Q3 2019

CORRS PROJECTS UPDATE

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Welcome to the latest edition of Corrs Projects Update Q3 2019

CORRS PROJECTS UPDATE

This publication provides a concise review of, and commercially focussed commentary on, the major judicial and legislative developments affecting the construction and infrastructure industry in recent months.

We hope that you find it interesting and stimulating.

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.

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Rinehart v Hancock Prospecting Pty Ltd [2019] HCA 13

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The facts

IIn *Rinehart v Hancock Prospecting*,[1] the High Court was asked whether a clause in a deed providing for arbitration "[i]n the event that there is any dispute under this deed"[2] encompassed disputes regarding the validity of that deed.

The High Court said that it did, relying on the context and purpose of the deed. These were reflected in the express terms of the deed,[3] which indicated that the arbitration clause was to have wide coverage. Given this finding,[4] it was not necessary for the High Court to decide whether the approach in *Fiona Trust*,[5] a decision of the House of Lords, applies in Australia. (In brief, the effect of that case is that it is presumed that attacks on the arbitration agreement are disputes "under" those agreements under English law.)

The decision

This decision is highly significant for two reasons.

First, the High Court has again endorsed the proposition that "a commercial contract should be construed by reference to the language used by the parties, the surrounding circumstances, and the purposes and objects to be secured by the contract".[6] Here, the express terms of the deed itself provided this context.[7] (This case thus does not resolve the lingering debate about when a court can look beyond a contract to construe its terms.[7]) The aim of preserving confidentiality was central. The case suggests that even a narrowly drafted reference to arbitration (for example, one covering disputes "under" a contract rather than disputes arising out of or in connection with it) can be read more broadly where the context suggests that was the objective intention of the parties. In so doing the High Court appears to have consciously rejected a notion of a legal presumption as to the scope of arbitration agreements as set out by the House of Lords in *Fiona Trust*.

Secondly, the High Court has confirmed the operation of those parts of the Commercial Arbitration Act that operate to deem a stranger to an arbitration agreement (that is, a non-party) as a party to an arbitration. Under the relevant commercial arbitration legislation, a non-party that claims "through or under" a party to an arbitration agreement is deemed to be a party to that arbitration agreement.[8]

In *Rinehart*, the majority restated the test articulated by Brennan and Dawson JJ in an earlier High Court decision, *Tanning Research Laboratories Inc*,[9] for determining whether a non-party was claiming through or under another party to an arbitration agreement. According to that test, it is necessary to consider whether an "essential element" of the non-party's cause of action/defence was or is vested in or exercisable by the party to the arbitration agreement.[10]

Key takeaways

The scope of an arbitration agreement should be construed by reference to its language, the surrounding circumstances and the purposes and objects of the agreement. The question as to whether an attack on the validity of an agreement is a dispute "under " that agreement is a question of construction of the particular agreement.

A third party claiming "through or under" a party to an arbitration agreement may be covered by that arbitration agreement where "essential element" of the third party's cause of action (or defence) is vested in or exercisable by a party to the arbitration agreement.

Keywords:

arbitration

The majority concluded that the third parties in *Rinehart* satisfied this test and were therefore parties to the relevant arbitration. Edelman J disagreed with the majority on this point and found that non-parties should not be able — much less, be compelled — to participate in an arbitration merely by dint of the liberal interpretation of the statutory definition of "party".[11]

http://eresources.hcourt.gov.au/showCase/2019/HCA/13

[Note: Corrs acted for several of the successful respondents and cross-appellants in these cases.]

1 *Rinehart v Hancock Prospecting* [2019] HCA 13 (**Rinehart**).
2 There were several deeds under consideration. The arbitration clauses included references to disputes "under this deed" or "all disputes hereunder". For ease of reading, this article concentrates on only one of the contested deeds.
3 For example, there were provisions relating to confidentiality; releases from claims; undertakings not to disparage or adversely impact interests; and acknowledgements that the deed was entered into without duress or undue influence (with letters from lawyers attesting to this).
4 *Rinehart* at [49] (Kiefel CJ, Gageler, Nettle and Gordon JJ); and [83] (Edelman J).
5 *Fiona Trust & Holding Corporation v Privalov* [2007] 4 All ER 951. The New South Wales Court of Appeal highlighted the controversy about the correctness in Australia of the Fiona Trust case in *Rinehart v Welker* [2012] 95 NSWLR 221.
6 *Rinehart* at [44] (Kiefel CJ, Gageler, Nettle and Gordon JJ). See also at [83] (Edelman J).
7 That is, the debate about Mason J's enunciation of the "true rule" of contractual interpretation in *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337 at 352 (Stephen and Wilson JJ agreeing). For one example of a response to the "true rule", see the reasons of Leeming JA (with whom Gleeson and White JJA relevantly agreed) in *Cherry v Steele-Park* [2017] NSWCA 295 at [79]-[82].
8 The definition of "party" is in section 2 of the uniform legislation, which implements the UNCITRAL Model Law on International Commercial Arbitration.
9 *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332.
10 *Rinehart* at [66] (Kiefel CJ, Gageler, Nettle and Gordon JJ).
11 *Rinehart* at [86] (Edelman J).

Boss Constructions (NSW) Pty Ltd v Rohrig (NSW) Pty Ltd [2019] NSWSC 374

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Background

Rohrig (NSW) Pty Ltd (**Rohrig**) was contracted to design and construct a performing arts centre. Rohrig invited Boss Constructions Pty Ltd (**Boss**) to tender for the fabrication and supply of structural steel. There ensued a lengthy course of dealings between the parties. Various versions of proposed contracts were exchanged, but no version was executed by both parties. During this time, Boss took steps to have the steel fabricated and issued some invoices, which Rohrig paid.

The parties fell into dispute after Boss made several variations claims. Boss advised Rohrig that it would not perform the works if Rohrig did not agree to and pay for these claimed variations. Boss also issued a number of payment claims under the Building and Construction Industry Security of Payment Act 1999 (NSW) (**SOP Act**).

Adjudication

After Rohrig refused to pay one of the payment claims, Boss gave notice under section 27 of the SOP Act that it was going to suspend work unless paid in full. Rohrig notified Boss it was terminating the contract based on Boss's alleged breaches.

Boss applied for adjudication under the SOP Act and was awarded part of what it had claimed. The adjudicator's determination was based on Boss's acceptance of the terms contained in documents Rohrig had proffered much earlier. Clause 5.1 of the document stipulated that Boss could accept the terms by undertaking work, which it did.

Supreme Court proceedings

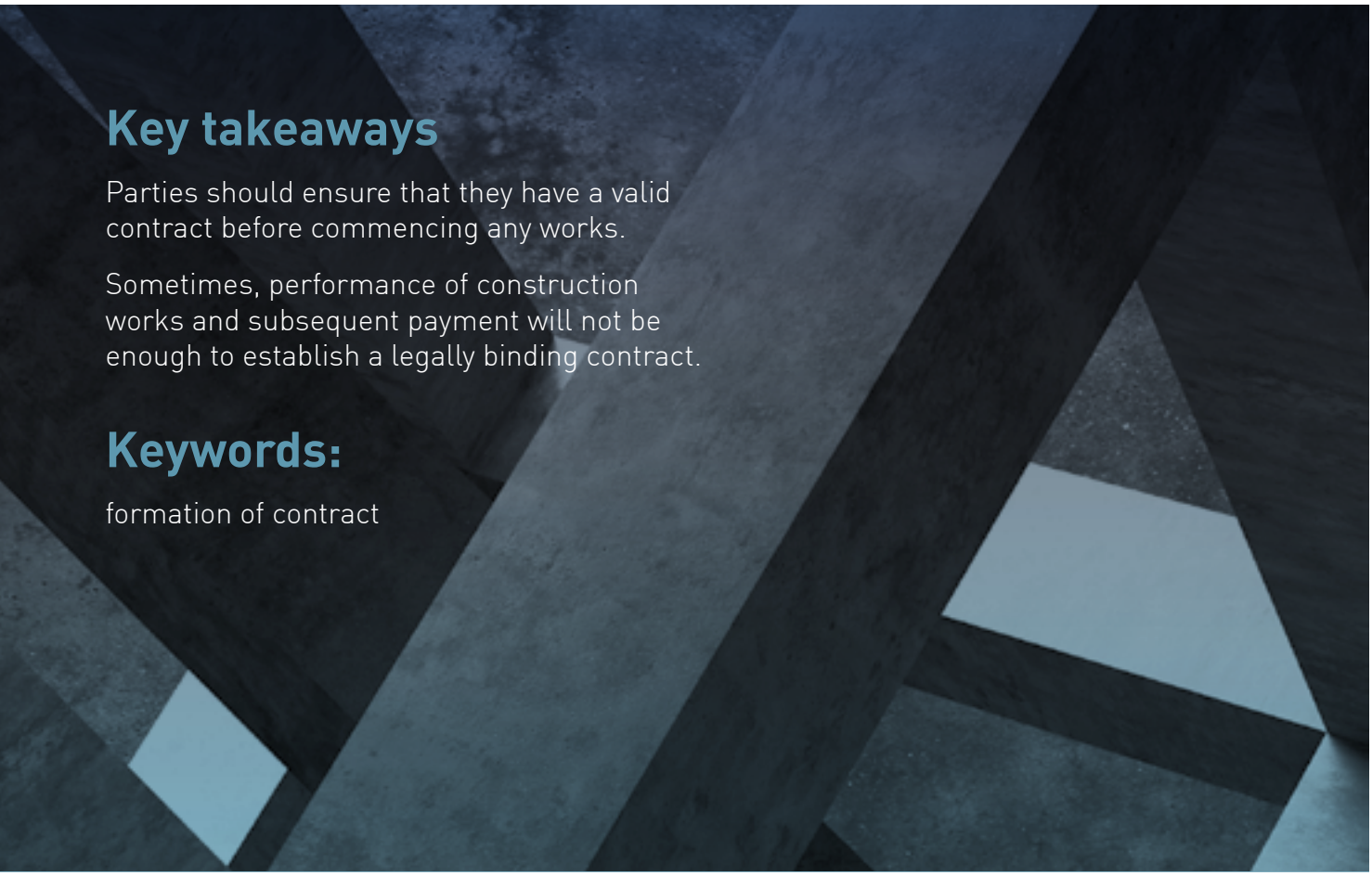
In the Supreme Court of NSW, each party sued for breach of contract. The main issue was whether a contract existed and if so, on what terms.

Boss claimed for the work carried out, plus a $200,000 termination fee which it claimed was provided for under the contract. Boss disagreed with the adjudicator's findings and argued the parties entered into a contract on the basis of a document titled "Small Works Package".

Rohrig cross-claimed for liquidated damages and loss of bargain damages. Rohrig's case was consistent with the adjudicator's finding that the contract was embodied in the documents that it proffered to Boss and which it said Boss had agreed to by commencing work.

Decision (Hammerschlag J)

His Honour found that no contract was established by either party. Whether there was a contract turned on whether a reasonable bystander would regard the conduct of the offeree as signalling to the offeror that its offer has been accepted. Hammerschlag J found that this objective test was not satisfied at any stage of their dealings.



Key takeaways

Parties should ensure that they have a valid contract before commencing any works.

Sometimes, performance of construction works and subsequent payment will not be enough to establish a legally binding contract.

Keywords:

formation of contract

His Honour first dismissed Boss's argument, saying it was clear that Rohrig had not accepted Boss's asserted contract as Rohrig accepted none of Boss's mark-ups in that document.

Further, his Honour did not accept Rohrig's argument, namely because:

1. There was no evidence that Clause 5.1 came to Boss's attention before it started working. Rohrig could not rely on a provision that was never agreed to, as evidence of a contractual agreement.
2. Rohrig's covering letter asked Boss to print, read and sign the instruments. This implied that there would be no agreement unless both parties signed.
3. By asserting the non-existence of a binding agreement at subsequent stages of discussion, Rohrig did not act as though a contract was in place.
4. Even in its Payment Schedule, Rohrig did not assert a contract based on the terms it had proffered early on.

Hammerschlag J concluded that the parties "contemplated" entering into a contract, and then "acted on the footing that one would be entered into", but never entered into a valid and binding contract.[1] Each party's conduct could be characterised as "seeking to impose, unsuccessfully, its terms on the other".[2]

Both parties' causes of action in contract were dismissed. The Court exercised its discretion and made no order as to costs.

Practical implications

This case has a clear message for the construction industry. Even though contract law generally recognises a contract where work has been performed and payments made, there may be instances where is insufficient for the court to determine the existence of a legally binding contract.

While it is common to commence works while negotiations are still on foot, best practice will always be to agree terms in a written contract before work commences.

https://www.caselaw.nsw.gov.au/decision/5ca59763e4b02a5a800bfd41

1 At [75].
2 At [103].

Lainson Holdings Pty Ltd v Duffy Kennedy Pty Ltd [2019] NSWSC 576

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Background

Lainson Holdings Pty Ltd (**Lainson**) contracted Duffy Kennedy Pty Ltd (**Duffy**) to carry out building work in Cronulla. At the same time, the parties entered into a deed which was expressed to take priority over the contract. The deed required any dispute arising out of the contract to be submitted to an Expert in accordance with The Institute of Arbitrators & Mediators Australia Expert Determination Rules (**Rules**).[1] Relevantly, the Rules provided that:

- the determination by the Expert shall be final and binding (Rule 3.2); and
- the Expert shall determine the dispute in accordance with the Rules and according to law (Rule 5.1).

The parties fell into dispute over a substantial breach by Duffy. Lainson purported to terminate the contract by issuing a notice to show cause and a notice of termination. Duffy alleged that Lainson had wrongfully repudiated the contract and claimed damages for unpaid work. The dispute was submitted to an Expert for determination. The Expert determined that Lainson's purported termination was invalid because it was subject to a duty to act reasonably and in good faith (**Implied Term**), and Lainson had exercised the power for an extraneous purpose.

Issue

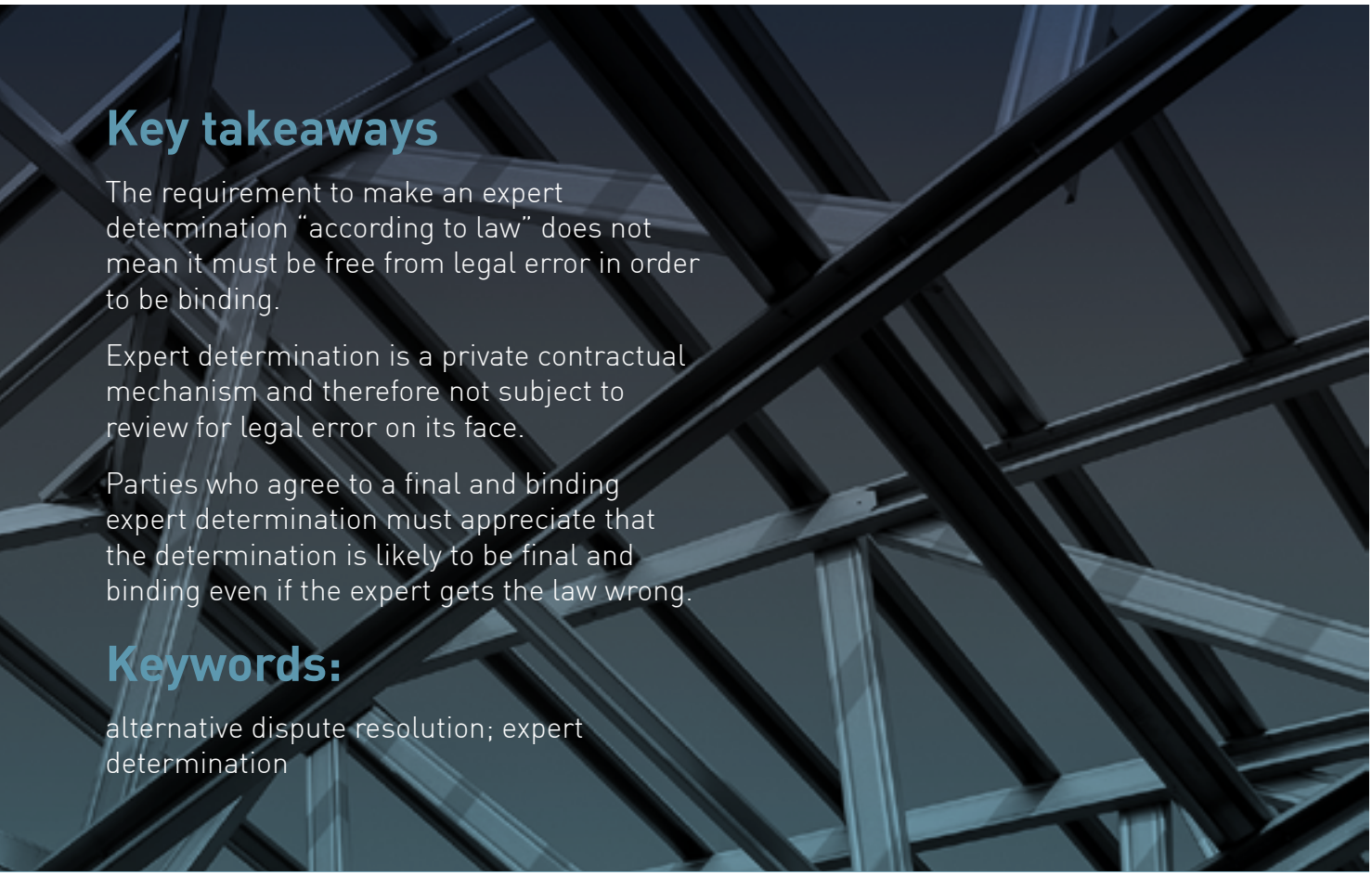
In the Supreme Court of New South Wales, Lainson challenged the expert determination, arguing:

- first, that the requirement to determine the dispute *"according to law"* under Rule 5.1 required the Expert not to make any mistakes of law; and
- second, that where a question of law was material, the Court could interfere where the Expert made a mistake of law on the face of the record.

Lainson contended that the relevant mistake of law was the finding of the Implied Term.

Duffy cross-claimed for the amount found by the Expert plus Lainson's unpaid half-share of the Expert's fees.

Hammerschlag J rejected both of Lainson's arguments and entered judgment in favour of Duffy. It was therefore not necessary to consider the merits of the expert determination. The parties would be bound by any determination by the Expert within the ambit of what the contract required the Expert to do.[2]



Key takeaways

The requirement to make an expert determination "according to law" does not mean it must be free from legal error in order to be binding.

Expert determination is a private contractual mechanism and therefore not subject to review for legal error on its face.

Parties who agree to a final and binding expert determination must appreciate that the determination is likely to be final and binding even if the expert gets the law wrong.

Keywords:

alternative dispute resolution; expert determination

Reasoning

Issue 1 — Do the words "according to law" mean the determination must be free from legal error?

This was a matter of construction. In this context, the words "according to law" referred to the way the expert was required to perform his duties, for example, honestly, without bias or collusion, and while not intoxicated.[3] His Honour rejected Lainson's argument for five reasons:[4]

1. Lainson's construction of the words *"according to law"* would be commercially inconvenient as it would mean that the expert determination would effectively be subject to appeal on every question of law which was determined by the Expert, therefore risking future inconsistent decisions;
2. the parties did not intend the contract to provide for arbitration and Lainson's construction would give the expert determination a wider right of review than if it was an arbitral award;
3. *"according to law"* appeared in the part of the Rules headed *"The Procedure"*;
4. it would be contrary to the commercial objectives of expert determination, efficiency and finality; and
5. Rule 5.5, which provided that any dispute concerning the Rules (including the Expert's jurisdiction) were to be determined by the Expert, showed a contractual intention that the Expert be the final arbiter.

Issue 2 — Can a court intervene to redress a mistake of law on the face of the expert determination?

Lainson referred to several authorities where courts were able to intervene to redress a mistake of law on the face of an arbitral award.[5] His Honour distinguished between an expert determination and an arbitral award. An arbitral award is a "record" which has the same effect as a judgment of the Court — it is kept by a superior or inferior tribunal as a memorial and testimony of its proceedings. On the other hand, an expert determination is a private contractual mechanism that does not create anything beyond binding contractual obligations. It has no statutory backing.

His Honour also considered that it made no commercial sense to distinguish between a dispute in which a question of law arises, and a dispute where a single question of law is submitted for expert determination.[6] To do so would give the dispute clause an "ambulatory" effect as it would only make the first scenario subject to review.

Judgment was entered in favour of Duffy for the amount determined by the expert (adjusted for time since the determination) and a further amount of over $80,000. Lainson was provisionally ordered to pay Duffy's costs.

Practical implications

Expert determination is an increasingly popular form of alternative dispute resolution. It can be a quick, informal and cost-effective method of resolving commercial disputes. This decision affirms that if parties agree that disputes will be submitted to an Expert for final and binding determination, those determinations will be final and binding, even if the Expert makes an error of law. Parties will generally be unable to challenge an expert determination unless their contract provides for this.

https://www.caselaw.nsw.gov.au/decision/5cdcde04e4b02a5a800c0d8e

1 The Institute of Arbitrators & Mediators Australia is now the Resolution Institute.
2 At [39].
3 At [49].
4 At [50]–[53].
5 *Kent v Elstob* (1802) 3 East 18; *Henry v Uralla Municipal Council* (1934) 35 SR (NSW) 15; *Gold Coast City Council v Canterbury Pipelines* (Aust) Pty Ltd (1968) 118 CLR 58.
6 At [61].

Lendlease Engineering Pty Ltd v Timecon Pty Ltd [2019] NSWSC 685

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Background

Timecon Pty Ltd (**Timecon**) was said to have entered into an "arrangement" with Lendlease Bouygues Joint Venture (**LLBJV**) which was said to have taken effect from 24 February 2017. This arrangement provided for the haulage and disposal of soil (also referred to as "spoil") generated at the NorthConnex Project site in Somersby, New South Wales. Timecon gave LLBJV a payment claim which was determined by an adjudicator on 2 January 2019 (**Determination**).

Issue

LLBJV argued that the adjudicator did not have jurisdiction to make the Determination because:

1. there was no *"contract or other arrangement"* between LLBJV and Timecon relating to the disposal of the soil at the Somersby site; and
2. if there was a *"contract or other arrangement"*, it did not relate to construction work or the supply of related goods and services.

Supreme Court of NSW decision

Issue 1 — meaning of "other arrangement" under the SOP Act

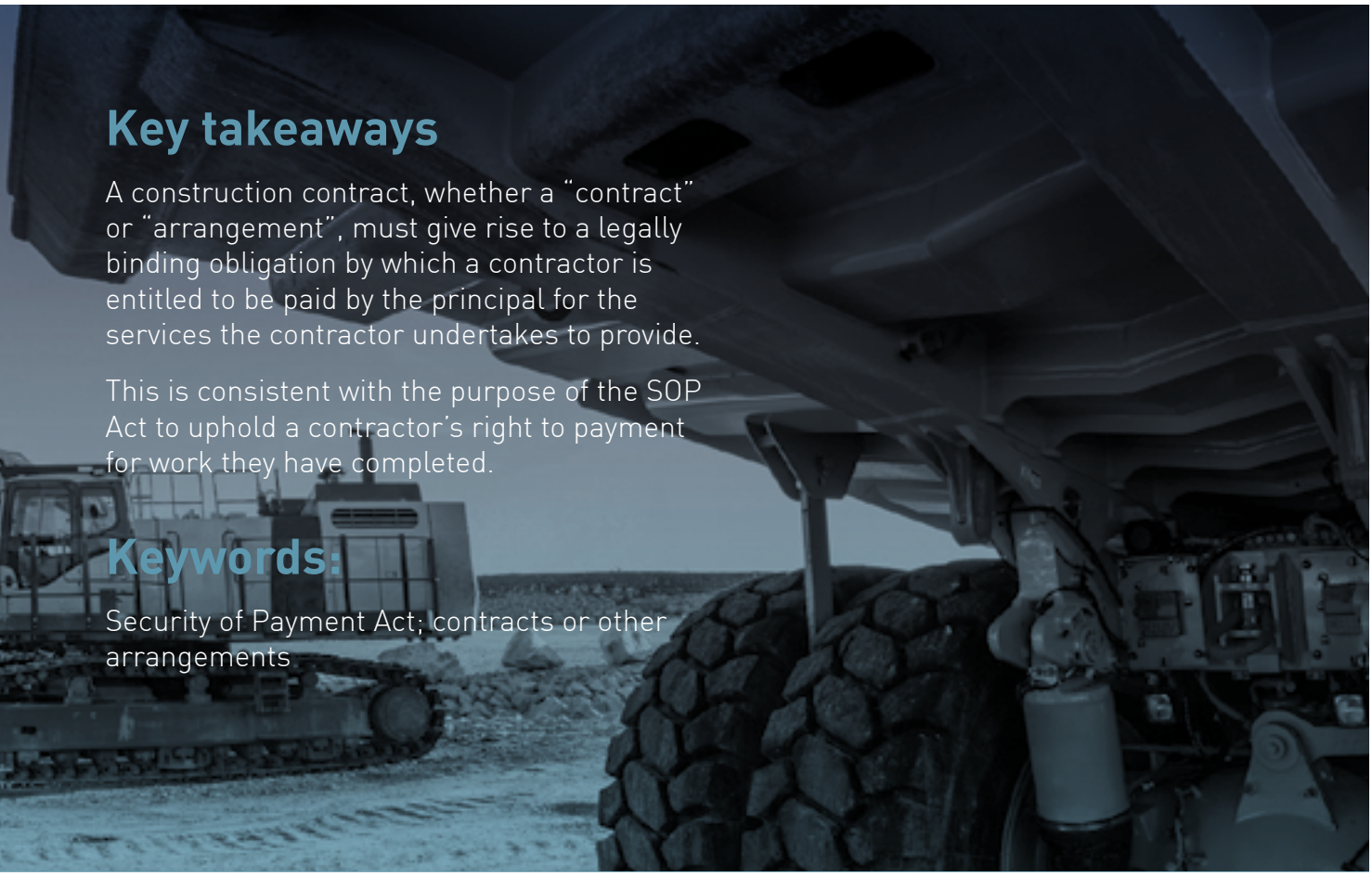
The primary issue was whether there was a "construction contract" for the purposes of section 4 of the Building and Construction Industry Security of Payment Act 1999 (NSW) (**SOP Act**), which defines a "construction contract" as:

> *"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".*

Timecon argued that an "arrangement" arose through email exchanges and oral conversations between senior members of the parties. These exchanges, along with evidence of delivery of the soil at the Somersby site, were said to evidence the "arrangement".

Ball J considered two cases: *IWD No 2 Pty LTD v Level Orange Pty Ltd*[1] (where Stevenson J summarised the principles of *Machkevitch v Andrew Building Constructions*[2]) and *Okaroo Pty Ltd v Vos Construction and Joinery Pty Ltd*.[3] His Honour departed from these authorities and concluded that the relevant arrangement must give rise to a legally binding obligation, though that obligation need not be contractual in nature.[4]

His Honour held that for an arrangement to be considered an "other arrangement" under the SOP Act, the claimant must have an underlying right to be paid for works performed.[5] This is because the primary purpose of the SOP Act is to safeguard a contractor's right to be paid for work it has done. His Honour found that Timecon has not made out an underlying right to be paid.



Key takeaways

A construction contract, whether a "contract" or "arrangement", must give rise to a legally binding obligation by which a contractor is entitled to be paid by the principal for the services the contractor undertakes to provide.

This is consistent with the purpose of the SOP Act to uphold a contractor's right to payment for work they have completed.

Keywords:

Security of Payment Act; contracts or other arrangements

Issue 2 — did the work fall within the definition of "construction work"?

His Honour indicated that had he resolved that there was a "contract or other arrangement" between Timecon and LLBJV, he would not have held that the contract was one for "construction work". Rather, he would have concluded that it was an *"arrangement for the tipping of spoil at that site"*.[6]

Further, his Honour indicated that the tipping of the soil was not so integral a part of the construction work at the NorthConnex Project as to attract the application of section 5(1)(e) of the SOP Act, which defines "construction work" to include *"any operation which forms an integral part of, or is preparatory to or is for rendering complete, work of the kind referred to in paragraph (a), (b) or (c)"*.[7] This is because the soil could have been disposed at any site authorised to accept it.[8] It was therefore not considered to be preparatory to the work or necessary to render the construction work complete.[9]

Timecon argued in the alternative that the question for consideration was whether the disposal of soil could be considered to be *"related goods and services"* within the meaning of section 6 of the SOP Act. His Honour held that for this to be the case, the soil must either be a component of the relevant building, structure or work, or must be used in connection with carrying out construction work.[10] His Honour was of the view that the soil met neither of these requirements.

Conclusion

His Honour concluded that there was no contract or other arrangement between Timecon and LLBJV within the meaning of the SOP Act. Even if a contract or other arrangement was determined to have existed, it would not fall within the definition of "construction work". The Determination was declared void.

https://www.caselaw.nsw.gov.au/decision/5cf9f84ae4b08c5b85d8a0ea

1 [2012] NSWSC 1439.
2 [2012] NSWSC 546.
3 [2005] NSWSC 45.
4 At [87].
5 At [69].
6 At [108].
7 At [109].
8 At [113].
9 At [109].
10 At [114].

Sought After Investments Pty Ltd v Unicus Homes Pty Ltd [2019] NSWSC 600

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Background

Sought After Investments Pty Limited (**SAI**) engaged Unicus Homes Pty Ltd (**Unicus**) to build a childcare centre in Horsley, NSW.

On 15 February 2019, Unicus served on SAI a letter dated 14 February 2019 which attached four documents expressed to be payment claims under the Building and Construction Industry Security of Payment Act 1999 (NSW) (the **SOP Act**). Each "payment claim" was dated between October 2018 and February 2019, and each was accompanied by a supporting statement required by section 13(7) of the SOP Act.

In response, SAI served four payment schedules, each dated 22 February 2019 and certifying the amount payable as zero. The reason given was that Unicus was not entitled to submit more than one payment claim per reference period.

Unicus lodged an adjudication application. The adjudicator characterised the four claims as a single payment claim and proceeded to deal with that claim.

Supreme Court of NSW

SAI sought a declaration that the adjudication determination was void. The main issues before Ball J were as follows.

Issue 1 — was there more than one payment claim?

SAI contended that Unicus had served four payment claims in respect of one reference date, contrary to section 13(5) of the SOP Act. Unicus argued that the four claims were a single payment claim made in respect of the reference date arising on 31 January 2019.

Ball J started by stating the relevant legal principles:

- whether there was more than one payment claim is to be resolved objectively by taking into account all relevant matters, including the terms of the document, any covering letter and the surrounding circumstances known to both parties;[1]
- the form of the claim or claims is relevant but not determinative;[2] and
- whether characterising multiple "claims" as a single payment claim would subvert the purpose of section 13(5), which is to prevent a principal from being vexed by multiple progress claims during the period between reference dates.[3]

Applying the above principles, Ball J concluded that there was only one payment claim, which was made for payment of the full amount of the four invoices. His Honour's reasons were:

Key takeaways

The Supreme Court of NSW has reaffirmed that whether a document is a payment claim is a question of substance that requires an objective construction of all relevant matters, even where a document is expressed to be a payment claim under the SOP Act.

Section 13(7) of the SOP Act allows for more than one supporting statement to be submitted in respect of one payment claim.

Keywords:

identifying payment claims; supporting statements

- Unicus's 14 February 2019 letter used the words *"payment claim"* and *"invoice"* interchangeably;
- although expressed in the plural ("claims"), the letter stated that the due date for payment was to be calculated from the date of the letter despite what was said in the claims, which was consistent with making a single demand for payment;
- the letter explained why four invoices or claims were included: three of the invoices were previously issued on the date of the invoice, but not as payment claims under the Act, so Unicus reissued them again as payment claims under the SOP Act;
- the letter stated that Unicus awaited receipt of *"payment in full"* or *"your payment schedule"* (singular); and
- for a respondent, there was no difference between receiving a single letter enclosing four invoices and a single document consolidating the four invoices or claims, so characterising the four claims/invoices as a single payment claim was consistent with the purpose of section 13(5).

The fact that SAI chose to serve in response to the claims four documents each expressed to be a payment schedule was held to be irrelevant to the objective characterisation of the claims/invoices.[4]

Issue 2 — whether multiple supporting statements can be issued for a payment claim

Section 13(7) provides that a head contractor must not serve a payment claim on the principal unless the claim is accompanied by a supporting statement. SAI argued that if Unicus did serve one payment claim, it did not comply with section 13(7) because it issued multiple supporting statements in respect of that claim. Ball J rejected this argument for two reasons.

- SAI relied on the reference to "a supporting statement" to contend that only one supporting statement could be served. His Honour, however, referred to the Interpretation Act 1987 (NSW) for the proposition that a reference to the singular can also include the plural unless there is a contrary intention. No such contrary intention appeared, because section 13(7) does not state that a claimant can only serve one supporting statement in respect of each payment claim.[5]
- The service of multiple supporting statements in respect of one payment claim aligns with the policy of the SOP Act and section 13(7). The prescribed form of the supporting statement requires the person who signs it to state that the person is *"in a position to know the truth of the matters that are contained in this supporting statement"* and this may not always be the same person in respect of all subcontractors.[6]

His Honour also noted in obiter that different views have been expressed on the consequences of a failure to comply with section 13(7), but the balance of authority is in favour of the view that it would invalidate a payment claim under the SOP Act.[7]

In conclusion, Ball J upheld the adjudicator's determination and found in favour of Unicus. The proceedings were dismissed and SAI was ordered to pay Unicus' costs.

Practical implications

Courts will look at all relevant matters objectively when deciding whether a document is a payment claim under the SOP Act. Use of the words "payment claim under the SOP Act" is not determinative, so a claimant must still ensure its payment claim meets all the statutory requirements. Conversely, a respondent who receives documents expressed to be a "payment claim" should not take them simply at face value.

A claimant may submit more than one section 13(7) statement supporting a payment claim. Indeed, it is advisable to do so if a single person is not in a position to make the prescribed statement in respect of all subcontractors.

https://www.caselaw.nsw.gov.au/decision/5ce39d2de4b0196eea407140

1 At [23], citing *Fernandes Construction Pty Ltd v Tahmoor Coal Pty Ltd* (t/as Centennial Coal) [2007] NSWSC 381.
2 At [24], citing *Alan Conolly & Co v Commercial Indemnity Pty Limited* [2005] NSWSC 339.
3 At [24].
4 At [28].
5 At [32]. Compare section 13(5), which specifically states that a claimant cannot serve more than one payment claim in respect of each reference date.
6 At [32].
7 At [35].

The Owners - Strata Plan 89041 v Galyan Pty Ltd [2019] NSWSC 619

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Background

The plaintiff is the owners' corporation of a residential property comprising 14 units. The first defendant, Galyan Pty Ltd, was the owner and developer of the property and the second defendant was the builder, ACH Clifford Pty Ltd. They are referred to together here as the **Builder**.

The Builder completed work on the units in 2013. However, after completion, the new owners of the units identified defects. On 20 August 2015, the owners' corporation commenced proceedings against the Builder in the NSW Civil and Administrative Tribunal.

On 6 October 2015, the Builder made an open offer to complete all rectification works within an agreed scope. Between October 2015 and February 2016, the parties exchanged correspondence regarding such a scope of works, but none was agreed. On 2 February 2016, the Builder withdrew its open offer. During this time, the owners' corporation denied the Builder access to the site to rectify the defects, stating that it would only allow access if a scope of work could be agreed.

In March 2016, the proceedings were transferred to the Supreme Court. The parties later agreed that:

- a referee (Ms Grey) would be appointed to determine the existence of defective works, the scope and cost of rectification, and a detailed construction program; and
- once the referee's report had been published, the Court would enter judgment for the owners' corporation against the Builder in the total amount found by the referee.

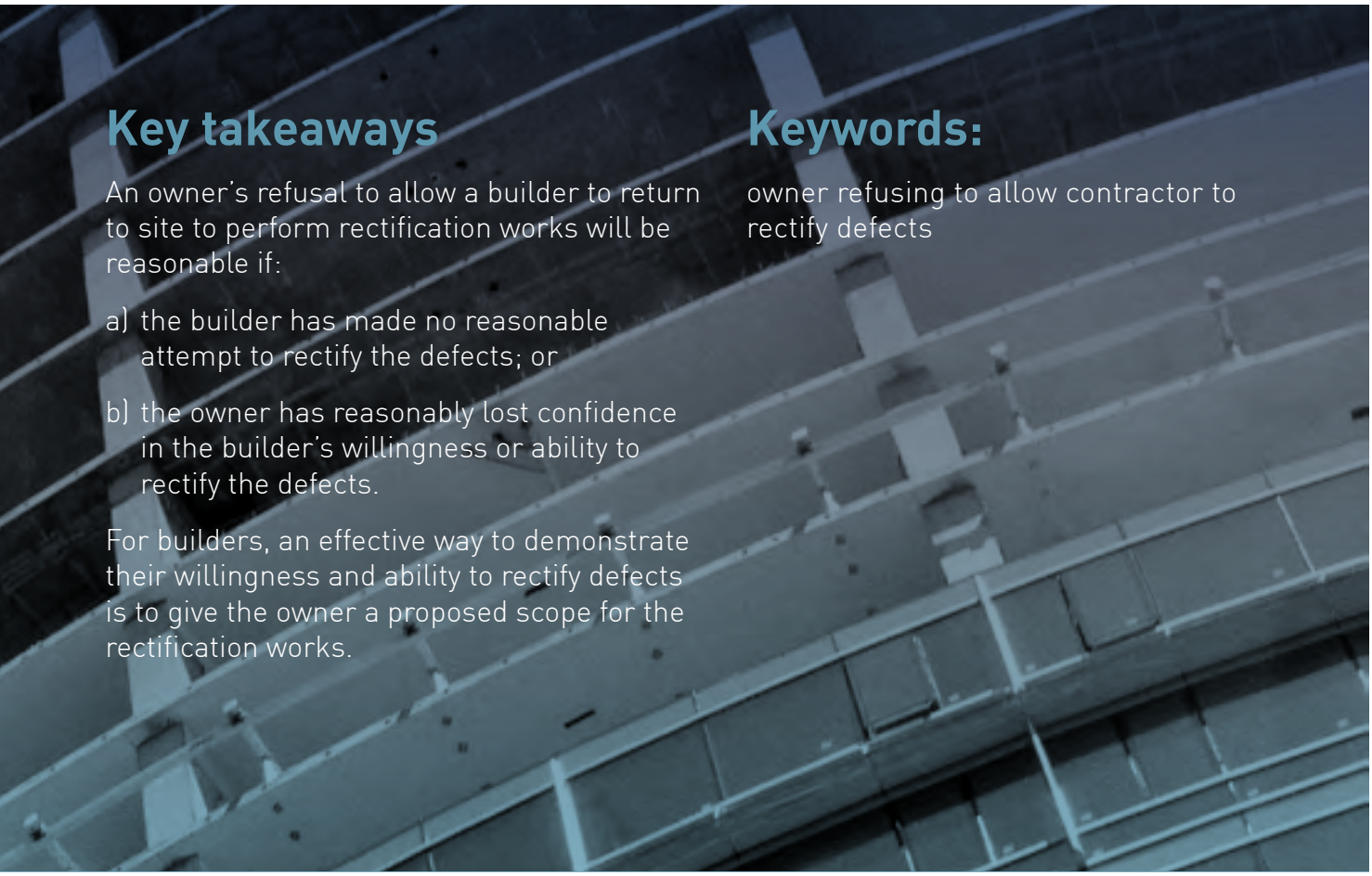
Hammerschlag J stated that no order would be made for costs unless one party had acted unreasonably in bringing or defending proceedings. As such:

> *"the only question will be whether, in all circumstances, the [owners' corporation's] refusal previously to allow the [Builder] in to carry on work on the premises was unreasonable. If that is not established to have been unreasonable, the [owners' corporation] will get its costs".*[1]

Referee's Findings

On 18 February 2019, Ms Grey published her report and awarded the owners' corporation $1,282,486. Hammerschlag J adopted Ms Grey's report and findings in full.

The issue that remained was whether the owners' corporation was entitled to the costs of the proceedings. This depended on whether the Builder could establish that it was unreasonable for the owners' corporation's to refuse to allow the Builder to re-enter the site to rectify the defects.



Key takeaways

An owner's refusal to allow a builder to return to site to perform rectification works will be reasonable if:

a) the builder has made no reasonable attempt to rectify the defects; or

b) the owner has reasonably lost confidence in the builder's willingness or ability to rectify the defects.

For builders, an effective way to demonstrate their willingness and ability to rectify defects is to give the owner a proposed scope for the rectification works.

Keywords:

owner refusing to allow contractor to rectify defects

Supreme Court of NSW Decision (Stevenson J)

Relevant principles

It fell to Stevenson J to consider this question. His Honour agreed with the following summary by the owners' corporation of the principles relevant to determining whether an owner has acted unreasonably in refusing to allow the builder to return to the premises to rectify defects:

1. the overarching principle is that a plaintiff may not recover losses which are attributable to its own unreasonable conduct;[2]
2. an owner must give the builder an opportunity to minimise the damages it must pay by rectifying defects, except where:
   - the owner's refusal to allow the builder that opportunity is reasonable; or
   - the builder has repudiated the contract by refusing to perform any repairs;[3]
3. whether the owner has acted unreasonably in refusing the builder the opportunity to rectify defects depends on all of the circumstances of the case, including whether:
   - the builder has attempted to repair defects in the past (and the nature of those attempts); and
   - in light of the builder's conduct, the owner has reasonably lost confidence in the builder's willingness and ability to perform the work;[4]
4. the onus lies on the defendant to prove that the plaintiff has acted unreasonably;[5] and
5. a plaintiff may rely on facts which come to its attention after its refusal to allow the builder to repair defects, but which relate to the defendant's conduct at the time, and is not limited to relying on what it knew at the relevant time.[6]

Was the plaintiff's conduct unreasonable?

Stevenson J found that the owners' corporation had acted reasonably in not allowing the Builder to return to the site to rectify the defects.[7] In reaching that decision, his Honour found that:

1. between the time that the owners' corporation excluded the Builder from the premises (in August 2015) and September 2017, the Builder did not propose a workable scope of works to rectify the defects even though the owners' corporation indicated it was willing to consider any proposal for the Builder to return to site to perform rectification work; [8]

2. the rectification work which the Builder's expert proposed in 2014 fell short of the rectification work which the referee later determined was actually required;[9]

3 the evidence presented by two members of the owners' corporation (which was unchallenged by the Builder) was that the owners' corporation had reasonably lost confidence in the Builder's ability or willingness to carry out the rectification works because of:

- the Builder's failure to provide a proposed scope of work;
- the poor quality of the rectification work initially performed by the Builder before it was excluded from the premises;
- the Builder's previous failure to attend the property at the appointed times to carry out rectification work; and
- the Builder's conduct in entering the property without permission or authority;[10] and

4 the Builder adopted an aggressive approach to the owners' corporation through its solicitor, including by describing the owners' corporation's claims as "bogus" and "frivolous".[11]

Conclusion

As the Builder had not established that the owners' corporation had acted unreasonably, the Court awarded costs in favour of the owners' corporation.[12]

https://www.caselaw.nsw.gov.au/decision/5ceb7d48e4b08c5b85d899eb

1 Citing *The Owners – Strata Plan No 76674 v Di Blasio Constructions Pty Ltd* [2014] NSWSC 1067 (*Di Blasio*) at [42], in turn citing *Hasell v Bagot, Shakes & Lewis Ltd* (1911) 13 CLR 374 at 388.
2 *Di Blasio* at [44].
3 *Di Blasio* at [45].
4 *Di Blasio* at [46].
5 At [21], citing to *Owners Strata Plan 78465 v MD Constructions Pty Ltd* [2016] NSWSC 16 at [30].
6 At [90].
7 At [87].
8 At [89] .
9 At [78]–[82].
10 At [88].
11 At [90]–[91].

Owners Corporation No 1 of PS613436T v LU Simon Builders Pty Ltd (No 2) (Building and Property)

[2019] VCAT 468

CORRS PROJECTS UPDATE

Background

The case concerned a fire at the Lacrosse Tower on La Trobe Street in 2014. The accidental fire was caused by an occupant who disposed of a cigarette butt in a plastic container sitting on a timber table on a balcony. The fire soon spread to other flammable materials such as the air-conditioning unit and eventually the alucobest façade and panels of the wall. These panels were made of highly flammable material and, as a result, the fire spread rapidly up the outside of the building. Within 12 minutes, the external aluminium composite wall cladding was alight. Fortunately, all occupants escaped the building without injury.

Various owners' corporations of the Lacrosse Tower (**Owners**) sued the builder, LU Simon Pty Ltd (**LU Simon**). The claim was heard in two parts before Judge Woodward in the Victorian Civil and Administrative Tribunal (**VCAT**). The current decision concerned the costs and interest payable by LU Simon and its subcontractors after Woodward J found them liable for the fire at first instance.

The decision

Damages

His Honour had previously ordered LU Simon to pay the Owners nearly $5,750,000.[1]

Apportionment of damages

LU Simon recovered the damages from:

- the surveyor;
- the architect;
- the fire engineer, jointly the **Liable Subcontractors**; and
- the cigarette-smoking occupant.

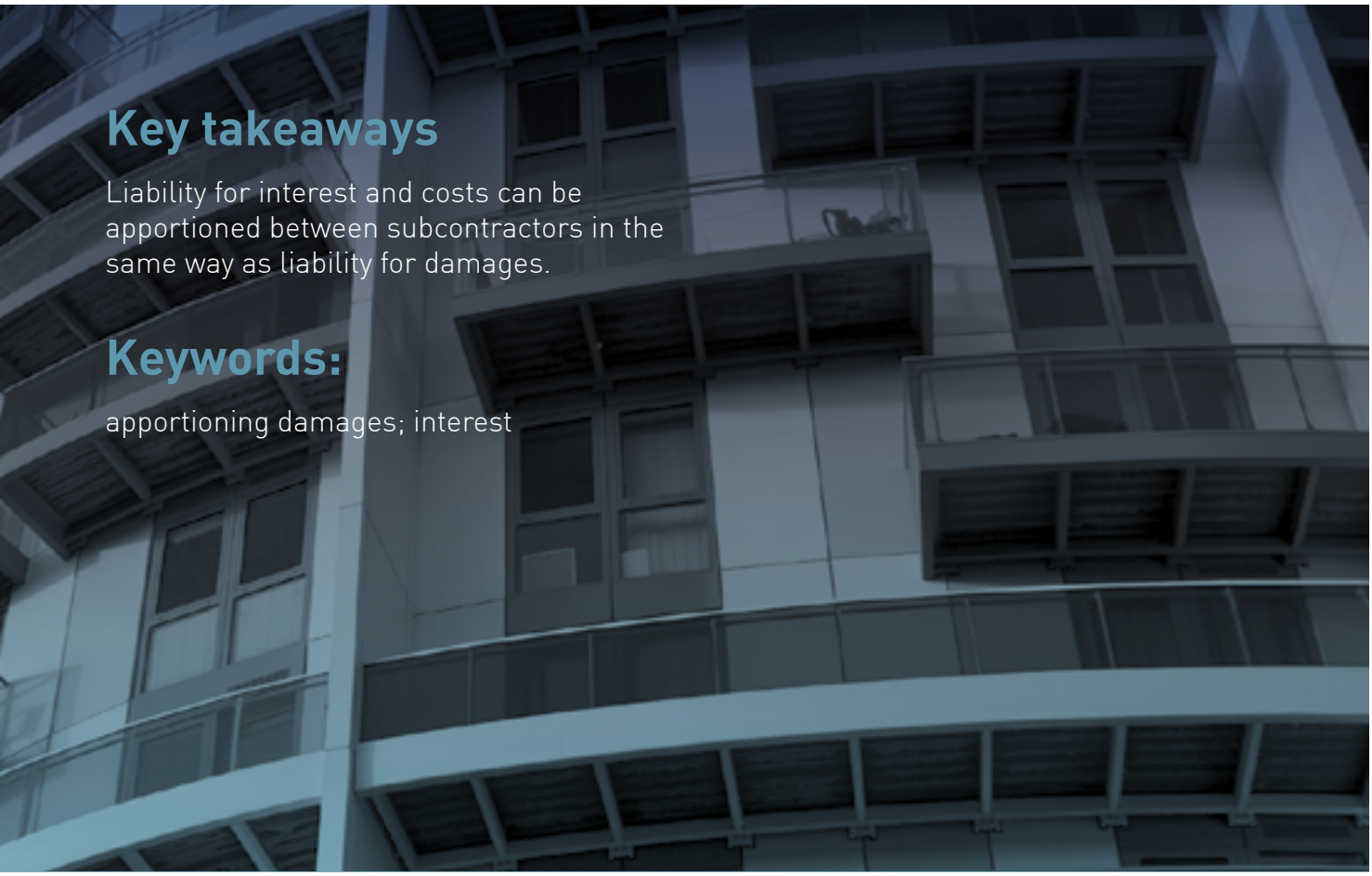
VCAT apportioned the damages as follows:

Party	Proportion of liability
Surveyor	33%
Architect	25%
Fire Engineer	39%
Occupant (LU Simon was liable for this as the occupant was not in the jurisdiction)	3%

Interest

The Owners sought interest of over $1,750,000 calculated at the fixed penalty rate (9.5% for some of the period and 10% for the remainder). The Owners argued the penalty interest rate should be the starting point. His Honour considered the following when determining interest:[2]

- was an entitlement to interest fair; and
- if the entitlement is fair, what would be the appropriate interest rate?



Key takeaways

Liability for interest and costs can be apportioned between subcontractors in the same way as liability for damages.

Keywords:

apportioning damages; interest

VCAT has the power to award damages in the nature of interest in domestic building cases.[3] Whether an interest order should be made was not contested, but the relevant rate was disputed.

His Honour stated in obiter that the penalty interest rate should not be a starting point, but rather the first step in analysing whether the rate is appropriate. Despite this statement, his Honour conceded and applied the current legal position that the fixed penalty rate applies unless unfairness arises. Here, Woodward J found the penalty rate to be unfair and as a result ordered interest at 2% per annum. His Honour reached this conclusion after analysing the strengths of the Owners claim, their actual success and the absence of delay or unfairness caused by either party.

Costs

(a) The cost scale

Section 109 of the Victorian Civil and Administrative Tribunal Act 1998 (Vic) provides that each party should bear their own costs unless the Tribunal is satisfied otherwise. LU Simon accepted that a cost order would be made as costs are commonly awarded in VCAT in domestic building disputes given the nature and complexity of the claims.[4]

The Owners sought a cost order based on the Supreme Court scale prior to 27 April 2017 and an indemnity cost order after that date, which was when the Owners' Calderbank offer (**Offer**) expired. The figures in the Offer fell short of what was actually awarded and aspects of the Offer, particularly in relation to costs, were uncertain. Thus, LU Simon's rejection of the Offer was reasonable. Accordingly, all costs were awarded at the Supreme Court scale.

(b) The Owners' costs

The second to fifth respondents were ordered to pay the applicants' costs despite arguing that LU Simon should bear all costs. The apportionment percentages mirrored the orders made in relation to damages.

(c) LU Simon's costs

His Honour ordered that the second to fifth respondents also pay LU Simon's costs of the proceeding, as he found no reason to depart from the usual order that costs follow the event. The apportionment was similar to all other orders, however all portions increased slightly to cover LU Simon's 3% liability.

Further sums for recladding works

Lastly, the Owners sought an order permitting them to claim further sums for the recladding works within 21 days of practical completion. The Owners' application for liberty to apply for further damages was refused as the matter was outside the scope of the proceedings.

1 *Owners Corporation No 1 of PS613436T v LU Simon Builders Pty Ltd* [2019] VCAT 9.
2 This was in reliance on *Domestic Building Contracts Act 1993* (Vic) section 53(3) and the *Penalty Interest Rates Act 1983* (Vic) section 2.
3 *Hungerford v Walker* (1989) 171 CLR 125 (Mason CJ, Wilson, Brennan and Deane JJ).
4 *Sweetvale Pty Ltd v Minister for Planning* [2004] VCAT 2000 (Morris J).

De-Cladding Victoria: Andrews Government announces new agency to address the combustible cladding crisis

CORRS PROJECTS UPDATE

Background

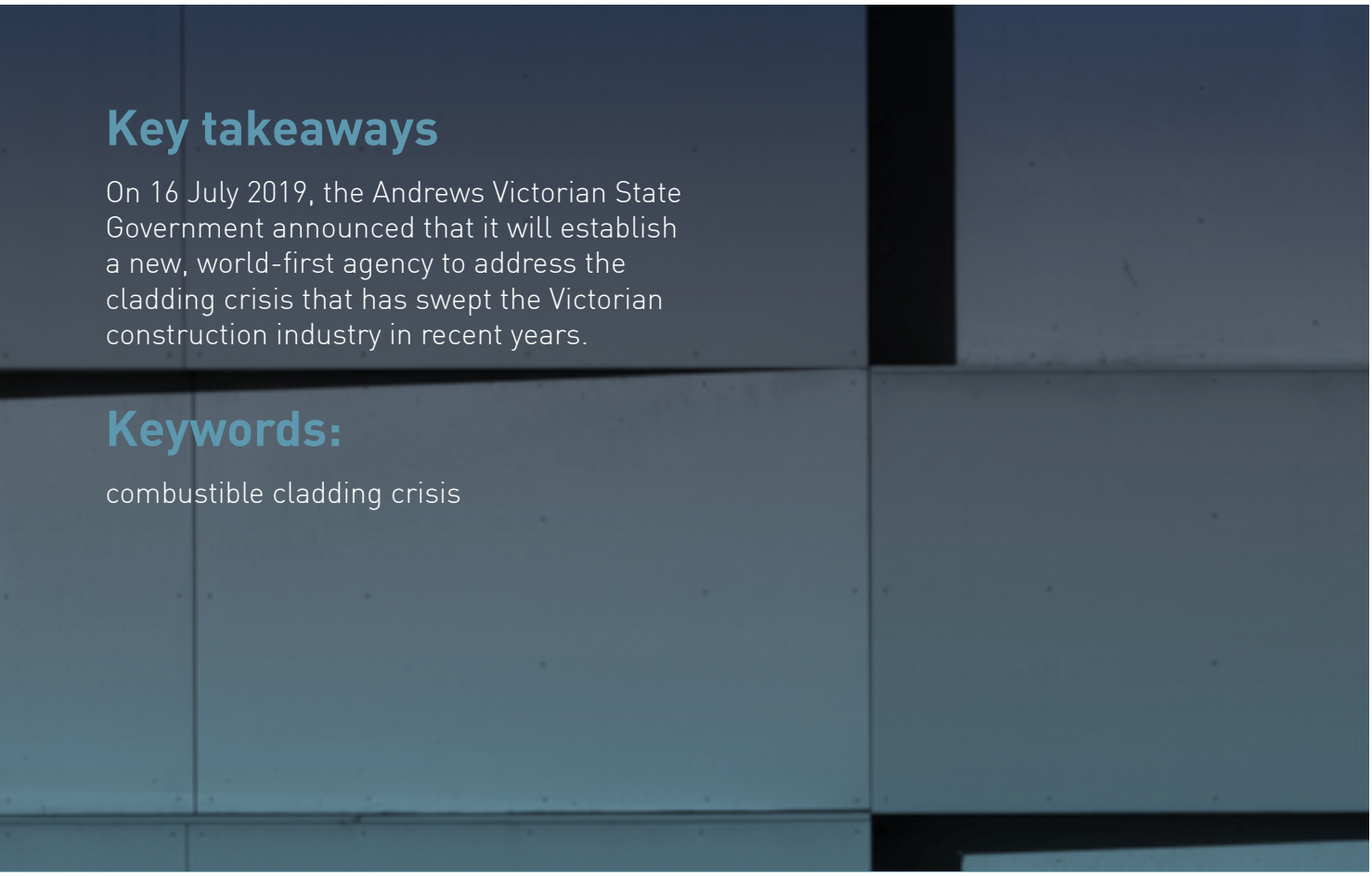
The new agency, Cladding Safety Victoria (**CSV**), will have access to a $600 million package from the State Government to fund rectification works on private residential buildings across the State which have been clad with combustible materials and are classified as "high-risk".

The State Government has committed to directly fund half of this $600 million package, and plans to introduce changes to the building permit levy to raise the remaining $300 million over the next five years.

It is proposed that CSV will work with affected owners' corporations from start to finish. Specific details of the proposed structure and operating methodology for this new agency are yet to be released. However, as the announcement of CSV's establishment coincided with the delivery of the Victorian Cladding Taskforce's Final Report, it is unsurprising that the establishment of this agency was one of the Taskforce's key recommendations.

We expect that CSV's structure and operating methodology will be largely informed by the Taskforce's recommendations,[1] which suggest the agency should, or could, take the following form:

Purpose	To support owners and occupants through the rectification process
Functions	Provide funding for rectification works
	Provide project management support
	Ensure proposed solutions are carried out in a timely and effective manner to bring buildings to an acceptable level of risk
	Educate owners about how to mitigate fire risks until the cladding on their buildings is rectified
Approach / methodology	Adopt a risk-based approach to prioritising buildings for rectification funding with higher-risk buildings eligible for earlier funding and rectification
	Require private owners to transfer their legal recovery rights to CSV as a condition of receiving funding, to allow the State to seek to recover rectification costs from responsible parties



Key takeaways

On 16 July 2019, the Andrews Victorian State Government announced that it will establish a new, world-first agency to address the cladding crisis that has swept the Victorian construction industry in recent years.

Keywords:

combustible cladding crisis

Commercial and legal challenges facing CSV

For many, the establishment of CSV and the announcement of its $600 million fund will be a welcome development. If successful, the CSV could set a positive precedent and be adopted across other Australian states, and possibly beyond.

However, given that CSV is the first agency of its kind and has a complex and widespread issue to tackle, it is likely to face a number of commercial and legal challenges.

While not insurmountable, the following issues will require careful management to ensure CSV operates effectively:

1. Prioritising buildings for rectification

The State Government will need to ensure its method for prioritisation of buildings is consistent across the State and is based on appropriate assessment criteria. It will also need to carefully consider where to draw the line between buildings that are eligible for funding and those that are not. Rectification (or recovery proceedings) that have commenced on high priority buildings should also be addressed. There is a related issue associated with disclosure of buildings to be rectified and the impact on prospective sales of those properties.

2. Limited funding

CSV's rectification fund is, initially, limited to $600 million, which could be exhausted relatively quickly. The State Government should consider whether it will top up the fund if/when it has been exhausted.

3. Quality control

It is assumed that CSV will not directly procure the rectification work, however it will need to take steps to ensure the work is delivered in a consistent and cohesive way and that all relevant standards are met. Part of this may be ensuring the work is not rushed and that design for the rectification is completed before work commences.

4. Insolvency of responsible practitioners may limit recovery

The construction industry is a volatile market — particularly in light of recent developments in cladding-related insurance. CSV may face difficulties recovering from responsible parties if those parties have since become insolvent or wound up.

5. Limitation periods

A number of affected buildings will likely have either reached the statutory limitation period, or be approaching it. CSV will need to commence any recovery proceedings quickly in order to ensure it is not time-barred.

6. Documentary issues

If CSV takes over the legal rights of owners' corporations to seek recovery against responsible parties, it may face practical difficulties obtaining the necessary documents to establish the claims, as standards of document retention may differ widely between owners' corporations.

7. Limited experts to support recovery claims

Given the current climate in the construction industry, many experts (such as fire engineering experts) are unavailable to give evidence in support of claims by owners against other building professionals. This might cause delays or create hurdles to CSV commencing proceedings to recover rectification costs.

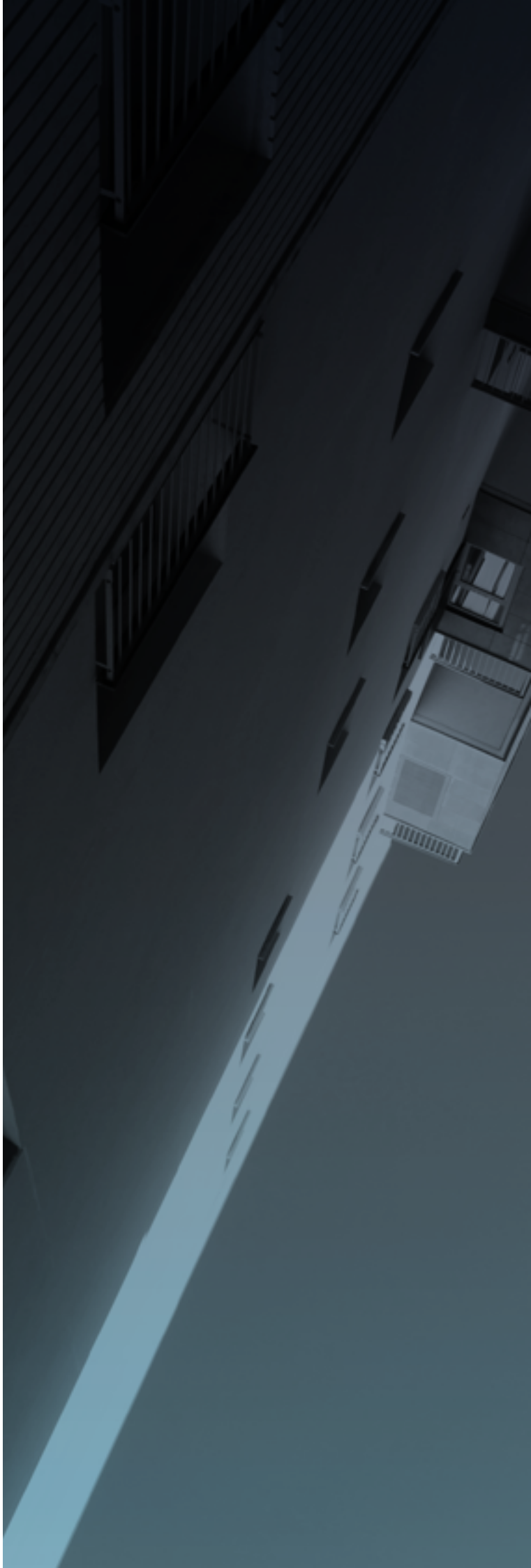
8. Time and cost for recovery

Proceedings in VCAT and the Supreme Court can take years from start to finish. This could result in the State Government using up the rectification fund without any prospect of recovering those costs in the short term (unless early negotiated outcomes can be reached). Further, the costs of investigating, commencing and running multiple recovery proceedings are likely to be significant.

9. Impact on the market

Victoria's infrastructure boom has resulted in capacity shortages for existing projects. A large-scale rectification program for hundreds of buildings will place further strain on the market's capacity.

[Note: this article by Jane Hider, Emily Steiner, Samuel Woff and Julia Korolkova was first published online at https://corrs.com.au/insights/de-cladding-victoria-andrews-government-announces-new-agency-to-address-the-combustible-cladding-crisis.]



1 Victorian Cladding Taskforce Report from the Co-Chairs dated July 2019, available at: https://www.planning.vic.gov.au/__data/assets/pdf_file/0019/426034/DELWP0124_Victorian_Cladding_Taskforce_Final_Report_July_2019_v9.pdf.

Trust Company (Australia) Ltd atf the WH Buranda Trust v Icon Co (Qld) Pty Ltd [2019] QSC 87

CORRS PROJECTS UPDATE

Background

The principal was Trust Company (Australia) Ltd atf the WH Buranda Trust (**Trust Company**). It engaged Icon Co (Qld) Pty Ltd (**Icon Co**) to build student accommodation. During the works, AECOM Cost Consulting Pty Ltd (**AECOM**) acted as the principal's representative.

Clause 7A of the construction contract provided that "notices" were to be served on the "Principal's physical address". Separately, the contract also established Aconex as the method of document control for the project.

Many of the Aconex document control features were automated, including progress claim notifications. When a new progress claim was uploaded to the platform, the intended recipients would automatically receive an email notifying them the document could be downloaded.

All of the progress claims were delivered via Aconex, including Payment Claim 37, which was endorsed as being made under the Building and Construction Industry Payments Act (Qld) 2004 (**BCIPA**). After being uploaded to Aconex, an automated notification email went out to the Trust Company and AECOM saying that Payment Claim 37 was available. AECOM logged in on the same day and downloaded it.

Payment Claim 37 was the subject of an adjudication determination in favour of Icon Co. In this proceeding, the Trust Company sought to have the determination set aside by arguing there was no jurisdiction to make the decision because Payment Claim 37 was not served in the way the contract required.

Issue 1 — contract construction

The primary issue was the construction and application of the competing service clauses.

Trust Company argued a payment claim was a "notice" under clause 7A. This clause required such notices to be served on the "Principal's physical address". This interpretation would exclude the use of Aconex.

Icon Co argued a payment claim was instead a "progress claim" under clause 37.1. This clause required "progress claims" to be *"given in writing to the Principal's Representative"*. This interpretation would allow the use of Aconex.

Applegarth J held that clause 37.1 governed the service of payment claims, which meant Aconex was a valid means of service. His Honour had regard to the "commercial context" of the progress claim process, rather than focusing on the fact the parties had actually sent the previous 36 progress claims over Aconex.

The commercial context gave the service clauses a business-like operation which meant avoiding a *"dual track mechanism"* that would *"bifurcate the service and handling of a single document"*. The construction sought to avoid contractual claims being governed

Key takeaways

Aconex can be used to serve a payment claim under security of payment legislation, if permitted by the contract. This raises a question about the proper construction of the contract.

In this case, this required considering the commercial context rather than what the parties actually did. This avoided a "dual track" construction that separated the handling of a progress claim under one clause from the service of the same claim under another.

The email notification feature of Aconex positions it closely to email. This may pose problems if the contract prohibits the use of email for serving notices. Without careful drafting, an email notification of the document's location (eg, through Aconex) may not constitute service of that document.

Keywords:

Aconex; service of progress claim

by one clause (clause 37.1), under which progress claims were to be *"given in writing to the Principal's Representative"*; and statutory claims being governed by another clause (clause 7A), under which payment claims were to be *"served to the Principal's physical address"*.[1]

This un-businesslike approach was only held to apply to the service of payment claims. Therefore, clause 7A would continue to govern the service of other notices under BCIPA, such as adjudication applications.[2]

Issue 2 — Aconex versus email

The Trust Company also argued that sending a notice by Aconex was equivalent to sending a notice by email (so as to engage the contract's prohibition on using emails for sending a notice).

The Court did not have to determine this issue because clause 37 was interpreted as permitting the use of Aconex. However, Applegarth J suggested that a distinction may be made between an email notification regarding the location of a document (which may not constitute service), and service of that document by email.[3]

https://www.sclqld.org.au/caselaw/QSC/2019/87

1 At [39], adopting *The Owners Strata Plan 56587 v Consolidated Quality Projects Pty Ltd* [2009] NSWSC 1476 at [29] (McDougall J).
2 At [41].
3 At [51].

Built Environs WA Pty Ltd v Perth Airport Pty Ltd (No 2) [2019] WASC 76

CORRS PROJECTS UPDATE

What is a Global Claim?

The term "global claim" generally refers to one of three types of claims: a true global claim, a total cost claim, or a modified total cost claim.

- In a true global claim, a plaintiff's position is that multiple interacting events for which the defendant was responsible caused the plaintiff a total loss. The significance of a global claim is that the plaintiff does not need to establish a precise loss arising from each event.
- In a total cost claim, the plaintiff claims that the defendant's breaches caused the plaintiff loss. The loss in a total cost claim is the actual cost of the work minus the expected reasonable costs.
- In a modified total cost claim, the plaintiff divides up its additional costs and argues that specific events for which the defendant was responsible caused all or part of those costs.

The fundamental difference between a true global claim and a total cost claim lies in what the plaintiff must prove. In a true global claim, the plaintiff must be able to identify the total loss but does not need to identify the causative link between the events and that loss. In a total cost claim, the plaintiff must be able to identify the causative events but does not need to neatly quantify the loss caused by the events, other than by claiming that all additional costs were caused by the events.

Background

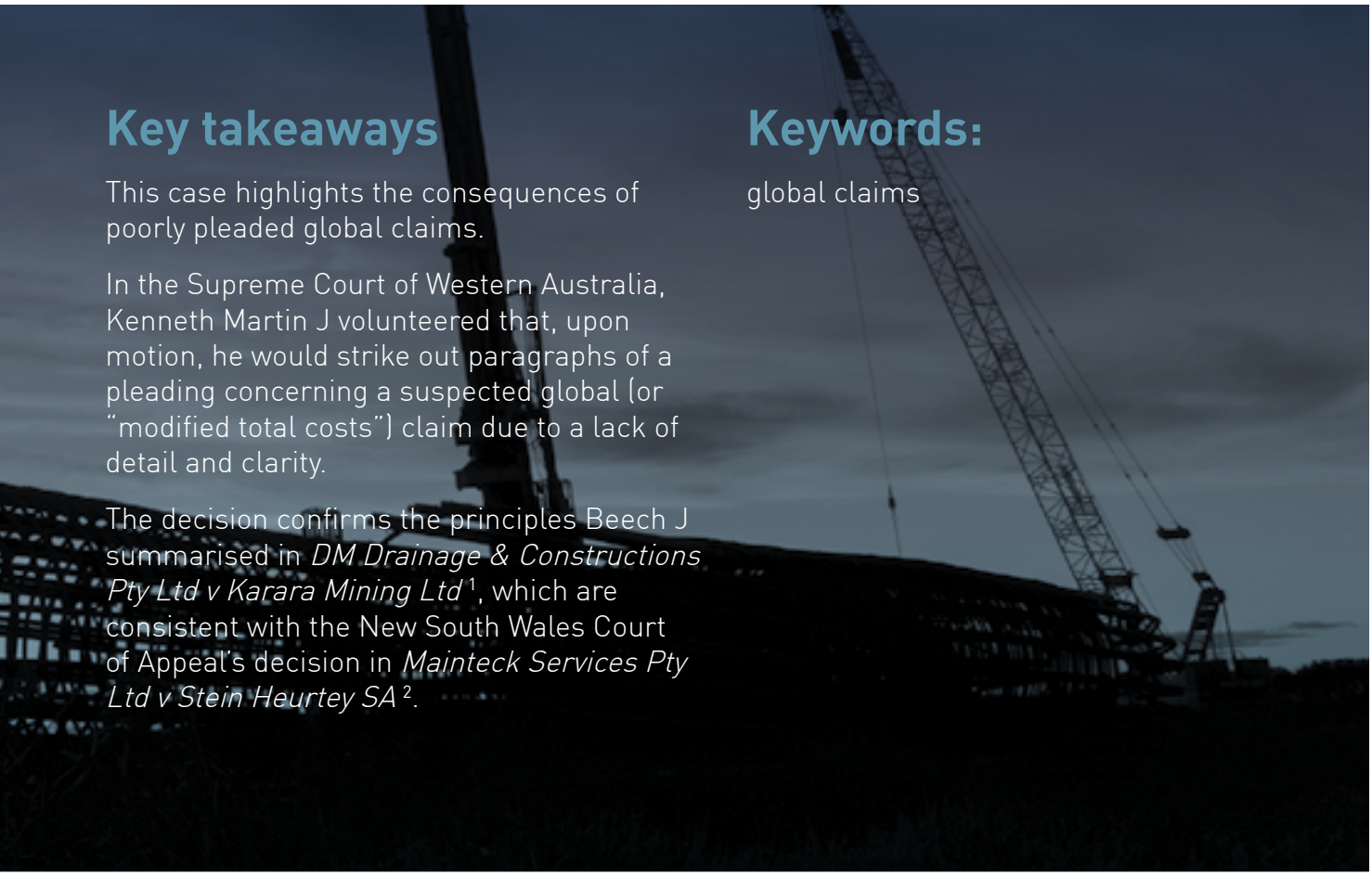
In 2016, Built Environs WA Pty Ltd (**Built Environs**) sued Perth Airport Pty Ltd (**Perth Airport**). The proceeding arose from a contract under which Perth Airport engaged Built Environs to perform major works to airport terminals.

In a substituted statement of claim, Built Environs claimed loss and damage totalling over $4.6 million as a result of alleged "General Drawing Deficiencies". After Perth Airport raised concerns about the sufficiency of detail in Built Environs' substituted statement of claim, Kenneth Martin J issued case management orders:

- requiring Built Environs to file and serve expert evidence of the alleged General Drawing Deficiencies; and
- granting leave for Built Environs to plead the facts establishing the allegations and causation of loss relevant to the alleged General Drawing Deficiencies.

Built Environs filed a preliminary expert report, the (**Brannigan Report**), which purported to provide further details of the alleged General Drawing Deficiencies. Built Environs amended its substituted statement of claim to refer to the Brannigan Report.

Subsequently, Perth Airport sought orders relieving Perth Airport of the requirement to provide discovery in relation to paragraphs of the further amended substituted statement of claim relevant to the alleged General Drawing Deficiencies.



Key takeaways

This case highlights the consequences of poorly pleaded global claims.

In the Supreme Court of Western Australia, Kenneth Martin J volunteered that, upon motion, he would strike out paragraphs of a pleading concerning a suspected global (or "modified total costs") claim due to a lack of detail and clarity.

The decision confirms the principles Beech J summarised in *DM Drainage & Constructions Pty Ltd v Karara Mining Ltd* [1], which are consistent with the New South Wales Court of Appeal's decision in *Mainteck Services Pty Ltd v Stein Heurtey SA* [2].

Keywords:

global claims

During an interlocutory hearing, Perth Airport moved in the alternative for leave to strike out these paragraphs (on the basis that they, read with the Brannigan Report, did not contain sufficient details about the alleged "General Drawing Deficiencies" or any detail about how they might have caused financial loss).

Sufficient Detail and Clarity

Kenneth Martin J found that Built Environs's claim, as pleaded, was *"almost certainly a claim that would fall under the rubric of global (or more correctly, a modified total costs) claim within the context of breached construction contracts and claims for breach damages."* [3]

His Honour referred to Justice Beech's decision in *DM Drainage* and held that Beech J's observations reflect the law in Western Australia. In *DM Drainage*, Beech J held that additional pleading obligations apply when a plaintiff is pleading a global claim or a modified total costs claim. For a total costs claim to succeed, the plaintiff must establish that there were no other operative causes of its loss apart from events that were the defendant's responsibility.[4] In global claims, there is an inference that the difference between the expected costs and the actual costs was caused by the defendant's conduct. The plaintiff must demonstrate that alternative causes are excluded for that inference to be successfully drawn.

Kenneth Martin J found that the Brannigan Report provided no details about the causation of the financial loss:

> *"Thus the Brannigan report does nothing to unlock the continuing mystery (for the defendant) of how the financial loss and damage the subject of par [15], aggregated down to the nearest cent, and exceeding $13 million, comes about".*[5]

His Honour held further that the changes Built Environs made to its statement of claim were only cosmetic and did not contain the necessary detail. It followed, in Kenneth Martin J's judgment, that Built Environ's position was impermissibly unclear and that the matter could no longer continue with such uncertainty:

> *"Notwithstanding the time which has passed since the October 2017 chamber summons, culminating in the December 2017 orders, the position over this issue still remains impermissibly unclear. Even at the hearing of the present application, the plaintiff, by senior counsel, would not or could not commit to a clear position as regards it advancing a modified total costs claim or not, asserting that it should not yet be asked to commit itself, in effect, forensically at this stage about what its position is. In my view, the continuing uncertainty on these core questions has endured long enough. It is no longer tolerable."* [6]

Kenneth Martin J held that when moved, he would grant Perth Airport's application and strike out specific paragraphs of Built Environs's further amended substituted statement of claim on the basis that they did not provide the requisite detail or clarity regarding Built Environs's position about a suspected modified total costs claim.[7]

Implications

One of the implications of global claims is that the defendant faces significant evidential, cost and practical burdens when attempting to unpick the plaintiff's allegations to establish a defence.

The decision in *Built Environs v Perth Airport* demonstrates that, to successfully plead a global claim, the plaintiff must make clear that there is a global claim and specify:

- the events causing the claimed loss; and
- any alternative causes of the loss.

The benefit of a true global claim or total or modified loss claim remains that either:

- the plaintiff does not need to prove a causative link (a true global claim); or
- the plaintiff does not need to quantify the loss flowing from each event (a total or modified costs claim).

However, the decision in *Built Environs v Perth Airport* demonstrates that some burden does rest on the plaintiff to plead its claim properly to allow the defendant adequate opportunity to prepare a defence.

Tips for pleading Global Claims

The case provides important lessons for practitioners drafting statements of claim which contain a global claim, total costs claim, or modified total costs claim. The statement of claim must detail:

- the type of claim;
- the events causing the claimed loss; and
- the reasons for the lack of alternate causes of the loss.

https://ecourts.justice.wa.gov.au/eCourtsPortal/Decisions/ViewDecision?returnUrl=%2feCourtsPortal%2fDecisions%2fFilter%2fSC%2fPartyNames&id=4ce5b2b4-b20c-45e6-95e5-84f5a4cc14c7

1 [2014] WASC 170.
2 [2014] NSWCA 184.
3 At [42].
4 At [46], citing *DM Drainage & Constructions Pty Ltd as Trustee for the DM Unit Trust t/as DM Civil v Karara Mining Ltd* [2014] WASC 170 at [59].
5 At [39].
6 Ibid [50].
7 Ibid [56].

Parent Company Guarantee can't circumvent arbitration because it's not "as good as cash"

CORRS PROJECTS UPDATE

Background

INPEX Operations Australia Pty Ltd engaged JKC Australia LNG Pty Ltd (**JKC**) to engineer, procure, construct and commission the Ichthys Onshore LNG Production Facility, which forms part of the Ichthys LNG Project.

The onshore facilities are powered by a Combined Cycle Power Plant (**Power Plant**). JKC subcontracted the engineering, procurement, construction and commissioning of the Power Plant to a consortium of CH2M Australia Pty Ltd, UGL Infrastructure Pty Ltd, General Electric Company and General Electric International Inc (**Consortium**).

The performance of the Consortium's obligations under the subcontract was guaranteed by Parent Company Guarantees (**Parent Company Guarantees**) given by CH2M Hill Companies Ltd, UGL Pty Ltd, and General Electric Company (the **Parents**).

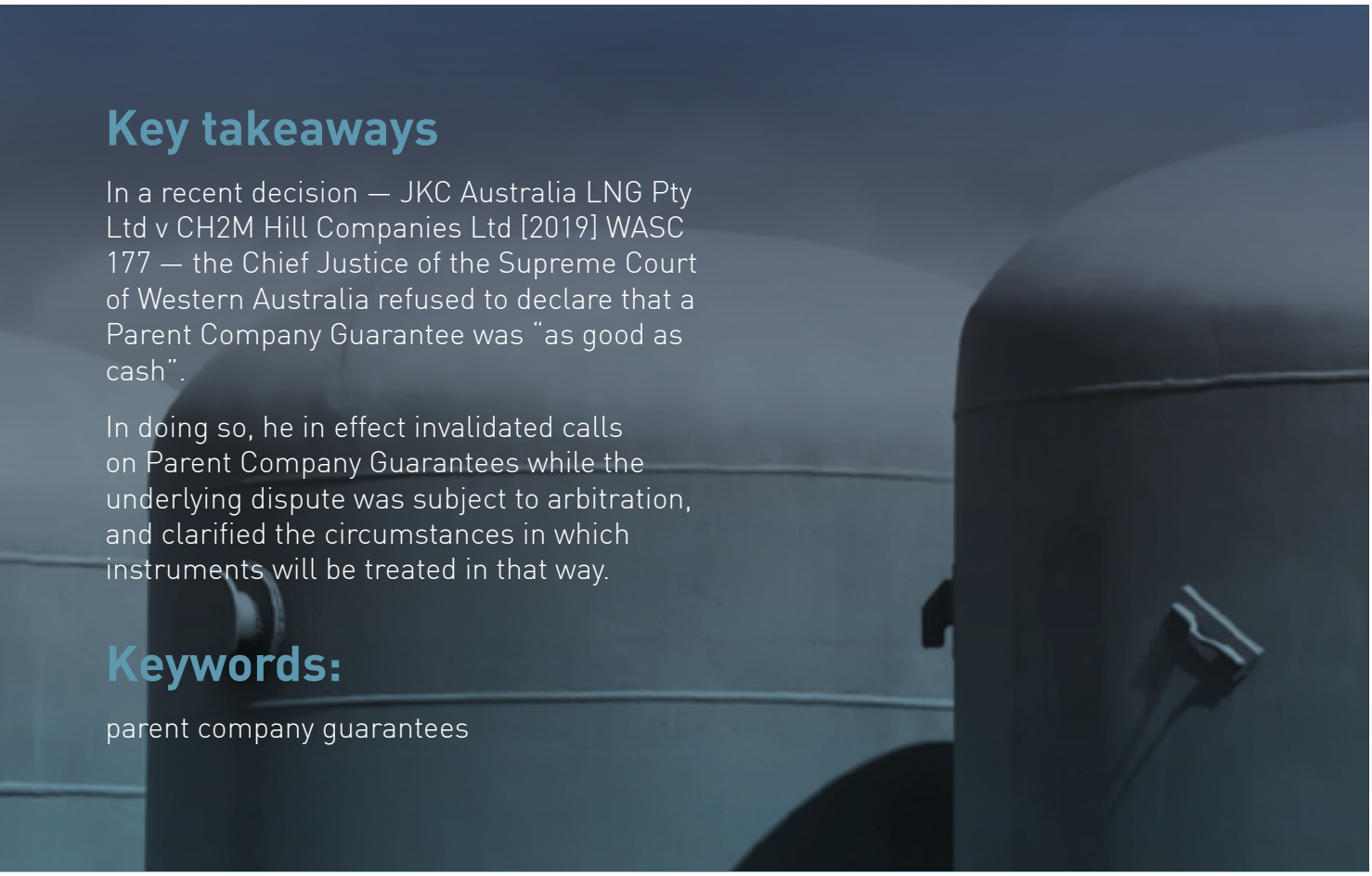
The subcontract was terminated no later than 2 February 2017 and disputes arose between JKC and the Consortium relating to the subcontract and its termination. These disputes are presently the subject of an arbitration. JKC is claiming the costs of engaging replacement subcontractors to complete the Power Plant, and the Consortium is claiming for the value of the work it performed.

On 24 July 2018 and 2 November 2018, with the arbitration still unresolved, JKC issued demands to the Parents under the Parent Company Guarantees. The Parents denied they had any liability under the Parent Company Guarantees for the amounts claimed, on the basis that the Consortium's liability was still in dispute, and that they were entitled to rely on any defence, set-off or counterclaim available to the Consortium.

The court proceedings — what were the issues?

JKC brought proceedings in the Supreme Court of Western Australia seeking a number of declarations as to the proper construction of the Parent Company Guarantees. JKC argued that the Parent Company Guarantees should be treated as "pay now, argue later" instruments, similar to bank guarantees.

The Parents argued that any obligation under the Parent Company Guarantees depended on establishing actual liability under the subcontract. This being so, they could rely on any defence, set-off or counterclaim that the Consortium could assert to resist payment under the Parent Company Guarantees. In that context, the Parents also challenged JKC's ability to form a reasonable opinion as to the Parents' liability without reference to the Consortium's defences.



Key takeaways

In a recent decision — JKC Australia LNG Pty Ltd v CH2M Hill Companies Ltd [2019] WASC 177 — the Chief Justice of the Supreme Court of Western Australia refused to declare that a Parent Company Guarantee was "as good as cash".

In doing so, he in effect invalidated calls on Parent Company Guarantees while the underlying dispute was subject to arbitration, and clarified the circumstances in which instruments will be treated in that way.

Keywords:

parent company guarantees

A question of construction

The dispute turned partly on the construction of clauses 2, 3 and 9.2 of the Parent Company Guarantees.

- Clause 2 provided that the Parents *"unconditionally and irrevocably guaranteed"* the performance of the Consortium's obligations under the subcontract, including *"the payment of any amounts due an unpaid under the subcontract"*.
- Clause 3 provided that, if in JKC's *"reasonable opinion"*, the Consortium had failed to perform any obligations under the subcontract, the Parents were required to perform those obligations on receiving written notice from JKC *"until the termination of the Subcontract by the effluxion of time or otherwise"*.
- Clause 9.2 related to the limitation of the guarantors' liability under the subcontract, and stated that in the event of *"any claim under this guarantee"*, the guarantor was entitled to assert any defence, set-off or counterclaim.

Parent Company Guarantees not "as good as cash"

Quinlan CJ found that the Parent Company Guarantees were not in the nature of performance bonds, and did require actual liability on the part of the Consortium. Accordingly, the Parents were entitled to assert any defence, set-off or counterclaim to a claim under the Guarantees.

In coming to that conclusion, Quinlan CJ started from a conventional position of giving the Parent Company Guarantees the meaning that reasonable commercial businesspeople would have understood them to mean. Again, conventionally, his Honour considered the text, context (including the subcontract and other bank guarantees provided under it) and their purpose.

He then turned to guarantee-type provisions, and recognised that the decided authorities direct attention to two common commercial purposes for these documents:

- first, as a mechanism to provide security; and
- second, as a contractual allocation of risk.

His Honour emphasised that these purposes must be discerned as a matter of construction.

The Parents argued that a presumption against the second purpose arises where guarantees are not provided by banks, relying on the decision of the Court of Appeal of England and Wales in *Marubeni Hong Kong and South China Ltd v Mongolian Government*.[1] His Honour found that this presumption did not form part of the law of Australia, which eschews reliance on presumptions in favour of construing the relevant contract itself using its text, context and purpose.

Applying the Australian principles to the Parent Company Guarantees, Quinlan CJ determined that the words of the subcontract did not suggest that the Parent Company Guarantees served a "risk allocation" purpose as contended by JKC, and so, was not intended to be akin to performance security.

In coming to that conclusion, his Honour gave weight to:

- the words *"to guarantee the due performance of Subcontractor's obligations"*, which preceded the Parent Company Guarantees in the subcontract, suggested that their true purpose was to serve as a mechanism for the Parents to provide security for the subsidiaries' performance;
- the words *"payable on first demand of Contractor"* in the subcontract supported a risk allocation purpose and, in context, could only apply to the bank guarantees contemplated by the subcontract and not the Parent Company Guarantees;
- the context in which guarantees by parent companies are often given. In such cases, parent companies have a real interest in the rights of the parties under the underlying contract, and are the very kind of entities that a reasonable businessperson would expect to be providing security for their subsidiaries' performance. This is a different scenario to that of a bank providing a bond or a letter of credit; and
- the terms of the Parent Company Guarantees did not contain any express provision which could be said to denote the *"cash equivalent"* and *"pay on demand"* quality of performance bonds. Rather, they manifested an intention and a purpose that the Parents had a real and substantial interest in the actual liability of the subcontractor, and that actual liability is what would determine the extent of the Parents' liability.

Comment

This decision is a good example of the Australian approach to the construction of contracts, whatever their nature. Australian courts will focus on the objective meaning of a contract, and will as a rule be reluctant to use any presumptions to fetter that focus.

It also emphasises that when drafting security that is to be "as good as cash", drafters must be careful to ensure that purpose and intent are clear on the face of the agreement. To achieve this they can:

- use clear words in the underlying contract, such as "payable on first demand" when referring to the security in question; and
- include a clause in the security instrument which notes that the guarantor's obligation to make payment arises on demand, notwithstanding any contest or dispute by the relevant party to the underlying contract.

https://ecourts.justice.wa.gov.au/eCourtsPortal/Decisions/DownloadDecision/060d8a0b-38eb-4ac3-9c19-b5bf5f6a38c9?unredactedVersion=False

[Note: this article by Spencer Flay, Callum Strike and Julien Blais was first published online at https://corrs.com.au/insights/parent-company-guarantees-cant-circumvent-arbitration-because-they-arent-as-good-as-cash.]

1 [2005] 1 WLR 2497. See also *IIG Capital LLC v Van De Merwe* [2008] EWCA Civ 542; and *Vossloh Aktiengesellschaft v Alpha Trains* (UK) Ltd [2011] 2 All ER (Comm) 307.

Papua New Guinea's new Prime Minister is focused on growing the economy and ensuring equitable distribution of benefits from major projects

CORRS PROJECTS UPDATE

Papua New Guinea's National Parliament has recently elected a new Prime Minister, Hon James Marape, in an orderly and democratic process – Mr Marape becomes only the third person to be appointed to the top post since 2002 highlighting the relative stability of leadership within PNG over the best part of two decades.

In his maiden speech, Mr Marape has flagged the need to review Papua New Guinea's resource laws with a view to achieving a more equitable distribution of the wealth generated from resources projects to the country and its people. It is unlikely that this review will be rushed, with the Prime Minister indicating that the new legislative framework may not be implemented until 2025, the year in which Papua New Guinea will celebrate 50 years of independence.

Significantly, Mr Marape has signalled that there would be consultation with industry on the changes, noting the important role foreign investment plays in driving economic growth. Mr Marape has also stated that existing project agreements, lawfully entered into by the State, will be honoured.

Papua New Guinea is blessed with bountiful natural resources including oil, gas, gold, nickel and copper. It is also home to the USD19 billion, ExxonMobil operated, PNG LNG Project which commenced production in 2014 and demonstrated that large scale projects can be developed in Papua New Guinea. Such projects, however, require very substantial capital expenditure, only possible with foreign investment. The proposed review of resource laws will need to strike the right balance between the interests of investors and the people of Papua New Guinea to ensure that investment continues with the support of the people.

A National Hydrogen Strategy – What does it mean for Australia?

CORRS PROJECTS UPDATE

Last year, the Council of Australian Governments' (**COAG**) Energy Council formed the Hydrogen Working Group (**HWG**) under the leadership of Australia's Chief Scientist, Dr Alan Finkel. This follows a worldwide trend which has seen governments and industry seriously investigate the potential avenues of producing or scaling up production of hydrogen as an alternative energy source.

The HWG released a discussion paper in March this year outlining the feasibility of a hydrogen industry in Australia and after subsequent stakeholder consultation, released a series of issues papers on 1 July 2019 discussing the potential of a "National Hydrogen Strategy". State-level hydrogen strategy papers have also been developed in Queensland, South Australia and Western Australia, with other States also committing to funding various hydrogen-related programs and projects.

The idea of a National Hydrogen Strategy is premised around leveraging Australia's current gas and renewable energy capabilities to develop a large-scale hydrogen export industry with the potential to add billions to our economy, while also increasing energy efficiency and reducing greenhouse gas (**GHG**) emissions both here and abroad. A big proponent of hydrogen, Alan Finkel, has high hopes for the plan and has indicated that if it succeeds, it will signal a major shift in Australia's energy landscape.

What is hydrogen gas?

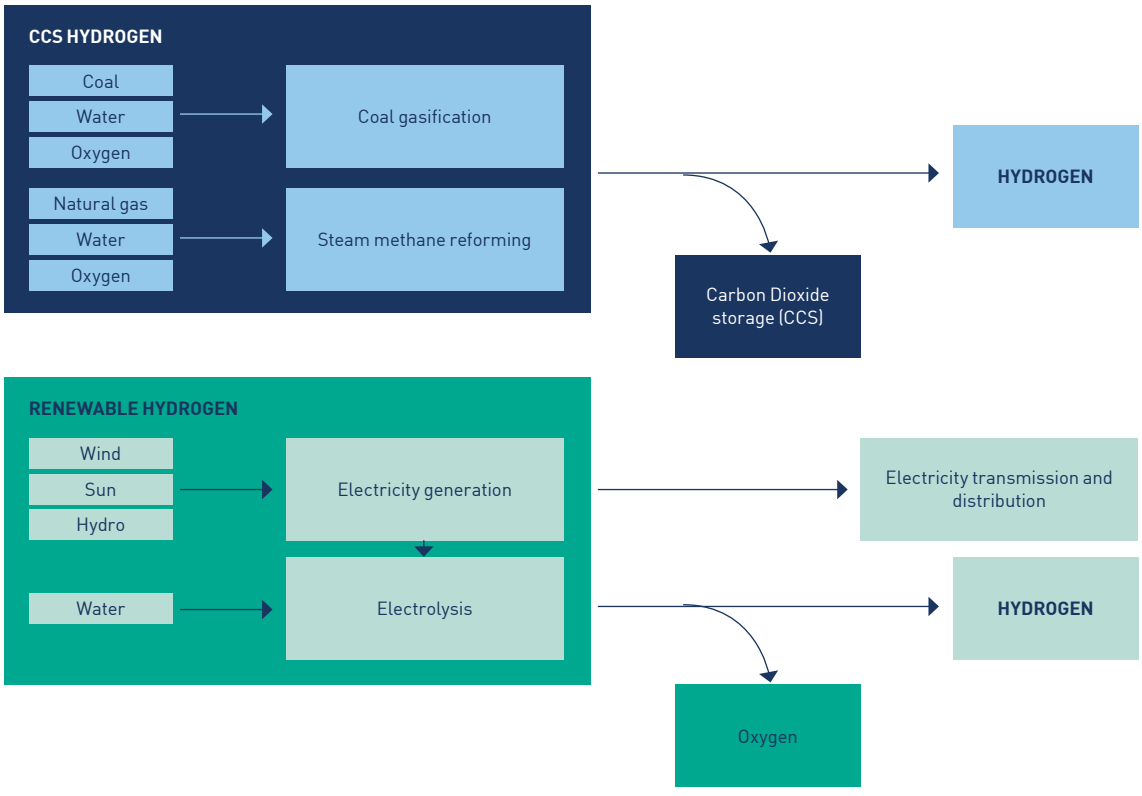
Hydrogen is the most abundant chemical element in the universe but is not freely available in its gaseous form. It instead exists in nature bound into compounds like water and fossil fuels, and accordingly needs to be extracted in order to be used as a gas.

Similar to natural gas, hydrogen gas can be used as a heat source, an electricity generator and a fuel to power vehicles. Hydrogen powered vehicles run via an electrical "fuel cell" which gives similar mileage and performance to a petrol or diesel vehicle, rather than a standard battery powered electric car. A major benefit of hydrogen is that when it is used as a fuel (for example in a hydrogen powered car) there are none of the emissions you would expect from a traditional internal combustion engine; instead only water vapour is produced. Hydrogen also has an impressive energy potential of around 2.4 times that of natural gas, which when combined with its potential for reduced GHG emissions makes it a desirable energy alternative for industrial and household uses.

How is hydrogen produced?

The HWG have been pursuing the idea of hydrogen with a clear focus on reducing GHG emissions. The reports and issues papers only deal with production of "clean" hydrogen, which they define as being produced either purely by using renewable energy and water, or by using fossil fuels combined with carbon capture and storage

technologies (**CCS**). These two methods of producing "clean hydrogen" are illustrated below.



Source: Hydrogen for Australia's Future, Commonwealth of Australia (2018)

There are two "commercially feasible" production pathways currently being considered by the HWG to produce hydrogen. These are referred to as **thermochemical** pathways and **electrochemical** pathways.

Thermochemical pathways involve heating a fossil fuel feedstock to produce hydrogen, and therefore require concurrent CCS in order to be considered "clean" hydrogen production. Typical thermochemical methods are steam methane reforming (**SMR**) which uses natural gas and steam, and gasification which uses coal or waste biomass. The majority of hydrogen produced at the moment is produced through these methods, and SMR is currently the cheapest and most common form of hydrogen generation.

Electrochemical pathways, on the other hand, use an electrical current to split purified water into hydrogen and oxygen in a process called **electrolysis**. As this process runs off electricity, it has the potential to be powered off purely renewable sources such as wind or solar. The process is however quite water-intensive, with typical electrolysis requiring an input of 9 kg of purified water to produce 1 kg of hydrogen. Methods for mitigating the considerable impact that large-scale electrolysis would have on existing water demands include utilising desalination plants and recycled water treatment plants to supply the water needed for the process.

Hydrogen production methods can be coupled with renewable energy systems to create clean energy with the ability to significantly abate carbon emissions. The benefit of producing hydrogen through renewable electricity is that the hydrogen molecules are able to store energy much like a battery, which can then be used when those renewables are not producing electricity. This has led to hydrogen advocates, like Finkel, likening an Australian hydrogen export industry to "exporting sunshine". Once produced, the hydrogen can be compressed and stored as a gas or liquefied, much like natural gas, for transport via truck, rail, ship or pipeline.

Why Australia? And why now?

The HWG describes Australia as being in a prime position to become a world leader in hydrogen exports. They point to Australia's abundant renewable energy resources, access to gas infrastructure and expertise in LNG exports as a reason for pursuing a hydrogen industry. The HWG does not shy away from the other clear driver, which is the potential for a huge hydrogen export market in Asia, specifically in Japan and Korea. Australia is conveniently positioned nearby both geographically and economically as an already valued energy provider and partner in the region to capitalise on this emerging market.

Both Japan and Korea are highly dependent on imported energy, which make up 94% and 81% of their total energy use respectively. Both countries have a strong focus on hydrogen as part of transitioning away from fossil fuels while at the same time ensuring energy security and diversity. However, there are currently no large-scale exporters of hydrogen able to meet this demand.

Japan released its "Basic Hydrogen Strategy" in 2017 which outlines the country's commitment to emissions reduction and an increased focus on imported hydrogen as an energy source. Korea's "National Basic Plan for New and Renewable Energies" similarly includes policies likely to increase the uptake of hydrogen in the country. The HWG suggests an aspirational target of Australia securing 50% of Japan and Korea's hydrogen supply by 2030.

Importantly, both of these countries have made commitments to their hydrogen imports being of sustainable origin, with Japan stating their imports need to be "carbon free" from 2030 and Korea indicating that imported hydrogen should come from water electrolysis and be "CO2 free" by 2040.

An analysis done in June 2019 by the International Energy Agency found that by 2030 it would be cheaper for Japan to import Australian hydrogen produced using renewable energy than to produce it onshore. This analysis determined that even when the costs of transport in this scenario made up between 30% and 45% of the total end cost of the hydrogen, renewables-powered electrolysis in Australia would still be the cheaper option.

What would an Australian hydrogen industry look like?

While the National Hydrogen Strategy is still in its consultation phase, Alan Finkel and the HWG have quite a clear direction of what they envisage for the future. The vision is that of large-scale hydrogen for export as well as domestic consumption being produced through electrolysis using renewable energy, with fossil fuel-reliant pathways coupled with CCS being an intermediate step on the way to achieving this.

The recent issues papers released by the HWG focus on nine different aspects that need to be considered in developing a National Hydrogen Strategy. They explore questions such as how hydrogen production can work at scale, how to attract foreign investment in Australian hydrogen, how to develop a successful export industry, and where hydrogen would fit in with Australia's current gas network.

The HWG identify a number of measures already established by the Australian Government that could assist in launching the industry including the Australian Renewable Energy Agency, the Clean Energy Finance Corporation, the Clean Energy Innovation Fund, the Emissions Reduction Fund and the Climate Solutions Fund.

As it stands, a number of hydrogen demonstration projects have already been established around Australia including the Hydrogen Energy Supply Chain (**HESC**) project in the Latrobe Valley in Victoria. The HESC project officially commenced construction on 19 July 2019 and aims to produce hydrogen through gasification of brown coal combined with CCS. The hydrogen is then to be exported to Japan beginning in 2020 using a world-first specialised hydrogen shipping vessel.

What are some of the current barriers?

While the HWG would ideally like renewables-powered electrolysis producing hydrogen in Australia, the reality is that currently 98% of hydrogen produced globally is through SMR or gasification of coal. This is largely due to the very high cost and inefficiency of current electrolysis processes, which require large amounts of both electricity and purified water to produce hydrogen. Further, if the electricity being used for the electrolysis is not 100% from renewable sources, then it generates significant GHG emissions during production which negates the potential benefits of the end product.

Using SMR or coal gasification combined with CCS comes with several issues of its own. Carbon dioxide is still produced from these processes and current CCS technology typically only captures 60% to 90% of the emissions produced. CCS technologies are still in their infancy in Australia and come at a considerable cost to build and operate. There are also practical issues of actually storing carbon underground. By way of example, the multi-billion dollar ZeroGen Project in central Queensland never got off the ground, largely due to a failure to find adequate underground storage areas to keep the captured carbon. When a suitable storage area was found, the cost of transporting the carbon to this remote location ended up increasing the cost of the project exponentially. On top of this is the significant risk that the carbon storage will eventually prove ineffective, and the gas leaks back into the atmosphere making the whole operation redundant.

Where to from here?

While the ambitious plan from Australia's Chief Scientist does have the potential to reshape our energy landscape, current hydrogen production in Australia is nowhere near the scale envisaged by the HWG, and reaching this goal is going to involve overcoming some serious hurdles.

It may be a while before we start seeing hydrogen fuel cell vehicles hitting the mainstream or Australian hydrogen exports to Asia overtaking LNG, but a National Hydrogen Strategy remains very much on the cards. The amount of political power behind this and the number of hydrogen projects already in motion nationally is testament to the potential this industry is perceived to have.

Once the HWG considers the submissions from this latest round of consultation which closed at the end of July, we can expect a draft strategy to be considered by State and Federal Energy and Resources Ministers in August and be released for public consultation in September this year. The HWG aims to have a completed National Hydrogen Strategy by the end of 2019.

Are we whistling against the wind?

CORRS PROJECTS UPDATE

Recent amendments to Australia's corporate whistleblower protection regime have been heralded as game-changing but a careful analysis raises many questions.

The development of Australia's corporate whistleblower protections regime has been years in the making. Now that it has come in to effect, it is worth recapping on its purpose and whether it lives up to expectations.

Laws concerning *"whistleblowing"* are not new. The new regime, under Part 9.4 AAA of the *Corporations Act 2001* (**Act**), came about because existing laws were considered theoretical, due largely to their inability to:

- protect whistleblowers from reprisals;
- hold those responsible for reprisals to account;
- effectively investigate alleged reprisals; and
- seek redress for those reprisals[1]

Bear in mind that the purpose of a whistleblowing policy is generally to promote good risk management and corporate governance and assist those covered[2] to speak up without fear of reprisal. Having a transparent whistleblowing policy that sets out clearly how a complaint will be investigated and how a whistleblower will be protected is key to this objective.

In this regard, the current legislation appears to fall short. Key areas of concern are:

- the practicalities - one size does not fit all;
- the emergency and public interest disclosure provisions;
- the removal of good faith requirements;
- the role of HR; and
- the policy is too prescriptive.

Practicalities of the Regime - One size does not fit all

The Act covers large corporations who have sophisticated investigation procedures and others including those who have limited financial resources. Smaller companies caught by the regime may also struggle with the confidentiality provisions.

In order for a *"whistleblower"* to receive protection, they first must report the matter to ASIC, APRA, a regulatory body, a legal practitioner or an eligible recipient.[3] If the entity is a body corporate, the eligible recipient can include a senior manager or officer.[4]

The potential wrongdoing must be about misconduct or an improper state of affairs in relation to the regulated entity. This includes contravention of a provision of any law of the Commonwealth that is punishable by

imprisonment for a period of 12 months or represents a danger to the public or the financial system.[5]

Once a complaint about misconduct has been made to the right person or body, the protections of the Act are enlivened, and protecting the confidentiality of the whistleblower becomes a paramount consideration.

In this respect, the Act makes it unlawful (potentially punishable as a criminal offence and by way of civil penalty) to disclose the identity of the whistleblower or other information likely to lead to their identity being discovered, unless it is an "authorised disclosure". This is fundamental to the new regime. Making it clear that a breach of confidentiality may lead to imprisonment is expected to give people confidence in the system and report.

However, this also means regulated entities will need to handle complaints in a way that does not inadvertently involve breach of the confidentiality provisions. To give an example, if a complaint involves bullying, instinctively an eligible recipient of the body corporate who receives that complaint may refer it to their human resources department. However, under the new regime, a complaint of bullying is likely to be classed as misconduct[6] and so must be treated as a whistleblowing complaint, bringing with it all of the confidentiality obligations.

For many businesses, this may mean having to completely re-engineer internal investigation procedures.

Emergency and Public Interest Disclosures provisions

The Government revised the emergency disclosure provisions to align the Act with the *Public Interest Disclosure Act 2013*, allowing disclosures to be made to a journalist of a member of parliament either as a public interest disclosure or an emergency disclosure, provided certain requirements are met.

To be afforded the protection under the Act, the whistleblower *must first* notify the Regulator and then *wait 90-days* (in the case of a public interest disclosure) before being able to raise the concern with a journalist or member of parliament and only after they have notified the Regulator that they intend to make a public interest disclosure.

In the case of an emergency disclosure, there is no waiting period. What is required is prior notification to the Regulator and the whistleblower believing that the information concerns a substantial and imminent danger to the health or safety of one or more persons or to the nature environment.

1 Parliamentary Joint Committee on Corporations and Financial Services, Executive summary.
2 Those entities covered include, public companies, large proprietary companies; and proprietary companies that are trustees of registrable superannuation entities within the meaning of the *Superannuation Industry (Supervision) Act 1993* (see 1317AI of the Act).
3 *Corporations Act 2001* section 1317AA(1)-(3).
4 RG 000.61 Draft Regulatory Guide.
5 *Corporations Act 2001* section 317AA(5).
6 *Crimes Act 1958* (Vic) 'Brodies Law'.

These provisions have the potential to cause difficulty.

For example, the Act requires regulated entities notify employees of the protections in the Act, for example by way of policy.[7] Technically, to comply with this requirement regulated entities will need to include in their whistleblower policy guidance that employees must first report the alleged misconduct to the Regulator.

The Draft Guidance[8] appears to support this position. While it notes under Good Practice Guidance that *"It is good practice for an entity's policy to encourage its employees and external disclosers to make a disclosure to the entity in the first instance."*[9], it also states in terms of complying with your legal obligations:

> *"An entity's policy should explain that disclosures of information relating to disclosable matters can be made to ASIC, APRA, or another Commonwealth body prescribed by regulation and qualify for protection under the Corporations Act."*[10]*; and*
>
> *"An entity's policy should explain that disclosures can be made to a journalist or parliamentarian under certain circumstances and qualify for protection."*[11]

This is unlikely to be well received by employers covered, as they will want to know first up about any potential misconduct so that they can attempt to resolve it internally. The new regime does not do this. It promotes first notification externally.

Removal of "Good Faith" Requirement

Under the previous whistleblower protections, disclosures had to be made in "good faith" to qualify for the protections. This minimised the risk of personal grievances being reported as it excluded protection for any reports made maliciously or with an ulterior motive.

In reviewing the previous regime, there was concern the "good faith" requirement could have the effect of discouraging whistleblowers from coming forward if they had multiple motives. While many interest groups including the Law Council of Australia supported the removal of the good faith requirement, many qualified their support on the basis that whistleblowers must disclose their identity in order to gain protection.

Under the new regime, the whistleblower must have "reasonable grounds" to suspect the alleged wrongdoing and can report anonymously.

The Draft Guidance suggests that relevant company policy can include a statement discouraging deliberate and false reporting[12] and can include an explanation about the potential consequences of deliberate false reporting to the entity's reputation and the reputations of those mentioned in the false report.[13]

However, the Draft Guidance does not go as far as to say that entities can include a statement that employees may be disciplined for false reporting. This is not consistent with the content of most Code of Conduct type policies, which generally include wording to the effect that making vexatious complaints is grounds for discipline.

Put simply, the new regime does not appear to contemplate challenges faced by employers in dealing with vexatious complaints. Employers covered may be forced to deal with vexatious complaints under the new regime and with little or no ability to discipline employees who make complaints for ulterior motives.

The role of HR

Most employers already have procedures in place for dealing with complaints by employees. In this context, the Act appears to acknowledge management prerogative by seeking to carve out personal work-related grievances from the ambit of the new regime. Examples of personal work related grievances include:

- an interpersonal conflict between the discloser and another employee;
- decisions that do not involve a breach of workplace laws:
  - about the engagement, transfer or promotion of the discloser;
  - about the terms and conditions of engagement of the discloser; or
  - to suspend, terminate or otherwise discipline the discloser.[14]

In practice however, it may be difficult to identify what a personal work related grievance is.

In addition, it may not be apparent until after an investigation has commenced that a matter is not a personal work related grievance and is otherwise covered by the new regime. However by then, the complaint may have been dealt with under another company policy, meaning the employer may have already breached the confidentiality requirements of the new regime.

Further, while the Draft Guidance notes that workplace grievances remain the jurisdiction of the *Fair Work Act 2009* (Cth),[15] it also explains that a personal-work related grievance still qualifies for protection if:

- it includes information about misconduct, or information about misconduct includes or is accompanied by a personal work-related grievance (mixed report);
- the entity had breached employment or other laws punishable by imprisonment for a period of 12 months or more, engaged in conduct that represents a danger to the public or the disclosure relates to information that suggests misconduct beyond the discloser's personal circumstances;
- the discloser suffers from or is threatened with detriment for making a disclosure; or
- the discloser seeks legal advice or legal representation about the operation of the whistleblower protections under the Act.[16]

In practical terms, eligible recipients will need to develop a good understanding of complaints early so they can decide how to treat them. Because the consequences for breaching confidentiality are so severe, employers covered may be forced to err on the side of caution and treat at least a higher proportion of complaints as complaints under their whistleblowing policy, meaning more time and expense dealing with them.

Furthermore, because employees can notify a complaint to the Regulator in the first instance (and should do so if they want to utilise the emergency disclosure or public interest provisions), the first time an employer may know about a complaint may be after the Regulator comes knocking. This will not be good news to those who seek to resolve employment related complaints early, at a workplace level.

The policy is too prescriptive

The Draft Guidance sets out in detail the information that ASIC suggests be included in any whistleblower policy. In our view, this has the potential to lead to a highly prescriptive document that is more likely to confuse, rather than guide.

For the Act to achieve its aim of encouraging people to report misconduct, a whistleblowing policy should ideally be brief, easy to understood and convey key messages. This may be difficult to achieve if the level of prescription proposed by the Draft Guidance is adopted.

What does this mean for regulated entities?

While reform to the corporate whistleblower protection regime was long overdue, more work needs to be done on implementation.

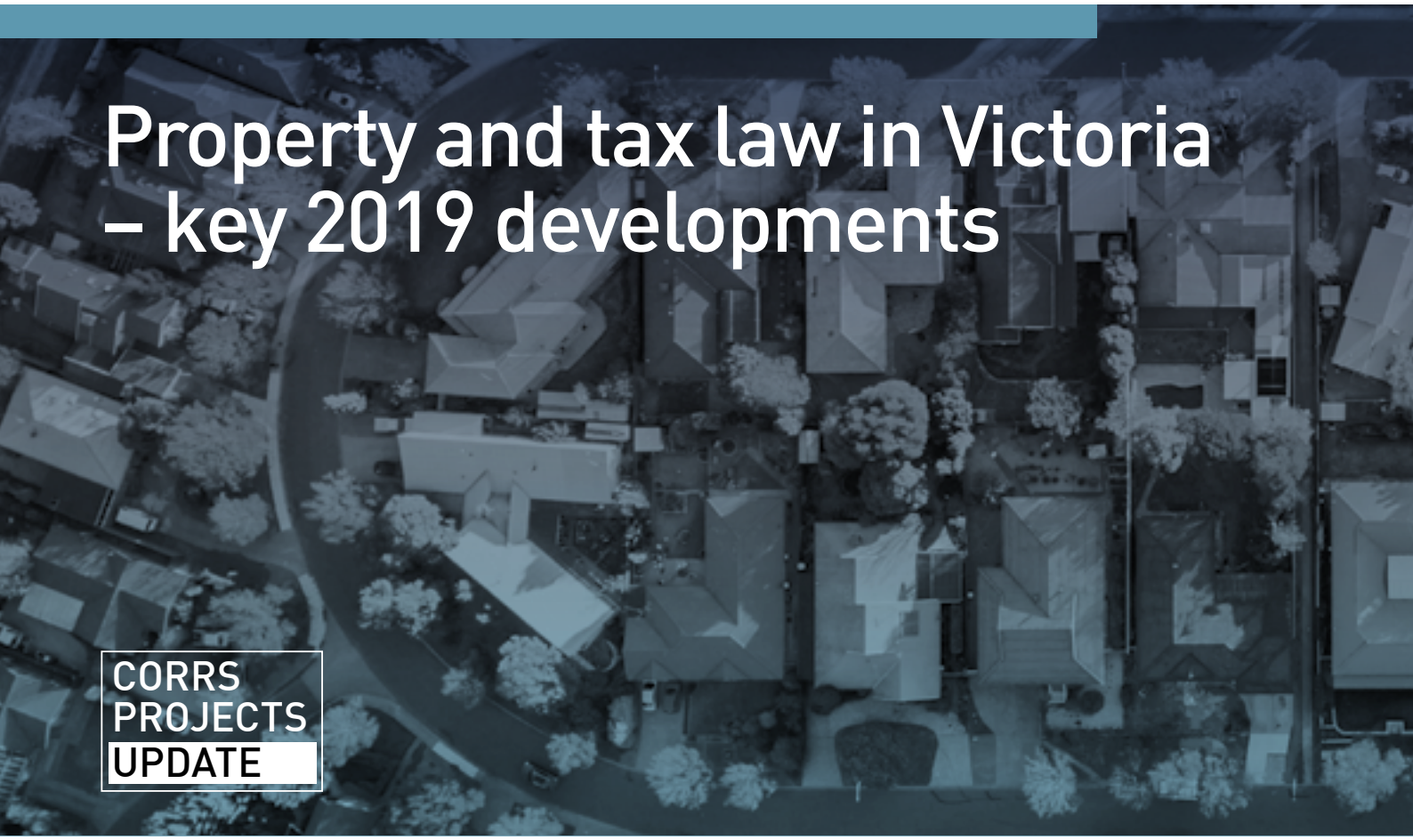
For now, regulated entities should ensure that they have a whistleblowing policy in place that is fit for purpose. An off the shelf policy is unlikely to work given the obligations imposed. Employers covered that want to foster a positive reporting culture should consider how they can better engage with their people about the changes.

Employers covered should also consider reviewing their internal reporting and audit procedures to identify gaps that could lead to a breach of confidentiality, inadvertently or otherwise. It is clear that a robust compliance framework is essential.

Consultation on the Draft Guidance is open until 18 September 2019. Please contact us if you would like to contribute. Authors – Nick Le Mare, Peter Anderson, Claire Brattey and Virginia Holdenson.

7 *Corporations Act 2001* section 1317AI(5).
8 Draft Regulatory Guide 000 – Whistleblower policies – ASIC – August 2019.
9 RG 000.62 Draft Regulatory Guide 000 Whistleblower polices.
10 RG 000.65 Draft Regulatory Guide 000 Whistleblower polices.
11 RG 000.68 Draft Regulatory Guide 000 Whistleblower polices.
12 RG 000.46 Draft Regulatory Guide 000 Whistleblower polices.
13 RG 000.48 Draft Regulatory Guide 000 Whistleblower polices.
14 RG 000.52 Draft Regulatory Guide 000 Whistleblower polices.
15 RG 000.51 Draft Regulatory Guide 000 Whistleblower polices.
16 RG 000.53 Draft Regulatory Guide 000 Whistleblower polices.

Property and tax law in Victoria – key 2019 developments



Throughout the first half of 2019, a number of key developments in property and tax law in Victoria emerged. Below, we explore the key tax changes introduced by the 2019-2020 Victorian State Budget, the shift to online assessment of complex duty transactions, and recent amendments to the Sale of Land Act 1962 (Vic).

State Tax changes

The Supreme Court decision in *BPG Caulfield Village Pty Ltd v Commissioner of Revenue* [2016] VSC 172 (**BPG**) has led to the Victorian Government undertaking a significant re-write of the "economic entitlement" provisions in the *Duties Act 2000* (Vic) (**Duties Act**).

The economic entitlement provisions are unique to Victoria and impose landholder duty to an arrangement between a landholder and another party (eg a developer) entitling the other party to receive dividends or income of the landholder, or the income, rents, profits, capital growth or proceeds of sale of the landholdings of the landholder.

Previously, landholder duty was triggered only on arrangements involving "private" landholders (being private companies or private unit holders) where the economic entitlement amounted to 50% or more. And after the BPG decision, the provisions did not apply to an arrangement that excluded some of the private landholder's land (no matter how small).

However, the new provisions impose landholder duty on all individual and corporate landowners where the market value of the land is more than $1,000,000. Importantly, the 50% threshold has been abolished, which means that landholder duty will apply regardless of the interest acquired.

As a result, it is likely that every development agreement executed on or from 19 June 2019 will now be subject to transfer duty because the fee payable to the developer has traditionally been calculated with some reference to the proceeds of sale.

Given the breadth of the provisions, there is potential the provisions to apply to a raft of agreements that were never intended to be dutiable. Accordingly all parties (contractors, agents, advisers etc) should seek tax advice before agreeing to a fee or commission calculated by reference to the economic proceeds to be derived from a piece of land.

Aside from the changes to the Duties Act, a raft of amendments were introduced to Victorian taxation legislation under the 2019-2020 Victorian State Budget, including:

1. from 1 July 2019, a 10% land transfer duty concession on commercial and industrial property transactions in regional Victoria (which will increase by ten percentage points each year to provide a full 50% discount from 1 July 2023) – this incentive may result in additional transactions/developments in regional Victoria;

2. from 1 July 2019, the replacement of the corporate reconstruction exemption with a concession (at the rate of 10% of the duty otherwise payable);
3. the amendment of the Duties Act to introduce "fixtures" as a new category of dutiable property – innovative construction techniques may be required to ensure equipment is not treated as dutiable;
4. on 1 July 2019, an increase in land transfer duty surcharge on foreign buyers of residential property from 7% to 8%; and
5. for the 2020 land tax year, an increase in absentee owner land tax surcharge from 1.5% to 2.0%.

Complex Duty Transactions

The move towards 100% electronic conveyancing continues, with the SRO recently allowing for electronic completion of "complex transactions" through Duties Online. A common example of a complex transaction is the purchase of multiple properties that are considered substantially one arrangement (also known as aggregation).

The shift to online lodgement is significant because the SRO have advised it will need at least 30 days prior to settlement to make its assessment of duty. This means that parties will be required to lodge through Duties Online at least 30 days before the scheduled settlement date (unlike regular duty transactions which can be calculated instantly online) which could result in settlement being delayed and the party that caused the delay to be in default under the contract (potentially being required to pay penalty interest).

Changes to the Sale of Land Act (Vic)

The *Sale of Land Amendment Act 2019* (Vic) was recently passed by Victorian parliament and introduces a number of key amendments to the Sale of Land Act (Vic) (**SLA**).

The most significant of these changes is the prohibition on a vendor or developer being entitled to rescind a residential off-the-plan contract under a sunset clause without obtaining prior written consent from affected purchasers (regardless of whether the vendor or developer has caused or contributed to any delay). This change is similar to the provisions introduced in NSW a few years ago.

If a vendor or developer is unable to obtain purchaser consent, the relevant party may seek an order from the Supreme Court to rescind the contract under a sunset clause.

Despite these new restrictions, a vendor or developer may still lawfully terminate a contract of sale for other events such as failure to obtain pre-sales or finance.

A more detailed summary of the amendments is contained in our Real Estate team's 2018 article, "The Sale of Land Amendment Bill 2018: What are the key changes?".

Avoiding another waste crisis: product stewardship for solar panels

CORRS PROJECTS UPDATE

As Australia pursues its commitment to reduce emissions to 26-28% on 2005 levels by 2030, photovoltaic (**PV**) solar systems will form an increasingly large part of our energy mix. While only 5.2% of Australian energy was produced by solar systems in 2018, 59 large-scale solar projects were in development at the end of 2018, comprising 68% of all renewable energy projects that were under construction or financially committed.[1] Meanwhile, household rooftop solar comprised 19.6% of total clean energy generated in Australia in 2018.[2]

With the marked growth in PV systems and associated battery storage across Australia, the inevitable issue of safe and sustainable disposal arises. As things currently stand, there is limited regulation of or provision for disposal of PV systems and batteries anywhere in Australia.

Given current global streams of PV waste amount to only 0.1% to 0.6% of the cumulative mass of all installed PV systems, and with the average PV system having a lifespan of 20 to 30 years, Australian governments, industry and households will soon have to devise waste systems that can handle large quantities of PV waste (estimated to be over 1,500 kilotonnes by 2050).[3]

One means of addressing this issue may be the establishment of a product stewardship scheme under the *Product Stewardship Act 2011* (Cth) (**PS Act**). We have provided an overview of the PS Act in this article and considered some of the issues that may arise in designing a product stewarship scheme for PV systems.

The PS Act

The PS Act provides the framework for product stewardship schemes to be established, but it does not prescribe how such schemes will or should operate or the products to which they apply. Rather, this is done through voluntary accreditation arrangements or via regulations introduced under the PS Act.

Voluntary product stewardship schemes

Voluntary product stewardship schemes are industry led and funded.[4] Such schemes apply to a class of products in a national market, must achieve a measurable effect in more than one State or Territory and be led by a body corporate administrator.[5] Participation in a voluntary scheme is at the discretion of industry participants.

Voluntary schemes must be accredited by the Federal Minister for Environment.[6] At present, only two voluntary schemes have achieved accreditation – MobileMuster and Fluorocycle.

MobileMuster is a scheme for the recycling of mobile phones, funded and administered by the Australian Mobile Telecommunications Association. Partnering with Australia Post, local governments and mobile phone retailers, the scheme offers consumers over

3,500 public drop off points to provide their mobile phone handsets for recycling.

Fluorocycle is a scheme for the recycling of mercury-containing lamps, administered by the Lighting Council of Australia and funded by a recycling levy paid by Council members. "Signatories" agree to participate in the scheme and must produce an Annual Statement of Compliance. Signatories provide their lamps to a recycler, which recovers the mercury and provides it to a dental amalgam manufacturer.

Co-regulatory product stewardship schemes

Co-regulatory product stewardship schemes are led by industry but are regulated by specific regulations introduced under the PS Act for a particular class of products. The regulations impose specific requirements on liable parties (which may include manufacturers, importers, distributors and users of products) who are required to be members of the co-regulatory schemes and who have scope to determine how the requirements will be met.[8] Liable parties who fail to join an approved co-regulatory scheme may be fined under civil penalty provisions of the PS Act.

At present, there is only one co-regulatory scheme in place under the PS Act – the National TV and Computer Recycling Scheme. The scheme was established in 2011 to provide Australian households and small businesses with access to free industry-funded collection and recycling services for TVs and computers, including printers, computer parts and peripherals (e.g. mouses, keyboards and webcams).

Mandatory product stewardship schemes

Regulations may be introduced under the PS Act which prescribe the actions that must be taken by specified persons in relation to products or a class of products – eg actions for the labelling of products and making end-of-life recycling arrangements. Such regulations leave no discretion to industry on how the regulated requirements will be met. Any failure by the specified persons to comply with the regulated requirements may be subject to fines of up to $210,000 for corporations.

To date, no mandatory product stewardship schemes have been introduced; however, there are increasing calls from the waste and other industries for such schemes to be introduced.

1 Clean Energy Council. 2019. *Clean Energy Australia Report 2019*. Available at ‹https://assets.cleanenergycouncil.org.au/documents/resources/reports/clean-energy-australia/clean-energy-australia-report-2019.pdf›.

2 Clean Energy Council. 2019. *Clean Energy Australia Report 2019*. Available at ‹https://assets.cleanenergycouncil.org.au/documents/resources/reports/clean-energy-australia/clean-energy-australia-report-2019.pdf›.

3 International Renewable Energy Agency. 2016. *End-of-Life Management: Solar Photovoltaic Panels*. Available at ‹ https://www.irena.org/publications/2016/Jun/End-of-life-management-Solar-Photovoltaic-Panels›; Steward, R, Salim, H and Sahin, O. 19 June 2019, *Research highlights potential solutions to looming solar panel waste crisis*, The Conversation.

4 *Product Stewardship Act 2011* (Cth) sections 4(2)(e) and 12(2) .

5 PS Act sections 5 and 12; *Product Stewardship (Voluntary Arrangements) Instrument 2012* (Cth) section 2.04.

6 PS Act section 11 and 13.

7 PS Act section 19.

8 PS Act section 18(1) and 19.

A key benefit of mandatory schemes is that they avoid any "free riders", being companies who produce the waste but do not contribute to the cost of the relevant product stewardship scheme (which is the case for voluntary schemes and, to some extent, co-regulatory schemes where the liable parties are defined too narrowly).

Product stewardship for solar panels

In 2018, State and Commonwealth Ministers agreed to fast-track the development of a product stewardship scheme for PV systems.[9] The Victorian government is currently leading investigations into possible designs for this scheme through a working group comprising representatives from all States, Territories and the Commonwealth. This follows a Senate committee report that recommended the implementation of a mandatory product stewardship scheme for PV waste.[10]

There is merit in implementing a mandatory scheme. As mentioned above, voluntary schemes lack effectiveness where free riders fail to contribute to the cost of product stewardship. Also, given the amount of PV waste soon to be generated and requiring disposal, and the toxicity of the components, any product stewardship scheme will likely be a costly exercise to develop and implement. Free riders should not obtain a benefit from the other industry participants who fund a scheme. It may also be difficult to formulate a product stewardship scheme for solar panels based off the only two currently-accredited voluntary schemes. Unlike mobile phones or lightbulbs, solar panels are not a product that can easily be dropped off at a readily accessible disposal collection point. The establishment of appropriate disposal services could either form part of, or flow from, a mandatory scheme.

This is not to say that an effective co-regulatory scheme could not be developed. Industry consultation and input would be required to ensure the viability of any co-regulatory scheme. The adoption of a co-regulatory model could accommodate both industry participation and have enforceable standards, provided the class of participants is appropriately defined.

Governments will need to consider how the costs of a product stewardship scheme would be distributed. If industry is required to bear the full cost, this will likely lead to higher prices for PV systems, potentially deterring households and energy producers from investing in PV systems. This may ultimately undermine the government efforts in achieving their respective renewable energy targets. On the other hand, if governments bear part of the costs of product stewardship (eg costs of administering the scheme), industry participants may not be encouraged to minimise use of toxic components.

Could a single State-based scheme be viable?

Failing national agreement on a product stewardship scheme for PV systems, could a single State implement its own scheme? While States can always "go-it-alone" when it comes to implementing a product stewardship schemes, in doing so, there is a risk that an individual State scheme could cause dissonance with any other State's parallel scheme that might come into being. Indeed, the development of State-based schemes can be seen as a disincentive to the development of any form of national scheme. Also, once the architecture of a State-based scheme is in place, experience with container deposit schemes shows that it is not a simple matter of replicating this across other States and Territories. Rather, it is more likely that each jurisdiction will design and adopt their own distinct regimes.

A further consideration for a State pursuing its own scheme, in the absence of agreement from the other States and the Commonwealth, is the risk that waste could merely be sent to other jurisdictions (as happened, in reverse, with industrial waste being sent to Queensland before the implementation of Queensland's waste levy).

Development of a national scheme is preferred, particularly given the increasing calls from the waste industry to develop schemes on a national level. Given the quantity of waste involved, and its toxicity, it is vital that all jurisdictions cooperate to develop a uniform response to this looming crisis.

9 Senate Environment and Communications References Committee. 2018. *Never waste a crisis: the waste and recycling industry in Australia.* Available at ‹https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/WasteandRecycling/Report›.

10 Senate Environment and Communications References Committee. 2018. *Never waste a crisis: the waste and recycling industry in Australia.* Available at ‹https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/WasteandRecycling/Report›.

Other recent developments

Triple Point Technology, Inc v PTT Public Company Ltd [2019] EWCA Civ 230

Keywords:

liquidated damages; delays

Key takeaways

Liquidated damages for delayed work may not be available if the contractor never completes the work.

A contractual clause that provides for liquidated damages for delayed work up until the date the principal "accepts such work"[1] might be interpreted to mean "up until the date of practical completion".[2] Drafting like this might not entitle a principal to liquidated damages for work that does not reach practical completion. This has important implications for the drafting of liquidated damages clauses.

Background

Public Company Ltd (**PTT**) engaged Triple Point Technology (**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.

Trial — Technology and Construction Court (TCC)

In the Technology and Construction Court, Jefford J found for PTT and awarded approximately USD3.5 million in liquidated damages for delay and USD1 million in general damages for wasted costs and the cost of procuring a new system.

Jefford J found that Triple Point had repudiated the contract and PTT was therefore entitled to terminate. Her Honour awarded liquidated damages from the date for practical completion of all outstanding work until the date of termination.

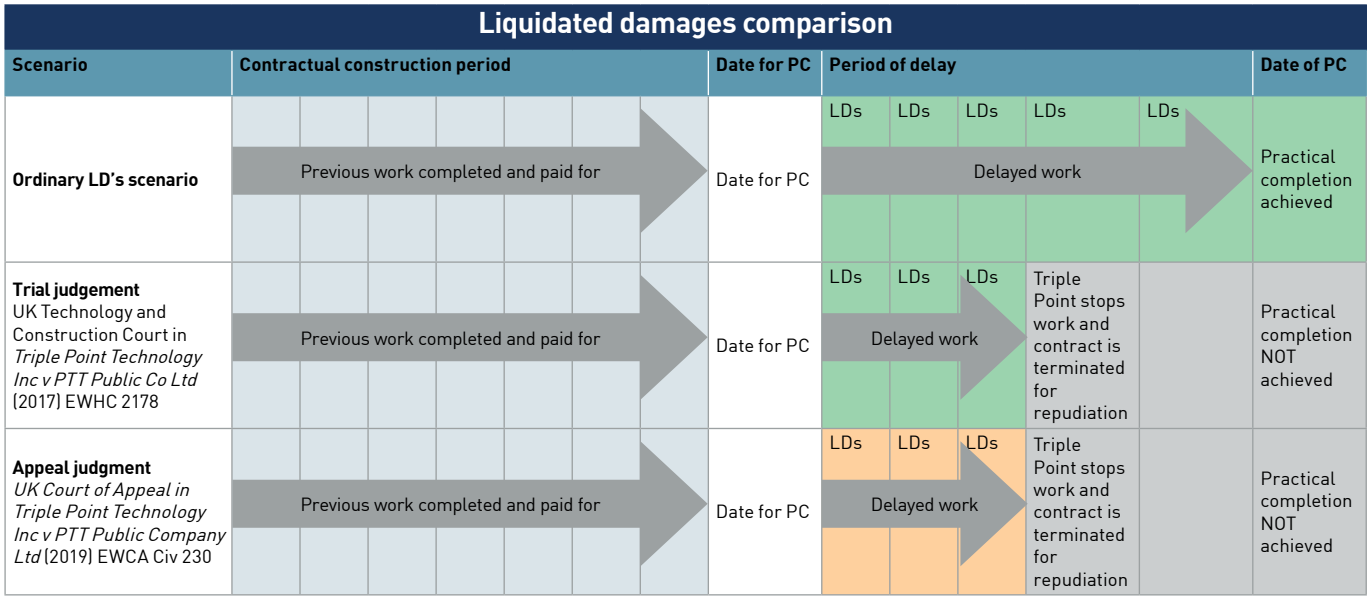
Court of Appeal

Both parties appealed. In a refreshingly easy-to-read judgment, Sir Rupert Jackson LJ found that the liquidated damages were not available to PTT on the proper construction of the contract. Floyd and Lewison LJJ agreed with Jackson LJ's judgment.

Jackson LJ considered three lines of cases on the interpretation of clauses providing for liquidated damages. His Honour found that on the wording of the clause in question, the liquidated damages only became available for work which was delayed but eventually still completed. This hinged on the wording of the clause (which is referred to as Article 5.3 throughout the judgment):

> *"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****".*

Figure 1: Timeline comparison of the different approaches to Liquidated Damages following *Triple Point v TPP*



1 This was the wording used in Article 5 of the contract between the parties in this case.
2 At [112].
3 (1912) SC 591.

Jackson LJ looked at a line of cases starting from *British Glanzstoff Manufacturing Co Ltd v General Accident, Fire and Life Assurance Co Ltd*,[3] in which similar liquidated damages clauses had been discussed. Following these cases, his Honour concluded that:

> *"[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".*

This decision leads to an interesting variation on the traditional understanding of liquidated damages and how they are awarded (see Figure 1).

Australian standards — what would be the result?

It is worth examining how this scenario would have played out under some of the more commonly used Standards Australia construction contracts.

AS4000–1997

Clause 34.7 reads (with emphasis added):

> *"If [the work] does not reach practical completion by the date for practical completion … [the Contractor must pay the Principal] liquidated damages … for every day after the date for practical completion to and including the earliest of the date of practical completion or termination of the Contract or the Principal taking [the work] out of the hands of the Contractor."*

If this clause had been in the contract between PTT and Triple Point, it is almost certain that PTT would have been entitled to liquidated damages for the delayed work, even though that work did not reach practical completion. The Court of Appeal upheld the Trial Judge's finding that the Contract was terminated for repudiation in February 2015. As a result, under AS4000, PTT would have been entitled to the liquidated damages it was awarded at trial, being those "for every day after the date for practical completion to and including … termination".

AS4300–1995

Clause 35.6 reads:

> *"If the Contractor fails to reach Practical Completion by the Date for Practical Completion, the Contractor shall be indebted to the Principal for liquidated damages … for every day after the Date for Practical Completion to and including the Date of Practical Completion or the date that the Contract is terminated pursuant to Clause 44, whichever first occurs."*

If this clause had been present in the contract in *Triple Point v PTT*, it would have also resulted in the liquidated damages being due up until termination.

A hypothetical complication

It is not difficult to imagine complications arising on the same drafting, with slight variations in the facts. What if PTT had not terminated the contract but simply brought a third party in to complete Milestone 2, before carrying on the rest of the Contract with Triple Point? In general, this could occur if a principal took advantage of a generous variations clause that permitted the principal to omit work and pass it on to third parties.

Under clause 34.7 of AS4000, the principal would be entitled to liquidated damages up until the date it took the work "out of the hands of the *Contractor*". The wording of clause 34.7 thus deals with this scenario explicitly.

Under clause 35.6 of AS4300, however, there is an argument that the contractor could be liable for liquidated damages not only up until a third party contractor takes over the work, but until the third party contractor actually brings that work to Practical Completion.

Unlike AS4000, clause 35.6 of AS4300 does not expressly contemplate work being removed from the primary contractor without the whole contract being terminated. On one view, the language "indebted to the Principal for liquidated damages … for every day after the Date for Practical Completion to and including the Date of Practical Completion" may apply *regardless of who brings the work to Practical Completion*.

This interpretation does not make a great deal of commercial sense, and there are strong competing interpretations, but the issue highlights the need for careful drafting.

Drafting notes

To minimise the principal's risk, liquidated damages clauses should contemplate the fact that delayed work may never reach practical completion. The clause should therefore provide for liquidated damages from the date for practical completion up until the earlier of the date of practical completion and the date of termination of the contract.

Contractors should be aware of the loophole in clauses like 35.6 of AS4300, which arguably could leave them liable for liquidated damages even when a third party contractor is brought in to complete the works.

Clause 34.7 of AS4000 provides a useful starting point as it deals with all three of the most likely outcomes for delayed work in a way that makes commercial and practical sense.

http://www.bailii.org/ew/cases/EWCA/Civ/2019/230.html

Hitachi Zosen Inova AG v John Sisk & Son Ltd [2019] EWHC 495 (TCC)

Keywords:

adjudicator's jurisdiction; dispute subject to previous adjudication

Key takeaways

This case departs from the well-established principle that an adjudicator must resign if the same or substantially the same dispute had already been decided in an earlier adjudication.

A distinction must be drawn between what has been decided in an earlier adjudication and what has been referred to a subsequent adjudication. This potentially broadens the ambit for parties to seek multiple adjudications on the same or similar issues where new evidence is discovered or where the adjudicator has left part of a question open.

Background

The claimant (**Hitachi**) was employed to specify, design, engineer, construct, commission and test a multi-fuel power plant in Yorkshire. In 2012, Hitachi engaged the defendant John Sisk & Son Ltd (**Sisk**) under a Design & Construct contract. The contract specified additional works to be completed, one of which involved acceleration works (**Event 1176**).

In accordance with the contract, Sisk applied for payment of items including Event 1176 (**Application**). Hitachi responded with a payment notice rejecting the claim. Sisk then referred the Application to adjudication, seeking a valuation of Event 1176 as a variation to the contract.

In relation to Event 1176:

- In April 2016, the adjudicator decided that Event 1176 was "a variation that requires valuation" and as he did not have sufficient details to value the works, he allowed £nil for the variation "for the purposes of [the payment notice]" (**Second Adjudication**); and
- In July 2018, Sisk referred the dispute to adjudication to recover money for Event 1176. The same adjudicator concluded that he had jurisdiction to value Event 1176 and that Sisk had substantiated a claim for £825,703 under the contract (**Eighth Adjudication**).

Hitachi argued that the adjudicator did not have jurisdiction in the Eighth Adjudication as the dispute related to the same or substantially the same dispute that had already been decided in a prior adjudication.

The decision

Stuart-Smith J held that the adjudicator had the requisite jurisdiction in the Eighth Adjudication and the decision in relation to the value of Event 1176 was therefore enforceable.

There were two issues to be determined:

1. what the adjudicator decided about Event 1176 in the Second Adjudication; and
2. whether the dispute referred to the adjudicator in the Eighth Adjudication was the "same or substantially the same" as the dispute decided by the adjudicator in the Second Adjudication.

The adjudicator's decision

The adjudicator in the Second Adjudication decided that:

- Event 1176 was a variation that required valuation; and
- due to the lack of evidence, nothing was payable for Event 1176.

However, the adjudicator did not decide the valuation of Event 1176 for any purposes other than in the context of the claim pursuant to the Application. This issue was essentially left open.

Individual passages of the adjudicator's decision had to be read in the overall context of the decision and not in isolation. References to *"my Valuation"* and *"the correct valuation of each of the items"* in the adjudicator's decision, if read in isolation, misleadingly suggested that the adjudicator had reached a conclusion on the correct value to be attributed to each item.

In fact, the adjudicator expressly declined to decide the value attributable to Event 1176. The inclusion of "£nil" as the "value" in his decision did not constitute a valuation of the variation. On the contrary, "£nil" merely represented the lack of substantiation and was not intended to express any view or decision with respect to the value of the variation.

The same or substantially the same

"Referred" vs "decided"

The correct comparison is between what was referred in the Eighth Adjudication and what was decided in the Second Adjudication.

Stuart-Smith J referred to Dyson LJ observation in *Quietfield Ltd v Vascroft Construction Ltd*[1] that whether two disputes are the same or substantially the same is a question of fact and degree. In that case, May LJ stated that the emphasis of the enquiry was on what the earlier adjudicator decided.

This line of authority continued in the decision of the Court of Appeal in *Harding v Paice*.[2] It affirmed that it

is ultimately what the earlier adjudicator decided which determines "how much or how little remains available for consideration by the second adjudicator".

The referred dispute in the Eighth Adjudication — the valuation of Event 1176 — was exactly what the adjudicator declined to decide in the Second Adjudication. Accordingly, the dispute referred in the Eighth Adjudication was not the same or substantially the same as the dispute decided in the Second Adjudication.

Overlap of evidence

Stuart-Smith J found that neither *Quietfield* nor subsequent cases laid down a definitive rule that disputes should be regarded as being the same or substantially the same if there was an overlap of evidence.

In particular, the following circumstances were not detrimental to the finding:

- some of the evidence was common to both adjudications; and
- some of the new evidence would have been available to Sisk at the time of the Second Adjudication.

Sisk misjudged the evidence that was necessary to substantiate a valuation for Event 1176 in the Second Adjudication, which rendered the adjudicator unable to come to a decision on the valuation of that variation. By the Eighth Adjudication, Sisk had gathered evidence that was now sufficient to substantiate its claim.

Alternative argument: estoppel

As an alternative to its main arguments, Sisk sought to rely on the existence of an estoppel that would prevent Hitachi from asserting that Sisk was precluded from pursuing its claims in the Eighth Adjudication.

Because of the primary finding as to the jurisdiction of the adjudicator, the estoppel arguments were not examined in detail. Stuart-Smith J stated that, had he been required to explore the issue, he would have found that no estoppel arose from the parties' conduct since the Second Adjudication.

http://www.bailii.org/ew/cases/EWHC/TCC/2019/495.html

1 [2007] BLR 67 (**Quietfield**).
2 [2015] EWCA Civ 1231.

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Perth OH&S Lawyer of the Year Best Lawyers Peer Review, 2017

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

Client's value his "excellent understanding of how legal processes work in Papua New Guinea" and the "valuable practical advice" that flows from it Chambers Asia Pacific Guide, 2018

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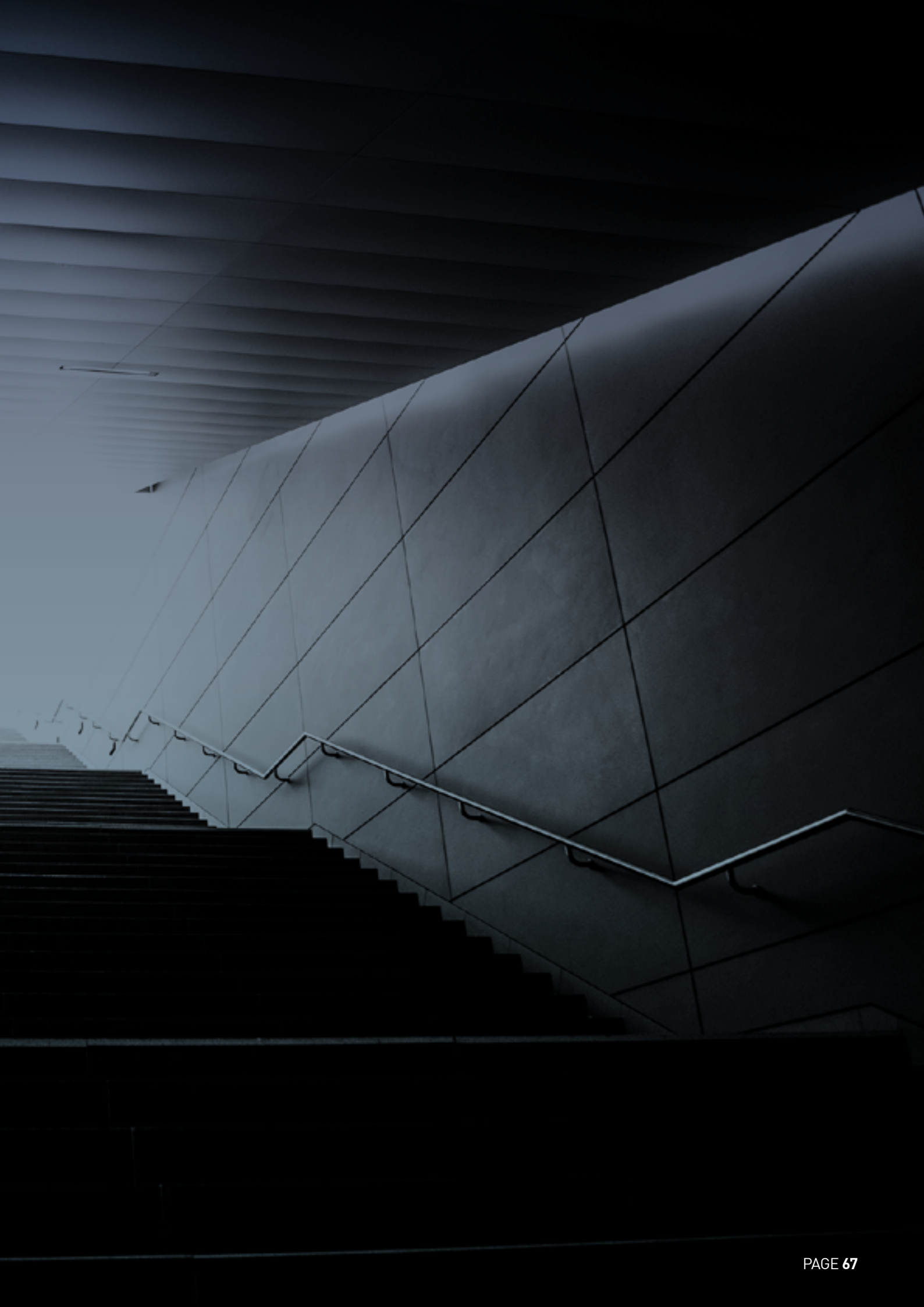

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