Corrs Projects Update

Special Edition: Public Private Partnerships

corrs.com.au

CORRS
CHAMBERS
WESTGARTH

Projects Update special edition: Public Private Partnerships

As the country embarks on a post-pandemic construction-led recovery, it is topical to consider the application and appropriateness of different procurement methodologies for the delivery of major infrastructure.

In our feature article, we consider contemporary concerns with the delivery of major projects and look at some innovative forms of Public Private Partnerships (PPPs) hybrid delivery models.

This edition also includes articles which:

- provide an update on the long term debt financing PPP projects;
- discuss the classification of PPPs as 'fixed infrastructure", and what this might mean for stamp duty in WA;
- detail proposed amendments to the environmental approvals process;
- consider alternative financing arrangements for PPP projects; and
- summarise the legislative framework for delivery of PPPs in PNG.

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

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 Projects Update links to some of our recent articles on issues affecting the construction industry.

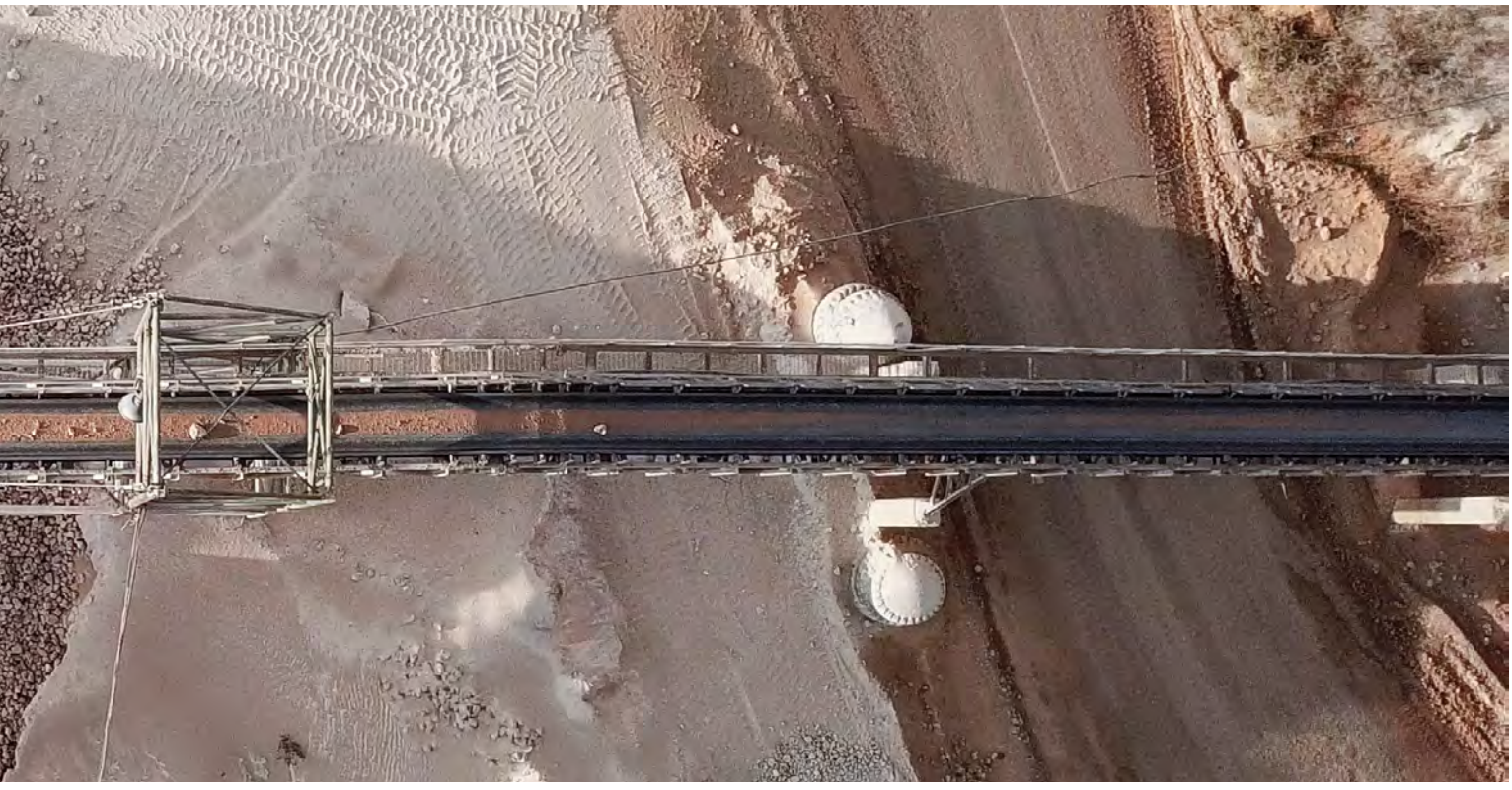
The information contained in this publication is current as at April 2021.

Editors:

Andrew McCormack
Partner

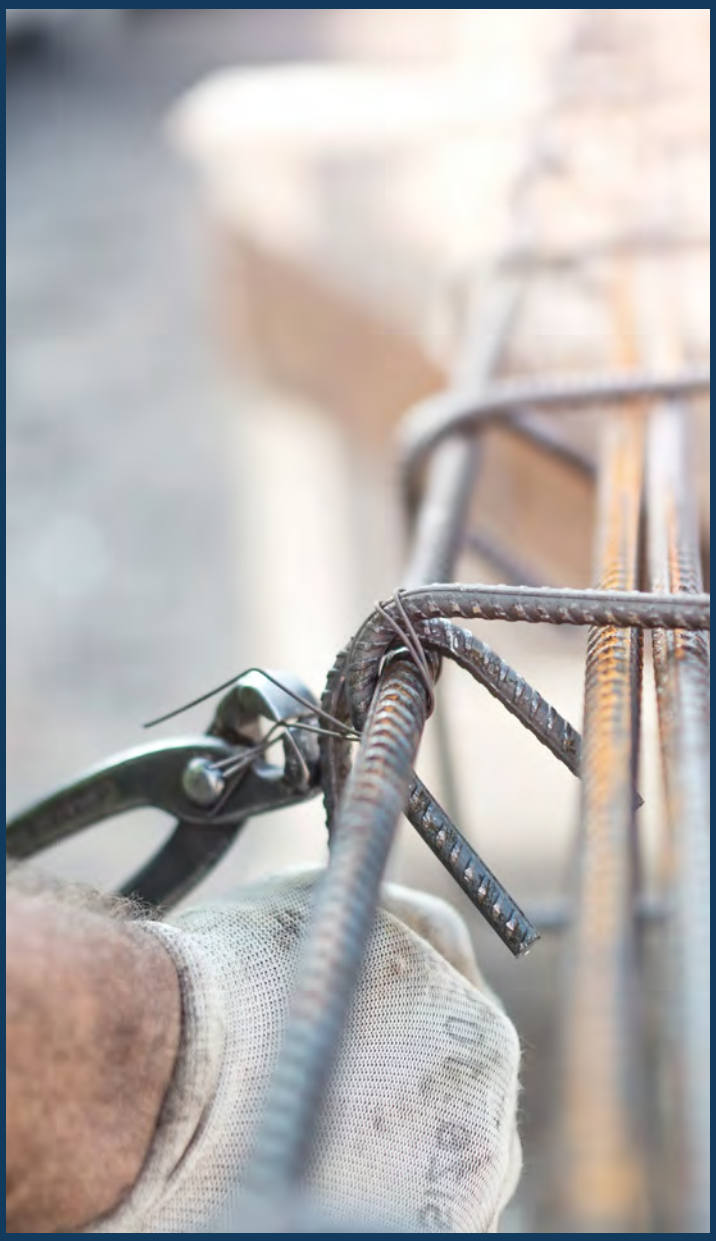
Wayne Jocic
Consultant

Contents



Feature article

The use of hybrid models for the delivery of mega infrastructure projects



Public Private Partnerships (**PPP**) have been widely adopted in Australia and abroad and have seen the delivery of a wide variety of social and economic infrastructure projects.

Indeed, Australia was quick to adopt the private finance initiative (**PFI**) model during the 1990s and, as such, is widely seen as an international leader in the PPP space. Victoria has been a particularly keen proponent of this approach and has used PPPs to deliver some 32 projects worth around $30.1 billion.

Whilst the PPP model will remain a part of the government policy toolbox, a number of significant issues with high profile projects in recent times has led to various observers questioning whether PPPs are the best means of delivering major infrastructure projects, and a number of innovative hybrid models are now emerging.

The problem

Spending on Australian mega infrastructure projects (those with a value of over $500 million) has soared over the last three decades. In a 2017 report on mega infrastructure projects (**2017 Report**), it was observed that "[i]n 1990, the largest single project tendered in Australia was worth A$50m. By 2000 this had grown to A$500m and in 2015 it was of the order of A$8b, an increase of 1,500%."[1]

Since that time, we can add the $16.8 billion WestConnex project in Sydney, the $12 billion Sydney Metro, the $11 billion Melbourne Metro Tunnel, the $9.3 billion Inland Rail project and the $6.8 billion West Gate Tunnel project (among others).

However, this record growth is not of itself demonstrative of a strong and stable construction industry. At the close of 2020, the University of Melbourne released a survey based research report into the health of the Australian construction industry (**2020 Report**).

This report found that only 34% of respondents believed that the industry was healthy (with 55% believing that it is not) and only 50% were optimistic about the future of the industry. The most commonly identified issue confronting the industry in the 2020 Report was the approach to risk allocation and a lack of collaboration – leading to an adversarial culture.

In relation to risk allocation, governments have tended to prioritise certainty of cost as one of the driving factors for the delivery of mega infrastructure projects. As the 2020 Report observes, "government, often driven by Treasury, strives for a 'not to exceed price' and this drives **an attitude of 'transferring all the risk'**." This has led to many mega projects being delivered by either a PPP model or through fixed time/fixed price design and construct (**D&C**) contracts.

These models, which are favoured by governments' legal, commercial and technical advisors, tend to shift the maximum risk away from the public sector and to the private sector (ultimately landing with the D&C and operate and maintain contractors). This approach ignores the oft-cited Abrahamson's principle that risk should be allocated to the party best able to manage it and gives precedence to cost certainty as one of the overriding objectives.

The 2020 Report highlights a number of flaws which respondents saw in the prevailing approach to risk allocation in major construction projects, such as:

- the approach of government to risk allocation adds 15% to 30% (on one estimation) and 30% to 50% (on another estimation) to project cost;
- the attempt to transfer all risk to a contractor through the PPP model is misconceived and does not bring value to government; and
- risk allocation has got to the point of absurdity and is not sustainable for the industry.

On the issue of sustainability, the 2017 Report found that, since 2000, on average Australian construction companies working on mega infrastructure projects have posted a loss of 16% for each project. For an average project size of $1.32 billion, that represents an average loss of $215 million per project.

Cumulatively, that amounted to losses of $6 billion between 2000 and 2015 and, the report projected, further losses of $11 billion between 2015 and 2020. This amounts to a total projected loss of $17 billion between 2000 and 2020, with an average loss of 28% per project.

Whilst it may be difficult to verify actual losses on any particular project, it is clear that an approach to project procurement which results in losses of this magnitude will be unsustainable and may well precipitate the failure of a number of mega infrastructure projects and tier one contractors.

Indeed this has been the experience in the United Kingdom where, following the collapse of the construction giant Carillion in 2018, the British government's enthusiasm for the PPP model has evaporated.[2] The Chancellor of the Exchequer, Phillip Hammond, declared proudly in October 2018 that "I have never signed off a PFI contract as chancellor, and I can confirm today that I never will".

1 Ryan, P. & Duffield, C. (2017). Contractor Performance on MEGA Projects – Avoiding the pitfalls. Mahalingam, A (Ed.) Shealy, T (Ed.) Gil, N (Ed.) Working Paper Series, Proceedings of the EPOC-MW Conference, pp.1-34. Engineering Project Organization Society, p 2.

2 Known as the Private Finance Initiative (**PFI**) model in the UK.

Suggestion

The purpose of this article is not to suggest that the PPP model should be discarded in its entirety; on the contrary, there are many instances where the model remains appropriate and is likely to offer best value for money to taxpayers.

However, given the current economic climate and the state of the Australian construction industry, it is timely to consider whether there may be opportunities to combine characteristics from various methods to develop a hybrid methodology which provides a more nuanced approach to risk allocation in the context of delivering future mega projects.

There is evidence of such a rethink of approach. For example, Transport for NSW is currently delivering the last stage of the A$16.8 billion WestConnex project by a hybrid model combining a series of D&C contracts followed by a user charge style concession period. The NSW Government is currently considering whether a similar model should be deployed for other mega infrastructure projects, such as the Western Harbour Tunnel project.

Another example is the Victorian North-East Link PPP project where, following an unsuccessful tender process, the government decided to significantly modify the risk allocation for the project. In November 2020, it retendered the PPP project on the basis of an 'incentivised target cost approach' rather than a traditional fixed price PPP model.

The United Kingdom has adopted a hybrid regulatory asset base approach for the delivery of the £4.2 billion Thames Tidal Tunnel project, which is in construction and scheduled for completion in 2025. The British government is also considering using that model for the £20 billion Sizewell C nuclear power plant in Suffolk.

These projects have taken characteristics of PPPs and other procurement methods and blended them to form different hybrid models for the delivery of mega infrastructure projects.

3 Although it is currently engaging with industry to obtain feedback on the appropriate model for the delivery of that project.

Banking & Finance

Long term debt financing of Australian PPPs – the state of play

Project financing, including debt financing of public private partnerships (**PPP**) projects, has traditionally been the domain of bank financiers. The construction risk inherent in these projects, and the related need for close monitoring and financier decision making during construction, meant they were not well suited to financing in the bond markets.

The rise of the monoline insurers in the late 1990s changed this landscape. In return for a fee, a monoline insurer would provide AAA-rated financial guarantees of the bonds issued by a PPP project company.

As the monoline insurer, or financial guarantor, assumed the credit exposure to the underlying project company, they took on the monitoring and decision making roles thereby overcoming one of the key barriers to bond market financing of greenfield projects.

The bondholders, on the other hand, effectively saw AAA-rated monoline credit and were therefore willing to subscribe bonds with maturities that matched that of the underlying PPP concession.

After a decade or so of long term, 'credit wrapped' bond financings of Australian PPPs, this funding source disappeared with the collapse of the monoline insurance sector during the GFC.

In the decade that followed the GFC, the Australian market for financing of new PPPs reverted to the traditional model of bank debt only financings. These facilities are typically structured as construction to term financings with debt maturities in the five to seven-year range.

The use of short tenor debt to finance 25 or 30-year concessions is not an optimal capital structure and entails refinancing risk for equity sponsors, which in turn increases their required equity internal rate of return. However, sponsors have generally taken the view that bidding a short term debt solution with tight refinancing margin assumptions is required to be competitive on new bids, even if longer term debt is available.

The last few years has seen a number of PPP projects head to the US private placement market for long term debt refinancings post construction completion. These have included the Victorian Desalination, Victorian Comprehensive Cancer Centre and Ravenhall Prison projects – the latter two being 'natural' Australian dollar financings with tenors of 24 and 22.5 years respectively.

The new willingness of private placement investors to lend natural Australian dollars has been a key factor in unlocking this market. It avoids the complications of the project company having to source cross currency swap lines and removes any cross currency risk for the relevant State government in a termination scenario.

Victoria's Western Roads Upgrade project was the first greenfield bond financing of an Australian PPP post GFC and a significant further advance in the development of a long-term debt financing market for PPPs. The financing followed a procurement process in which the Victorian Government encouraged bidders to explore the use of long term debt financing in the capital structure of their bids. Time will tell whether other state governments will adopt a similar stance in encouraging the development of this market.

Australian non-bank lenders, including superannuation funds, have been active in bank debt syndicates financing Australian PPPs. While there is some appetite among these investors for tenors of 10 to 12 years, there is significantly less appetite to play in the 20 plus year tenors that can be obtained in the US private placement market.

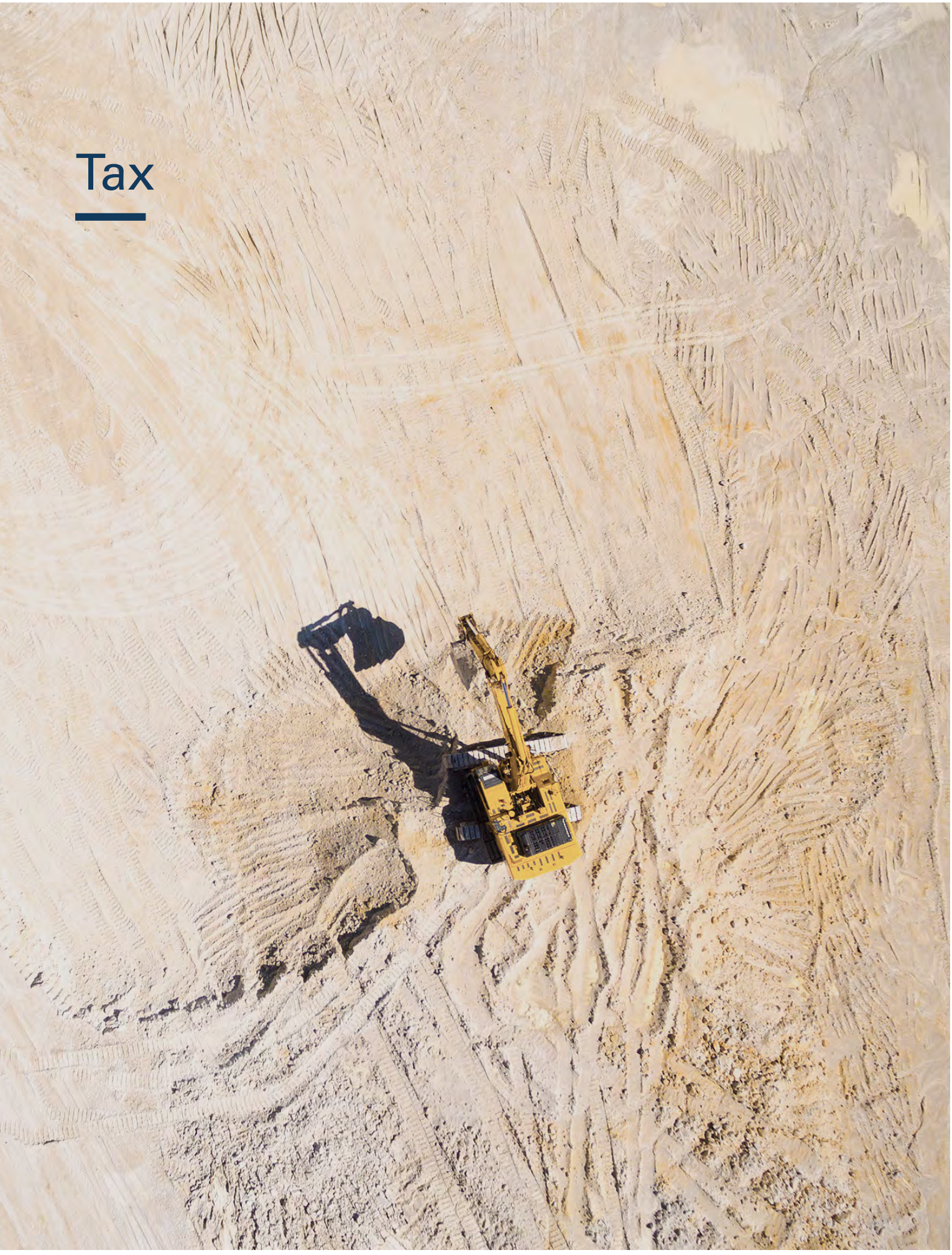
Participants in that market are predominantly life insurers and defined benefit pension funds, with long term liabilities that they look to match with long term assets (loans).

Australia's superannuation system, on the other hand, is predominantly an 'accumulation' system in which superannuants can switch between funds at short notice. As a result, funds focus more on return and liquidity than long term liability matching. This often translates to fund preferring to use their illiquid investment baskets for higher yielding investments rather than tying up that capacity in very long-term debt investments.

While state governments pushing bidders to bid long-term debt financing solutions will help maintain momentum towards more bond financings of greenfield PPPs, we expect bank financiers to continue to play the key role in PPP construction financings in the short term.

For those projects that do access long term debt financing, we see the US private placement market continuing as the mainstay for the foreseeable future.

Tax



WA fixed infrastructure rights and stamp duty

Dealings in certain rights relating to fixed infrastructure in Western Australia can be subject to stamp duty, whether those dealings are by way of transfer, grant or surrender. Further, indirect dealings in such fixed infrastructure rights can be subject to duty (such as for example, a transfer of shares in a company that directly or indirectly holds such rights).

Relevantly, the categories of fixed infrastructure rights that are dutiable property include 'fixed infrastructure control rights' (**control right**), 'fixed infrastructure access rights' (**access right**) and 'fixed infrastructure statutory licences' (**statutory licence**).

However, a transaction involving an access right or a statutory licence may not be subject to duty unless the transaction also involves (or is substantially part of one arrangement that involves) the relevant fixed infrastructure or a control right.

Fixed infrastructure

Anything fixed to land. It is irrelevant whether or not the thing in question is a fixture at law, is owned separately to the land, or is severed from the land by operation of any law.

Fixed infrastructure control right

A lease, licence or other right that enables the holder to have the day-to-day control and the operation or use of fixed infrastructure.

Fixed infrastructure access right

A licence or other right that authorises access or use of land for a purpose associated with fixed infrastructure, including a purpose related to the control, operation, use, construction, inspection, testing, maintenance or repair thereof.

Fixed infrastructure statutory licence

A licence, permit or authority that is issued under a written law that authorises the ownership, control or operation of fixed infrastructure and prohibits any other person from engaging in the relevant authorised activity.

What is fixed infrastructure?

Fixed infrastructure for duty purposes essentially means anything fixed to land, whether or not the thing constitutes a fixture at law, is owned separately from the land or is notionally severed or considered to be legally separate from the land.

A thing is deemed to be fixed to land if it is physically connected to the land or is buried (or partly buried) under the surface of the land.

The potential breadth of the meaning of 'fixed to land' has been a concern to practitioners and taxpayers since the provisions were introduced with effect from June 2019.

The WA Commissioner of State Revenue (**Commissioner**) recently released her views on the scope of the fixed infrastructure regime (see Revenue Ruling DA 26.0 'Things fixed to land and rights relating to fixed infrastructure').

The public ruling is long awaited and welcomed in the sense that there is finally some guidance on the Commissioner's position. Less welcomed, however, is the broad view adopted by the Commissioner on the meaning of 'fixed to land'.

Specifically, the Commissioner considers 'fixed to land' to include a thing that:

- is buried or partly buried under the surface of the land regardless of the extent of the physical connection (for example, a pipeline, a conduit or a cable in a conduit, even if it can be easily removed);
- rests on land by its own weight, where it is rendered immovable, for example, by virtue of its weight, the weight or nature of its constituent parts or its configuration;
- has foundations or is bolted to a slab; or
- is physically connected to land through a pipe, cabling or conduit for services such as water, sewerage or electricity.

Relevance for public private partnerships

PPP projects will likely involve fixed infrastructure, be that social infrastructure (such as hospitals, prisons and schools), or rail, road or other transport infrastructure. Stamp duty issues will therefore need be considered throughout the life of a PPP project, and not merely at bid phase for the project or prior to investing in a project.

As outlined above, a control right is a lease, licence or right that enables the holder to have the day-to-day control, and the operation or use, of fixed infrastructure. The Commissioner has taken the view that the rights relating to fixed infrastructure do not need to be exclusive or give exclusive possession of the fixed infrastructure. This likely means that operation and maintenance rights granted as part of a PPP project will constitute a fixed infrastructure control right for duty purposes.

The Commissioner provides the following example specific to PPPs.

> Toll Road Co Pty Ltd enters into a public private partnership (PPP) for the design, construction, maintenance and operation of a new toll road. Among the suite of rights granted to Toll Road Co at the time of entering into the PPP is the right to control and operate the toll road once it is constructed.
>
> Although the grant of a new infrastructure control right is a dutiable transaction, the grant of the right to control and operate a toll road that has not been constructed is not a dutiable transaction as the fixed infrastructure is not in existence.
>
> After the toll road is constructed and operational, New Road Co Pty Ltd acquires 100 per cent of the shares in Toll Road Co. Toll Road Co's right to control and operate the toll road is a control right that will be included in Toll Road Co's land assets when determining if Toll Road Co is a landholder and calculating duty on the acquisition.

The above example might suggest that the Commissioner does not seek to impose duty on the entry into a PPP, although duty will be charged on a change in the ownership of the project.

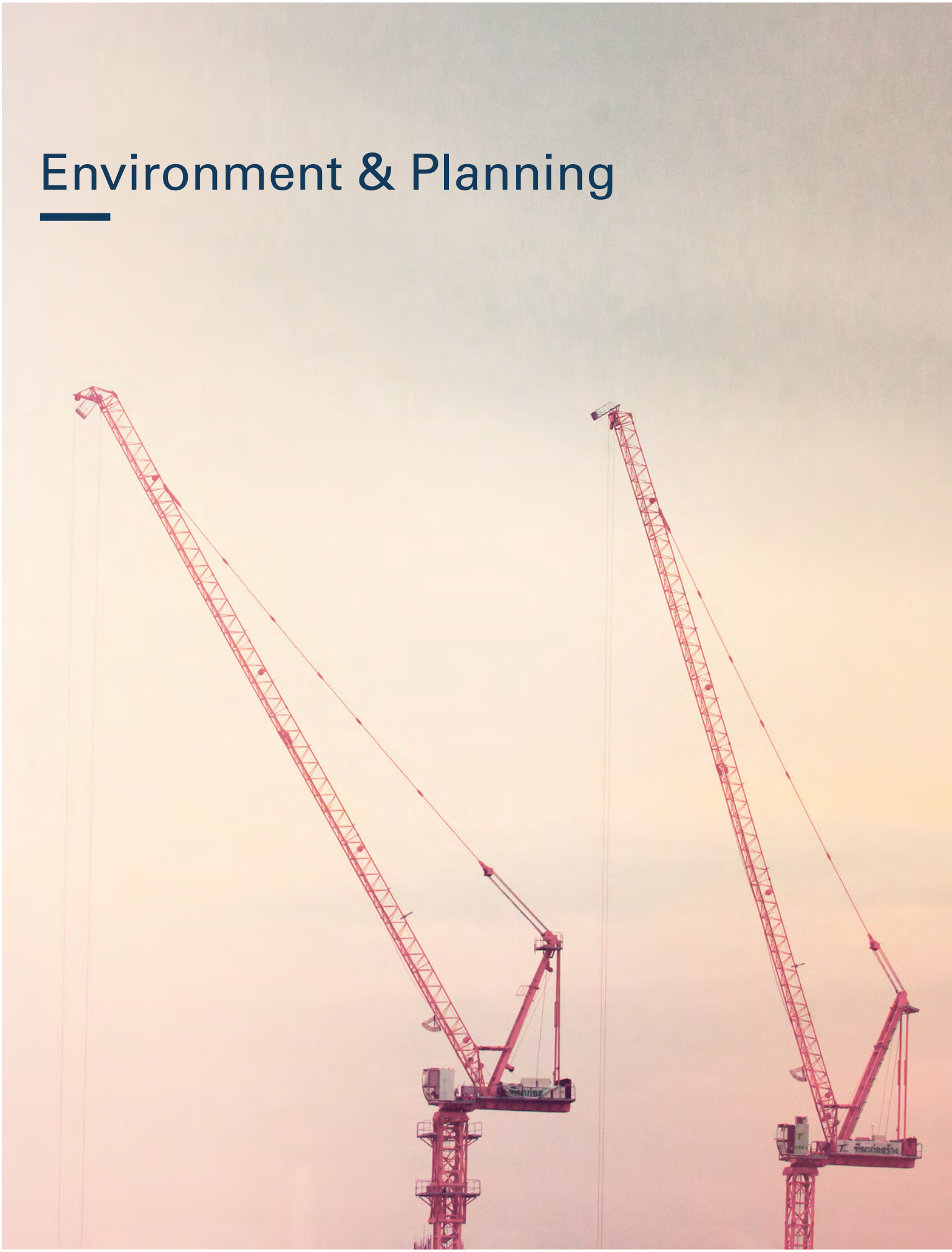
Importantly however, the Commissioner's example is premised on the relevant rights being granted at the time of entry into the PPP (presumably on execution of the Project Deed) and not after construction of the fixed infrastructure.

It seems to us therefore that there remains an outstanding question whether the grant of a licence to carry out operation and maintenance activities would be subject to duty if the licence is granted at completion of the design and construction phase.

More than ever before, potential proponents will need to carefully consider proposed PPP structures in WA to determine whether the proposal gives rise to duty implications.

At this stage other states and territories do not have similar provisions dealing specifically with fixed infrastructure rights, although it is worth noting that Victoria has similar provisions that impose duty on a transfer of items that are fixed to land (even if they are not common law fixtures); and most jurisdictions treat items that are fixed to land (even if they are not common law fixtures) as 'land' for landholder duty purposes.

Environment & Planning



Pending changes to the environmental approvals process

The *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**) is the centrepiece of Commonwealth environmental legislation, regulating activities that may impact on environmental values that are of national significance.

Such environmental values include native flora and fauna, migratory species, World Heritage areas, Ramsar wetlands, national heritage places, water resources, national parks and marine parks (such as the Great Barrier Reef Marine Park).

Construction and infrastructure projects will often have an impact on environmental values, requiring a detailed consideration of the EPBC Act requirements. A recent independent review of the EPBC Act has suggested a number of recommendations to the regime, two of which are now the subject of pending legislation, namely:

1. devolving the Commonwealth's functions to the states, with a streamlining of the processes; and
2. introducing National Environmental Standards to set clear rules for decision-making by the states.

Second Independent Review of the EPBC Act

In late 2019, the EPBC Act was open for its 10-year statutory review – an opportunity for an independent review of how well the framework has been operating, and what changes could be implemented to better protect Australia's environmental values. This was the second such review of the EPBC Act following the Hawke Review in 2009.

In August 2020, Corrs reviewed the second independent interim report published by Professor Graeme Samuel AC in June 2020 (**Interim Report**).

The Final Report, released in October 2020, was not materially different from the Interim Report. Two pieces of pending Commonwealth legislation seek to implement just a few of the 38 recommendations made in the Final Report. They are the Environment Protection and Biodiversity Conservation Amendment (Streamlining Environmental Approvals) Bill 2020 (**Approvals Amending Bill**), and the Environment Protection and Biodiversity Conservation Amendment (Standards and Assurance) Bill 2021 (**Standards Amending Bill**).

Proposed amendments to the EPBC Act Regime

The Approvals Amending Bill is intended to enable the states and territories to issue approvals for EPBC Act purposes, pursuant to approved bilateral agreements between the states and territories and the Commonwealth. While state assessment of environmental impacts of 'actions' under the EPBC Act pursuant to state assessment processes recognised in bilateral agreements has long been a feature of the Act, enabling the states to grant EPBC Act approvals has been problematic. A previous attempt in 2014 failed.

The Final Report recommends that the EPBC Act should be immediately amended to "provide confidence to accredit state and territory arrangements to deliver single touch environmental approvals in the short term". These arrangements, it said, should be underpinned by legally enforceable National Environmental Standards and be subject to rigorous and transparent oversight by the Commonwealth, including comprehensive audit by the proposed new position of an independent Environmental Assurance Commissioner.

Recommendations for the implementation of National Environmental Standards remain at the centre of Professor Samuel's review of the operation of the EPBC Act. They are considered to be an antidote to the Act's perceived failure to focus on outcomes and preservation over time for Matters of National Environmental Significance (**MNES**) with which the EPBC Act is concerned.

The Final Report recommends that National Environmental Standards be developed to "set clear rules for decision-making" by the states and territories. These will be relevant to assessment and approvals of actions and accreditation of State assessment and approval processes through bilateral agreements.

The Final Report also includes a number of fully drafted Standards (albeit a first iteration) dealing with MNES, Indigenous participation and decision making, compliance and enforcement, and data collection and information.

The 'Overarching MNES Standard' is of particular interest because it introduces the new principle of 'non-regression'. The principle is defined in the Standard as one that seeks to "ensure the overall protection of the environment is not diminished over time" and is said to be consistent with the principles of ecologically sustainable development and the Environmental Offsets Policy 2012.

The Standards Amending Bill requires that certain decisions made under the EPBC Act must not be inconsistent with the new National Environmental Standards. That will include decisions to approve the taking of actions and the accreditation of bilateral agreements with the states. The states must be able to demonstrate that their processes, for which accreditation is sought, will comply with the Standards.

There is no limit to the things a person making a relevant decision under the EPBC Act may take into account when assessing compliance with a Standard. In rare situations, the Minister may depart from compliance with a Standard, but only if the decision to do so is in the public interest. This is consistent with recommendations in the Final Report.

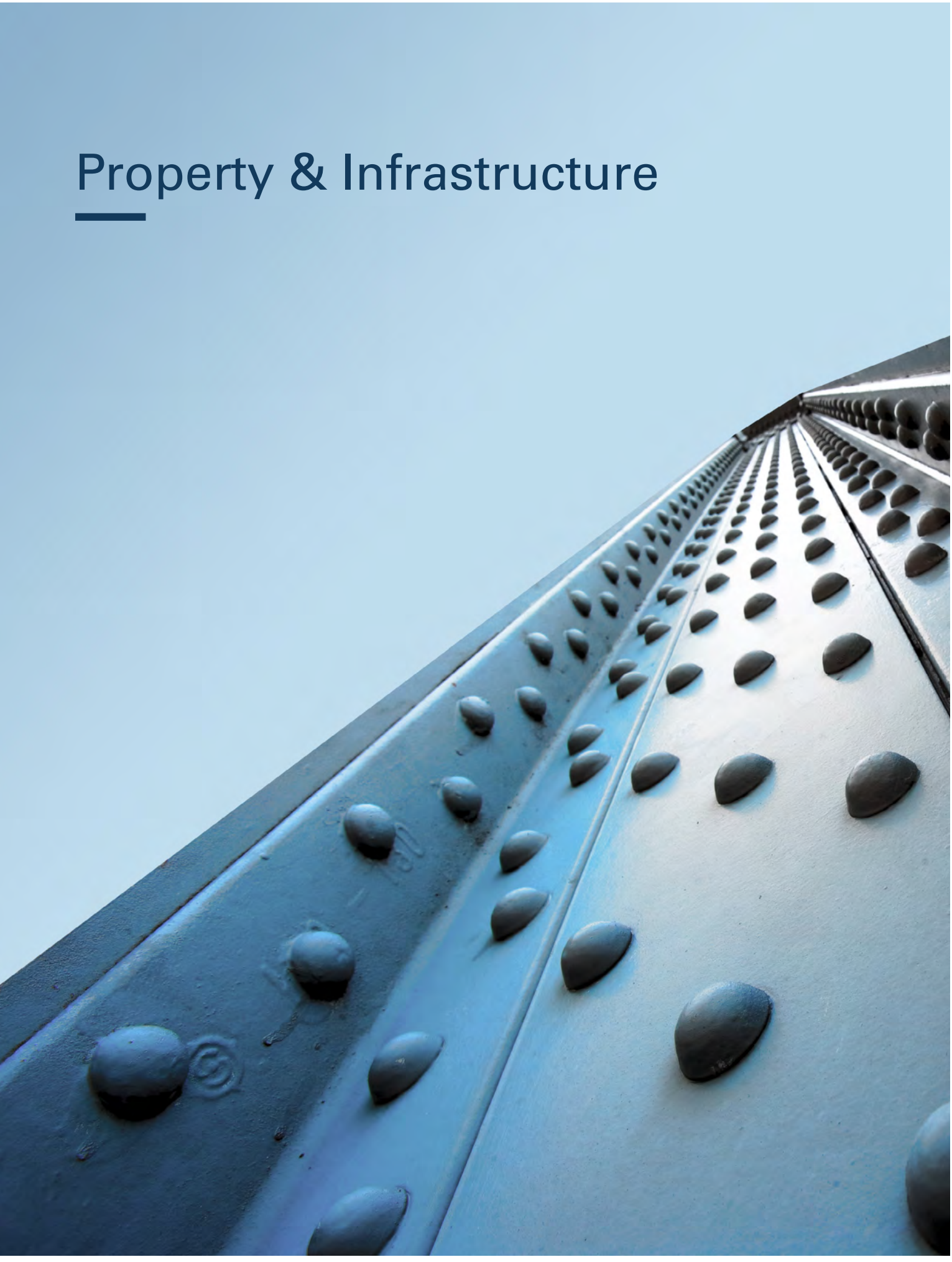
The Standards Amending Bill will also create the position of the Environment Assurance Commissioner, another of the Final Report's recommendations. The Commissioner will have a significant oversight role in the administration of the EPBC Act, including in relation to:

1. the operation of bilateral agreements;
2. the processes used for decisions about "controlled actions" including their assessment and approval; and
3. monitoring compliance.

It is not intended though that the Commissioner have any direct role in the auditing or monitoring of any single decision about a particular project.

At this stage it is not clear whether the Commonwealth will adopt other recommendations made in the Final Report.

Property & Infrastructure



Alternative funding models for public infrastructure projects

Typically a public private partnership (PPP) is funded by the private partner and the costs are recovered by:

- a service charge (for example, annual payments over 30 years to cover costs of building and maintaining and operating building services new hospital facility); or
- a concession/right to charge a toll (for example the right to change tolls for 40 years to cover costs of constructing, maintaining and operating a toll road).

Alternative funding models are often bundled under the heading 'value capture' but that expression encompasses a wide range of very different funding models.

Other funding models

Alternative funding models that get labelled as value capture include:

- direct levies;
- differential rates/special rates and charges;
- tax increment financing; and
- compulsory acquisition.

Direct levies

The idea of imposing specific taxes to pay for infrastructure is not new. The earliest legislation appears to be the *Sewers Act 1427* in England.

In the UK, the concept has progressed and developed a more up-to-date tax system under the *Business Rate Supplements Act 2009* (UK). This legislation applies to each 'levying authority' (the Greater London Authority and county/district councils) but only allows for a levy for specific infrastructure to be imposed on non-domestic rate payers. That is, the tax only applies to businesses that are rate payers, not individuals.

Differential rates, special rates and charges

In Australia a common method of raising charges for specific infrastructure is through differential, or special, rates and charges.

Examples of levies include:

- transport levy;
- environmental management levy;
- rural fire levy; and
- management and promotion rates for malls, CBDs etc.

The logic behind a special rate and charge is for an area which will benefit from the expenditure should contribute to the cost.

In some jurisdictions the levy applies to all rate payers but more typically the levy would apply to the properties directly connected to or in the vicinity of the infrastructure.

One of the difficulties with these types of arrangements, particularly in Queensland, is that the charges have regularly been subject to challenges.

Tax increment financing

The categories of value capture already covered by this paper result in capture of value by rates and charges. A regular criticism of value capture is that it results in additional/increased taxes.

Traditional funding models operate on the basis that the government funds the infrastructure and the government gradually gains additional revenue as property values rise as a result of the infrastructure. While this generates additional general rates for the local government, and additional land tax and payroll tax for the state government, it does not assist with funding the initial cost.

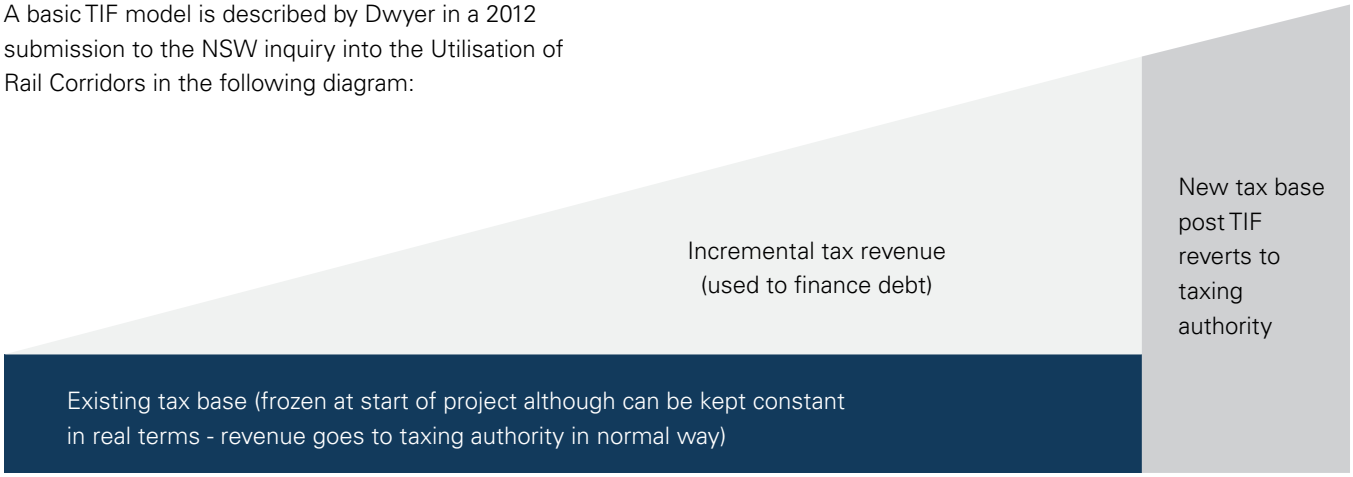
Tax increment finance (**TIF**) is a model where a government (typically a local government) acts as the sponsor and designates a geographic area as a tax increment financing district.

Under a TIF model, typically the existing property tax base is frozen and the base revenue goes to the local government in the normal manner.

However, the sponsor borrows funds to construct the infrastructure and the incremental increase in tax revenue is used to finance the repayment of that debt and interest.

Once the debt is retired and the term of the TIF comes to an end, all the tax reverts to the local government.

A basic TIF model is described by Dwyer in a 2012 submission to the NSW inquiry into the Utilisation of Rail Corridors in the following diagram:



The TIF model means that the project is funded by an hypothecation of future tax revenue to the extent it is generated by the project.

However, it is often criticised as being complex, uncertain and would require enabling legislation. Furthermore, the apparent uncertainty is more of a barrier in a low interest environment.

Compulsory acquisition

Another way to capture value (to fund the construction of the infrastructure) is for the entity to control the land on and around the new infrastructure.

This approach was adopted by the Hong Kong Mass Transit Railway Corporation and allows the development of land provided by the government under partnerships/joint ventures with developers to fund part of the capital and operating costs of new metro lines.

It was a forerunner of current CBD rail projects in Australia incorporating commercial development above and around stations but not all involved compulsory acquisitions. Also, the additional costs of building above and in the vicinity of rail corridors limits the amount of funds that can be raised by this method.

Another example of the compulsory acquisition method was the transformation of South Bank at Brisbane brought about by Expo 88. A key part of the funding for Expo 88 came from the land acquisition strategy.

The Expo 88 site was compulsorily acquired, aggregated and then developed over many years by the 'sale' of long term leases by the new statutory authority. As part of that process, the enabling legislation removed a provision which required a constructing authority disposing of the land within seven years after its acquisition to offer the land for sale to the former owner.

Nevertheless, the compulsory acquisition model needs to address community concerns about a government or statutory authority compulsorily acquiring land so it can aggregate, develop and resell at a profit - albeit after developing infrastructure on or in the vicinity of that land.

Some legislation also allows transport bodies to acquire, hold, dispose of and deal with property for the purposes of transport, for an incidental purpose, for the purpose of transport associated development or a combination of these purposes.[1]

The purpose of the legislation of this type is to allow the acquisition of land in the vicinity of existing or proposed transport infrastructure, thereby allowing the transport authority to recoup part of the construction costs by 'capturing' the increased value of the land.

Unfortunately, at a practical level, these provisions have been difficult to implement. In particular, the private sector seems to operate faster than the transport entities and the market 'moves' before the transport entity can take advantage of these provisions.

Furthermore, the acquisition of additional land, in the short term, increases the cost of the project.

Conclusion

Value capture is not new but it is one of many considerations that needs to be addressed as governments seek funding options for infrastructure.

1 *Transport Planning and Coordination Act 1994* (Qld). Also see *Transport Administration Act 1988* (NSW) and *Major Transport Projects Facilitation Act 2009* (Vic).

PNG

PNG Public private partnerships: status and key issues

The commencement of the Papua New Guinea (**PNG**) *Public Private Partnership Act 2014* brought hope for the improvement of quality, cost-effectiveness and timely provision of infrastructure and services in PNG however implementation of the Act has been very slow.

Key takeaways

The Public Private Partnership Act (the **PPP Act**) was passed by the Parliament in 2014 and commenced operation on 31 January 2018.

However, key administrative issues affecting the implementation of the PPP Act remain outstanding. This includes the establishment of the Public Private Partnership Centre (the **PPP Centre**), a statutory body intended to assist the Government in developing, tendering and implementing projects.

The procurement processes under the *National Procurement Act 2018* will still apply to government projects, including large scale infrastructure projects, in PNG.

The PNG Government passed the PPP Act in 2014 and it commenced on 31 January 2018. The Act is a reflection of the PNG Government's PPP policy which, amongst other things, aims to achieve the Government's current and future development plans and strategies.

It is hoped that the legislation will create a competitive PPP market in PNG. This is a framework that participants in the construction industry should keep an eye out for.

Overview of the PPP Act

The PPP Act sets out the structure for the procurement and delivery of infrastructure facilities and services through PPP arrangements. The legislation allows the Government and state bodies to partner with the private sector on large-scale infrastructure projects. Such arrangements may relate to:

- the design and construction of infrastructure, together with the operation of services relating to it and the provision of finance if required for design, construction and operation; or
- the provision of services, including maintenance relating to infrastructure for five years or more and the provision of finance, if required, for services.

The arrangements however do not extend to:

- mining projects, gas projects, petroleum projects, and all associated development agreements;
- projects undertaken as part of the Government's tax credit scheme; or
- procurement projects with a size or value which is less than the referral threshold. The threshold will be prescribed in the regulations to be enacted at a later date.

Management of PPP arrangements

The following key administrative bodies that will administer and manage PPP arrangements on behalf of the Government are the:

- PPP Centre;
- PPP Steering Group; and
- PPP Forum.

These administrative bodies have not yet been established. The PPP Centre once established will be a statutory body tasked with reviewing and analysing proposed projects in order to determine whether a PPP arrangement is the most appropriate procurement option available to the Government.

Amongst other functions, the PPP Centre will act as a specialist advisor to the PNG National Executive Council and state bodies. However, decisions on projects ultimately rest with the PPP Steering Group and the National Executive Council - the PPP Centre's role is limited to coordinating and implementing those decisions.

PPP project process

Briefly, the PPP Act requires state bodies to conduct an initial assessment in the manner and form prescribed by the PPP Centre where it intends to procure infrastructure. This initial assessment must include:

- details as to the type of project and its estimated value; and
- whether the project is suitable for procurement as a PPP arrangement.

The state body must then submit its initial assessment to the PPP Centre within 30 days for review. If the PPP Centre determines that it is suitable for procurement as a PPP arrangement, the state body may, subject to the approval of the National Executive Council, register that project in the manner prescribed with the PPP Centre and seek the advice of the PPP Centre on that project.

The PPP Act does not contain much operational detail on the PPP process itself and it is anticipated that this will be covered in regulations (when enacted).

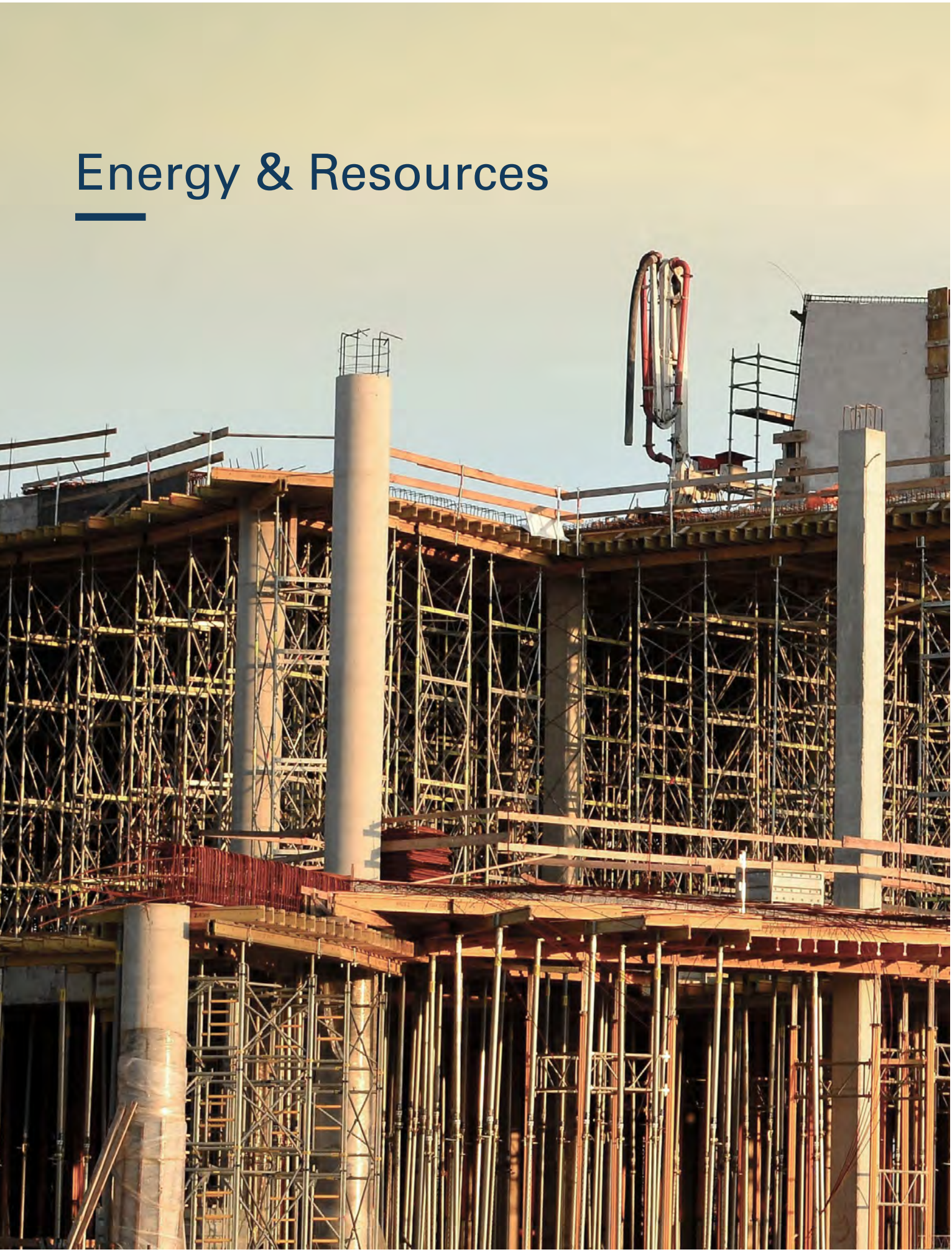
Delays in implementation

Although the PPP Act has commenced it has not been implemented as key administrative bodies such as the PPP Centre have not been established and regulations are yet to be promulgated.

This has resulted in delays in the implementation of the PPP Act.

Until the PPP Act is fully operational and implemented, the normal public procurement processes under the *National Procurement Act 2018* will continue apply to Government infrastructure projects.

Energy & Resources



Growth and developments in the energy storage sector in Australia

There has been significant recent growth in Australia's energy storage sector and indications suggest that the pace of development is only going to increase.

Recent examples have included the expansion of the Hornsdale Power Reserve, commencement of work on the 300MW/450MWh Victorian Big Battery, and announcement of a pipeline of nearly 3GW of new battery storage projects by other developers.

Why are we seeing such growth in the energy storage sector?

Renewable generation continues to increase

Australia's energy industry is in rapid transition from a centralised coal generation system to a highly diverse and de-centralised system dominated by large and small scale renewable generation.

The pace of transition is likely to increase with the Australian Energy Market Operator (**AEMO**) predicting in its *2020 Integrated System Plan* that:

- more than 26GW of new grid-scale renewables will be needed to replace the 15GW (63%) of Australia's coal-fired generation which is likely to retire by 2040;
- distributed energy resources (**DER**), such as rooftop solar, will double if not triple over the next 20 years; and
- between 6GW and 19GW of new dispatchable generation, such as pumped hydro, battery storage, virtual power plants and gas plants, will be needed to support the forecast increase in distributed and renewable generation.

Transition to renewables putting pressure on grid infrastructure

The transition to renewables brings with it a number of issues stemming from the fact that renewable generation is inherently variable, has different physical characteristics to conventional thermal generation and is often located in remote parts of the grid. As non-synchronous wind and solar generators are weather dependent, they cannot offer the same baseload stability that thermal (and hydro) generators can.

As noted in our previous article that explores the Energy Security Board's (**ESB**) pathway for reform of the National Electricity Market (**NEM**), recent reports released by the ESB have highlighted the challenges facing the NEM as a result of the increasing amount of renewable energy generation.

The ESB says that security of the system remains the single most concerning issue in the NEM.[1] System strength and inertia in the system have decreased and security has become increasingly difficult to maintain with the increase in variable renewable generation coming into the grid. Increased variable renewable generation, combined with the exponential growth of DER and an ageing fleet of thermal generators has also led to increased variations in both load and supply in the grid.

Weak system strength is making grid connection difficult in many areas of the grid, resulting in connection delays and additional costs. Once connected, some generators have had their output curtailed or revenues reduced due to high levels of congestion and transmission losses.

AEMO has intervened more than 250 times in the last year to either turn off grid-destabilising renewable generation or turn on gas-fired peak demand plants. The frequency of these security directions issued by AEMO has increased significantly over the last three years.

Energy storage technologies can support the transition to distributed and renewable generation

Energy storage technologies, such as battery storage, pumped hydro and virtual power plants play an important role in supporting the transition to distributed and renewable generation.

Energy storage can help balance supply and demand for electricity, and can provide the essential system strength services previously provided by synchronous generators that have withdrawn from the market.

In the following sections we explore some common and emerging energy storage technologies.

1 Energy Security Board, *Health of the National Electricity Market 2020*

Battery energy storage systems

Batteries are relatively quick to install, versatile, and can be deployed in a wide range of locations, scales and contexts. They are commonly coupled with variable renewable generation but are increasingly being developed as standalone facilities which allow energy to be stored during times of low demand and dispatched at times of peak demand.

Batteries can respond rapidly and precisely to changes in energy demand, which allows them to play an important role in providing grid stability services, as well as stabilising the output from intermittent renewable generation projects.

Big batteries such as the Hornsdale Power Reserve in South Australia and the Victorian Big Battery near Geelong have been procured (at least in part) to provide energy security and grid stability services.

However, the capacity of even the biggest batteries remains relatively small (typically up to four hours) compared to long duration pumped hydroelectric storage. The capacity of a lithium-ion battery also degrades over time, requiring eventual replacement.

In Australia, the big battery market has been dominated by lithium-ion batteries, however Australia's first utility scale flow battery has recently been announced and may offer another alternative for medium duration storage needs. Yadlamalka Energy is installing the 2MW/8MWh flow battery at a site near Neuroodla north of Adelaide. Flow batteries claim to have a longer operating life than lithium-ion batteries and the ability to be charged and discharged indefinitely without degradation over time. Storage capacity can be scaled up or down relatively affordably, with flexibility to provide between two and 12 hours of storage.

Despite their limitations, the opportunities for batteries are likely to increase in the short to mid-term. Costs are declining rapidly with Bloomberg New Energy Finance's latest report predicting that current lithium-ion pricing of approximately US$137 per kWh will drop as low as US$100 per kWh by 2023, and it is becoming clear that batteries can provide a much wider range of system services than are currently being valued in the NEM. Future rule changes will likely create opportunities for the provision of these services and changes to scheduling mechanisms.

With so much storage capacity already operational and in development, it is unclear how future rule changes might impact existing storage projects, the scope of services already provided under those projects, and future revenue opportunities for those projects.

Declining costs and the opportunity to take advantage of a greater range of essential system services may continue to improve the business case for battery storage systems, however there could be a saturation point if growth continues at current pace.

Pumped hydroelectricity

Pumped hydro uses water reservoirs to store energy. Excess energy is used during periods of low demand to pump water into an elevated storage reservoir, and is then released to return via hydroelectric turbines to generate electricity.

Like battery systems, pumped hydro systems can come online very quickly and can provide power when needed to help reduce surges, avoid blackouts or meet spikes in demand.

Pumped hydro has greater storage potential than batteries and can supply larger amounts of electricity over a longer duration. Snowy 2.0, for example, will have a capacity of 2,000MW/350,000MWh, nearly 800 times the capacity of the 300MW/450MWh Victorian Big Battery. Pumped hydro is currently the only available technology for long term storage (greater than eight hours).

However, pumped hydro facilities take a considerable time to develop and build, require suitable geography, hydrology and topographical conditions, and face many potential engineering challenges and construction risks.

A direct price comparison between the cost of pumped hydro and the cost of big batteries is complex as both the cost of the power component ($/MW) and cost of the storage component ($/MWh) need to be considered. Typically, for grid scale facilities, the cost of the power component is less for batteries than for pumped hydro, whereas the cost of the storage component is less for pumped hydro than for batteries. This means pumped hydro tends to be more competitive as storage capacity increases, whereas batteries are more cost effective for shorter term storage. The relative cost of pumped hydro improves further when lifetime and replacement costs are factored in. Pumped hydro systems are generally designed to last between 50 to 100 years, whereas lithium-ion batteries may need to be replaced, due to degradation, at approximately 10 year intervals.

Pumping facilities can be retro-fitted into some existing hydroelectric plants reducing development time and capital costs. There are over 100 operating hydroelectricity plants in Australia and three major pumped hydro systems connected to the national grid.

Snowy 2.0 will provide an additional 2,000MW of dispatchable, on-demand generating capacity and approximately 350,000MWh of large-scale storage to the NEM; enough storage to power three million homes for a week. The first power generated from Snowy 2.0 is expected in 2025.

Tasmania already has significant hydropower assets and potential for adding pumped hydro capability to add value to existing assets. The Battery of the Nation project is developing a pathway of future development opportunities for Tasmania to make a greater contribution to the NEM, with a target of 2,500MW of combined installed capacity. Coupled with the potential for a second Bass Strait interconnector, there is an opportunity for Tasmania to produce more renewable energy and to realise more value from existing and new hydropower assets to contribute more dispatchable power and system security services to the NEM.

Virtual power plants

Virtual power plants (**VPP**) harness and aggregate the energy stored by numerous smaller systems and can rapidly deploy this energy into the grid on a collective basis to respond to energy shortfalls, provide frequency control ancillary services and other network support services.

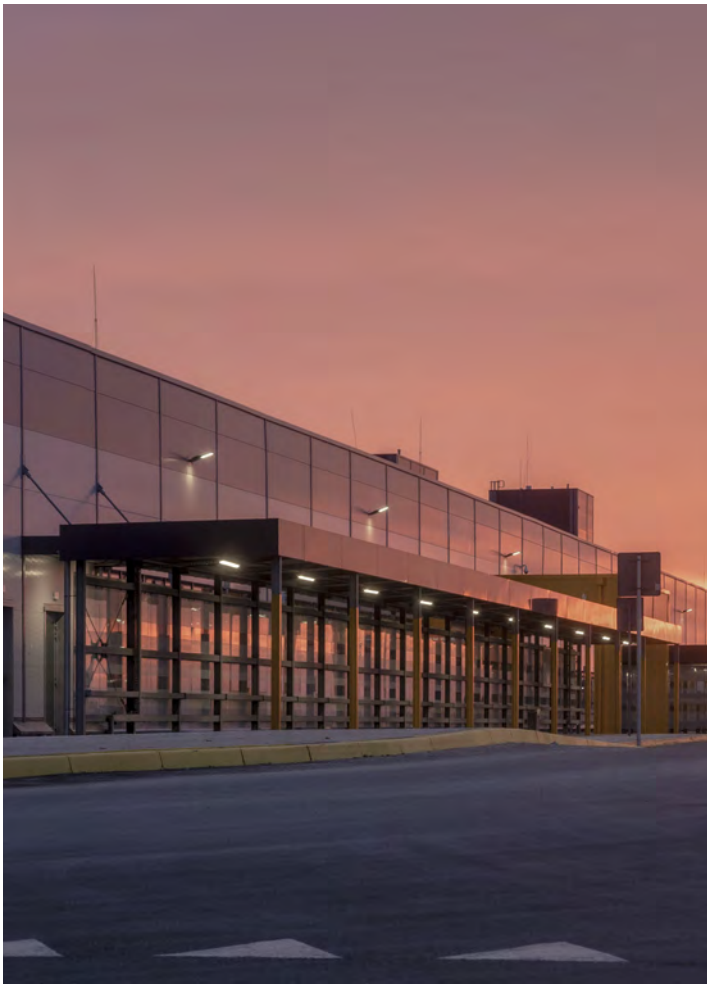
AEMO's VPP Demonstrations Program has provided a framework over recent years to allow VPPs to demonstrate their capability to deliver grid stability services and to inform the effective integration of VPPs into the NEM. The Demonstrations Program includes Tesla's SA VPP (which may ultimately include 50,000 solar and home battery systems, forming the world's largest VPP) and the AGL Virtual Power Plant comprising 1,000 solar battery storage systems across Adelaide.

With more than 2.6 million rooftop solar systems and 73,000 home battery systems already in Australian homes, DER predicted to double if not triple over the next 20 years, and the declining cost of energy storage systems, there is huge potential for VPPs to play an important role in providing cost effective, secure and reliable energy systems of the future.

Electric vehicles

Like household solar batteries, the energy stored by electric vehicle (**EV**) batteries may provide an opportunity for pooling and deploying this power collectively, through 'vehicle-to-grid' technology, to support the grid.

The *Realising Electric Vehicle-to-grid Services* (**REVS**) project, led by ActewAGL and part funded by the Australian Renewable Energy Agency (**ARENA**), is currently trialling how a fleet of EVs can provide similar grid services to big batteries and VPPs. The REVS project will deploy 50 EVs across Canberra and will become one of the world's largest vehicle-to-grid demonstrations.



Kinetic energy storage systems

Flywheel energy storage systems offer another alternative to batteries, with modern long duration flywheel technology able to store tens of kWh of energy per unit and provide approximately four hours of discharge. The technology is modular and multiple units grouped together can scale up to tens or hundreds of MW for grid scale applications.

These systems do not degrade significantly over time and do not have the same limitations on number of charge and discharge cycles as battery energy storage systems. The units are generally made of steel and able to withstand a broad range of ambient temperatures without the need for HVAC systems commonly required with batteries.

Hydrogen

Hydrogen could become another way of storing renewable energy by using excess wind or solar energy for producing and then storing, transporting and using the hydrogen as a fuel for new dispatchable generation (similar to natural gas).

The hydrogen market is as yet undeveloped and we have yet to see the impact of this emerging market on the electricity market but there is a clear momentum building up in this sector, following the release by the Council of Australian Governments (**COAG**) of its National Hydrogen Strategy in 2019 and a range of Federal and State Government initiatives funding a variety of trials and pilot plants aimed at proving up hydrogen producing and storage technologies.

Is the recent growth in the energy storage sector likely to continue?

The transition to renewables is likely to continue and there will therefore be a continuing need for new dispatchable generation such as pumped hydro, battery storage, VPPs and gas plants. Policy settings at Federal, State and Territory levels are all very clearly aimed at the reduction of emissions and corporate Australia is also increasingly taking steps to reduce its carbon footprint and ensure it is part of a green and sustainable energy future.

It seems likely that a mix of technologies will be required to suit particular contexts with longer term storage requirements requiring long duration storage such as pumped hydro, and opportunities for batteries and other storage technologies where a more rapid deployment or shorter duration storage is required.

As the cost of batteries continues to decline, we may see batteries starting to challenge the need for some longer term storage projects where pumped hydro might previously have been considered as the only viable solution.

It is unclear, however, whether the current pace of development is sustainable and whether (in the absence of new markets) we may soon reach a point at which price competition between an increased number of service providers will reduce the attractiveness and viability of new storage projects.

We may also see a slowdown in new big battery projects which are designed to shore up existing grid infrastructure as recent projects are completed and short term needs are satisfied.

Looking further ahead, it seems likely that there will be an ongoing role for energy storage projects to support the increasing amounts of new variable renewable generation which will be needed as conventional thermal generators continue to retire from the market. Many of these facilities may be located in and coordinated with the development of Renewable Energy Zones (**REZ**) to support the generation from the REZ and related grid infrastructure.

New South Wales

Mistrina Pty Ltd v Australian Consulting Engineers Pty Ltd

[2020] NSWCA 223

Key takeaways

Misleading or deceptive conduct need only be a material cause of the plaintiff's loss for that loss to be recoverable. This may be established by inference.

Consultants may be liable for economic loss caused by their misleading or deceptive conduct even where there is no direct relationship between them and parties who suffer loss.

Keywords

causation and damages for misleading or deceptive conduct

Background

Mistrina Pty Ltd (**Mistrina**) engaged a builder to design and construct a mixed use 10-storey development on a property in Brighton-Le-Sands. Mistrina borrowed $7.2 million from Bankwest to fund the development. Security for the loan included a mortgage over the Brighton-Le-Sands property, and a personal guarantee by a Mr Sikos that was supported by a mortgage over another property (**the Rowley Street property**).

The design for the development included a raft slab. The builders had engaged Australian Consulting Engineers Pty Ltd (**Australian Consulting Engineers**), which issued a certificate incorrectly certifying that the design of the raft slab complied with the Building Code of Australia and relevant Australian standards. It was not disputed that in providing this certificate, Australian Consulting Engineers engaged in misleading or deceptive conduct in contravention of section 52 of the *Trade Practices Act 1974* (Cth) (which still applied in this case).

The defect in the structural integrity of the raft slab was not discovered until the construction was substantially complete. By then, the building threatened the integrity of a neighbouring property. A stop work order was issued in April 2010.

The appellants suffered substantial loss after Bankwest exercised its rights to the security and sold the partially complete development and also the Rowley Street property. The appellants sued Australian Consulting Engineers, arguing that its misleading or deceptive conduct had caused Mistrina to lose the opportunity to make a profit from the development and Mr Sikos to lose the Rowley Street property.

Decision at first instance

The primary judge held that causation was not established because the appellants had failed to adduce sufficient evidence to find that the structural defect and delay were a factor, or a material factor, in Bankwest's decision to enforce its security.[1] His Honour considered that it was a matter of conjecture whether the structural defects causally contributed to the appellants' loss.

1 *Mistrina Pty Ltd v Australian Consulting Engineers Pty Ltd* [2020] NSWSC 130

Issues on appeal

The appellants appealed, asserting that the primary judge ought to have held that the respondent's misleading or deceptive conduct caused the appellants' loss or damage. The respondent argued that the loss was not a foreseeable consequence of the misleading or deceptive conduct.

The main issue was whether the Court could infer that Bankwest's enforcement of its security was caused by the structural defect and the respondent's misleading or deceptive conduct. The Court also had to assess any damages for loss of opportunity.

Decision

The NSW Court of Appeal allowed the appeal and dismissed the respondent's cross-appeal.

Material contribution to the loss

Their Honours held that the primary judge erred in finding that the structural design defect was not a material cause of the appellants' loss. The High Court's decision in *Henville v Walker*[2] was relevant: it was sufficient to establish causation for the plaintiff to prove that the misleading or deceptive conduct played a material part in the loss.

Ward JA (Macfarlan and Leeming JJA in agreement) found that there was an "overwhelming inference" that the cessation of construction due to the raft slab structural design defect was a material cause in Bankwest's decision to enforce its security interests. Her Honour rejected the conclusion that it was no more than conjecture, instead stating that this was the most obvious and probable inference to be drawn from the facts. This was despite the lack of any evidence from Bankwest.

Ward JA also found that the loss or damage Mistrina suffered was a reasonably foreseeable consequence of the respondent's misleading or deceptive conduct. Again relying on *Henville v Walker*, it would suffice for the loss of opportunity to be foreseeable 'even in a general way'.[3]

Calculation of damages

The Court of Appeal agreed with the primary decision regarding the calculation of damages and discount for loss of opportunity. The primary judge had suggested that a discount rate of 15% should be applied to the claim for loss of opportunity.[4] Ward JA acknowledged that the building was close to complete when the loan was repayable to Bankwest, and that it went against commercial common sense for Bankwest to enforce its rights by taking the partially complete development at such a late stage. These factors went against a more substantial discount. Further, since an assessment of loss of opportunity is effectively a discretionary judgement, the Court of Appeal was reluctant to overturn the primary judge's decision.

Conclusion

The Court of Appeal's decision reiterates that a consultant may be liable for economic loss arising from misleading or deceptive conduct. Australian Consulting Engineers were found to have caused Mistrina's loss even though there was no direct contractual relationship with Mistrina and Australian Consulting Engineers and it was Mistrina's builders that were induced to rely on the representation (the incorrect certificate).

Consistent with *Henville v Walker*, the fact that the structural defect in the raft slab was 'a' material cause of the Bankwest's decision to enforce its security was enough for the misleading or deceptive conduct to have caused Mistrina's loss.

https://www.caselaw.nsw.gov.au/decision/174af54a434669161f7da9d3

2 *Henville v Walker* (2001) 206 CLR 459
3 At [100] and [106], citing McHugh J in *Henville v Walker* (2001) 206 CLR 459
4 *Mistrina Pty Ltd v Australian Consulting Engineers Pty Ltd* [2020] NSWSC 130

Acciona Infrastructure Australia Pty Ltd v Chess Engineering Pty Ltd

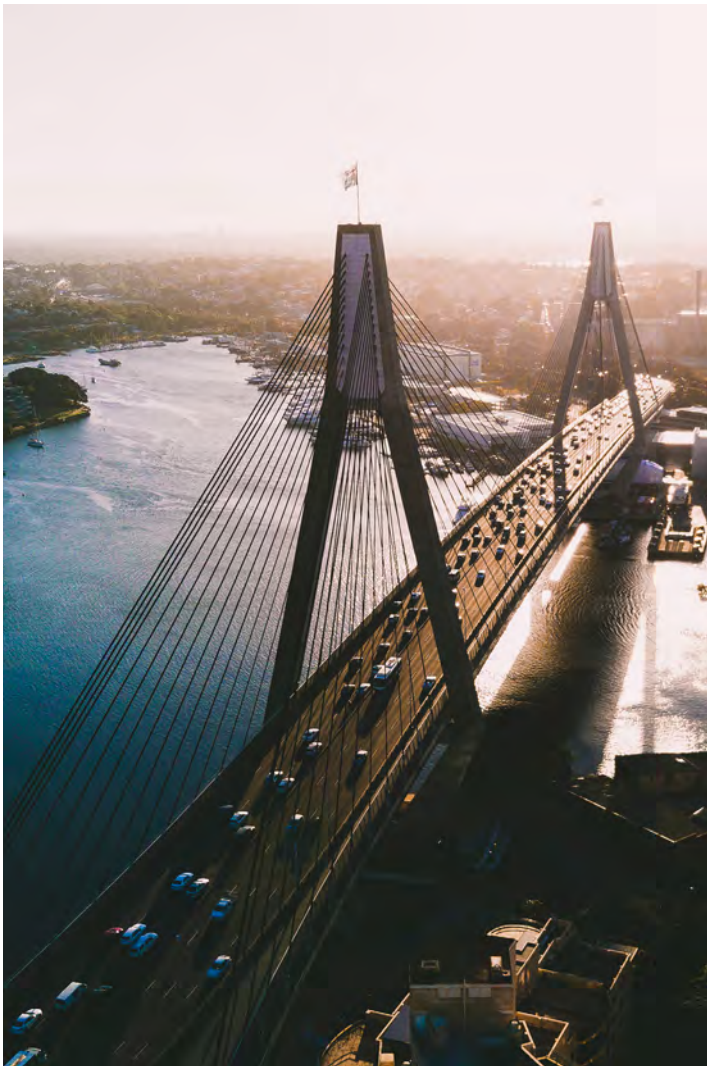
[2020] NSWSC 1423

Key takeaways

If an adjudicator makes a mistake in interpreting the parties' submissions, this will not usually amount to jurisdictional error, even when a mistake results in a complete exclusion of important submissions.

Keywords

jurisdictional error



Background

Acciona Infrastructure Pty Ltd (**Acciona**) subcontracted Chess Engineering Pty Ltd (**Chess**) for the supply and installation of screens for a pedestrian bridge on Anzac Parade, as part of the Sydney Light Rail Project.

In March 2020, Acciona served a payment schedule which disputed aspects of one of Chess's payment claims. Chess applied for adjudication.

The adjudicator determined that Chess was entitled to an interim payment of approximately $640,000 under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**the Act**).

Issues

Acciona challenged the determination on the basis that the adjudicator:

- failed to consider the payment schedule and supporting adjudication response, resulting in either (1) a failure to fulfill the adjudicator's statutory duty under section 22(2)(d) of the Act; or (2) a failure to afford Acciona procedural fairness;
- failed to perform his statutory duty under section 22 of the Act to form a view as to what was properly payable to Chess; and
- breached his statutory duty by considering matters extraneous to those set out in the Act.

The Court also faced the question of what relief can be granted when one part of a determination is found to be invalid but the remainder is unaffected.[1]

Decision

Issue 1 — Failure to consider payment schedule or adjudication response

At multiple points in the determination, the adjudicator's reasons and statements in relation to Acciona's arguments were clearly incorrect. Acciona argued that this indicated that the adjudicator had failed to consider the payment schedule and adjudication response, as required by section 22(2) of the Act.

Henry J found that the adjudicator had misinterpreted these documents, but not failed to consider them. As a result, he had not made any jurisdictional error. In reaching this conclusion, her Honour noted that the documents were drafted in a complex and confusing manner, and that the adjudicator had explicitly referenced the relevant parts of both documents.

The adjudicator had also excluded some submissions under section 20(2B) of the Act because, as a result of his misinterpretation of the payment schedule and adjudication response, he believed them to be irrelevant. Henry J stated that this might be a jurisdictional error if the mistaken exclusion was done on a basis which lacks any "reasonableness or rationality". In this case, due to the confusing nature of the submissions, and the inconsistent terminology used in the payment schedule and adjudication response, the adjudicator's mistake did not meet this threshold.

Issue 2 — Did the adjudicator fail to form a view as to what was properly payable to Chess?

Under the Act, the adjudicator was required to come to a view on what was 'properly payable'. Acciona argued that he failed to do this with respect to several of Chess's claims and instead simply accepted their valuation after rejecting the amounts in Acciona's payment schedule.

Acciona based this submission on the general lack of analysis or reasons discussing Chess's methodology in support of its claim. However, Henry J found that, where the adjudicator made some reference to Chess's relevant submissions, it could be implied that he had assessed and approved their methodology.

Following this approach, her Honour identified only one claim on which the adjudicator had committed a jurisdictional error of this kind. This arose where the Adjudicator accepted the quantum Chess suggested without any reference whatsoever to their submissions in support of that quantum.

Issue 3 — Did the adjudicator consider matters extraneous to the Act?

The Act provides that the adjudicator should have regard to certain matters 'only'. The adjudicator's determination used words such as 'reasonableness' and 'adequacy', which Acciona argued indicated the adjudicator had considered extraneous factors when making his determination.

However, her Honour disagreed, stating that this wording needed to be considered "through the prism of language used by a lay decision maker",[2] and was simply expressing his approval of Chess's calculations.

Conclusion

This judgment is a reminder that mistakes adjudicators may make in interpreting the parties' submissions will not usually amount to jurisdictional error, even when a mistake results in a complete exclusion of important submissions.

Further, the judgment illustrates the courts' approach to adjudicators' reasoning and conclusions. Especially in relation to issues two and three, Henry J read the determination in a manner which seemed to assume that the adjudicator had done what was necessary to meet his statutory duties. The one jurisdictional error her Honour found was where the adjudicator had made no reference whatsoever to the considerations he was bound to make.

https://www.caselaw.nsw.gov.au/decision/175296529277e7829389dcd2

1 This question was dealt with in a separate proceeding: *Acciona Infrastructure Australia Pty Ltd v Chess Engineering Pty Ltd* (No 2) [2020] NSWSC 1788

2 At [105]

Queensland

Civil Contractors (Aust) Pty Ltd v Galaxy Developments Pty Ltd; Jones v Galaxy Developments Pty Ltd

[2021] QCA 10

Key takeaways

In Queensland, an adjudication determination delivered after the prescribed statutory period will be void. If that occurs, the adjudicator will not be entitled to their fees.

Keywords

late adjudication determinations; building licences

Background

Galaxy Developments Pty Ltd (**Galaxy**) engaged Civil Contractors (Aust) Pty Ltd (**CCA**) to perform civil works priced at approximately $1.4 million. The scope of works included a minor component for the removal and relocation of an existing bus stop shelter and the installation of a bike rack, valued at approximately $37,000 (the **bus stop works**). CCA held a structural landscaping licence, as defined in Schedule 2 of the Queensland *Building and Constriction Commission Act 1991* (Qld) (**QBCC Act**).

A dispute arose in relation to one of CCA's payment claims, which ultimately went to adjudication under the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) (**BIF Act**).

The adjudicator determined that CCA was entitled to payment of approximately $1.3 million, including for the bus stop works, however the determination was delivered five days after the date required under the BIF Act.

The Supreme Court of Queensland found that the adjudication determination was void because it was issued after the statutorily required time or, alternatively, because CCA did not hold the appropriate licence class to complete all of the works under the contract, which rendered the contract void and any consequent adjudication determination void.

The key issues

The Court of Appeal was required to determine three issues:

1. whether an adjudication determination delivered beyond the statutory time limit is void;
2. whether upon the proper construction of the QBCC Act, CCA did not hold the proper building licence, with the effect of rendering the contract and the adjudicator's determination void; and
3. whether the adjudicator is entitled to fees and expenses for a late adjudication determination.

The Court of Appeal unanimously dismissed the appeal on all grounds.

Issue 1 — Was the late adjudication determination void?

In determining the first issue, the Court of Appeal noted that the BIF Act does not expressly provide that a late determination will be of no effect, but does provide a 'strong indication' that that is the case.[1]

Ultimately, the Court of Appeal agreed with the decision at first instance, finding that an adjudicator only has as much time as is prescribed by the legislation and that any determination issued after the statutory time frame is void.

1 At [38]

The Court of Appeal rejected the argument that the legislative intent of the BIF Act was similar to those in Victoria and New South Wales which provide that late adjudications remain valid.[2] Noting that the BIF Act does not entitle a claimant to withdraw an adjudication if the determination is rendered late (which entitlement exists under the Victorian regime[3]), the Court of Appeal held that the only conclusion is that a late determination under the BIF Act is void.

The Court of Appeal also considered that such a finding supported the desirable position that be certainty in a commercial context by incentivising adjudicators to decide applications as the BIF Act specifically requires, namely, within time.

Issue 2 — Did CCA hold the appropriate licence to perform the works?

Given its finding on Issue 1, the Court of Appeal found it was not necessary to determine whether the adjudication determination was void by operation of section 42 of the QBCC Act (regarding unlawful building work). Nonetheless, the Court of Appeal considered CCA's ground of appeal as to whether it held the appropriate building licence for the small part of the works contended to fall outside the scope of CCA's building licence (being the bus stop works).

This was of particular importance to CCA as section 42 of the QBCC Act provides that a person who carries out building work without the appropriate licence is not entitled to payment under the contract[4] and that, in the absence of a right to a progress payment under a construction contract, an adjudicator will not have jurisdiction to determine an adjudication.

After carefully considering the definitions and exclusions in the QBCC Act and QBCC Regulation relevant to CCA's licence class, the Court of Appeal disagreed with the primary judge's conclusion that the bus stop works were outside the scope of CCA's building licence, finding instead that the particular works took place on a footpath that was part of the area of land which was the road. As such, the Court of Appeal determined that CCA was licenced to carry out all of the works under the contract.

Whilst this was a victory for CCA, the Court of Appeal did not resolve the jurisdictional issue that may arise when a contractor is not licenced for all of the works under contract. The primary judge considered that a contractor would be disentitled to all payments under contract, and therefore any adjudication flowing therefrom, where even a small portion of the works fell outside the scope of the contractor's building licence (such as the bus stop works). The primary judge labelled this "absurd in reality".[5]

Issue 3 — Was the adjudicator entitled its fees?

On the final ground of appeal, the Court of Appeal upheld the primary judge's decision that the adjudicator was not entitled to be paid his fees, but clarified the basis for this.

At first instance, Dalton J held that the adjudicator was not entitled to be paid his fees because he had not acted in good faith under section 95(8) of the BIF Act as he was aware of the applicable time limits and represented that the determination had been made on time when it had, in fact, not.

The Court of Appeal held that there need not be a finding of good faith or otherwise as a late adjudication determination is simply one by which an adjudicator "fails to make a decision on the application". Under section 95(6) of the BIF Act, this disentitles an adjudicator to payment of any fees.

Conclusion

The Court of Appeal unanimously determined that an adjudication determination will be void if it is delivered after the time limits of the BIF Act. This position remains in contrast with the position in Victoria and New South Wales and reinforces the importance of the time frames under the BIF Act.

Further, adjudicators will not be entitled to be paid for a late determination under the BIF Act.

The decision also reinforces the need for contractors to ensure they hold the appropriate licence class for all works under contract. The risks of non-compliance include rendering the contract unenforceable and losing access to the adjudication regime under the BIF Act.

https://www.sclqld.org.au/caselaw/QCA/2021/10

2 The Court of Appeal considered *Ian Street Developer Pty Ltd v Arrow International Pty Ltd* [2018] VSCA 294 and *Cranbrook School v JA Bradshaw Civil Contracting* [2013] NSWSC 430

3 Section 28(2) of the *Building and Construction Industry Security of Payment Act 2002* (Vic)

4 The contractor will instead be entitled to "reasonable remuneration" under section 42(4) of the *Queensland Building and Construction Commission Act 1991* (Qld)

5 *Galaxy Developments Pty Ltd v Civil Contractors (Aust) Pty Ltd t/a CCA Winslow* [2020] QSC 51 at [109] (Dalton J)

New project trust account regime in Queensland

On 1 March 2021, Phase 1 of the new project trust account (**PTA**) regime under the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) commenced.

Background

The new PTA regime was introduced by the *Building Industry Fairness (Security of Payment) and Other Legislation Amendment Act 2020* (Qld) and is being commenced in phases.

This regime replaces (and aims to simplify) the previous project bank accounts framework, which required three separate trust accounts to be established. One of the three trust accounts previously required (disputed funds account), is no longer required under the new PTA regime.

What is a project trust account?

A PTA is a trust account into which a principal pays monies that are owing to a head contractor under a construction contract. First tier subcontractors are then paid (by the head contractor) directly from the PTA.

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

Changes from 1 March 2021

Phase 1 applies to eligible State Government building contracts entered into on or after 1 March 2021, where:

- the contract price is valued between $1 million and $10 million;
- more than 50% of the contract price is for 'project trust work' (this includes a wide variety of works such as erecting, constructing, renovating, extending or repairing a building);
- a subcontract is entered into by the head contractor for all or part of the work; and
- the contract is not an 'exempt contract' (exempt contracts include contracts with a practical completion date of less than 90 days and small scale residential work).

The PTA regime will also apply if the original contract price increases by 30% or more, causing the contract price to be between $1 million and $10 million.

Under Phase 1, state authorities can choose to opt into the PTA regime.[1]

Project trust account regime

Where a contract is eligible for the PTA regime, the contractor will be required to establish:

- a single project trust account for each project; and
- a single retention trust account for any retention amounts across **all of the contractor's eligible projects**.[2]

Some of the other changes introduced from 1 March 2021 include:

- the granting of additional oversight powers to the Queensland Building and Construction Commission;[3] and
- the removal of the requirement for principals to have viewing access to trust accounts.[4]

Future phases

A summary of the future phases and roll out dates are set out below:

Phase	Summary[5]	Date[6]
Phase 2A	Extended to apply to all eligible State Government and Hospital and Health Services contracts valued at $1 million or more	1 July 2021
Phase 2B	Extended to apply to all eligible, private sector, local government, statutory authorities' and government-owned corporations' contracts valued at $10 million or more	1 January 2022
Phase 3	Extended to apply to all eligible, private sector, local government, statutory authorities' and government-owned corporations' contracts valued at $3 million or more	1 July 2022
Phase 4	Extended to apply to all eligible contracts (public or private sector) valued at $1 million or more	1 January 2023

Do I need a project trust account?

If you're unsure whether a project trust account is required, the Queensland Building and Construction Commission has created a useful trust accounts tool to assist in making that determination.

1 *Building Industry Fairness (Security of Payment) Act 2017* (Qld) s 14(2)(a); 'State authority' is defined in s 8 of the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) and includes a commission, corporation or office established under an Act or a hospital and health service.

2 *Building Industry Fairness (Security of Payment) Act 2017* (Qld) ss 18 and 34.

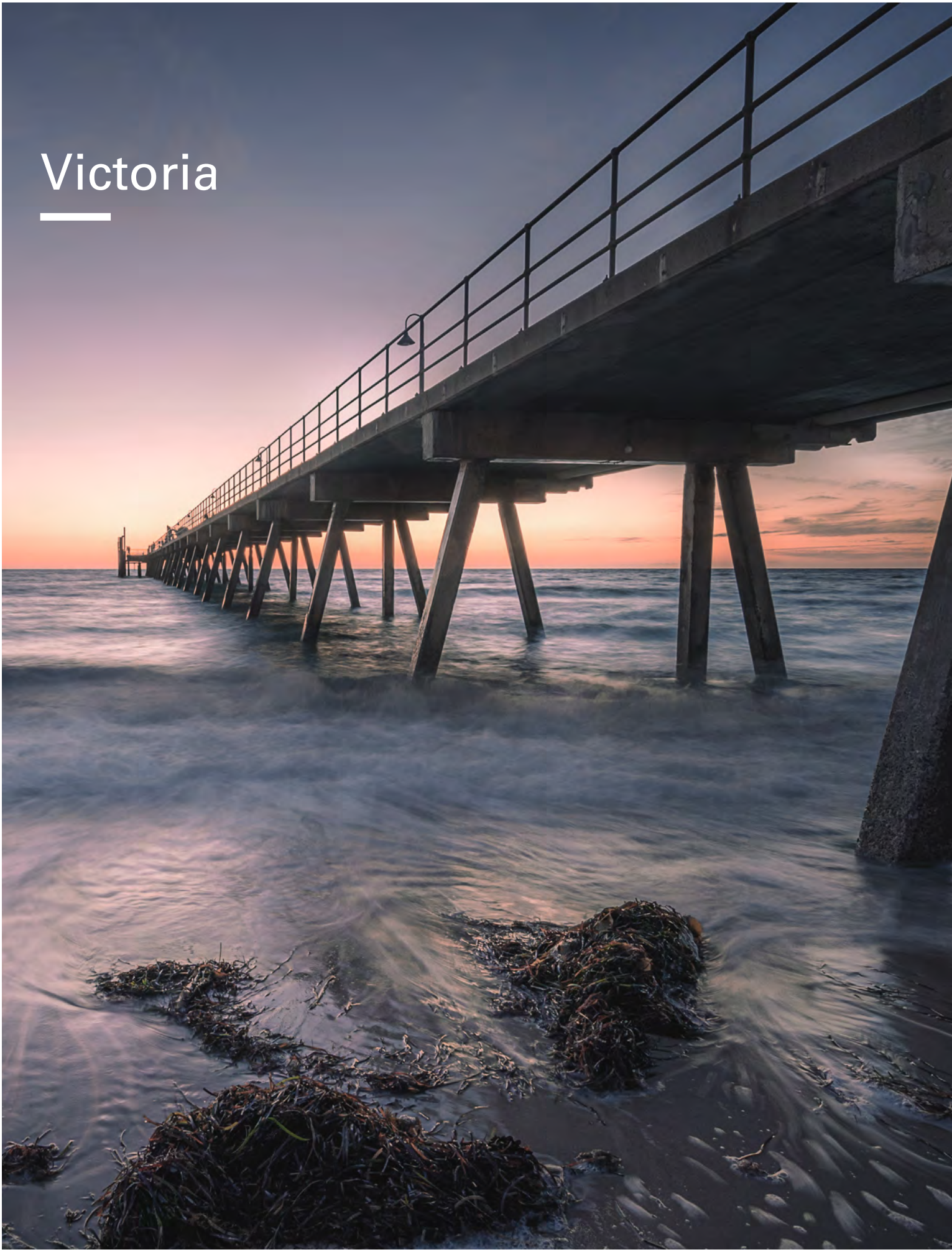
3 See for instance, *Building Industry Fairness (Security of Payment) Act 2017* (Qld) ss 53A and 53D.

4 Previously s 24(2) of the *Building Industry Fairness (Security of Payment) Act 2017* (Qld).

5 Explanatory notes for Subordinate Legislation 2020 No. 159 made under the *Building Industry Fairness (Security of Payment) Act 2017*; *Building Industry Fairness (Security of Payment) Act 2017* (Qld) ss 213-218.

6 Proclamation No. 159 of 2020 made under the *Building Industry Fairness (Security of Payment) Act 2017*; Explanatory notes for Subordinate Legislation 2020 No. 159 made under the *Building Industry Fairness (Security of Payment) Act 2017.*

Victoria



Bensons Property Group Pty Ltd v Key Infrastructure Australia Pty Ltd

[2021] VSCA 69

Key takeaways

The prevention principle may only be enlivened and relied on by parties where the allegedly preventative act is a breach of an express or implied contractual term.

A contracting party that seeks to rely on the prevention principle on the basis that another party has breached an implied duty to cooperate must establish, on the balance of probabilities, that it would have been able to perform its obligations but for the wrongdoing party's uncooperative conduct.

Keywords

prevention principle

Facts

This case concerns a contract between Key Infrastructure Australia Pty Ltd (**KIA**) and Bensons Property Group (**Bensons**) regarding a proposed Port Melbourne property development. In April 2016, the parties executed a development management agreement (**DMA**) under which Bensons was obliged to pay KIA a development management fee of $2 million in four instalments if KIA could successfully procure a planning permit for the site by a sunset date of 31 December 2016. If KIA failed to meet that deadline, the DMA was to terminate and KIA was to repay any instalments that Bensons had already paid.

By May 2016, it became apparent that the council might further delay or refuse to issue the permit. Under the *Planning and Environment Act 1987* (Vic), appeal to the Victorian Civil and Administrative Appeals Tribunal (**VCAT**) is possible. The DMA provided that Bensons could instruct KIA to appeal a decision to VCAT, but was not obliged to do so. On 10 May 2016, Bensons informed KIA that it would not fund a VCAT proceeding.

On 18 May 2016, Bensons wrote to KIA alleging that KIA would breach the DMA if it appealed to VCAT as Bensons had not instructed KIA to appeal under the DMA (**18 May 2016 letter**). However, that same day, KIA had already commenced an application in VCAT. After receiving the 18 May 2016 letter, KIA promptly withdrew that application.

On 5 July 2016, KIA reinstated its VCAT application for a planning permit. Ultimately, on 22 December 2016, VCAT made orders directing the council to issue the planning permit. The council did not issue the planning permit until 6 February 2017; that is, after the sunset date.

KIA sought payment of the balance of the development management fee which Bensons refused to pay on the basis that the permit had not been issued by the sunset date.

KIA commenced proceedings in the Supreme Court of Victoria. Bensons counterclaimed to recover the instalments of the development management fee, which it had already paid. The trial judge held that the 18 May 2016 letter had induced KIA to withdraw its VCAT application, and that Bensons' actions had breached an implied duty to cooperate. Accordingly, Bensons was liable to pay damages.

Issues

In the Court of Appeal, Niall, Emerton and Sifris JJA gave a joint judgment considering three issues:

1. the application of the prevention principle;
2. whether the DMA contained an implied duty to cooperate and, if so, what the content of that duty was; and
3. whether KIA's actions precluded the operation of the prevention principle.

Application of the prevention principle

The relevant question was "whether the conduct of the party alleged to be preventing performance deprived the opposite party of a 'substantial chance' of meeting the condition". The wrongdoing party may not insist that the innocent party perform a contractual obligation with which the act of prevention interfered.

The Court observed that the principle requires parties not to engage in conduct which prevents the other party from enjoying the benefit of the contract.

However, the Court held that the prevention principle is not a freestanding principle of law; rather, the prevention principle must attach to a breach of the specific contract, by the party alleged to be preventing performance.

Accordingly, the Court found that the trial judge had erred in applying the prevention principle without considering whether Bensons' conduct amounted to a breach of the implied duty to cooperate.

Did the DMA include an implied duty to cooperate and, if so, what is the content of that duty?

The implied duty to cooperate seeks to ensure that contracts are effective by preventing parties from engaging in uncooperative conduct which might undermine the bargain.

While Bensons accepted that the DMA was subject to an implied duty to cooperate and that such an implied duty would be consistent with the express terms of the DMA, Bensons asserted that it had not breached that implied duty as its actions had not rendered satisfaction of the DMA impossible.

The Court disagreed with the argument that the implied duty to cooperate applied only where satisfaction of the underlying contract was impossible. In doing so, it reiterated the position that the implied duty to cooperate requires parties not to "**hinder or prevent** the fulfilment of the purposes of the express promises made" in the contract. This construction of the implied duty to cooperate is capable of capturing conduct which does not render performance impossible.

Did KIA's actions preclude the operation of the prevention principle?

The Court held that the 18 May 2016 letter, which alleged that KIA would breach the DMA if it applied to VCAT, did not amount to a breach of the implied duty to cooperate. It had not prevented KIA from meeting the permit condition.

The Court considered that KIA, notwithstanding the 18 May 2016 letter, had the capacity, knowledge, legal and planning assistance necessary to secure the permit, and that Bensons' actions "did not render the contract nugatory, worthless or seriously undermined".

The requirement to secure the permit by the sunset date was KIA's fundamental obligation under the DMA. It could not be inferred from Bensons' conduct that it was relieving KIA of this obligation. The DMA did not impose any affirmative obligations on Bensons to elect that KIA apply to VCAT or to assist in any application. Further, the Court noted that, regardless of Bensons' allegations in the 18 May 2016 letter, it would not amount to a breach of the DMA for KIA to pursue an application at VCAT without an election from Bensons. As such, the 18 May 2016 letter did not prevent KIA from further working to secure a permit through the council, or from applying to VCAT at its own cost. It was also not apparent that the permit would have been secured by the sunset date even if KIA's initial VCAT application had remained on foot.

Accordingly, Bensons was not found to have breached the implied duty to cooperate and, as the 18 May 2016 letter did not breach the DMA, the prevention principle was not enlivened.

Conclusion

The Court unanimously upheld the appeal and set aside the trial judgment. The Court remitted the decision for judgment on Bensons' counterclaim, requiring KIA to refund the first and second instalments of the development management fee.

http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSCA/2021/69.html

Yuanda Vic Pty Ltd v Façade Designs International Pty Ltd

[2021] VSCA 44

Key takeaways

In Victoria, where the claimed amount under section 16(4)(a)(ii) of the *Building and Construction Industry Security of Payment Act 2002* (Vic) contains any excluded amounts (such as interest), the Court will not give judgment in favour of the claimant.

Keywords

'excluded amounts' in Victorian SOP Act

Facts

Yuanda Vic Pty Ltd (**Yuanda**) engaged Façade Designs International Pty Ltd (**Façade**) to install façade elements as part of the construction of commercial and residential towers in Melbourne. Façade performed the works until the contract governing the installation was terminated in November 2019.

On 30 September 2019, Façade provided a payment claim under section 14 of the *Building and Construction Industry Security of Payment Act 2002* (Vic) (**SOP Act**). The amount claimed was $4,584,820. Yuanda did not provide a payment schedule to Façade within 10 business days of receiving the payment claim. As a consequence, Yuanda became liable to pay Façade the claimed amount.

When Yuanda failed to pay the claimed amount, Façade sought a court judgment under section 16(2)(a)(i) of the SOP Act. However, section 16(4)(a)(ii) of the SOP Act provides that the court may not give judgment unless it is satisfied that the claimed amount does not include an excluded amount. It was common ground between the parties that the claimed amount included interest, which was an excluded amount.

Issues

The central issue was whether the courts could simply exclude or sever the interest and give judgment for the lower amount, or whether the inclusion of interest denied the granting of judgment altogether.

At first instance, the trial judge found that if a payment claim contained an excluded amount, judgment could still be given for a lesser amount (that is, the claimed amount less the excluded amount). Judgment was given to Façade. Yuanda appealed this decision.

Decision

Majority

The majority (McLeish and Niall JJA) allowed the appeal, finding that judgment could not be given in favour of Façade because the payment claim contained an excluded amount.

Their Honours adopted a strict interpretation of section 16(4)(a)(ii) of the SOP Act and found that the Court was precluded from giving judgment where the claimed amount contained an excluded amount. The Court's role was limited to determining whether a statutory liability exists and whether it could be enforced. Where there was a dispute about the extent to which excluded amounts were being claimed, the proper action was to pursue adjudication. Extending the Court's role would "sit uncomfortably with the Act's clear policy" of encouraging disputes to be resolved through adjudication — "the quicker and more informal processes contemplated by the Act."

Façade had argued that any excluded amount could be severed so that section 16(4)(a)(ii) of the SOP Act could be satisfied. The Court rejected this submission. The doctrine of severance could only apply where part of an instrument was invalid and, in limited circumstances, the remainder could be preserved by severing the invalid part.

However, in this case, there was no question of validity of the instrument because a claim containing an excluded amount was still a valid payment claim. Therefore, the doctrine of severance had no application.

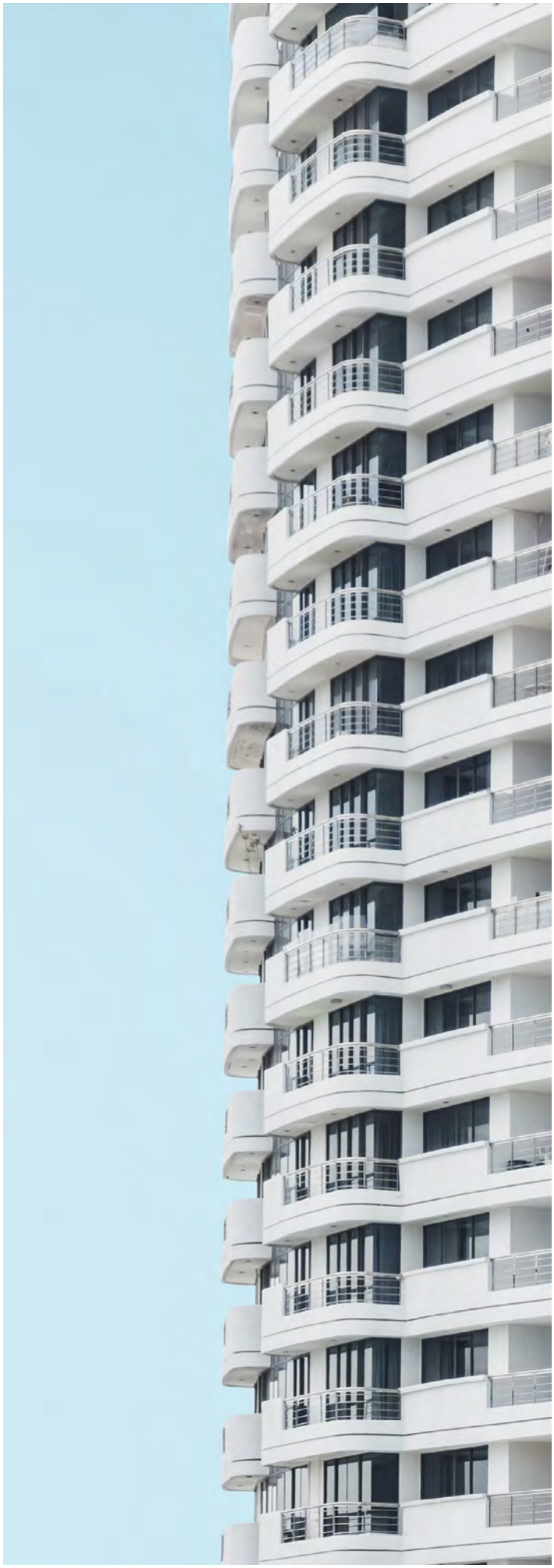
Dissent

In dissent, Sifris JA opined that the procedure for payment under the SOP Act was not intended to be inflexible or to punish a claimant for putting an excluded amount in the payment claim. There was nothing in the SOP Act that prevented the Court from giving less than the claimed amount where an adjustment was necessary and consistent with the aim of the SOP Act to allow contractors to recover progress payments in a timely and cost effective manner.

Conclusion

The appeal was allowed, the trial judge's orders were set aside and Façade's claim was dismissed.

http://classic.austlii.edu.au/au/cases/vic/VSCA/2021/44.html



Western Australia

Primero Group Ltd v Wärtsilä Australia Pty Ltd

[2021] WASC 44

Key takeaways

Australian courts will consider various factors, including convenience, when determining whether proceedings should transferred to another Australian jurisdiction.

Cost-effective technology may weigh in favour of transferring proceedings.

Keywords

transfer of proceedings

Facts

In early 2018, AGL Barker Inlet Pty Ltd (as trustee for the Barker Inlet Trust) engaged Wärtsilä Australia Pty Ltd (**Wärtsilä**) as head contractor responsible for establishing the Barker Inlet power station on Torrens Island, South Australia.

Wärtsilä subcontracted Primero Group Pty Ltd (**Primero**) to perform some works on the power station. Disputes arose regarding delays, key events, and payments.

On 24 April 2020, Primero commenced proceedings in the Western Australian Supreme Court. Primero sought an interlocutory injunction restraining Wärtsilä from calling on performance bonds.

Two months later, Wärtsilä commenced proceedings in the South Australian Supreme Court, seeking:

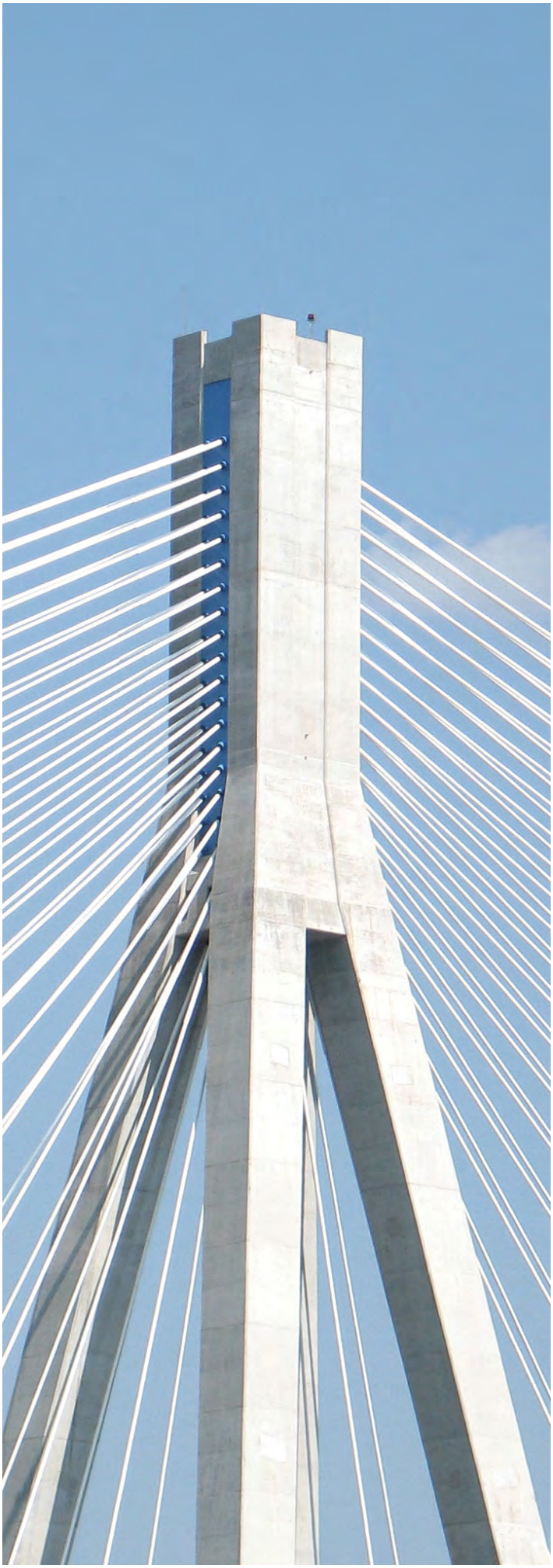
- reimbursement of a part of an interim payment to Primero; and
- payment of liquidated damages under the subcontract.

Consequently, litigation had commenced in Western Australia and South Australia between the same parties, on essentially the same issues.

Issues

Wärtsilä applied for the WA proceeding be transferred to the Supreme Court of South Australia under section 5(2) of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (WA) (**WA Cross-vesting Act**). Alternatively, Wärtsilä sought a permanent stay of the WA proceeding.

What the WA Cross-vesting Act requires is essentially a 'nuts and bolts' management decision, as reflected in the criteria in section 5(2)(b)(iii), to be made in the overall interests of justice. Courts determining such applications must act neutrally in deciding which forum is more appropriate for resolving the parties' dispute.



Conclusion

Ultimately, Kenneth Martin J determined that, in the overall interest of justice, the WA proceeding was to be transferred to South Australia.

Martin J considered several factors in reaching this decision. No factor was necessarily determinative or overwhelming; rather, the factors were to be weighed up and balanced with the interest of justice. The factors considered were:

- the underlying contractual dispute between the parties was more geographically proximate to South Australia;
- the dispute was a contractual breach dispute, where the chosen law of the subcontract was the law of South Australia, which was a 'healthy pointer' towards reinforcing South Australia as the neutral forum for the present dispute;
- both parties were well-resourced and sophisticated commercial parties accustomed to making their personnel available remotely; and
- the dispute was capable of being determined swiftly, justly, fairly and appropriately in the Supreme Court of South Australia.

Martin J noted that the parties' affidavits had been directed to factors of convenience, such as geographical locations of the parties' lawyers or counsel and the parties' respective bases of operation across Australia.

His Honour found that in the context of COVID-19, effective evidence can be taken in trials through remote video links. The commonplace and widespread use of remote evidence-taking technology was a beneficial and cost effective development that weighed in favour of transferring the proceeding to South Australia.

http://classic.austlii.edu.au/au/cases/wa/WASC/2021/44.html

Overseas

Vim Engineering Pte Ltd v Deluge Fire Protection (SEA) Pte Ltd

[2021] SGHC 63

Key takeaways

Decision of the High Court of Singapore. If a contract stipulates that variations may only be carried out on written instruction, a party that performs variation works without written instruction will probably not be able to claim payment. Oral instructions are unlikely to suffice.

Keywords

oral variation directions

Facts

Deluge Fire Protection (SEA) Pte Ltd (**Deluge**) was a subcontractor of Samsung C&T Corporation (**SCT**). Deluge in turn subcontracted plumbing and sanitary works to Vim Engineering Pte Ltd (**Vim**).

Vim left the project site before completing its originally contracted works (**main works**). Vim had also completed several variations based on oral instructions. However, clause 16 of the subcontract provided that variations were only to be carried out on written instructions from Deluge's project manager.

Vim sued Deluge for payment due to it for the main works and the alleged variations.

Deluge counterclaimed for the costs it incurred completing the main works and rectifying defects, and for back-charges under clause 19 of the subcontract.

Issues

The principal issues before Maniam JC were:

1. the amount to which Vim was entitled for the completed portion of the main works;
2. whether Vim was entitled to claim for the variations despite the lack of written instructions;
3. whether Vim was entitled to a reasonable sum for the variations (on a quantum meruit basis);
4. the amount to which Deluge was entitled for completing the main works and rectification works; and
5. whether Deluge was entitled to back-charges or damages.

Issue 1 — What was Vim entitled to for the completed portion of the main works?

Maniam JC found that Vim was entitled to $453,912 SGD for the amounts unpaid on the completed portion of the main works.

Issue 2 — Was Vim entitled to claim for the variations despite the lack of written instructions?

Maniam JC held that in light of the contractual requirement that variations only be carried out on written instructions, Vim was not entitled to any amount for the variations as no written instructions had been given.

Relying upon *Mansource Interior Pte Ltd v CSG Group Pte Ltd* as authority, his Honour held that if a contract precludes variation claims, save for authorised variation works, then the subcontractor is not entitled to claim payment for any unauthorised variations. Here, it was common ground that Vim had not received written instructions for variation works. Accordingly, no claim for payment could be made.

Alternatively, Vim argued that Deluge had waived the written instructions requirement or was estopped from denying the variation claims because it had provided oral instructions, assured Vim that it would be paid, and signed Vim's invoices for the variations.

Maniam JC rejected this argument. Vim had contractually promised to perform variation works only on written instructions. Therefore, any alleged oral instructions only meant that the subcontract had not been complied with.

Further, the signatures of Deluge staff on Vim's invoices were merely acknowledgements that the works had been carried out, not that Vim would be paid for them. Deluge staff who signed the invoices had no authority to waive the requirement for written instructions.

Accordingly, Vim was not entitled to any amount for the variation works.

Issue 3 — Was Vim entitled to a reasonable sum for the variations?

Alternatively, Vim claimed that Deluge had accepted the variation works and been paid for these works by SCT. Vim argued it should be paid a fair and reasonable sum for these works on a *quantum meruit* basis.

Maniam JC denied this claim. Vim could provide no evidence that Deluge had received any additional payment from SCT for the variation works. Accordingly, Deluge had not been unjustly enriched, particularly given that the performance of the variation works was contrary to the terms of the subcontract due to the lack of written instructions.

The *quantum meruit* claim was dismissed.

Issue 4 — What amount was Deluge entitled for completing the main works and rectification works?

Maniam JC accepted that Deluge had incurred costs completing Vim's unfinished works and rectifying the defects after Vim had left the site. Deluge was awarded $105,037 SGD on this basis.

Issue 5 — Was Deluge entitled to back-charges or damages?

Deluge claimed back-charges under clause 19 of the subcontract, which provided that Deluge could claim against Vim the cost of any subcontract works that Vim failed to complete.

Maniam JC held that Deluge was entitled to these charges, as the evidence proved that there were delays and defects in Vim's work. His Honour found that Vim did not have enough workers on site each day to complete the works, that these workers may not have been properly certified to perform the subcontracted work, and that materials were ordered on very short notice.

Deluge was awarded $858,604 SGD in back-charges.

Conclusion

After setting off the claim for completing the main works and the back-charges owed to Deluge against the balance amount due to Vim, the net judgment was $509,729 SGD in favour of Deluge.

https://www.supremecourt.gov.sg/docs/default-source/module-document/judgement/-2021-sghc-63-pdf

Black Sea Commodities Ltd v Lemarc Agromond Pte Ltd

[2021] EWHC 287 (Comm)

Key takeaways

Decision of the English High Court. Courts will not readily recognise an arbitration clause implied by custom.

Draft versions of contractual amendments including an arbitration clause will not bind the parties unless they have agreed on the amendment.

Keywords

Arbitration agreements

Facts

Black Sea Commodities Ltd (**Seller**) was negotiating the sale of corn to Lemarc Agromond Pte Ltd (**Buyer**). By early March 2018, the parties had agreed on several important contractual terms, including the price, payment terms and delivery period, but several other terms remained to be decided. In subsequent negotiations, a standard Grain and Free Trade Association (**GAFTA**) arbitration clause was added to the draft contract. GAFTA contracts are widely used in grain shipping and sales). Neither party objected to its inclusion.

The Seller later withdrew from the negotiations. The Buyer commenced GAFTA arbitration proceedings, contending that a binding contract had come into effect, which the Seller had repudiated. Arbitral awards were rendered in the Buyer's favour on jurisdiction and liability, and subsequently for quantum.

The Seller challenged the arbitral awards before the English Commercial Court on the basis that the arbitral tribunal lacked jurisdiction.

The Seller argued that regardless of the existence of a binding contract, there was no binding arbitration agreement in place at the time negotiations broke down. Further, there was no meeting of the minds (a consensus ad idem) in the exchange of draft conditions in relation to the arbitration agreement.

The Buyer responded that the arbitration agreement had become binding either through a variation of the contract agreed by the parties, or as an independent agreement. It relied on the doctrine of separability under section 7 of the *Arbitration Act 1996* (UK) (**Arbitration Act**).

Issues

The Court considered whether:

- there was agreement on an arbitration clause in exchanges between the parties prior to the breakdown in negotiations, or whether the arbitration clause was incorporated into the underlying agreement by way of variation;
- the arbitration clause was implied; and
- the arbitrators had jurisdiction to determine whether there was a binding arbitration agreement in place between the parties.

Issue 1 — Was there agreement on an arbitration clause?

The Court held that there was no meeting of the minds on the arbitration clause. His Honour, Sir Michael Burton, stated that if it was required to be decided, there was objectively a sufficient agreement to the essential terms of the contract prior to the breakdown of negotiations. However, no arbitration clause was then included in the contract, nor were there any draft conditions referring to one.

The Buyer maintained that since the arbitration clause was uncontested during the negotiation stage, the arbitration clause became part of the agreement. His Honour held that this argument was not supported by standard applications of offer and acceptance.

Issue 2 — Could an arbitration clause be implied?

The Buyer's amended defence argued that the contract agreed between the parties "included a term implied by trade/custom that this grain contained a provision for GAFTA arbitration". The Court considered that for this argument to succeed, the Buyer would need to establish a trade custom that is "an invariable, certain and general usage or custom of any particular trade or place". The only evidence submitted in this regard was that the Buyer always included a GAFTA arbitration clause in its own contracts of this kind.

His Honour held that an arbitration clause could not be implied by virtue of "custom and usage of the trade in Ukrainian corn".

His Honour was not persuaded, on the evidence, that such a trade custom existed. His Honour was also concerned that a term that there be 'provision for GAFTA arbitration' was not sufficiently certain. Further, his Honour expressed doubt as to whether an arbitration agreement implied into a contract through custom would comply with section 6(2) of the Arbitration Act as there was an absence of prior dealings between the parties.

Issue 3 — Did the arbitrators have jurisdiction to decide whether there was a binding arbitration agreement between the parties?

For the reasons above, the Court ultimately held that the parties had not concluded a governing law and jurisdiction clause so as to create a binding agreement to arbitrate. The arbitral tribunal therefore did not have jurisdiction.

The Court found in the Seller's favour and set aside the GAFTA award.

Conclusion

Courts will not readily recognise an arbitration clause implied by custom. Under general contractual principles of offer and acceptance, draft amendments including an arbitration clause will not form part of the contract unless there is a meeting of the minds.

https://www.bailii.org/ew/cases/EWHC/Comm/2021/287.html

Corrs Insights

Click on the links to our recent articles relevant to your industry

Corrs High Vis: Episode 49 – Lacrosse Tower dispute: the appeal

The Corrs High Vis podcast considers the Victorian Court of Appeal's decision in the highly anticipated sequel to the Lacrosse Tower cladding dispute.

Click here

Caution: electronic execution under the Corporations Act suspended

The article considers the temporary measures to permit electronic execution of documents under the Corporations Act which expired on 21 March 2021, with the Bill to extend its operation delayed.

Click here

Corrs High Vis: Episode 48 – The health of the Australian construction industry: part one

The podcast considers the key takeaways from a recent study into the health of the construction industry.

Click here

Financiers urged to consider new building compliance requirements before lending

The article discuss Construct NSW's new regulatory framework and what it means for lending arrangements in the building and construction sector.

Click here

Hydrogen regulation in Australia: the state of play

The article discusses the current state of play in relation to the establishment of a regulatory framework concerning hydrogen in Australia.

Click here

The National Electricity Market: addressing the challenges of renewable penetration

The article discusses reports released by the Energy Security Board which further highlight challenges facing the National Energy Market as a result of an increasing amount of renewable energy generation.

Click here

Energy from Waste: the solution to Australia's war on waste?

The article discusses the potential viability of Energy from Waste technologies in managing waste in Australia, supporting the Australian Government's aim to become a completely circular economy over the coming decades.

Click here

Corrs High Vis: Episode 47 – Commonwealth Government framework for offshore clean renewable energy projects

The article discusses the proposed framework for the delivery of offshore clean renewable energy projects in Commonwealth waters.

Click here

Victoria declares absolute ban on high-risk cladding

The article unpacks the Victorian Government's ban on the use of high-risk cladding products in certain types of buildings, effective from 1 February 2021.

Click here

Combatting modern slavery in the construction industry: putting the structures in place

The article considers how the construction industry is susceptible to modern slavery practices as a result of the complex and multi-layered supply chains involved in delivering a project.

Click here

Contacts

Brisbane

Rod Dann

Partner
Projects and Arbitration

+61 7 3228 9434
+61 418 731 976
rod.dann@corrs.com.au

Leading Lawyer – Construction
Chambers Asia Pacific Guide, 2018–2020

Best Lawyer – Alternative Dispute Resolution, Litigation and Regulatory Practice
Best Lawyers Peer Review, 2013–2020

Best Lawyer – Construction/Infrastructure Law
Best Lawyers Peer Review, 2011–2020

Leading Individual – Construction
Asia Pacific Legal 500, 2018

The [Construction] team's prize litigator
Asia Pacific Legal 500, 2011–2018

Andrew McCormack

Partner
Projects and PNG

+61 7 3228 9860
+61 403 904 572
andrew.mccormack@corrs.com.au

Best Lawyer – Construction/Infrastructure Law
Best Lawyers Peer Review, 2016–2020

"Andrew has demonstrated a great approach in prioritising to meet the challenge of dual negotiations. His enthusiasm, knowledge, attention to detail and performance in meetings has been outstanding"
Energy and resources client

"Andrew demonstrates a strong power of analytical reasoning and excels in analytical thinking"
Infrastructure client

Matthew Muir

Partner
Projects and Arbitration

+61 7 3228 9816
+61 407 826 224
matthew.muir@corrs.com.au

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

Leading Individual – Construction
Asia Pacific Legal 500 2018

Dispute Resolution and Litigation
Asialaw Leading Lawyers 2016–2018

Leading Construction & Infrastructure Lawyer
Doyles Guide 2016–2018

"He provided valuable support, strategic advice, insight and good humour in a troublesome case"
CEO, Statutory Body

Michael MacGinley

Partner, Energy & Resources and Corporate M&A

+61 7 3228 9391
+61 417 621 910
michael.macginley@corrs.com.au

Leading Lawyer – Energy & Natural Resources: Mining – Australia
Chambers Asia Pacific and Global Guides, 2008–2020

Best Lawyer – Natural Resources, Energy, Mining and Oil & Gas
Best Lawyers Peer Review, 2009–2020

Best Lawyer – Climate Change
Best Lawyers Peer Review, 2010–2020

Brisbane Energy Lawyer of the Year
Best Lawyers Peer Review, 2012, 2016 and 2019

Joshua Paffey

Partner
Projects and Arbitration

+61 7 3228 9490
+61 437 623 559
joshua.paffey@corrs.com.au

"The best construction lawyer in the market"
General Counsel, Australian Government-Owned Corporation

Recommended Construction Lawyer
Legal 500

Best Lawyer – Alternative Dispute Resolution
Best Lawyers Peer Review, 2020

Leading Construction Lawyer
Doyle's Guide

Brent Lillywhite

Partner, Environment & Planning and Projects

+61 7 3228 9420
+61 416 198 893
brent.lillywhite@corrs.com.au

Best Lawyer – Transportation
Best Lawyers Peer Review, 2015–2020

Best Lawyer – Planning and Environment
Best Lawyers Peer Review, 2019–2020

Leading Planning & Development Lawyer, Queensland Doyle's Guide to the Australian Legal Profession, 2018, 2019

Leading (Recommended) Planning & Development Lawyer, Queensland
Doyle's Guide to the Australian Legal Profession, 2017

Michael Leong

Partner, Environment & Planning and Real Estate

+61 7 3228 9474
+61 406 883 756
michael.leong@corrs.com.au

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

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

Best Lawyer – Planning & Environment
Best Lawyers Peer Review, 2010–2020

Best Lawyer – Land Use and Zoning
Law Best Lawyers Peer Review, 2018–2020

Best Lawyer – Regulatory Practice
Best Lawyers Peer Review, 2013–2020

Queensland Land Use and Zoning Lawyer of the Year Best Lawyers Peer Review, 2019

Nick Le Mare

Partner
Employment & Labour and PNG

+61 7 3228 9786
+61 428 556 350
nick.lemare@corrs.com.au

Best Lawyer – Project Finance and Development
Best Lawyers Peer Review, 2016-2020

Best Lawyer – Employee Benefits
Best Lawyers Peer Review, 2016–2020

Best Lawyer – Labour and Employment
Best Lawyers Peer Review, 2015–2020

Best Lawyer – Occupational Health & Safety Best Lawyers Peer Review, 2018–2020

Lawyer of the Year – Employee
Benefits Best Lawyers Peer Review, 2018

Daryl Clifford

Partner
Projects and Real Estate

+61 7 3228 9778
+61 417 761 559
daryl.clifford@corrs.com.au

Leading Lawyer – Real Estate
Chambers Asia Pacific Guide, 2010–2020

Best Lawyer – Transportation
Best Lawyers Peer Review, 2015–2020

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

Best Lawyer – Project Finance and Development
Best Lawyers Peer Review, 2016–2020

Anna White

Partner, Projects and Environment & Planning

+61 7 3228 9489
+61 408 872 432
anna.white@corrs.com.au

"Professional, attentive, responsive and considers the bigger picture"
General Counsel Australasia, manufacturing client

"A highly capable and dependable lawyer who always has her eye on the tasks ahead and factors them into her strategic decision making and matter management"
Senior Legal Counsel, property client

"Her expertise across jurisdictions has been of particular benefit to us given our national portfolio"
Senior Legal Counsel, multinational developer

Peter Schenk

Partner
Projects

+61 7 3228 9869
+61 419 641 482
peter.schenk@corrs.com.au

Leading Lawyer – Infrastructure Australia
Chambers Asia Pacific, 2020

Pre-eminent Lawyer Doyles Guide, 2019

Leading Lawyer – Infrastructure & Project Finance
Chambers Asia Pacific and Global Guides, 2009–2019

Best Lawyer – Project Finance and Development Practice
Best Lawyers Peer Review, 2017–2019

Best Lawyer – Mining Law
Best Lawyers Peer Review, 2016–2019

Best Lawyer – Construction/Infrastructure Law
Best Lawyers Peer Review, 2009–2019

Rhys Lloyd-Morgan

Partner
Projects and Real Estate

+61 7 3228 9532
+61 411 116 082
rhys.lloydmorgan@corrs.com.au

"We use Corrs for much of our work because of our confidence in Rhys. We regularly recommend Corrs for the same reason."
Property Industry Client, 2020

Contacts

Melbourne

Joseph Barbaro
Partner
Projects and Arbitration

+61 3 9672 3052
+61 417 154 612
joseph.barbaro@corrs.com.au

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

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

Leading Construction Lawyer Victoria
Doyles, 2013-2015, 2017

Ben Davidson
Partner
Projects and Commercial Litigation

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

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

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

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

Andrew Stephenson
Partner
Projects and Arbitration

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

Leading Lawyer : Construction – Australia
Chambers Asia Pacific, 2020

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

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

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

John Tuck
Partner, Employment & Labour and Commercial Litigation

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

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

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

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

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

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

Jane Hider
Partner
Projects and Energy & Resources

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

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

Recommended – Who's Who Legal
Global Leaders 2019

Recommended – Who's Who Legal
Australia Construction 2019

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

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

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

David Warren
Partner
Projects

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

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

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

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

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

Leading Lawyer – Infrastructure
Chambers Asia Pacific Guide, 2020

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

Jared Heath

Partner
Projects and Commercial Litigation

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

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

Best Lawyer – Government Practice
Best Lawyers in Australia 2020

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

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

Chris Horsfall

Partner
Projects and Arbitration

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

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

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

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

Nathaniel Popelianski

Partner
Property & Real Estate

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

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

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

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

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

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

David Ellenby

Partner
Property & Real Estate

+61 3 9672 3498
+61 401 030 979
david.ellenby@corrs.com.au

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

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

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

John Walter

Partner, Projects and Commercial Litigation

Tel +61 3 9672 3501
john.walter@corrs.com.au

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

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

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

Paul Brickley

Partner
Projects

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

Best Lawyer – Banking and Finance
Best Lawyers Peer Review, 2019

Anthony Arrow

Partner
Projects

+61 3 9672 3514
+61 421 114 010
anthony.arrow@corrs.com.au

Recognised Practitioner – Construction
Chambers Asia Pacific, 2020

Contacts

Sydney

Andrew Chew

Partner, Projects and Property & Real Estate

+61 2 9210 6607
+61 407 453 443
andrew.chew@corrs.com.au

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

Leading Lawyer: Infrastructure – Australia
Chambers Asia Pacific, 2020

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

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

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

Michael Earwaker

Partner
Projects and Arbitration

+61 2 9210 6309
+61 428 333 837
michael.earwaker@corrs.com.au

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

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

Construction – 2019
Who's Who Legal, 2019

Airlie Fox

Partner, Projects and Property & Real Estate

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

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

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

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

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

Christine Covington

Partner, Environment & Planning and Property & Real Estate

+61 2 9210 6428
+61 419 607 812
christine.covington@corrs.com.au

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

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

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

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

Louise Camenzuli

Partner, Projects and Environment & Planning

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

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

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

Leading Lawyer – Environment
Chambers Asia Pacific Guide, 2018

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

Natalie Bryant

Partner, Projects and Property & Real Estate

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

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

Leading Leasing Lawyers – NSW 2019
Doyles Guide, 2019

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

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

Jack de Flamingh

Partner, Employment & Labour and Energy & Resources

+61 2 9210 6192
+61 403 222 954
jack.de.flamingh@corrs.com.au

Leading Lawyer– Employment
Chambers Asia Pacific Guide, 2012–2019

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

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

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

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

Carla Mills

Partner
Projects and Arbitration

+61 2 9210 6119
+61 449 562 089
carla.mills@corrs.com.au

Rising Star
Doyles Construction & Infrastructure – Australia, 2020

Trevor Thomas

Partner
Projects

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

Contacts

Perth

Spencer Flay

Partner
Projects and Arbitration

+61 8 9460 1738
+61 415 048 270
spencer.flay@corrs.com.au

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

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

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

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

Chris Ryder

Partner
Projects and Arbitration

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

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

Rebecca Field

Partner
Property & Infrastructure

+61 8 9460 1628
+61 427 411 567
rebecca.field@corrs.com.au

Best Lawyer – Real Property Law
Best Lawyers Peer Review, 2014–2020

Perth Property & Real Estate Lawyer
Doyles Guide, 2018

Perth Leading Banking & Finance Lawyer
Doyles Guide, 2015

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

Nicholas Ellery

Partner, Employment & Labour and Commercial Littigation

+61 8 9460 1615
+61 417 505 613
nicholas.ellery@corrs.com.au

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

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

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

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

Chris Campbell

Partner, Projects and Property & Infrastructure

+61 8 9460 1672
+61 451 802 128
chris.campbell@corrs.com.au

Contacts

Papua New Guinea

Vaughan Mills
Partner, PNG and Energy & Natural Resources

+61 7 3228 9875
+61 413 055 245
vaughan.mills@corrs.com.au

Nick Thorne
Partner, PNG and Energy & Natural Resources

+61 7 3228 9342
+61 424 157 165
nick.thorne@corrs.com.au

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

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

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

Best Lawyers – Corporate Law
Best Lawyers 2020

"It's great to get this transaction across the line and I just wanted to thank all of you for your contribution over the last year – including all those who worked so tirelessly over the last few days and especially Nick Thorne who has provided fantastic support from the very beginning."
Oil and Gas client

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

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

CORRS
CHAMBERS
WESTGARTH

Sydney
Melbourne
Brisbane
Perth
Port Moresby

corrs.com.au

BRO0013