headed 'Initiation of Price Review' which provides that:

> "The Buyer or the Sellers may initiate a Price Review by issuing, in the case of the Buyer, to the Sellers and the Sellers' Representative and in the case of the Sellers, to the Buyer, a notice which complies with Clause 14.4 (**Price Review Notice)** not more than 120 days nor less than 90 days prior to a Price Review Date."

## Decision

Quinlan CJ, Murphy and Beech JJA gave a joint judgment of more than 300 paragraphs. Their Honours treated the time requirement as essential, meaning that the Buyer could not initiate a gas price review as its notice was late.

Their Honours carefully analysed clause 14 in light of the entire contract. Naturally, any dispute about the meaning of an express term turns on the language in which it is expressed. Despite this, two aspects of the judgment are likely to be useful in future cases.

### No presumption timely notice was not essential

First, the Buyer had argued that there is a general principle that time stipulations in "machinery-type provisions for determining price adjustments are not construed as essential unless there was an express provision or necessary implication to that effect".

1 See *CMA Assets Pty Ltd v John Holland Pty Ltd [No 6]* [2015] WASC 217.

The Court of Appeal's rejection was strident: "In our view, neither authority nor principle sustains any such general principle or presumption." Their Honours reached this conclusion after detailed analysis of the principal Australian and English cases.

### Contractual interpretation arguments favouring treating timely notice as essential

The second significant aspect of the judgment is the Court's textual analysis of the contract. Their Honours relied on six reasons to conclude that the timely notice was essential. In generalised form, these factors provide a helpful summary for parties regarding when time bars will be enforceable, and they were:

- the language and structure of the clause support treating the timely notice as essential;
- nothing in the language or structure points away from timely notice being essential;
- treating timely notice as inessential would give the temporal aspect of the clause no work to do;
- reating timely notice as essential would be harmonious with other aspects of the clause;
- treating timely notice as inessential would result in incoherence when read with other clauses; and
- a clause that allows a party to initiate a price review cannot be seen as merely mechanical.

## Conclusion

The Court treated the time requirements for notices under clause 14.3 as essential. As a result, a late notice was ineffective. This is consistent with the courts' literal approach to time bars.

Finally, it is worth noting that different drafting might have avoided or simplified the dispute. The timing requirement might expressly have been described as essential. Alternatively, it might have been framed as a condition precedent. Including the words 'only if' may also have sufficed.

https://ecourts.justice.wa.gov.au/eCourtsPortal/Decisions/ViewDecision?returnUrl=%2feCourtsPortal%2fDecisions%2fFilter%2fSC%2fRecentDecisions&id=e244f149-ef0e-45b7-b0d8-0d31b0c66d56

# Chevron Australia Pty Ltd v CBI Constructors Pty Ltd

## [2021] WASC 323

### Key takeaways

While Australian courts might typically seek to uphold arbitral awards, courts do have discretion to set them aside. One situation in which this may occur is where the arbitral tribunal has already discharged its mandate. Through the legal doctrine of 'functus officio', an arbitral order may be set aside in that situation on the basis that the tribunal lacked jurisdiction.

This has tactical implications for decisions about the structure of arbitral proceedings.

### Keywords

setting aside interim arbitral award; functus officio

## Facts

In 2011, Chevron Australia Pty Ltd (**Chevron**) engaged CBI Constructors Pty Ltd and Kens Pty Ltd (**CKJV**) to provide 'Craft Labour and Staff' to carry out work on Chevron's Gorgon oil and gas project.

A dispute arose over the meaning of provisions of the Contract requiring Chevron to reimburse CKJV. Chevron argued that it had overpaid CKJV, while CKJV argued it was owed more money.

In February 2017, arbitration commenced, with a three-person tribunal. In March 2018, CKJV sought to split the arbitration into two separate hearings: the first dealing with liability, and the second with quantum and quantification. Chevron objected, but the Tribunal approved the split.

In the first hearing, CKJV contended that a variation of the Contract in August 2016 had changed the earlier terms so that it would be reimbursed for labour costs on the basis of 'rates' rather than 'actual costs'. The Tribunal delivered an interim award (the First Interim Award) resolving this issue in Chevron's favour.

Prior to the second hearing on quantum issues, however, CKJV amended its quantum case by submitting tabulated information explaining the basis on which it sought reimbursement. CKJV's amended case was an attempt to recast its case on liability under the banner of quantum. Chevron objected to CKJV's new case and applied to have the plea struck out.

Chevron contended that there was no longer any valid submission by the parties to allow the Tribunal to hear further liability issues. In the second hearing, the Tribunal rejected Chevron's functus officio argument by a two-to-one majority. Therefore, the Tribunal proceeded to determine the merits of CKJV's arguments on particular staff costs rather than considering the contention as a preliminary objection. In this context, the Tribunal issued a Second Interim Award in CKJV's favour in respect of the staff costs issue.

Chevron sought to have the question of the arbitral tribunal's jurisdiction determined by the court, under section 16(9) of the Commercial Arbitration Act 2012 (WA) (**CAA**). It also sought relief under section 34(2)(a)(iii) of the CAA to have the second interim award dated 4 September 2020 set aside.

## Decision

### Issue one: application to have the court determine the tribunal's jurisdiction

The first issue determined by the Court was whether it should decide the arbitral tribunal's jurisdiction.

Under section 16(9) of the CAA, a party, after receiving notice of a ruling by an arbitral tribunal as a preliminary question, may request that the Court decide the matter. This issue was decided swiftly as the Tribunal had not rendered a ruling against Chevron's functus officio objection as a preliminary question.

Instead, it had proceeded to resolve the objection, along with further issues on the merits, under the second interim award. Consequently, the limited avenue of recourse to a court under section 16(9) of the CAA was not available. Thus, the application was dismissed.

### Issue two: application to have the second interim award set aside

One question is whether the court may intervene in setting aside arbitral awards under section 34(2)(a)(iii) where the Tribunal has discharged its duties (that is, it is functus officio) but has proceeded to resolve further issues on their merits. In determining this, two sub-issues emerge. First is whether the functus officio condition arises under section 34(2)(a)(iii), and then whether the Court itself makes this assessment.

On the first sub-issue, Kenneth Martin J relied on the reasoning in *CRW Joint Operation v Pt Perusahaan Gas*. In that case, the Court of Appeal of Singapore held that 'authority' is "a significant and influential authority towards supporting the potential for a s 34(2)(a)(iii) engagement under functus officio encountered circumstances."[1]

Consequently, Martin J held that an application to set aside an arbitral award based on questions about authority or jurisdiction arising from allegations that the Tribunal is functus officio does engage section 34(2)(a)(iii) of the CAA, which contemplates issues "beyond the scope of the submission to arbitration".

Further, in assessing the second sub-issue, his Honour held that it "must always be for the court itself to render its own objective determination on the issue." Arbitrators "cannot by their own decision … create or extend the authority conferred upon them".

It was thus open to Chevron to seek to have the Court examine afresh its arguments that the Tribunal was functus officio.

### Issue three: was the tribunal functus officio?

By majority, the Tribunal rejected Chevron's functus officio objections. Martin J disagreed with this assessment.

His Honour held that by application of the functus officio doctrine, the Tribunal's jurisdiction to resolve liability (heard in the first hearing) had ended and therefore the tribunal was functus officio as regards matters dealt with in the Second Interim Award.

## Conclusion

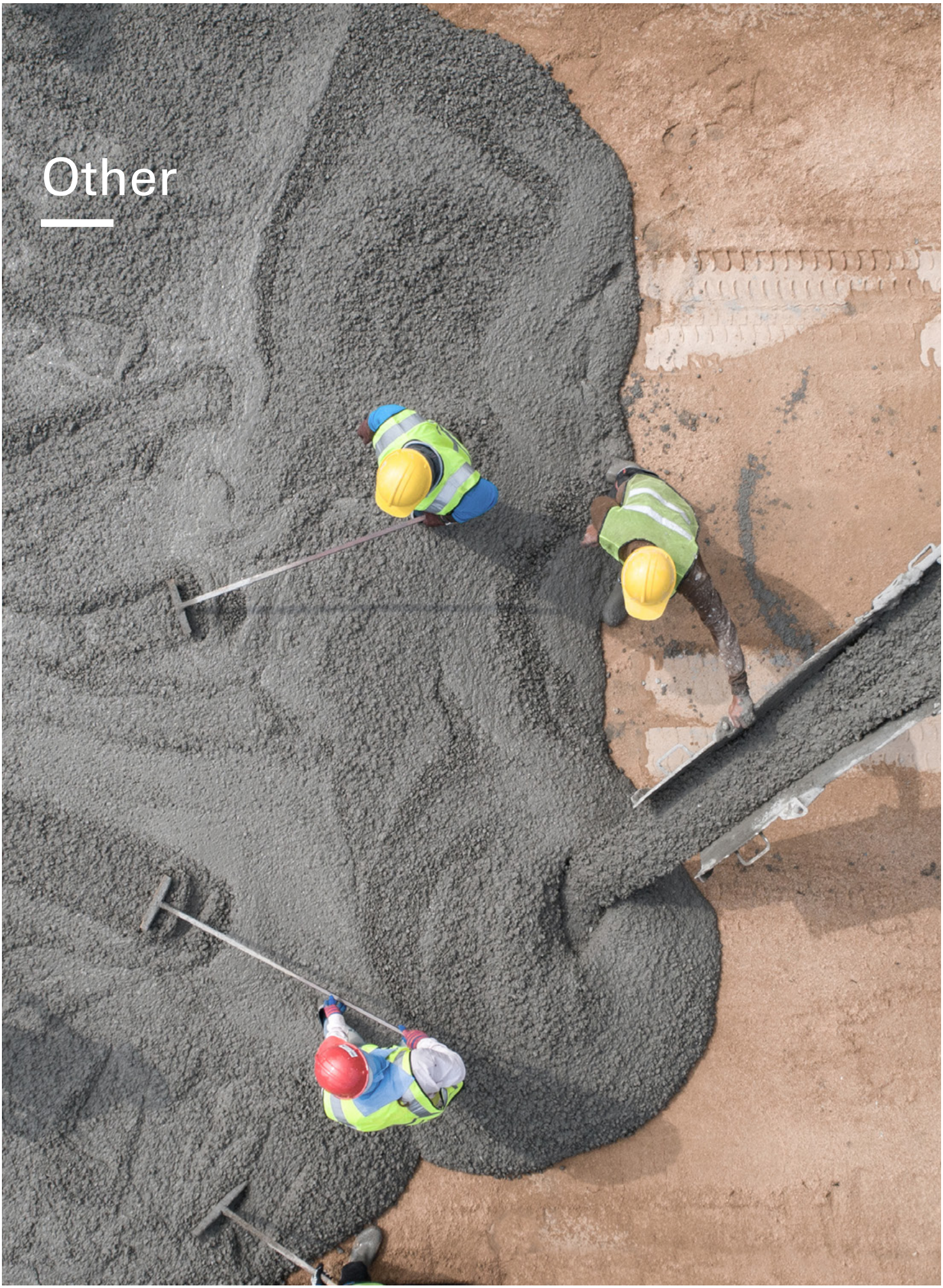
Martin J set aside the Second Interim Award.

Australian courts will seek to uphold arbitral awards. However, courts' pro-enforcement attitude is not determinative and courts will intervene if a tribunal has acted outside its jurisdiction.

http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/wa/WASC//2021/323.html

1 [2011] SGCA 33 at [30]–[33].

# Other



# Triple Point Technology, Inc v PTT Public Company Ltd

## [2021] UKSC 29

### Key takeaways

Even where a liquidated damages clause is poorly drafted, high authority supports a commercial approach to its interpretation. Typically, that will mean that liquidated damages will be available to the point that the work is completed or the contract has been terminated.

### Keywords

liquidated damages

## Facts

PTT engaged Triple Point to develop a new software system for commodities trading. Under the contract, payment became due when Triple Point reached milestones. When Triple Point fell significantly behind in the work, PTT stopped making payments. Triple Point eventually stopped work midway to the next milestone and brought a claim for outstanding payments. PTT counter-claimed liquidated damages for delay, as well as general damages for repudiation of the contract. Article 5.3 of the contract provided:

> "If CONTRACTOR fails to deliver work within the time specified and the delay has not been introduced by PTT, CONTRACTOR shall be liable to pay … at the rate of 0.1% (zero point one percent) of undelivered work per day of delay from the due date for delivery up to the date PTT accepts such work."

Critically, the contract was terminated before the relevant work was completed or accepted. The central issue was whether PTT was entitled to liquidated damages for the period between the due date for delivery and the date of termination (other issues arose from the construction of a limitation of liability clause that carved out liability arising from negligence, but that topic is beyond the scope of this note).

## Court of Appeal: liquidated damages unavailable

In the Court of Appeal, Sir Rupert Jackson (with Floyd and Lewison LJJ agreeing) held that PTT was not entitled to liquidated damages. After analysing the case law, Sir Rupert concluded:

> "[t]he phrase in article 5.3 'up to the date PTT accepts such work' means 'up to the date when PTT accepts completed work from Triple Point'. In my view Article 5.3 in this case, like clause 24 in Glanzstoff, has no application in a situation where the contractor never hands over completed work to the employer".[1]

In a Corrs Insight on the Court of Appeal decision we observed that many Australian standard form contracts take a different drafting approach. For example, AS4000–1997 and AS 4300–1995 expressly provide that liquidated damages are available for the period between:

- the date for practical completion; and
- the sooner of the date of practical completion or the date of termination.

The outcome could differ given small changes in the drafting, or unusual facts. In short, the Court of Appeal decision raised the stakes for contract drafters.

1 *Triple Point Technology, Inc v PTT Public Company Ltd* [2019] EWCA Civ 230 at [112]. The *Glanzstoff* decision, on which Sir Rupert heavily relied, is *British Glanzstoff Manufacturing Co Ltd v General Accident, Fire and Life Assurance Co Ltd* (1912) SC 591 (***Glanzstoff***).

## Supreme Court: liquidated damages remain available up to termination

In the Supreme Court, all five Justices allowed the appeal on the central issue. PTT was thus entitled to liquidated damages for the period from the due date for delivery up to the date of termination.

The interlocking pattern of judgments, however, has the feel of a jigsaw puzzle:

| Judge | Decision on the central issue | Reasoning on the central issue |
|---|---|---|
| Lord Hodge | Allowed appeal | Agreed with Lord Sales (thus indirectly agreeing with Lady Arden and Lord Leggatt). |
| Lady Arden | Allowed appeal | Gave the principal judgment. |
| Lord Sales | Allowed appeal | Agreed with Lady Arden and also Lord Leggatt. |
| Lord Leggatt | Allowed appeal | Agreed with Lady Arden but gave supplementary reasons. |
| Lord Burrows | Allowed appeal | Agreed with Lady Arden and also Lord Leggatt. |

Put simply, everyone agreed with Lady Arden and four Justices agreed with Lord Leggatt's supplementary reasons.

### Lady Arden's reasons

As noted above, Sir Rupert heavily emphasised the case law, including Glanzstoff.

Lady Arden objected to this approach for several reasons, including that:

- the cases canvassed were at best equivocal as to whether they were about interpretation of the contract in that case, or about some broader principle;
- by implication, it was proper to focus attention on the drafting in this case rather than cases about similar but different drafting; and
- the Glanzstoff case was insignificant in any event.

In interpreting the particular clause, it seems obvious that Lady Arden emphasised commercial sense rather than textual analysis. Given the global significance of the issue, it is worth noting a number of her Ladyship's observations:

- "The difficulty about this approach [taken in the Court of Appeal] is that it is inconsistent with commercial reality and the accepted function of liquidated damages."
- "[I]t is in my judgment unrealistic to interpret the clause as meaning that if that event does not occur the contractor is free from all liability for liquidated damages, and that the employer's accrued right to liquidated damages simply disappears. It is much more probable that they will have intended the provision for liquidated damages to cease on completion and acceptance of the works to stand in addition to and not in substitution for the right to liquidated damages down to termination."
- "[I]t did not follow that there were to be no liquidated damages if there was no such acceptance. To reach that conclusion would be to render the liquidated damages clause of little value in a commercial contract. To use an idiomatic phrase, the interpretation accepted by the Court of Appeal in effect threw out the baby with the bathwater."

Even though the drafting of Article 5.3 was open to serious criticism, Lady Arden sought to give it a commercially sensible interpretation.

### Lord Leggatt's supplementary reasons

Two aspects of Lord Leggatt's judgment are worthy of note; one trivial and the other significant.

The trivial, but amusing, aspect is that Lord Leggatt invited counsel for Triple Point - as a 'cross-check' - to identify a standard form construction contract under which liquidated damages are only payable if the contractor actually completes the work. After the hearing, counsel suggested the 2017 FIDIC Yellow Book, but it failed the test (see clause 15.4(c)).

The significant aspect of his Lordship's judgment, with which a majority of the Court agreed, has powerful implications:

> "I conclude that it is ordinarily to be expected that, unless the clause clearly provides otherwise, a liquidated damages clause will apply to any period of delay in completing the work up to, but not beyond, the date of termination of the contract."

## Conclusion

Typically, liquidated damages will be available to the point that the work is completed or the contract has been terminated. As so often, competent drafting can put this beyond all sensible debate.

UK Supreme Court decision: https://www.supremecourt.uk/cases/docs/uksc-2019-0074-judgment.pdf

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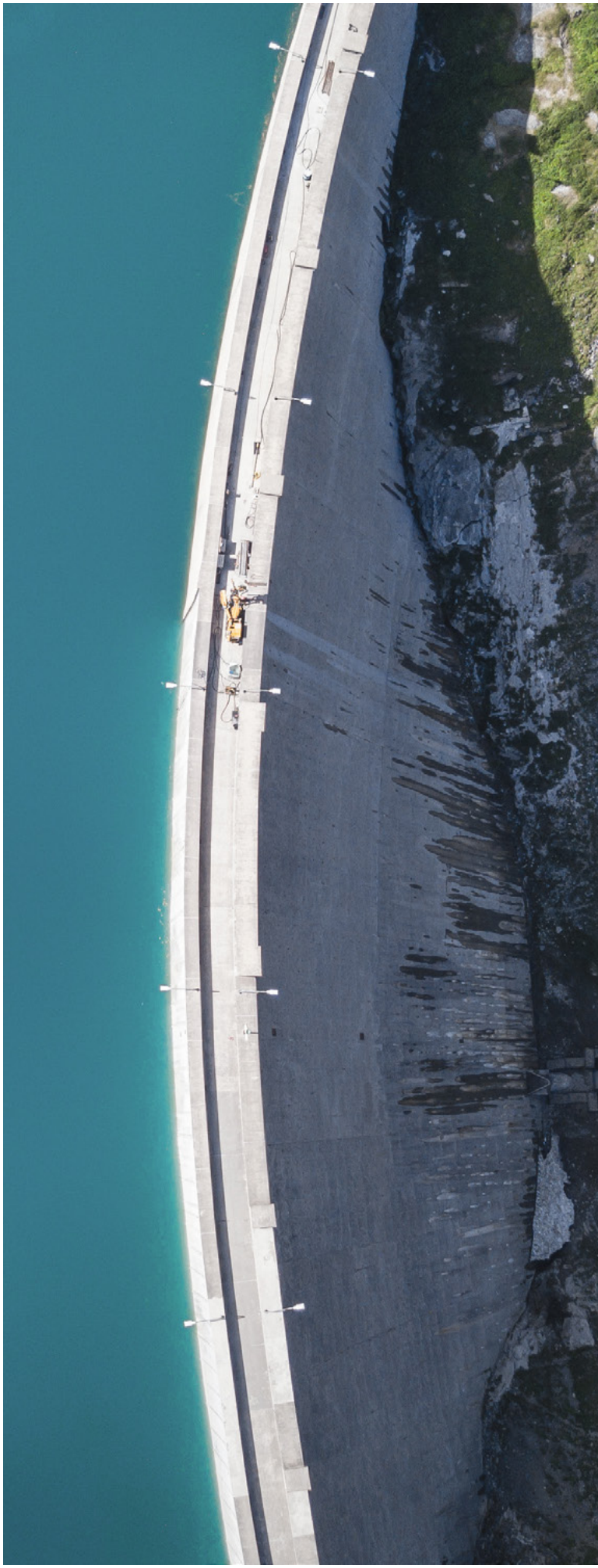

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Best Lawyer – Water Best Lawyers
Peer Review, 2014 - 2020

Best Lawyer – Construction/ Infrastructure
Best Lawyers Peer Review, 2018 - 2020

Leading Construction Lawyer Victoria
Doyles, 2013-2015, 2017

### Ben Davidson
Partner, Projects and Commercial Litigation

+61 3 9672 3500
+61 418 102 459
ben.davidson@corrs.com.au

Best Lawyer – Construction/ Infrastructure
Best Lawyers Peer Review, 2013–2020

Leading Lawyer – Construction & Infrastructure
Chambers Asia Pacific Guide, 2012–2018

"A big-picture thinker" and "someone who can easily distil complex matters into simple issues."
Chambers Asia Pacific Guide, 2018

### Andrew Stephenson
Partner
Projects and Arbitration

+61 3 9672 3358
+61 498 980 100
andrew.stephenson@corrs.com.au

Leading Lawyer : Construction – Australia
Chambers Asia Pacific, 2020

Market Leader – Construction & Infrastructure Doyle's Guide – 2018–2019

Leading Lawyer – Construction & Infrastructure
Chambers Asia Pacific Guide, 2011–2019

Best Lawyer – 2020 Lawyer of the Year, Construction/Infrastructure Law – Melbourne
Best Lawyers Peer Review, 2019

### Brad Robinson
Partner
Projects

+61 3 9672 3550
+61 404 156 370
brad.robinson@corrs.com.au

"Brad is a brilliant lawyer...he has a deep understanding of each transaction and what is important to us based on his extensive experience."
Chambers Asia-Pacific

Hall of Fame – Capital Markets
The Legal 500, Asia-Pacific

Leading Individual: Capital Markets: Debt
The Legal 500, Asia-Pacific

### John Tuck
Partner, Employment & Labour and Litigation

+61 3 9672 3257
+61 434 181 323
john.tuck@corrs.com.au

Leading Lawyer: Employment Australia
Chambers Asia Pacific Guide, 2012–2020

Leading Lawyer: Government - Australia
Chambers Asia Pacific Guide, 2018–2020

"Genuinely tries to always support the needs of his clients and to deliver tailored, customised solutions"
Chambers Asia Pacific Guide, 2018

"He is very intelligent and strategic"
Chambers Asia Pacific Guide, 2018

Best Lawyer – Labour & Employment
Best Lawyers Peer Review, 2014–2018

### Jane Hider
Partner, Projects and Energy & Resources

+61 3 9672 3218
+61 423 026 218
jane.hider@corrs.com.au

Best Lawyer – Construction
Best Lawyers Peer Review, 2016–2020

Recommended – Who's Who Legal
Global Leaders 2019

Recommended – Who's Who Legal
Australia Construction 2019

"Best Lawyer in Transport & Logistics"
Euromoney LMG Australasia Women in Business Law Awards 2013

Nominee "Legal Mentor of the Year"
Lawyers Weekly Women in Law Awards 2015 and 2016

Nominee for Mentor of the Year
13th Victorian Legal Awards 2017

### David Warren
Partner,
Projects

+61 3 9672 3504
+61 421 059 421
david.warren@corrs.com.au

Best Lawyer – Transportation
Best Lawyers Peer Review, 2014–2020

"Very proactive and he does whatever it takes to get the transaction done"
Chambers Asia Pacific Guide, 2018

Leading Lawyer - Construction & Infrastructure
Chambers Asia Pacific Guide, 2009–2016

Leading Lawyer – Infrastructure & Project Finance
Chambers Asia Pacific Guide, 2017–2019

Leading Lawyer – Infrastructure
Chambers Asia Pacific Guide, 2020

Who's Who Legal: Government
Contracts Who's Who Legal, 2019

### Phoebe Wynn-Pope
Head of Business and Human Rights

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+61 418 526 918
phoebe.wynn-pope@corrs.com.au

## Jared Heath

Partner, Projects and Commercial Litigation

+61 3 9672 3545
+61 450 928 430
jared.heath@corrs.com.au

"Stands out for his refreshing attitude… He's excellent at all levels. He's direct and straight and understands the subtleties."
Chambers Asia Pacific 2020, Band 3: Government

**Best Lawyer – Government Practice**
Best Lawyers in Australia 2020

**Finalist, Government Lawyer of the Year**
Law Institute of Victoria Awards 2016

"Jared's advice and guidance was a valuable asset" Hon Marcia Neave AO, Commissioner, Royal Commission into Family Violence;

## Chris Horsfall

Partner
Projects and Arbitration

+61 3 9672 3326
+61 405 035 376
chris.horsfall@corrs.com.au

**Best Lawyer – Construction/ Infrastructure Law** Best Lawyers Peer Review, 2018–2020

**Leading Construction & Infrastructure Litigation Lawyers – Victoria (Recommended)**
Doyles Guide, 2018–2019

"Horsfall is a specialist in construction dispute resolution and has previously advised on infrastructure and development projects such as the Adelaide Desalination Plant and Origin Energy's BassGas project in Victoria."
Australasian Lawyer, February 2014

## Nathaniel Popelianski

Partner
Property & Real Estate

+61 3 9672 3435
+61 407 092 567
nathaniel.popelianski@corrs.com.au

**Leading Lawyer – Real Estate**
Chambers Asia Pacific Guide 2012–2020

**Leading Lawyer – Charities**
Chambers Asia Pacific Guide, 2018 & 2019

**Best Lawyer – Real Property**
Best Lawyers Peer Review, 2014–2018

**Best Lawyer – Leasing**
Best Lawyers Peer Review, 2016–2018

"A clear standout"
Asia Pacific Legal 500, 2015, 2016

## Nastasja Suhadolnik

Partner
Projects and Arbitration

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nastasja.suhadolnik@corrs.com.au

## David Ellenby

Partner
Property & Real Estate

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+61 401 030 979
david.ellenby@corrs.com.au

"The commercial and prompt approach all round certainly contributed to a speedy and positive result, which we appreciated"
Senior Legal Counsel, multinational developer

"He is approachable and accessible, adapting his style and language as appropriate to the audience and topic"
CEO, not-forprofit housing provider

"The advice provided and work done by David on the legal documentation was instrumental in the success of the project"
Property industry client

## John Walter

Partner, Projects and Commercial Litigation

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+61 419 582 285
john.walter@corrs.com.au

**Senior Statesperson : Government & Infrastructure – Australia**
Chambers Asia Pacific, 2020

**Senior Statesmen – Government and Infrastructure & Project**
Finance Chambers Asia Pacific Guide, 2019

**Leading Lawyer – Infrastructure & Project Finance Chambers Asia**
Pacific Guide, 2011–2018

## Paul Brickley

Partner
Projects

+61 3 9672 3329
+61 487 225 551
paul.brickley@corrs.com.au

**Best Lawyer – Construction/ Infrastructure Law**
Best Lawyers Peer Review, 2021-2022

**Rising Star – Construction in Australia**
Euromoney's Expert Guides, 2017-2020

**Rising Star – Construction & Infrastructure**
Doyles, Construction & Infrastructure Rising Stars, 2018

"Paul … has gone above and beyond on this deal – his command of the issues and depth of knowledge have been invaluable."
Infrastructure investor legal counsel

## Anthony Arrow

Partner
Projects

+61 3 9672 3514
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anthony.arrow@corrs.com.au

**Recognised Practitioner – Construction**
Chambers Asia Pacific, 2020

# Contacts

## Sydney


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Best Lawyer – Construction/Infrastructure
Best Lawyers Peer Review, 2014–2020

Leading Lawyer: Infrastructure – Australia
Chambers Asia Pacific, 2020

Leading Lawyer - Construction & Infrastructure
Chambers Asia Pacific Guide, 2012–2018

Leading Lawyer – Infrastructure & Project Finance
Chambers Asia Pacific Guide, 2017–2019

Featured Expert – Construction/ Government International
Who's Who Legal 2012–2019


### Michael Earwaker
Partner
Projects and Arbitration

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+61 428 333 837
michael.earwaker@corrs.com.au


Best Lawyer – Construction/Infrastructure and Litigation
Best Lawyers Peer Review, 2009–2020

Best Lawyer – Litigation
Best Lawyers Peer Review, 2013–2020

Construction – 2019
Who's Who Legal, 2019


### Airlie Fox
Partner, Projects and Property & Real Estate

+61 2 9210 6287
+61 416 003 507
airlie.fox@corrs.com.au


Leading Lawyer – Infrastructure
Chambers Asia Pacific Guide, 2019–2020

Up & Coming – Infrastructure
Chambers Asia Pacific Guide,2017–2018

"She is a dynamic lawyer, she understands the client's needs and acts accordingly."
Chambers Asia-Pacific 2020

"She's good at developing alternative commercial solutions for dealing with risks"
Chambers Asia-Pacific 2019


### Christine Covington
Partner, Environment & Planning and Property & Real Estate

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+61 419 607 812
christine.covington@corrs.com.au


Best Lawyer – Planning & Environmental Law
Best Lawyers Peer Review, 2010–2020

Best Lawyer – Real Property
Best Lawyers Peer Review, 2013–2020

Leading Lawyer – Environment
Chambers Asia Pacific Guide, 2011–2019

"Incredibly focused and extremely knowledgeable"
Chambers Asia Pacific Guide, 2015


### Louise Camenzuli
Partner, Projects and Environment & Planning

+61 2 9210 6621
+61 412 836 021
louise.camenzuli@corrs.com.au


Best Lawyer – Planning and Environment Law
Best Lawyers Peer Review, 2016–2020

Up & Coming – Environment
Chambers Asia Pacific Guide, 2015–2017

Leading Lawyer – Environment
Chambers Asia Pacific Guide, 2018

"Her client service is second to none, and she often goes above and beyond to provide advice producing a result which is strategic and commercial."
Chambers Asia Pacific Guide, 2018


### Natalie Bryant
Partner, Projects and Property & Real Estate

+61 2 9210 6227
+61 402 142 409
natalie.bryant@corrs.com.au


Up and Coming – Australia, Real Estate
Chambers Global, 2018–2020

Leading Leasing Lawyers – NSW 2019
Doyles Guide, 2019

"Natalie provides clear and commercial advice and seamlessly navigates complex legal issues to ensure our development objectives are consistently met"
Property Developer Client

"She has an extremely strong legal mind, is great on the pure property side, a hard worker and quick to get us what we need"
Property Developer Client

## Jack de Flamingh

Partner, Employment & Labour and Energy & Resources

+61 2 9210 6192
+61 403 222 954
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**Leading Lawyer– Employment**
Chambers Asia Pacific Guide, 2012–2019

**Best Lawyer – Employment and Labour Law** Best Lawyers Peer Review, 2013–2020

**Best Lawyer – Occupational Health and Safety Law**
Best Lawyers Peer Review, 2018–2020

**Best Lawyer – Employee Benefits**
Law Best Lawyers Peer Review, 2018–2020

**Recommended Lawyer – Employment (Employer Representation)**
Doyle's Guide, 2012–2017, 2019

## Trevor Thomas

Partner
Projects

+61 2 9210 6581
+61 457 001 163
trevor.thomas@corrs.com.au

## Peter Calov

Partner,
Projects; Property & Real Estate

+61 2 9210 6215
+61 412 397 660
peter.calov@corrs.com.au

**"He is outstandingly knowledgeable and his team is bright ... He is calm and gets things done in a timely manner with a can-do attitude."**
Chambers Asia Pacific Guide

**"Clients describe him as a sensational negotiator and fantastic at complex structuring acquisitions, or rather, at simplifying them."**
Chambers Asia Pacific Guide

**Leading individual - Australia , Real estate**
The Legal 500, Asia-Pacific

**Band 1 – Real Estate – Australia**
Chambers and Partners Asia-Pacific

## Carla Mills

Partner
Projects and Arbitration

+61 2 9210 6119
+61 449 562 089
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**Rising Star**
Doyles Construction & Infrastructure – Australia, 2020

## Andrew Leadston

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+61 403 862 799
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**Best Lawyer - Real Property – Sydney**
Best Lawyers Peer Review, 2015-2021

**Best Lawyer – Leasing – Sydney**
Best Lawyers Peer Review, 2016-2021

# Contacts

## Perth

### Spencer Flay
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Projects and Arbitration

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**Best Lawyer – Construction/Infrastructure**
Best Lawyers Peer Review, 2013–2020

**Best Lawyer – International Arbitration**
Best Lawyers Peer Review, 2018–2020

**Leading Lawyer – Construction (WA)**
Doyle's Guide to the Australian Legal Profession, 2012–2018

**Who's Who Legal**
Leading Construction Lawyer, 2017–2018

### Chris Ryder
Partner
Projects and Arbitration

+61 8 9460 1606
+61 412 555 388
chris.ryder@corrs.com.au

**"A standout from a construction perspective"** and **"the leading practitioner in the West."**
Well regarded for his practice on contentious matters, he often represents contractors and construction companies with regard to major disputes. A client notes that he is **"very easy to deal with and also very clever."**
Chambers Construction – Australia 2020

### Rebecca Field
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Property & Infrastructure

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+61 427 411 567
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**Best Lawyer – Real Property Law**
Best Lawyers Peer Review, 2014–2020

**Perth Property & Real Estate Lawyer**
Doyles Guide, 2018

**Perth Leading Banking & Finance Lawyer**
Doyles Guide, 2015

**Best Lawyer – Leasing Law**
Best Lawyers Peer Review, 2019–2020

### Nicholas Ellery
Partner, Employment & Labour and Commercial Littigation

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**Best Lawyer – Labour & Employment**
Best Lawyers Peer Review, 2011–2020

**Best Lawyer – Government**
Best Lawyers Peer Review, 2013–2020

**Perth Labour & Employment Lawyer of the Year**
Best Lawyers Peer Review, 2013

**Best Lawyer – OH&S**
Best Lawyers Peer Review, 2015–2017

### Chris Campbell
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**Best Lawyer – Real Property Law – Perth**
Best Lawyers Peer Review, 2015 – 2021

**Best Lawyer – Health & Aged Care Law – Perth**
Best Lawyers Peer Review, 2014 – 2021

# Contacts

## Papua New Guinea


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+61 424 157 165
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Expertise Based Abroad in Papua New Guinea: General Business Law - PNG
Chambers Asia Pacific & Global Guide, 2020

Leading Lawyer – Papua New Guinea
Chambers Asia Pacific Guide, 2018

Expertise based abroad in Australia – Papua New Guinea
Chambers Asia Pacific & Global Guides, 2019

Best Lawyers – Corporate Law
Best Lawyers 2020

"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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