Q4 2019

CORRS PROJECTS UPDATE

CORRS CHAMBERS WESTGARTH

www.corrs.com.au

Welcome to the latest edition of Corrs Projects Update Q4 2019

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

We hope that you find it interesting and stimulating.

CORRS PROJECTS UPDATE

Insights

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

Editors:

Andrew McCormack
Partner

Wayne Jocic
Consultant

Contents

Mann v Paterson Constructions Pty Ltd [2019] HCA 32

CORRS PROJECTS UPDATE

The facts

In March 2014, Mr and Mrs Mann (**Owners**) entered into a major domestic building contract with Paterson Constructions Pty Ltd (**Builder**) for the construction of two double storey townhouses.

In April 2015, with one of the two townhouses completed, a dispute emerged regarding payment for variations that had been orally instructed by the Owners and implemented by the Builder.

After the Builder issued an invoice for the outstanding variation costs, the Owners repudiated the contract and the Builder accepted that repudiation, thus terminating the contract.

Procedural background

The Builder brought a claim against the Owners in the Victorian Civil and Administrative Tribunal (**VCAT**) for damages for breach of contract or restitution for the work, labour and materials involved.

VCAT found that the Builder was entitled to restitution on a quantum meruit basis for an amount reflecting the reasonable value of the work performed and the materials used. This amount was substantially more than the Builder would have been entitled to under the contract.

The Owners appealed to the High Court after its earlier appeals to the Supreme Court of Victoria and Victorian Court of Appeal were substantively dismissed.

The appeal grounds

Relevantly, the Owners raised three grounds:

- that the lower courts had erred in holding that the Builder was allowed to elect to recover a reasonable value of the works carried out by it on a quantum meruit basis following the termination of the contract based on the Owners' repudiation;
- alternatively, if the Builder was entitled to such a restitutionary remedy, the contract should have operated as a ceiling or cap on the calculation of the quantum meruit; and
- that the lower courts had erred in finding that section 38 of the DBC Act did not apply so as to preclude the Builder from claiming a quantum meruit in relation to variations under a domestic building contract (there was no dispute that the DBC Act applied, only whether the legislation permitted restitutionary recovery by the Builder for variations).

Key takeaways

Mann v Paterson Constructions Pty Ltd (**Mann v Paterson**) has brought clarity to an area that has often been described as controversial: the ability to elect to seek a quantum meruit for repudiation of a building contract.

Clarity from the High Court comes in two ways:

- clarification of the limited circumstances in which a builder may now pursue a claim of quantum meruit; and
- clarification around quantification.

In the case, the High Court also found that the *Domestic Building Contracts Act* 1995 (Vic) (**DBC Act**) applied and provided for the full scope of variation works performed, thereby negating the recovery of a quantum meruit for that work.

The decision means that builders/contractors must pay close attention to their contracts (both in terms of negotiation and contract administration) as it will now be more difficult for them to avoid onerous contractual mechanisms (such as time bars and caps) by seeking a quantum meruit.

Keywords:

termination; repudiation; quantum meruit

The decision of the High Court

Gageler J identified that the Court essentially had to determine the Builder's remedial entitlement, following the termination of the contract by acceptance of the Owners' repudiation, in relation to three categories of work performed:

- work in respect of variations to the contractual scope that the Owners had requested;
- work under the contract for which the Builder had accrued a contractual right to payment prior to termination; and
- work under the contract for which the Builder had not yet accrued a contractual right to payment at the time of termination.

Gageler J's categorisation provides a convenient structure to consider the practical implications of the High Court's decision.

Accrued contractual rights to payment

The High Court unanimously held that the Builder's remedy for stages of work completed prior to termination of the contract (i.e. where a right to payment had already accrued) was payment of the contractually agreed amounts due for completion of the relevant stages. Accordingly, the Builder could not elect to pursue a quantum meruit for completed portions of work.

How this reasoning will be applied in more complex contractual contexts is unclear, particularly where progress payments are assessed and paid on a provisional basis (i.e. when it is unclear whether a right to payment of a set amount has accrued).

Divisible obligations and uncompleted work

The majority of the Court, comprised of Gageler, Nettle, Gordon and Edelman JJ, held that the Builder was entitled to choose between damages or restitution for work that had not been completed prior to termination (i.e. where a right to payment of a specified amount had not accrued under the contract). However, any such amount calculated on a quantum meruit basis in relation to uncompleted stages of work should generally not exceed the contract price or the relevant portion of same.

Accordingly, where a contract does not specify stages of the work and corresponding amounts to be paid upon completion of those stages, a builder may be entitled to claim on a quantum meruit basis for the entirety of the works performed, albeit that the eventual assessment is likely to be constrained by the total contract price. The application of the High Court's reasoning in *Mann v Paterson* to such circumstances is likely be provide fertile ground for further consideration by courts in the future.

The minority on this relatively narrow point, Kiefel CJ and Bell and Keane JJ, would have allowed the first ground of appeal and limited the Builder's remedial rights in the present case to damages in contract. This made it unnecessary for the minority to specifically address the issue of whether the contract price acted as a cap on any recovery in restitution.

Ultimately, the majority chose not to directly address the controversy surrounding a party's election between damages or restitution by closing off the ability to choose entirely. Rather, the Court's decision significantly limits both the availability and scope of any quantum meruit following termination as a result of repudiation by:

- confining the availability of a quantum meruit to work performed but for which no contractual right to payment has accrued prior to termination; and
- making the calculation of any quantum meruit in that regard effectively subject to a cap by reference to the price(s) attached to the work or parts thereof within the terminated contract.

The Court reasoned that this approach represents a more coherent application of remedies following termination of a contract and places due weight on the contract price negotiated between the parties and the contractual allocation of risk that such consideration represents.

Variations — Domestic Building Contracts Act

The Court unanimously held that section 38 of the DBC Act precluded the Builder from obtaining restitution for variations on a quantum meruit basis. The only right of recovery for that work was under section 38(6)(b) of the DBC Act as per the amounts prescribed by section 38(7).

The High Court's construction of the DBC Act in *Mann v Paterson* significantly narrows the scope for recovery of variations to contractual works covered by that (and likely similar) legislation.

However, any application of the majority's broader reasoning to variation work not covered by the DBC Act will likely need to be considered further in future cases.

Conclusion

Ultimately, the High Court remitted the matter back to VCAT to reconsider the quantum of the Builder's entitlement by reference to its contractually accrued rights to payment, the residual contract price amounts and the application of section 38 of the DBC Act.

While the election to pursue a claim in restitution may still be available in limited circumstances, a claim for quantum meruit will likely now be less appealing in the average case, as it is now significantly less likely to permit a party to recover an amount that is materially different from the amount(s) payable under the contract.

The reasoning of the Court in *Mann v Paterson* represents a significant step forward in providing greater certainty and coherence in respect of the costs that may flow from the termination of a contract.

http://eresources.hcourt.gov.au/showCase/2019/HCA/32

[Note: this article by Ben Davidson first appeared online on 18 October 2019 at https://corrs.com.au/insights/high-court-clarifies-availability-of-quantum-meruit-following-repudiation-of-a-building-contract]

Victorian Building Authority v Andriotis [2019] HCA 22

CORRS PROJECTS UPDATE

Introduction

In this recent unanimous decision by the High Court, a building practitioner was not barred from registering interstate even though the interstate registration body found the practitioner had lied in their registration application in the first jurisdiction.[1] At a time when the building industry is in crisis because of the proliferation of serious defects, particularly in multi-dwelling residential buildings, it is concerning that a registration body cannot reject a building practitioner who is not of good character.

This curious situation came about because of the Commonwealth's *Mutual Recognition Act* 1992 (**MRA**), which has the generally admirable aim of freedom of movement of goods and service providers across Australia. The High Court held that a State authority, in this case the Victorian Building Authority (**VBA**), does not have a discretionary power to refuse to register a building practitioner who is already registered in another State. In short, the MRA's '*mutual recognition principle*' trumps a "*good character*" requirement in a State Act, in this case the *Victorian Building Act 1993* (**Building Act**).

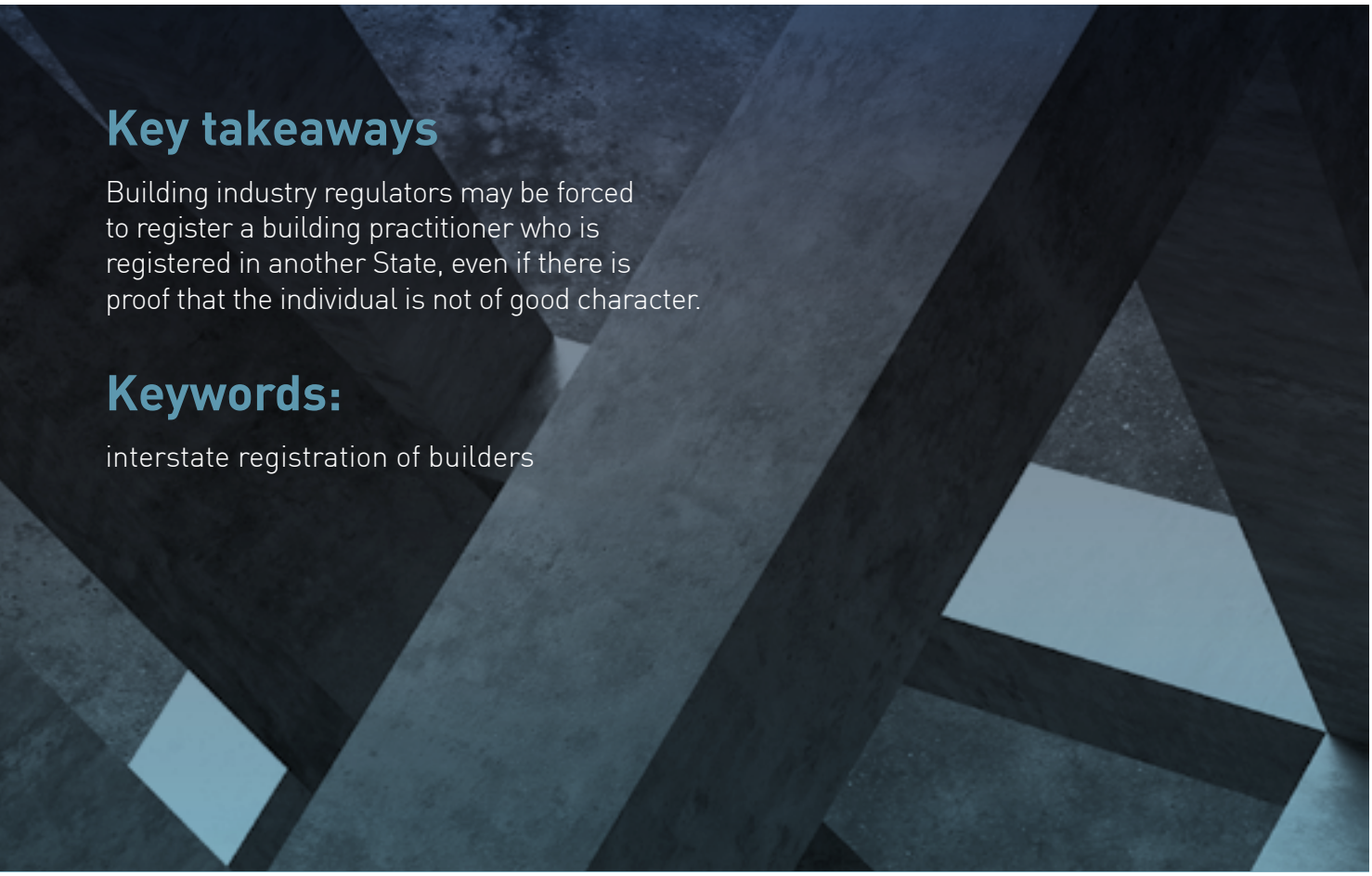
Background

The mutual recognition principle set out in section 17(1) of the MRA means a person registered for an occupation in one State may be registered in an equivalent occupation in another State, after notifying the local registration authority of the second State. Section 20(2) provides that the local registration authority *"may"* grant registration on that ground. Section 17(2) provides for an exception, which is that the mutual recognition principle does not affect the operation of laws that regulate the manner of carrying on an occupation in the second State. This is contingent on those laws not being *"based on the attainment or possession of some qualification or experience relating to fitness to carry on the occupation".*

Mr Nickolaos Andriotis was registered in New South Wales as a waterproofer. In his application to the New South Wales authority, Mr Andriotis falsely stated that he had particular work experience. After being registered in New South Wales, he then sought registration as a waterproofer in Victoria, pursuant to the MRA.

The Victorian Building Practitioners Board (the **Board**) refused to grant his registration on the basis that his New South Wales application demonstrated dishonesty, and he was therefore not of "*good character*" as required by section 170(1)(c) of the Building Act, the Victorian scheme regulating registration.

The Administrative Appeals Tribunal affirmed the decision.[2] At Mr Andriotis's appeal to the Federal Court, the VBA (the Board's successor) argued that:



Key takeaways

Building industry regulators may be forced to register a building practitioner who is registered in another State, even if there is proof that the individual is not of good character.

Keywords:

interstate registration of builders

- a local registration authority retains a discretion to refuse registration under section 20(2) of the MRA; and, in any event
- the "*good character*" requirement in section 170(1)(c) of the Building Act falls within the exception to the mutual recognition principle in section 17(2) of the MRA.

The Full Court rejected both arguments and allowed the appeal.[3] The VBA was granted special leave to appeal to the High Court.

The decision

The central issue was whether the MRA permitted the Board to consider whether Mr Andriotis was of *"good character"* under section 170(1)(c) of the Building Act when assessing his application for registration. In dismissing the appeal, the High Court held that the MRA did not permit the Board to consider whether Mr Andriotis was of good character.

The High Court held that the words *"qualification ... relating to fitness to carry on the occupation"* in section 17(2) have a broader meaning than a qualification of an educational or technical kind, and clearly encompass section 170(1)(c) of the Building Act. For the Court, that construction was consistent with the aims of the MRA. Under the mutual recognition principle on which the MRA is founded, registration for an occupation in one State is sufficient for recognition in another State, without a need to meet any further requirements of the second State.

The Court held that the word "*may*" in section 20(2) of the MRA empowers a local registration authority to register a practitioner who is registered in another State or Territory. The word "*may*" does not grant a broader discretion to refuse registration. The Court also held that a "*good character*" requirement in State legislation does not fall within the exception to the "*mutual recognition principle*" in section 17(2) of the MRA.

The appeal was dismissed, with costs awarded against the VBA. The matter was remitted to the Administrative Appeals Tribunal for a re-hearing of the appeal against the Board's decision.

Practical implications

The VBA believes the High Court's decision may have profound implications for the building industry across Australia, resulting in the mutual recognition legislation being used to allow less experienced practitioners or persons of poor character to be admitted to the industry.[4] The decision allows these practitioners to become registered in jurisdictions with easier registration requirements, and then use the mutual recognition regime to gain registration in States with tougher requirements (such as Victoria).

The chief executive officer of the VBA, Ms Sue Eddy, believes the decision represents a setback for consumer protection in Victoria:

"Victorian consumers should be entitled to presume that the building practitioners they invite into their homes have the requisite experience and are of good character... [i]n this instance, the applicant lied to the NSW regulator about his previous experience. Due to the manner in which his application for registration in NSW was processed at the relevant time, this was not picked up. In circumstances where the VBA is aware that an applicant has provided false information to gain registration in NSW, it seems incredible that the mutual recognition regime requires the VBA to register him in Victoria, yet this is the effect of the High Court's decision."[5]

The VBA has said it would ask the New South Wales regulator to reconsider Mr Andriotis's registration in light of the AAT's findings as to his character and the circumstances in which he obtained his original registration.[6] If the New South Wales regulator cancels, suspends or places conditions on Mr Andriotis's registration, then by virtue of section 33 of the MRA, his registration in Victoria would be affected in the same way.

Some of the Justices of the High Court explained what they considered the Board or another second State regulatory authority could do in a similar situation.

Nettle and Gordon JJ emphasised that the regulatory authority in the second State could discipline a practitioner for a breach of the laws of that State despite the MRA. Using the Building Act as an example, their Honours explained that under section 179 of that Act, the Board could have cancelled, suspended or imposed conditions on Mr Andriotis's registration if the Board found him guilty of unprofessional conduct or found that he had failed to comply with a code of conduct after his registration. [7]

Edelman J also pointed out that a second State could take disciplinary action against a person convicted of a serious dishonesty offence while carrying on an occupation in that State, on the basis of lack of good character or fitness or propriety to carry on the occupation.[8]

The High Court's proposed solution of disciplining a practitioner may be effective when a breach of a law in the second State is identified and disciplinary action commenced shortly after registration. In these situations, it is unlikely consumers would be harmed by building practitioners who would not have passed the requirements in the second State and were only registered due to the MRA. However, where a breach is not identified until long after registration, many consumers could be exposed to work by a practitioner who falls short of the requirements in their State.

This risk of substandard building practitioners is particularly concerning at a time when the building industry is plagued by highly publicised examples of poor workmanship and cost cutting. In light of the High Court's decision in *Victorian Building Authority v Andriotis,* State and Territory registration authorities must work together to ensure that unprofessional practitioners are not registered, or are deregistered or placed on conditional registrations.

http://eresources.hcourt.gov.au/showCase/2019/HCA/22

[Note: this article by Ben Davidson and Claire Newhouse first appeared online on 10 October 2019 at https://corrs.com.au/insights/high-court-rules-that-a-state-authority-cannot-refuse-to-register-a-building-practitioner-registered-in-another-state]

1 *Victorian Building Authority v Andriotis* [2019] HCA 22. Although all Justices agreed on the result, there were four judgments: Kiefel CJ, Bell and Keane JJ; Gageler J; Nettle and Gordon JJ; and Edelman J.
2 *Re Andriotis v Building Practitioners Board* [2017] AATA 37.
3 *Andriotis v Victorian Building Authority* [2018] FCAFC 24.
4 Victorian Building Authority, *High Court Decision on the Application of the Mutual Recognition Act 1992 (Cth)*, Media Release (12 August 2019).
5 Victorian Building Authority, *High Court Decision on the Application of the Mutual Recognition Act 1992 (Cth)*, Media Release (12 August 2019).
6 Victorian Building Authority, *High Court Decision on the Application of the Mutual Recognition Act 1992 (Cth)*, Media Release (12 August 2019).
7 *Victorian Building Authority v Andriotis* [2019] HCA 22 at [145]–[146].
8 At [163].

Lucas Earthmovers Pty Limited v Anglogold Ashanti Australia Limited [2019] FCA 1049

CORRS PROJECTS UPDATE

Background

Lucas Earthmovers Pty Ltd (**Lucas**) contracted with Anglogold Ashanti Australia Ltd (**AGA**)[1] to construct an access road to a mine site 330km northwest of Kalgoorlie in Western Australia.

The materials for the road were to be obtained from areas along the road alignment. Prior to construction, the parties recognised that material in some areas would not be suitable and would have to be sourced from borrow pits at other locations along the alignment. Much of the material along the road alignment ended up not meeting the specifications, meaning there had been changes in how significant portions of the road were constructed.

Consequently, the project fell into delay and Lucas incurred additional costs as a result. Lucas was paid for its direct costs for the additional haulage and the placement of the material on the road, but was not paid for the additional time-related costs incurred.

Lucas claimed damages for breach of contract for:

- payment for time-related costs incurred as a result of additional work;
- payment for variations under the contract; and
- other consequences of the additional time taken and the additional work.[2]

The contract between the parties contained a "*no damage for delay*" clause which provided that Lucas could not claim any liabilities resulting from any delay or disruption. This was the key issue for the court.

Federal Court of Australia

Issue 1 — claims for time-related costs

AGA contended that Lucas was not entitled to the time-related costs because of clause 18.8. In contrast, Lucas argued that, when a variation affects the critical path of the work and causes a delay to the whole of the work, time-related costs are appropriate.

Clause 18.8 of the contract provided:

"Notwithstanding any other provision of this contract, the Contractor will not be entitled to claim any liabilities resulting from any delay or disruption (even if caused by an act, default or omission of the Company or the Company's Personnel (not being employed by the Contractor)) and a claim for an extension of time under Clause 18.3 will be the Contractor's sole remedy in respect of any delay or disruption and the Contractor will not be entitled to make any other claim."

AGA argued that, properly characterised, clause 18.8 overrode any other provision in the contract, including any inconsistent provision.

Key takeaways

"*No damage for delay*" clauses will be enforceable, including when a delay occurs as a result of a contract variation.

Keywords:

no damage for delay; variations; time-related costs

In assessing this argument, White J observed that clause 18.8 was to be construed in the context of the contract as a whole, so as to have a harmonious operation with other provisions in the contract.[3] White J held that, when construed in the context of the contract as a whole, clause 18.8 made it plain that Lucas was not to have any claim for losses, costs and expenses which *result from any delay or disruption,* with the word "*any*" indicating that clause 18.8 is directed to delays or disruptions of all kinds.[4]

Consequently, clause 18.8 applied to the costs of delays resulting from variation work. The purpose of clause 18.8, on its face, was to address Lucas's entitlements in the event of delay or disruption to the works. Lucas's only entitlement was to an extension of time as a consequence of delay or disruption.

On its proper construction, clause 18.3 allowed the contract to operate in a practical way, with time-related costs being taken into account by the pricing of variations, rather than as a damages claim.

Ultimately Lucas sought to recover delay costs incurred because of the delay to completion of the contract as a whole, but characterised its claim as being for time-related costs of variations. Given clause 18.8 operated to prohibit a claim of that kind, White J upheld the enforceability of the no damage for delay clause, finding that Lucas's time related claims could not succeed.[5]

Issue 2 — time bar defence

AGA attempted to make a time bar defence claim based on clause 30 of the contract, which required Lucas to give notice in writing within 30 days after the first occurrence of the circumstances on which the claim was based. White J dismissed this argument because Lucas did provide adequate notice for the purpose of clause 30(c) through letters regarding delays to practical completion.[6]

Issue 3 — latent conditions

Lucas made various latent condition claims under clause 19 of the contract in relation to "*soft spots*". White J noted that clause 19.1 required an objective assessment, with the existence of a latent condition to be determined objectively by assessing whether the physical condition in question materially differs from the physical conditions which could reasonably have been anticipated by a competent contractor as at the date of contract if it had inspected relevant information sources.[7] This assessment is not to be made by an examination of the conduct of the contractor in question.[8] White J concluded that Lucas fell short in providing evidence to establish that the soft spots present at the site were a latent condition.

Issue 4 — implied term

Lucas claimed that the contract included an implied term that AGA would act reasonably and in good

faith in assessing extensions of time, requests for variations and the costing of variations.[9] Lucas alleged that AGA failed to act reasonably in assessing whether Lucas was entitled to an extension of time under clause 18, in assessing whether to permit variations, and in assessing the reasonable rate for variations under the contract. White J found that there was no breach of any implied term, as there was no evidence to demonstrate that AGA had not acted reasonably or in good faith.

Issue 5 — misleading or deceptive conduct claim

Lucas also made a claim for misleading or deceptive conduct on the basis that it suffered loss because it had relied on representations AGA had made. Lucas argued that four representations amounted to an overall representation that:

- 75% of the total volume of material required for the sub-base would be obtained from material from the cut along the road alignment;
- the material obtained from the cut areas would satisfy the requirements in the scope of works; and
- the haulage distance for importing additional material would not exceed 6km.[10]

The claim failed as White J found that the overall representation was not made.[11]

Practical implications

This decision confirms that Australian courts will enforce "*no damage for delay*" clauses. This requires parties to consider how such clauses may affect pricing given the contractor's acceptance of this aspect of delay risk.

It does not appear that the parties have filed an appeal and the time for doing so has now lapsed.

https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2019/2019fca1049

1 The first respondent was Anglogold Ashanti Australia Ltd and the second respondent was Independence Group NL. The two respondents established an unincorporated joint venture to undertake a gold mining project and are collectively referred to as 'AGA' for the purposes of the case.
2 At [3]–[5].
3 At [277], citing *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99 (109); *Wilkie v Gordian Runoff Ltd* (2005) 221 CLR 522 [6].
4 At [292].
5 At [391].
6 At [508].
7 At [660], citing *BMD Major Projects Pty Ltd v Victorian Urban Development Authority* [2007] VSC 409 at [24]; *Walton Construction Pty Ltd v Illawarra Hotel Co Pty Ltd* [2011] NSWSC 534 at [137].
8 At [660], citing *BMD Major Projects Pty Ltd v Victorian Urban Development Authority* [2007] VSC 409 at [24].
9 At [704].
10 At [742].
11 At [803]

Style Timber Floor Pty Ltd v Krivosudsky [2019] NSWCA 171

CORRS PROJECTS UPDATE

The facts

In late 2017, Style Timber Floor Pty Ltd (**Style Timber**) engaged Krivosudsky to perform floor grinding and topping work at several sites. Style Timber disputed the quality of work and refused to pay some invoices.

Krivosudsky served a payment claim for $106,166 under section 13 of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**Act**). Style Timber responded with an email inviting Krivosudsky to its office to see evidence as to why he had not been paid. The email also referred to correspondence and other evidence about Krivosudsky's work, but did not give specific details.

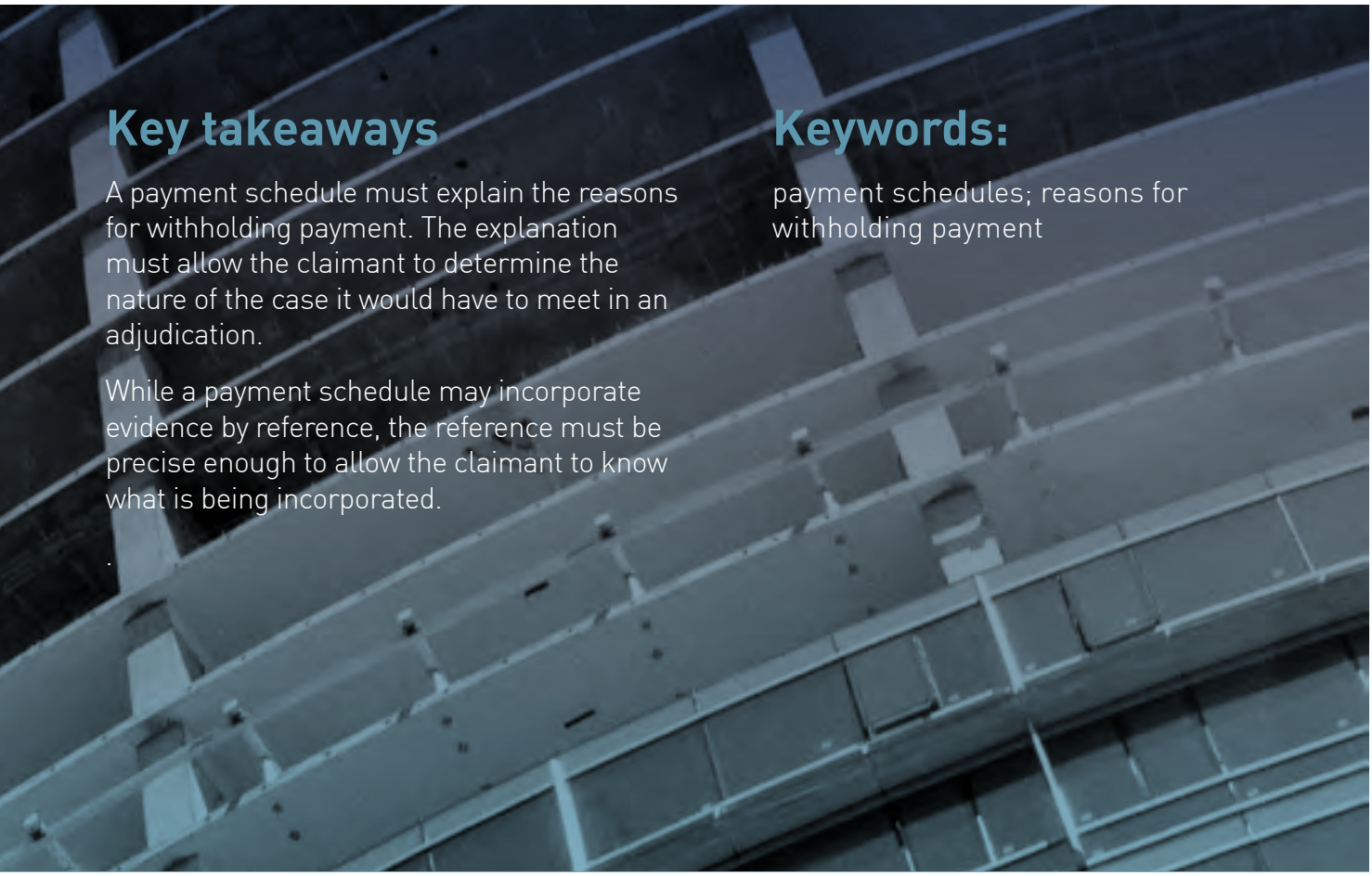
Krivosudsky obtained summary judgment from a Judicial Registrar in the NSW District Court on the basis that the email was not a valid payment schedule and therefore there was no triable issue. The reason given was that the email did not indicate Style Timber's reasons for withholding payment. Rather, it was an offer to provide those reasons at a later date. Style Timber sought leave to appeal to the NSW Court of Appeal on the basis that the granting of summary judgment was an appellable error.

Issue

The issue before the Court of Appeal was whether Style Timber's email, including its vague reference to evidence, constituted a valid payment schedule. Under section 14(3) of the Act, a valid payment schedule must *"indicate why the scheduled amount is less [than the claimed amount] and ... the respondent's reasons for withholding payment"*. If the email was a payment schedule, Krivosudsky would have no statutory debt claim and the appeal would be dismissed. Otherwise, Style Timber would owe Krivosudsky the amount in the payment claim.

Court of Appeal decision (Bell P, Leeming JA and Simpson AJA)

Leeming JA held that the basis for the section 14(3) requirement is that a payment schedule must describe the dispute in sufficient detail to allow the claimant to determine the nature of the case that it would have to meet in an adjudication. Bell P agreed, adding that while a payment schedule may incorporate evidence by reference, the reference must be precise enough to allow the claimant to know what is being incorporated.



Key takeaways

A payment schedule must explain the reasons for withholding payment. The explanation must allow the claimant to determine the nature of the case it would have to meet in an adjudication.

While a payment schedule may incorporate evidence by reference, the reference must be precise enough to allow the claimant to know what is being incorporated.

.

Keywords:

payment schedules; reasons for withholding payment

Simpson AJA agreed with Leeming JA's judgment and Bell P's brief additional observations.

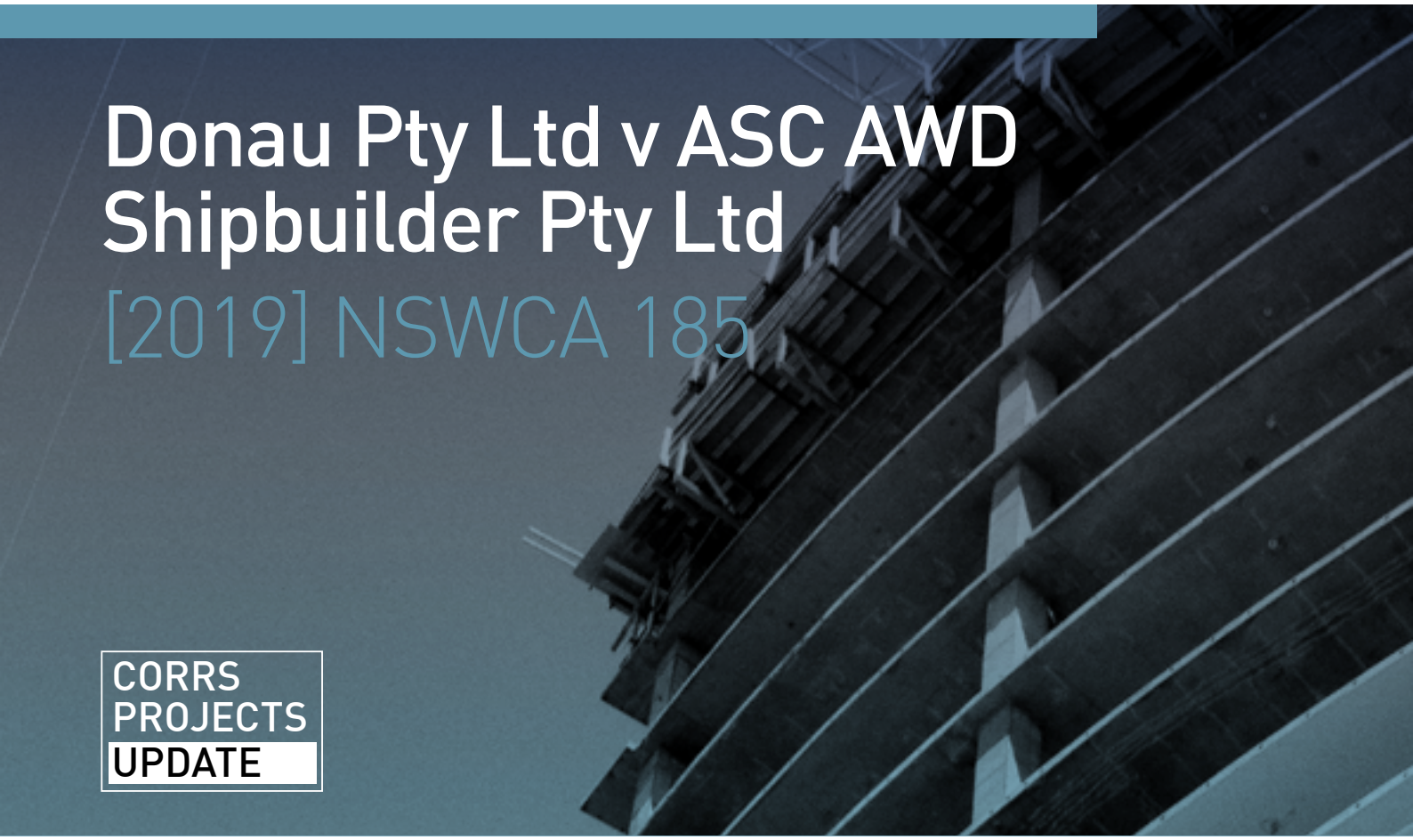
The Court upheld the Judicial Registrar's finding that Style Timber's email inviting Krivosudsky to its office to view evidence did not by itself explain Style Timber's reasons for withholding payment. Rather, the invitation was an offer to provide those reasons at a later date. The email was not directed towards any particular invoice or even any particular project. Krivosudsky was working on multiple sites. Hence, the email failed to describe the scope of the dispute. This meant the email could not be a payment schedule.

Furthermore, the attempted incorporation of evidence in the payment schedule failed because the vague reference to "*many emails, photos, videos*" and so on failed to identify the evidence with sufficient specificity.

Conclusion

As the Court unanimously held that the email did not constitute a payment schedule, it dismissed the appeal with costs.

https://www.caselaw.nsw.gov.au/decision/5d258334e4b02a5a800c2547



Donau Pty Ltd v ASC AWD Shipbuilder Pty Ltd [2019] NSWCA 185

CORRS PROJECTS UPDATE

The facts

In October 2007, the Commonwealth entered into arrangements with ASC AWD Shipbuilder Pty Ltd (**ASC**) to procure air warfare destroyers (**AWD**). ASC, a wholly owned subsidiary of ASC Shipbuilding Pty Ltd, was to be the shipbuilder for the procurement program.

ASC subcontracted a portion of the works to Forgacs Engineering Pty Ltd (**Forgacs**) (which later became Donau Pty Ltd).

A dispute arose between ASC and Forgacs over payment entitlements under a subcontract the parties entered into on 20 August 2009 (**Original Contract**) and a second contract referred to as the *"Second Heads of Agreement"* (**2HA**).[1]

The 2HA's effective date was 26 October 2012. It contained provisions replacing or modifying the Original Contract's method for calculating payment and the processes authorising work.

Of particular importance was clause 4.1(a), which required that the parties use all reasonable endeavours to complete the "*Baseline True Up*" by 14 December 2012. If the Baseline True Up was not agreed by 28 February 2012, ASC was entitled to terminate the 2HA. The Baseline True Up referred to ASC's *"review and approval of"* a range of processes relating to timetables for the production of parts of the AWDs from the Transition Date.

The Baseline True Up was not agreed by 14 December 2012, nor by 28 February 2013. The parties continued to negotiate the Baseline True Up in good faith through to early June 2013, but never reached agreement. On 7 June 2013, ASC purported to exercise its right to terminate the contract.

Supreme Court decision

Ball J found at first instance that ASC had **not** lost its contractual right to terminate by election or by failure to terminate the 2HA within a reasonable time.

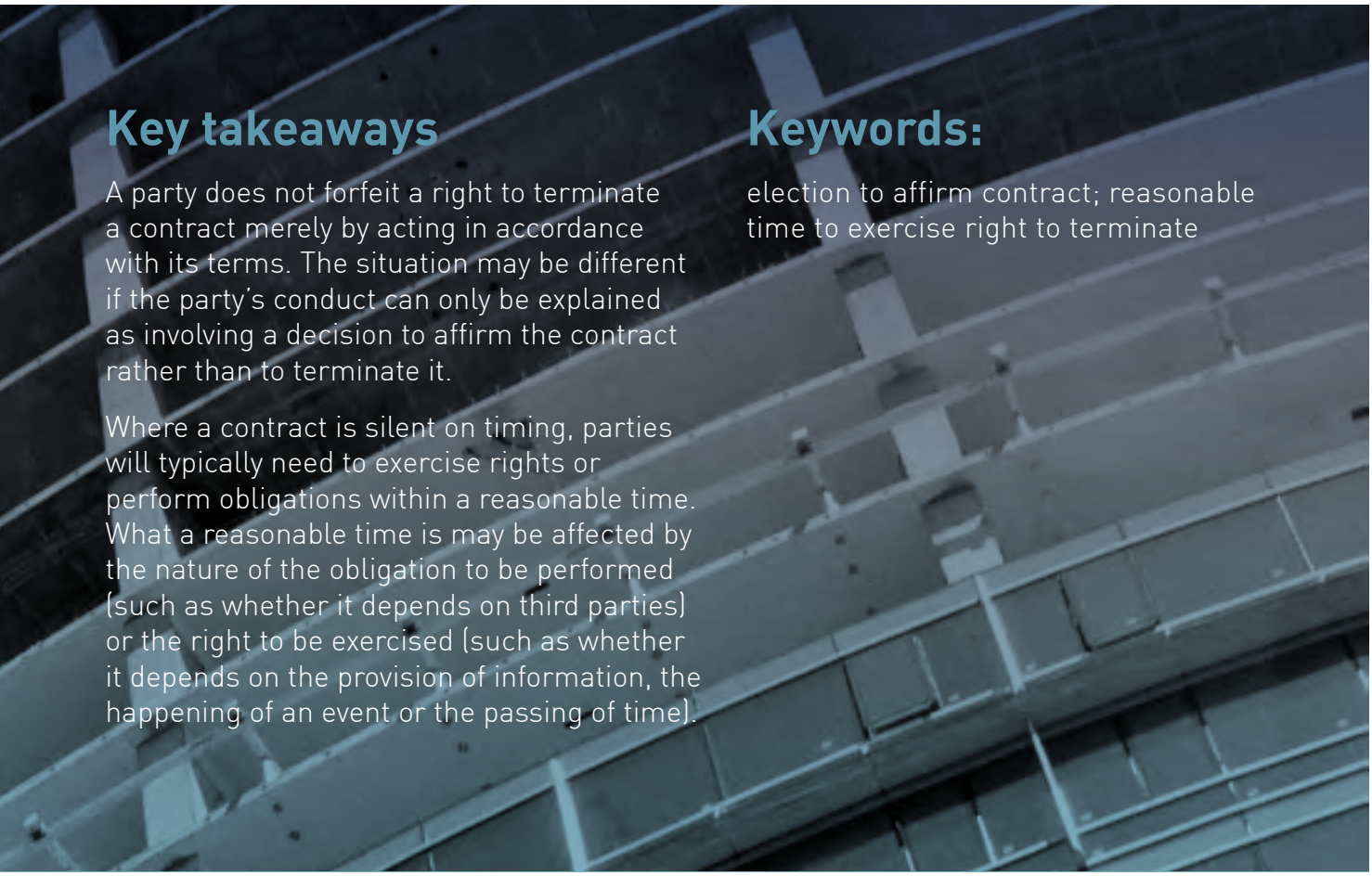
Court of Appeal decision (Bell P, Basten JA, Emmett AJA)

The Court of Appeal considered whether ASC validly exercised its right to terminate on 7 June 2013, or whether ASC either:

1 elected to affirm the 2HA (**Issue 1**); or

2 did not terminate the 2HA within a reasonable time (**Issue 2**).

There were three separate judgments, stretching to 219 paragraphs. Bell P and Basten JA broadly agreed, while Emmett JA dissented in part.



Key takeaways

A party does not forfeit a right to terminate a contract merely by acting in accordance with its terms. The situation may be different if the party's conduct can only be explained as involving a decision to affirm the contract rather than to terminate it.

Where a contract is silent on timing, parties will typically need to exercise rights or perform obligations within a reasonable time. What a reasonable time is may be affected by the nature of the obligation to be performed (such as whether it depends on third parties) or the right to be exercised (such as whether it depends on the provision of information, the happening of an event or the passing of time).

Keywords:

election to affirm contract; reasonable time to exercise right to terminate

Issue 1 — election

Forgacs contended that ASC elected to affirm the contract after 28 February 2013 by continuing to follow the procedures in the 2HA. The primary judge had rejected this argument on the basis that ASC had been following these procedures before it had any contractual obligation to do so; the continuation of the conduct was accordingly equivocal. ASC had not insisted on compliance with the procedures in 2HA, nor did it insist on a right in a way that was only consistent with a decision to elect to obtain the benefits of the contract. Bell P accepted this reasoning.[2]

Bell P found the conduct was equivocal because the parties continued to seek agreement on the Baseline True Up after the date of termination, ASC had a reasonable time after that date within which to terminate the 2HA, and the parties tended to operate outside the precise contractual arrangements.[3]

Issue 2 — termination within a reasonable time

While the 2HA did not say how quickly the right to terminate had to be exercised after the Transition Date, it is well-established that in such circumstances *"the law implies that it is to be [exercised] within a reasonable time"*.[4] Bell P noted that there is no distinction in the authorities between the concepts of a reasonable time to perform an obligation and a reasonable time to exercise a right. Rather, whether a reasonable time has passed for either the performance of an obligation or the exercise of a right is a question of fact or one of mixed fact and law.[5]

Bell P held that, in the absence of a standstill agreement to preserve its rights, ASC was only entitled to a very short period in which to exercise its contractual right to terminate. This had elapsed by the date ASC purported to exercise its right to terminate on 7 June 2013.

Bell P observed that the time for ascertaining the legal meaning of *"reasonable time"* is at the time of contracting.[7] However, what is reasonable as a matter of fact will be assessed by circumstances as at the date on which the right is first capable of being exercised (or the date on which the obligation falls to be performed), in light of the context of the contract as a whole.[8]

What is a reasonable time may be affected by the nature of the obligation to be performed or the right to be exercised. In the former category, his Honour pointed to obligations that depend on some third party performance or circumstances outside the control of the party that owes the obligation. In the latter category, his Honour pointed to rights that depend

on provision of information to be assessed, or on the occurrence of an event, or the passing of time.[9]

Bell P considered the High Court decision of *Ballas v Theophilos (No 2)*.[10] In that case, a partnership deed gave a surviving partner an option of purchasing a deceased partner's share on terms which required a third party to prepare a balance sheet. The Court noted that a reasonable time would include the preparation of the balance sheet and valuation of goodwill of the business and *"some short additional period"* for the consideration of this information.[11]

Here, the exercise of the right to terminate was not dependent on the provision of any additional information to ASC, and Forgacs' obligation to use reasonable endeavours to complete the Baseline True Up had ceased two months earlier. This meant that ASC was on notice of the risk of the Baseline True Up not being agreed for some considerable period prior to 28 February 2013. It had a 10 week period after 14 December 2012 to decide whether to terminate on 28 February 2013. It could have negotiated a standstill agreement if it sought more time.[12]

The fact that the parties continued to negotiate on securing agreement as to the Baseline True Up had no bearing on ASC's exercising its right to terminate. Forgacs was entitled to hold ASC to its promise.[13]

Basten JA, while agreeing with Bell P's finding, differed in how to identify whether a right had been exercised within a reasonable time. Basten JA preferred to approach the question as one of contractual interpretation, rather than one of implication. His Honour opined that whilst there is no *"bright line between interpretation and implication"*, focusing on an implied term of a *"reasonable time"*, rather than construing the clause, serves to detract from the objective intention of the parties at the time of entering into the contract.[14]

His Honour's approach was directed towards the terms of the contract, rather than any examination of conduct as at the date the right fell to be exercised.[15]

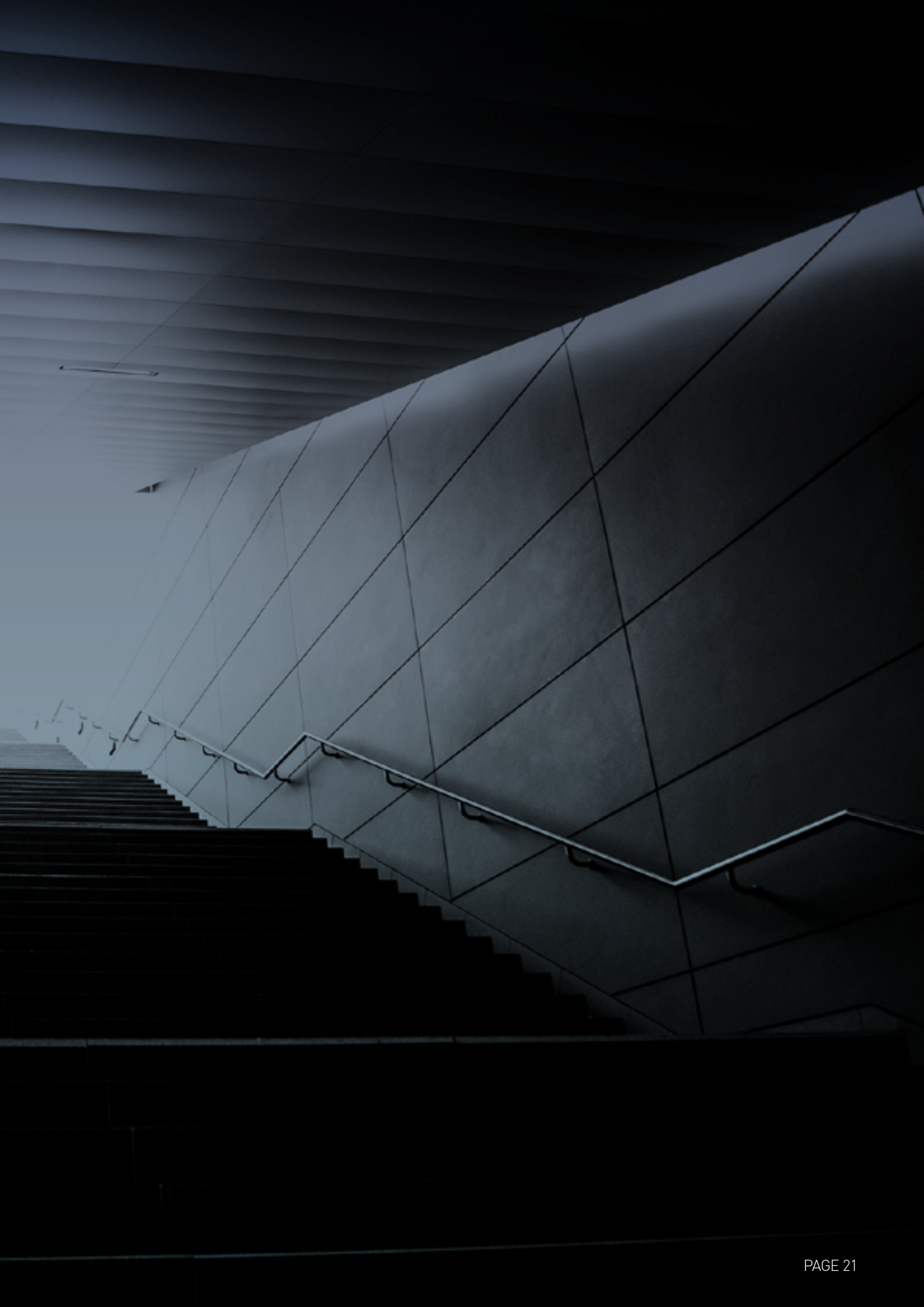
Under either analysis, however, ASC had lost its right to terminate the 2HA under clause 4.1(a) and was bound by the terms of 2HA.[16]

Conclusion

It is important, where possible, that parties clearly specify the time period in which obligations are to be performed or rights are to be exercised. Without express timeframes, parties should perform the relevant obligations or exercise the relevant rights promptly and without delay, or execute a standstill agreement, lest they lose them or be found in breach of contract.

https://www.caselaw.nsw.gov.au/decision/5d1d92b5e4b08c5b85d8aa27

1 At [4].
2 At [91].
3 At [91].
4 At [99].
5 At [103].
6 At [97].
7 At [109].
8 At [101], [109].
9 At [104].
10 (1957) 98 CLR 193.
11 At [114].
12 At [125]–[126].
13 At [127]–[129].
14 At [155].
15 At [157]–[160] and [169]–[176].
16 At [130], [177].



White Constructions Pty Ltd v PBS Holdings Pty Ltd [2019] NSWSC 1166

CORRS PROJECTS UPDATE

Introduction

Questions of delay and responsibility for it feature in most construction disputes. Delay cases are complex and expert opinion evidence is often necessary to resolve them.

The UK Society of Construction Law's *Delay and Disruption Protocol* (**Protocol**) is well-known to construction industry participants for its explanation of various methodologies that may be used to analyse delay. The Protocol describes itself as a guidance document only and disavows the notion that it should be treated as a statement of law.

Nevertheless, in *White Constructions Pty Ltd v PBS Holdings Pty Ltd* (**White**),[1] the Supreme Court of New South Wales (Hammerschlag J) recognised that *"[the Protocol methods have apparently been accepted into programming or delay analysis lore."*[2] There is, at times, a perception in the industry that methods of analysis included in the Protocol ought to be preferred over other methodologies.

In *White*, the Court rejected the party-appointed experts' evidence even though both experts used analysis methodologies countenanced by the Protocol. Instead, the Court emphasised the need to select a delay analysis method that has regard to what actually happened on the ground and produces a common-sense analysis of the extent and cause of any actual delay.[3]

Background

White concerned a project involving the design and construction of sewerage infrastructure. The developer sued two of its consultants for loss and damage that it alleged it had suffered due to the delayed development of the sewerage design. A large component of the damages claimed comprised delay costs that the developer alleged it was liable to pay its construction contractor under their construct-only contract because of the delayed design.

The developer was therefore required to establish the delays to the project that had resulted from the design, and that such delays had caused it to suffer loss and damage. While the Court found that the developer had failed to establish liability, it nevertheless addressed the parties' delay evidence.

Experts

The parties called delay experts to give evidence. Each expert selected a different delay analysis methodology ("*collapsed as-built*" in the case of the consultants, and "*as-planned versus as-built windows analysis*" in the

Key takeaways

Complex, expensive delay analysis will be wasted if fundamental matters such as the available records and appropriate analysis methodology are not carefully considered at the outset. Simply identifying one method available under the UK Society of Construction Law's *Delay and Disruption Protocol* will not do.

Keywords:

delay analysis

case of the developer), both of which are included in the Protocol. Each expert disagreed with the methodology that the other had adopted and how the other had applied that methodology. The experts' conclusions were profoundly different.

The Court described the situation as follows:

"Plainly, both experts are adept at their art. But both cannot be right. It is not inevitable that one of them is right. ... It is not inevitable that one of [their] methods is the appropriate one for use in this case."[4]

Remarking that the reports were complex — *"[t]o the unschooled... impenetrable"*[5] — the Court used a procedure permitted by its procedural rules (but seldom used) to obtain advice from a third expert to critically evaluate the opinions and conclusions of the parties' experts.[6]

Findings

The Court considered the third expert's assistance to be invaluable, stating that *"[h]is advice demonstrated that the complexity that has been introduced is a distraction"*.[7] The Court acted upon the third expert's advice, preferring it to the findings of either of the party-appointed experts.

On the question of the appropriate delay analysis methodology, the Court found that:

"[F]or the purpose of any particular case, the fact that a method appears in the Protocol does not give it any standing, and the fact that a method, which is otherwise logical or rational... does not appear in the Protocol, does not deny it standing."[8]

The Court found that neither of the methods adopted by the party-appointed experts was appropriate in the case at hand, and that the following instead was required:

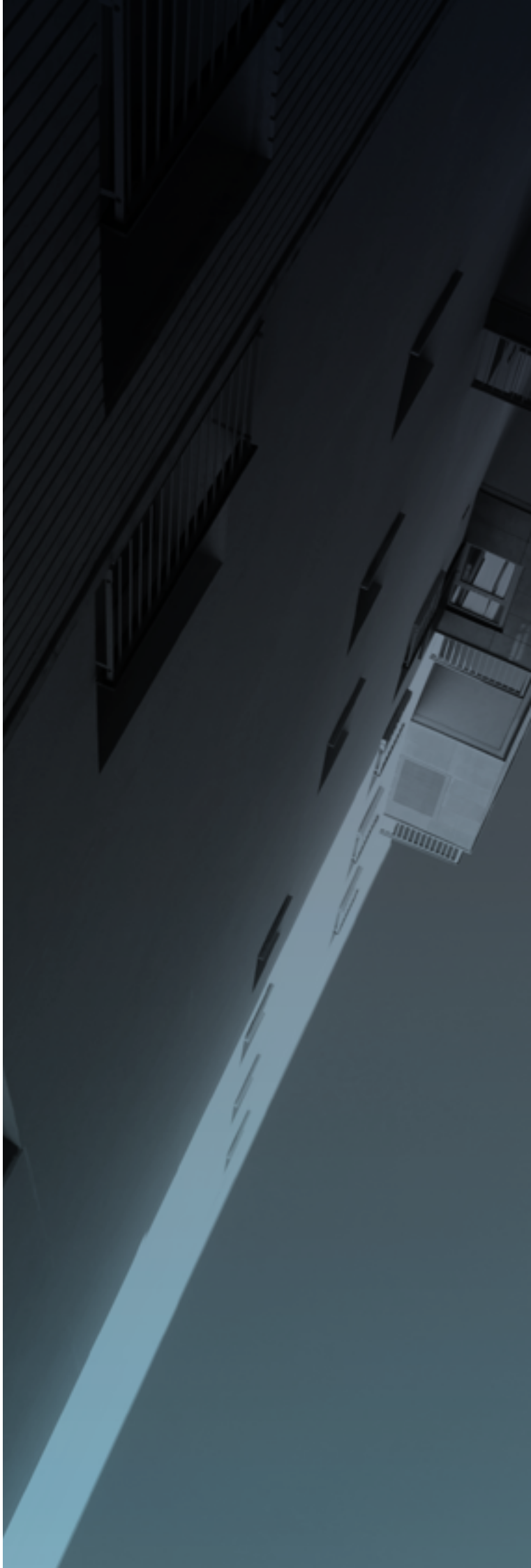
"[C]lose consideration and examination of the actual evidence of what was happening on the ground [to] reveal if the delay in approving the sewerage design actually played a role in delaying the project and, if so, how and by how much. In effect... a common law common sense approach to causation..."[9]

Implications

Delay cases are won or lost on the evidence, and the skill with which the available records of work on site are marshalled and analysed. Expert evidence plays a key role, but debates over analysis methodologies should not cloud or distract from the real issues requiring resolution.

The decision in *White* is an important reminder that complex and often expensive delay analysis will be wasted if fundamental matters such as the available records and appropriate analysis methodology are not carefully considered at the outset.

https://www.caselaw.nsw.gov.au/decision/5d70aadce4b0ab0bf6071bc0



1 [2019] NSWSC 1166 (Hammerschlag J).
2 At [190].
3 At [196].
4 At [18], [21].
5 At [22].
6 Uniform Civil Procedure Rules 2005 (NSW), rule 31.54.
7 At [26].
8 At [191].
9 At [196].

BH Australia Constructions Pty Ltd v Kapeller [2019] NSWSC 1086

CORRS PROJECTS UPDATE

Background

In September 2015, the defendants entered into a written contract for the construction of their home. The defendants dealt with Mr Roberts during negotiations. Mr Roberts was:

- an employee of "*Blissful Constructions Pty Ltd*" (**Blissful Constructions**), currently trading as "*BH Australia Constructions Pty Ltd*", which had the benefit of an insurance policy in respect of the property, and was licensed under the Home Building Act 1989 (NSW); and
- a director of "*Prospective Developments (Aust) Pty Ltd*" (**Blissful Developments**), which had changed its name to "*Blissful Developments Pty Ltd*" and was placed into liquidation in April 2018.

The contract was signed with the ABN of Blissful Developments, but the insurance and licence number of Blissful Constructions. At the top of each page of the contract were the words "*Blissful Properties*".

A dispute arose over the building works. The defendants wrote to Blissful Developments and claimed costs for the contractual works. They also noted that Blissful Developments did not have the required building licence and insurance. Blissful Developments offered to novate the contract to Blissful Constructions. It also attached a proposed statement of claim, in the name Blissful Developments, seeking money from the defendants.

The defendants rejected the offer. The questions remained: Who was the builder? With whom had the defendants contracted?

Procedural history

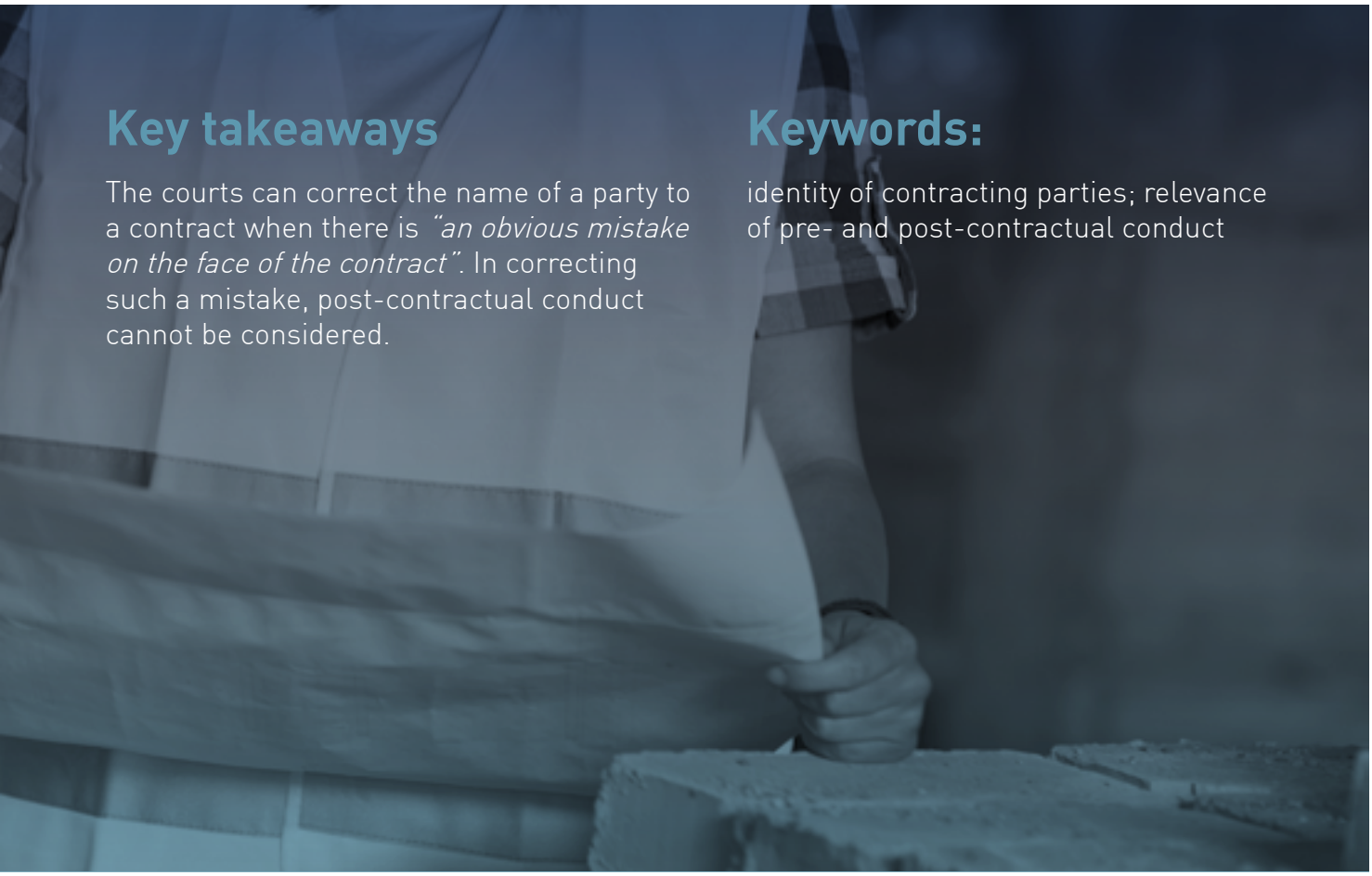
In the Tribunal, the Senior Member dismissed the defendants' application against Blissful Constructions, on the basis that the contract was with Blissful Developments.

On appeal, the Appeal Panel rejected the Senior Member's decision and held that Blissful Constructions was the correct entity. In doing so, the Panel considered the conduct of the parties after the date of the contract to identify the intended parties.

Supreme Court decision

Leeming JA concluded that the Appeal Panel's formulation of the law was wrong and that there was an error of law in the reasons given for the decision, but the error was immaterial.[1] His Honour also concluded that Blissful Constructions, and not Blissful Developments, was a party to the contract.

Leeming JA stressed that, at common law, obvious



Key takeaways

The courts can correct the name of a party to a contract when there is *"an obvious mistake on the face of the contract"*. In correcting such a mistake, post-contractual conduct cannot be considered.

Keywords:

identity of contracting parties; relevance of pre- and post-contractual conduct

mistakes can be corrected as a matter of construction.[2] The test for correcting such obviously incorrect contractual language requires that (i) the literal meaning of the words are an absurdity and (ii) it is self-evident what the objective intention should be taken to have been.[3]

His Honour concluded that the parties must have intended that Blissful Constructions be the builder.[4] His Honour inferred this because:

- a builder must be taken to have sought to comply with the law.[5] His Honour ascribed an intention to the parties not to break criminal law;
- a builder cannot demand payment without insurance.[6] His Honour further imputed that the intention was that Blissful Constructions was the intended party as they were insured (as opposed to Blissful Developments);
- the defendants' intention could be imputed for similar reasons: they would not intend their builder to be uninsured;
- the contract was for the construction of a home. The different roles of a developer and a builder are well known. Blissful Constructions was licensed and insured as a builder, and Blissful Developments was not.

Leeming JA concluded that post-contractual conduct must be disregarded, except in so far as it bears on a relevant aspect of the pre-contractual purpose or context.[7]

https://www.caselaw.nsw.gov.au/decision/5d5e0355e4b0c3247d71143a

1 At [122].
2 At [105]. Compare *Simic v New South Wales Land and Housing Corporation* (2016) 260 CLR 85, where the High Court insisted rectification and not interpretation was the appropriate doctrine on those facts.
3 At [107], referencing *Seymour Whyte Constructions Pty Ltd v Ostwald Bros Pty Ltd (in liquidation)* [2019] NSWCA 11 at [8]–[9].
4 At [109].
5 Section 92(1) of the Home Building Act 1989 (NSW) (**the Act**) requires all builders to have insurance if they are performing works under a contract.
6 Section 92(2) of the Act states that a contractor will not otherwise be entitled to claim damages or recover money.
7 At [118].

CC Builders (Aust) Pty Ltd v Milestone Civil Pty Ltd [2019] NSWSC 1251

CORRS PROJECTS UPDATE

Background

CC Builders (Aust) Pty Ltd (**CCB**) sought to set aside a May 2019 determination an adjudicator made in favour of Milestone Civil Pty Ltd (**Milestone**).

In its adjudication response, CCB argued that Milestone had abandoned the works on two occasions, delaying completion. Two periods of delay were asserted:

1 21 November 2018 to 22 February 2019 (**first claim**); and

2 23 February 2019 to 24 April 2019 (**second claim**).

Both claims were also referred to in CCB's payment schedule. However, the adjudicator determined that CCB had not advanced the second claim in its payment schedule. After proceeding on this basis, CCB was prevented from including the second claim in its adjudication response pursuant to section 20(2B) of the SOP Act.[1]

CCB's main concerns about the determination concerned:

- a denial of natural justice and procedural fairness (in that the adjudicator did not properly consider CCB's payment schedule or the delays CCB alleged Milestone had caused); and
- a jurisdictional error in relation to a claim (for carry over work) that the adjudicator had allowed.

Supreme Court decision

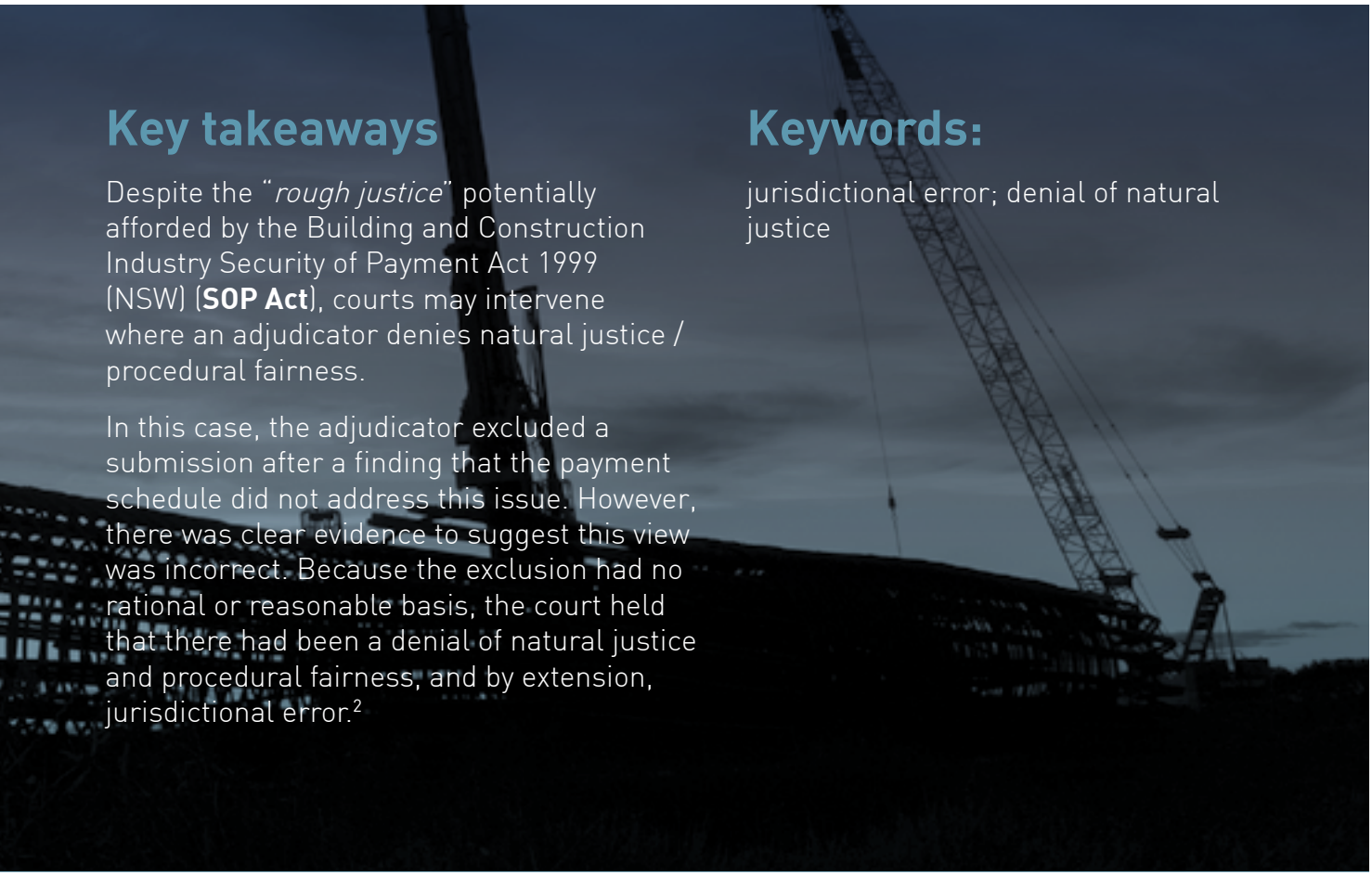
Issue 1 — denial of natural justice and procedural fairness

The issue was whether the determination should be quashed if the adjudicator had denied natural justice and procedural fairness. Rein J reviewed the relevant authorities[2] and held that the present case involved the intersection of two important principles:[3]

1 the clear reluctance of the courts to intervene where "*rough justice*" had already been administered in adjudications under the SOP Act; and

2 the need for *"the measure of natural justice that the Act requires to be given"*[4] and adherence to the requirements of section 22 of the SOP Act.

Rein J acknowledged that if an adjudicator has reasonable reasons to find that a submission was not duly made, it was not for the court to determine whether the adjudicator was correct. This is so even if the finding was erroneous, since this would not ordinarily constitute a denial of procedural fairness.[5]



Key takeaways

Despite the "*rough justice*" potentially afforded by the Building and Construction Industry Security of Payment Act 1999 (NSW) (**SOP Act**), courts may intervene where an adjudicator denies natural justice / procedural fairness.

In this case, the adjudicator excluded a submission after a finding that the payment schedule did not address this issue. However, there was clear evidence to suggest this view was incorrect. Because the exclusion had no rational or reasonable basis, the court held that there had been a denial of natural justice and procedural fairness, and by extension, jurisdictional error.[2]

Keywords:

jurisdictional error; denial of natural justice

Notwithstanding this, Rein J noted that a denial of procedural fairness, and by extension, jurisdictional error, can be an exception to the courts' reluctance to intervene. His Honour gave the example of an adjudicator who failed to explain how they concluded that a submission had not been advanced in a payment schedule when clear evidence contradicted this conclusion. A determination made under an erroneous view of this kind lacks *reasonableness and rationality.* It might be said to amount to a denial of procedural fairness.[6]

In applying these principles, Rein J held there was sufficient evidence to suggest that the second claim had been included in the payment schedule. The adjudicator was therefore erroneous in finding that CCB had not raised the second claim in its payment schedule. On this erroneous view, the adjudicator failed to consider the submissions which had been duly made. This constituted a jurisdictional error affecting the second claim. His Honour was persuaded that the *"decision to reject CCB's submission on the Second EOT claim had no rational or reasonable basis".*[7]

Issue 2 — Whether the claim for carry over work was a jurisdictional error

CCB alleged that the adjudicator's decision to allow Milestone's claims for carry over work was a jurisdictional error. Milestone claimed that $245,046 had been assessed as due. CCB argued that there had been no evidence before the adjudicator evidencing that this amount had been assessed.

A document produced by CCB did, however, show an assessment of an amount payable which corresponded to the amount Milestone claimed. This document was deemed an admission by CCB and one that the adjudicator was entitled to rely on in allowing Milestone's claim. Accordingly, Rein J did not accept that the adjudicator's decision to allow the claim for carry over work was a jurisdictional error.

Conclusion

Rein J held that the adjudicator had breached his obligation of procedural fairness and natural justice. To avoid depriving Milestone of the benefit of the other aspects of the determination unaffected by the adjudicator's error, his Honour exercised discretion inherent in the nature of prerogative relief to set aside the determination with conditions. These conditions included that CCB not re-agitate the carry over work claim in any further adjudication or otherwise seek to recover the carry over amount except at a final hearing under section 32 of the SOP Act.

Previously, no legislation or authoritative case law allowed for the partial invalidation of a determination impugned by omitted submissions.[8] However, under the amendments to the SOP Act which commenced on 21 October 2019,[9] the Supreme Court now has jurisdiction to set aside the whole or any part of an adjudication determination affected by jurisdictional error.

https://www.caselaw.nsw.gov.au/decision/5d843ceee4b0c3247d711edf

1 Under that section, "The respondent cannot include in the adjudication response any reasons for withholding payment unless those reasons have already been included in the payment schedule provided to the claimant".

2 For example, *John Holland Pty Ltd v Roads and Traffic Authority of New South Wales* [2007] NSWCA 19 and *Downer Construction (Australia) Pty Ltd v Energy Australia* [2007] NSWLR 72.

3 At [32].

4 Consider *Brodyn Pty Ltd (t/a Time Cost & Quality) v Davenport* [2004] NSWCA 394, [55]–[56] (Hodgson JA).

5 At [33].

6 At [33].

7 At [34].

8 See *John Holland v Roads and Traffic Authority of New South Wales* [2007] NSWCA 19, [55] (Hodgson JA, Beazley JA concurring) and *Supreme Court Act 1970* (NSW) s 69.

9 *Building and Construction Industry Security of Payment Act 1999* s 32A.

KDV Sport Pty Ltd v Muggeridge Constructions Pty Ltd & Ors

[2019] QSC 178

CORRS PROJECTS UPDATE

The facts

In August 2017, KDV Sport Pty Ltd (**KDV**) and Muggeridge Constructions Pty Ltd (**Muggeridge**) entered into a lump sum contract for the construction of student accommodation. Under the contract, Muggeridge was contracted to carry out the construction work.

On 20 August 2018, Muggeridge served KDV a payment claim for $2,365,432. KDV's solicitors subsequently wrote to Muggeridge stating the payment claim was invalid as it did not meet the requirements of section 17(2) of the BCIPA. KDV, whilst reserving its primary position, provided a payment schedule for a payment of nil. Muggeridge applied for adjudication.

An adjudicator determined KDV owed Muggeridge $802,198.

Was there a valid payment claim?

KDV raised several matters for determination by the Supreme Court. The main issue was whether the adjudicator's decision was void because there was no valid payment claim. If that issue was determined in KDV's favour, then the remaining matters did not require determination.

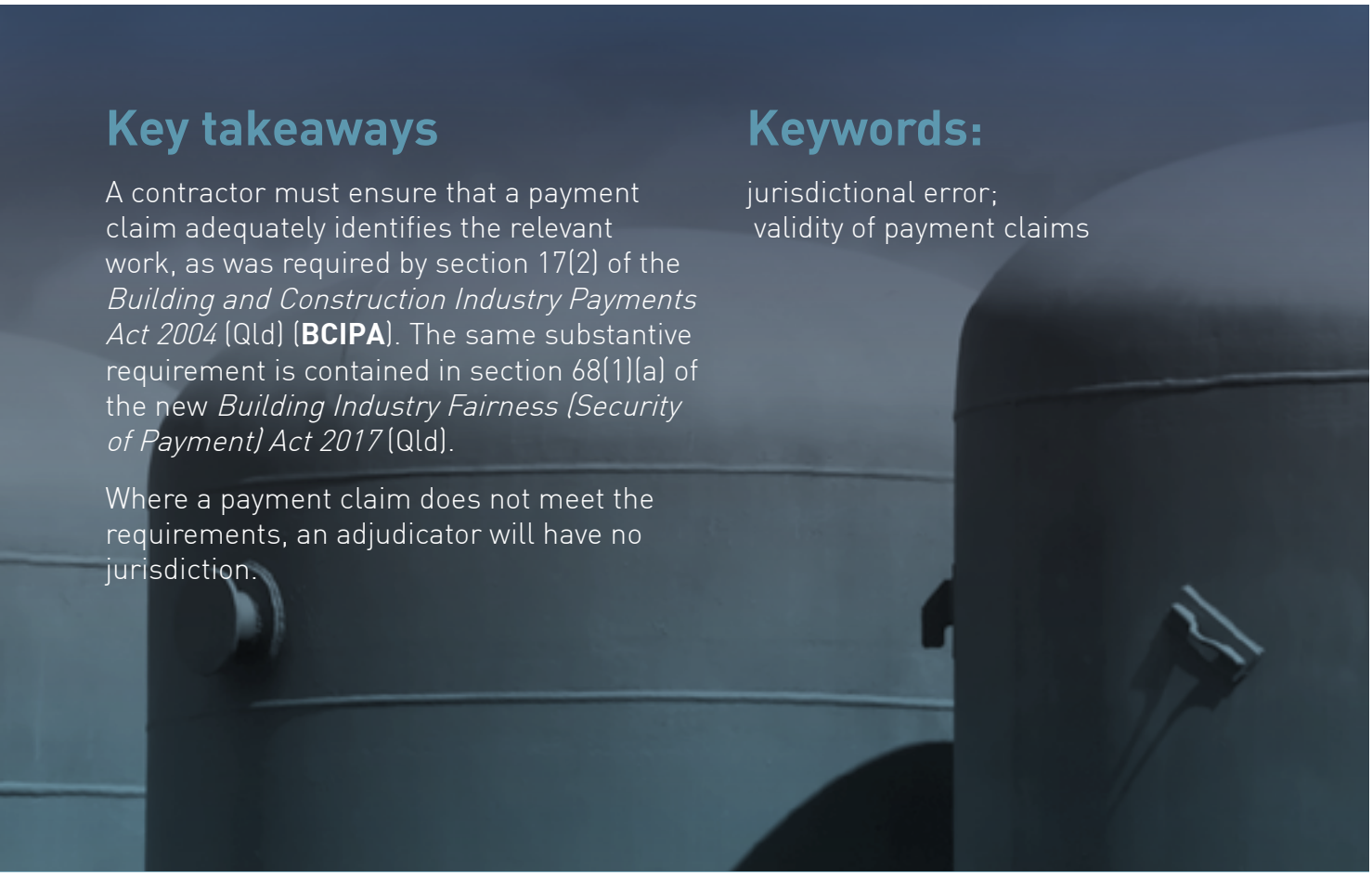
Findings

KDV submitted that Muggeridge had not provided a valid payment claim under the BCIPA. KDV argued that the claim failed to identify with sufficient particularity the construction work to which the progress claim related (and therefore did not satisfy the requirements of section 17(2)). Section 17(2)(a) of BCIPA provides:

> *"(2) A payment claim—*
>
> *(a) must identify the construction work or related goods and services to which the progress payment relates; ..."*

KDV submitted that of the 51 items that Muggeridge referred to in its payment claim as the "*trade breakdown*", the descriptions were extremely general and did not offer any meaningful information about the work performed. KDV further argued that the descriptions for the variations did not, on their face, identify the purported work.

KDV contended further that, although it could not invalidate the claim, there were inconsistencies and errors in the amount of the claim that made it hard for KDV to identify the construction work to which the progress claim related.



Key takeaways

A contractor must ensure that a payment claim adequately identifies the relevant work, as was required by section 17(2) of the *Building and Construction Industry Payments Act 2004* (Qld) (**BCIPA**). The same substantive requirement is contained in section 68(1)(a) of the new *Building Industry Fairness (Security of Payment) Act 2017* (Qld).

Where a payment claim does not meet the requirements, an adjudicator will have no jurisdiction.

Keywords:

jurisdictional error;
validity of payment claims

Brown J accepted KDV's submission that simply providing the total percentage of work completed was insufficient for KDV to reasonably identify which construction work was the subject of the claim.

Accordingly, the Court held that the adjudication decision was void for want of jurisdiction because the payment claim was not valid under section 17(2) of the BCIPA.

https://www.sclqld.org.au/caselaw/QSC/2019/178

Queensland Government accepts proposed amendments to the Building Industry Fairness Act

CORRS PROJECTS UPDATE

The Queensland Government has issued its response to the *Building Industry Fairness Reforms Implementation and Evaluation Panel Report* (**Report**), which proposed amendments to the *Building Industry Fairness (Security of Payment) Act 2017* (**BIF Act**) regarding the use of project bank accounts (**PBAs**).

All 20 recommendations proposed in the Report have been either accepted or accepted in-principle by the Queensland Government. The reforms are expected to commence on 1 July 2020 and be fully implemented within 24 months.

Background

A PBA is a trust account that a principal pays progress payments into under a construction contract for "*building work*" where certain criteria are met. The PBA framework is designed to ensure that payments that subcontractors are entitled to receive remain protected in the PBA until they are due to be paid to the subcontractor. Our previous article on the project bank account regime can be accessed here.

The current laws surrounding PBAs

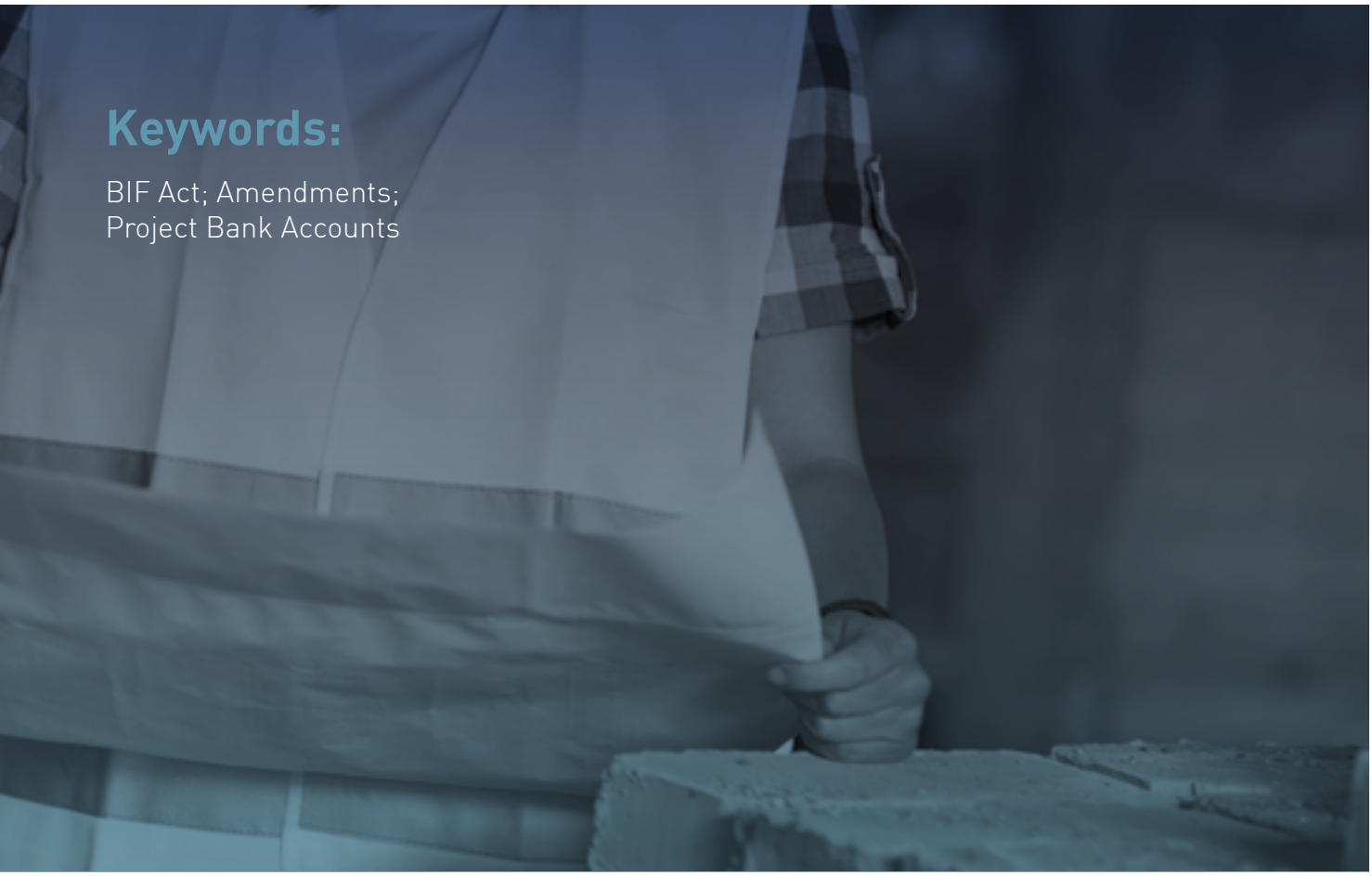
Phase 1 of the PBA reforms commenced on 1 March 2018, but only applied to Government building and construction projects valued between A$1 million and A$10 million (GST inclusive).[1]

It was proposed in the Report (and accepted by the Queensland Government) that through three further phases, PBAs would be made compulsory for every project for building work valued over A$1m:

- **Phase 2**: PBAs will be required for all Government and Private projects valued at A$10m or more (GST exclusive);
- **Phase 3**: PBAs will be required for Government and Private projects between A$3m and A$10m (GST exclusive); and
- **Phase 4**: PBAs will be required for Government and Private projects in the range of A$1m and A$3m (GST exclusive).

Additionally, the Report recommended further amendments be made to the BIF Act regarding the operations of PBAs. The most important of these accepted amendments include:[2]

- **Recommendation 2**: The definition of "*building work*" will be amended so it is consistent with the definition under the *Queensland Building and Construction Commission Act 1991* (Qld). Contracts solely for the supply of construction related services (including



Keywords:

BIF Act; Amendments; Project Bank Accounts

architectural, design and surveying services) will be excluded from the PBA requirements. The definition of "*subcontractor*" will be amended to include civil construction work and consultants.

- **Recommendation 3**: The requirement for a disputed funds trust account will be removed from the PBA framework. This was suggested in light of the new protections in Recommendation 5 (see below).
- **Recommendation 4**: The BIF Act will be amended so that it will be an offence for a person given a payment claim to pay less than the amount stated in a payment schedule.
- **Recommendation 5**: The BIF Act will be amended so that a subcontractor can give a Payment Withholding Request to a project principal on or after making an adjudication application. This request would require the principal to retain enough money (from amounts due to the head contractor) to cover the adjudication claim. Queensland would be the first jurisdiction to introduce such measures.[3]
- **Recommendation 6**: The requirement to create a Retention Trust Account as a part of the PBA will be removed.[4]
- **Recommendation 7**: The Retention Trust Account will be replaced as a part of a PBA by requiring all contractors and private sector principals in the contractual chain to create a (separate) retention trust account to withhold cash retentions in relation to any project which requires a PBA or prescribed work.[5]
- **Recommendation 10**: The Retention Trust Account requirement will be progressively phased in alongside the PBA phases (outlined above). In accordance with this recommendation, where a PBA is required in Phases 2 and 3, all head contractors and private sector principals must hold any retentions from those projects in a Retention Trust Account. In Phase 4, all contractors holding retentions for "*building work*" and private sector principals on projects requiring a PBA will also have to hold any retentions in a Retention Trust Account.
- **Recommendation 18**: The BIF Act currently provides that on termination of the contract or insolvency of the head contactor, the principal may step in and administer the PBA.[6] The Report proposes (and the Queensland Government accepted) removing the ability of the principal to become the trustee of the PBA in the instance of insolvency or contract termination. Instead, the Queensland Building and Construction Commission (**QBCC**) will be able to administer PBAs in these circumstances.[7]

When will the reforms be rolled out?

Phase 2 (the initial Phase) will commence on 1 July 2021. When this phase commences, all government and private projects for building work valued at A$10m and above will require PBAs (in addition to existing requirements for government projects for building work over A$1m to have a PBA).

Phase 3 will commence 4-6 months after Phase 2 (likely 1 January 2022). When this phase commences, all private projects for building work valued between A$3m and A$10m will also require PBAs.

Finally, **Phase 4** will commence 4-6 months after the commencement of Phase 3 (likely 1 July 2022). When this phase commences, private projects for building work valued between A$1m and A$3m will also require PBAs.[8]

It is anticipated that legislation will be forthcoming in the final half of 2020.

1 *Building Industry Fairness (Security of Payment) Act 2017* (Qld), 13, 14.
2 A full list of recommendations can be seen in attachment A of the report.
3 *An Evaluation of Queensland's Building Industry Fairness Reforms* (n 1), pg 32.
4 Ibid, pg 35.
5 Ibid.
6 *Building Industry Fairness (Security of Payment) Act* 2017 (Qld), Part 5, Chapter 2.
7 *An Evaluation of Queensland's Building Industry Fairness Reforms* (n 1), pg 41.
8 Building Industry Fairness Reforms Implementation and Evaluation Panel 'Panel review of building reforms', *Department of Housing and Public Works* (Website, 28 November 2019), available here.

Built Environs WA Pty Ltd v Perth Airport Pty Ltd (No 3) [2019] WASC 399

CORRS PROJECTS UPDATE

Background

In *Built Environs WA Pty Ltd v Perth Airport Pty Ltd (No 2)* [2019] WASC 76 (**Built Environs (No 2)**),[1] Justice Kenneth Martin struck out part of the pleadings prepared by Build Environs WA Pty Ltd (**Built Environs**). The offending paragraphs, [14] and [15], had made a global (or modified total costs) claim arising from alleged drawing deficiencies, but did not properly explain how any deficiencies might have caused financial loss.

Months later, Built Environs sought leave to re-plead paragraphs [14] and [15] in its further amended statement of claim. Leave was required because of Martin J's orders in *Built Environs (No 2)*. A further revised and amended (yet, still incomplete) Schedule V was also in dispute.

Built Environ's proposed reconstructed case

Built Environs submitted that it had addressed the "*abiding structural difficulty*" that was identified in *Built Environs (No 2)*. Built Environs sought leave to plead conventional damages claims as it no longer intended to advance a global claim.

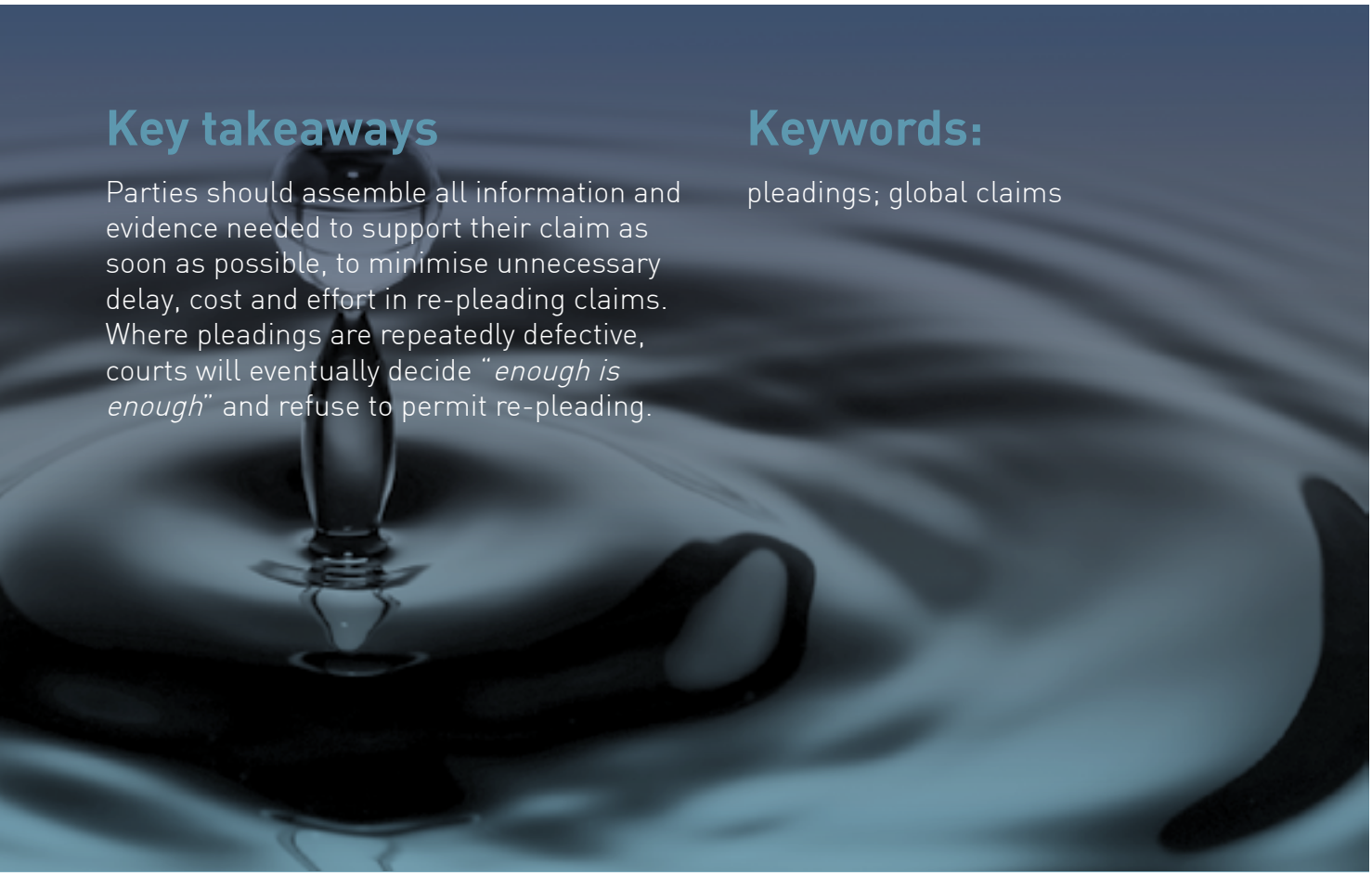
The proposed pleading contended that Perth Airport Pty Ltd (**Perth Airport**) had a contractual obligation to give Built Environs drawings and specifications for works of a particular kind, and that Perth Airport gave Built Environs drawings that did not meet the contractual standard. Built Environs pleaded 151 distinct claims of breach of contract which were identified in Schedule V.

Built Environs' solicitors informed the Court that work was continuing on the general drawing deficiencies claim and that further breach claims, as they emerged in the future, would be added to Schedule V. In other words, almost three and a half years after the action commenced, alleged breaches of contract by Built Environs were still unidentified.

The decision

Martin J permanently refused leave to re-plead paragraphs [14] and [15][2] because:

- the proposed amendments to paragraphs [14] and [15] did not provide fundamental details of the financial losses said to have been caused by each alleged drawing deficiency;
- too much time had passed, over multiple prior iterations of the attempted pleadings, for Built Environs to remain unable to describe its claims coherently;



Key takeaways

Parties should assemble all information and evidence needed to support their claim as soon as possible, to minimise unnecessary delay, cost and effort in re-pleading claims. Where pleadings are repeatedly defective, courts will eventually decide *"enough is enough"* and refuse to permit re-pleading.

Keywords:

pleadings; global claims

- the missing information regarding causation of financial loss should have been assembled before the writ was issued (some three and a half years ago), so that Built Environs could hold a reasonable basis for suing for breach of contract; and
- *"the point has finally been reached, in effect, where 'enough is enough'"* and it would not be proper to ask Perth Airport *"to tolerate any more delay, waste, changes of position and more multiple unexplained extra grievances emerging ad hoc"*.[3]

Ultimately, after three and a half years, Martin J had no confidence that the enduring structural problems with Built Environ's pleadings would be satisfactorily addressed.[4]

http://classic.austlii.edu.au/au/cases/wa/WASC/2019/399.html

1 This decision was the subject of a note in the 2019 Q3 Corrs Projects Update.
2 At [110].
3 At [45].
4 At [105].

Property snapshot – key changes and shifts

CORRS PROJECTS UPDATE

As the property market shifts, we explore the consequences of the increasing use of electronic signatures by companies and the rights of purchasers to walk-away from off-the-plan contracts in Victoria.

Sign here please: concerns over companies splitting electronic signatures

In a digitised world, companies are moving towards the convenience of electronic signing. The recent case of *Bendigo Bank* demonstrates that companies must abide by strict requirements when signing a document. Accordingly, despite the increasing popularity of electronic signing, it remains best practice to reject e-signatures and to obtain manual signatures on a single document if relying on execution under the *Corporations Act.*

Companies commonly sign documents under section 127 of the *Corporations Act.* This section provides that a company may execute a document if signed by either two directors or a director and a company secretary.

In *Bendigo Bank*, the Court held that a loan deed executed by a company using electronic signatures was not validly signed, did not meet the requirements of section 127 and, therefore, was unenforceable. The loan deed was purported to be executed by someone affixing the electronic signatures of a director and a secretary of the borrower to an electronic copy of the loan deed.

The Court found that the placement of two electronic signatures on the deed, one after another, amounted to a "*split execution*". A split execution occurs when the directors, or a company secretary, sign separate duplicates of a document rather than signing the same document. Justice Stanley stated that the requirement under section 127 is for *"a single, static document rather than a situation where two electronic signatures are sequentially applied to an electronic document".*

This is a narrow view and one that is inconsistent with the take-up of electronic signatures by the market. Until further clarity is given by an appellate court or the legislation is updated to allow electronic signing of deeds under the Corporations Act, we recommend that companies executing deeds under section 127 should use wet-ink signatures on one physical document. The two authorised persons signing pursuant to section 127 should sign the same piece of paper to avoid split execution.

Developers beware: plan amendments may result in contract termination

Developers should take extra care when making amendments to existing plans under off–the-plan contracts. While such amendments may be par for the course, they could expose vendors and developers to contract termination risk where they are inconsistent

Keywords:

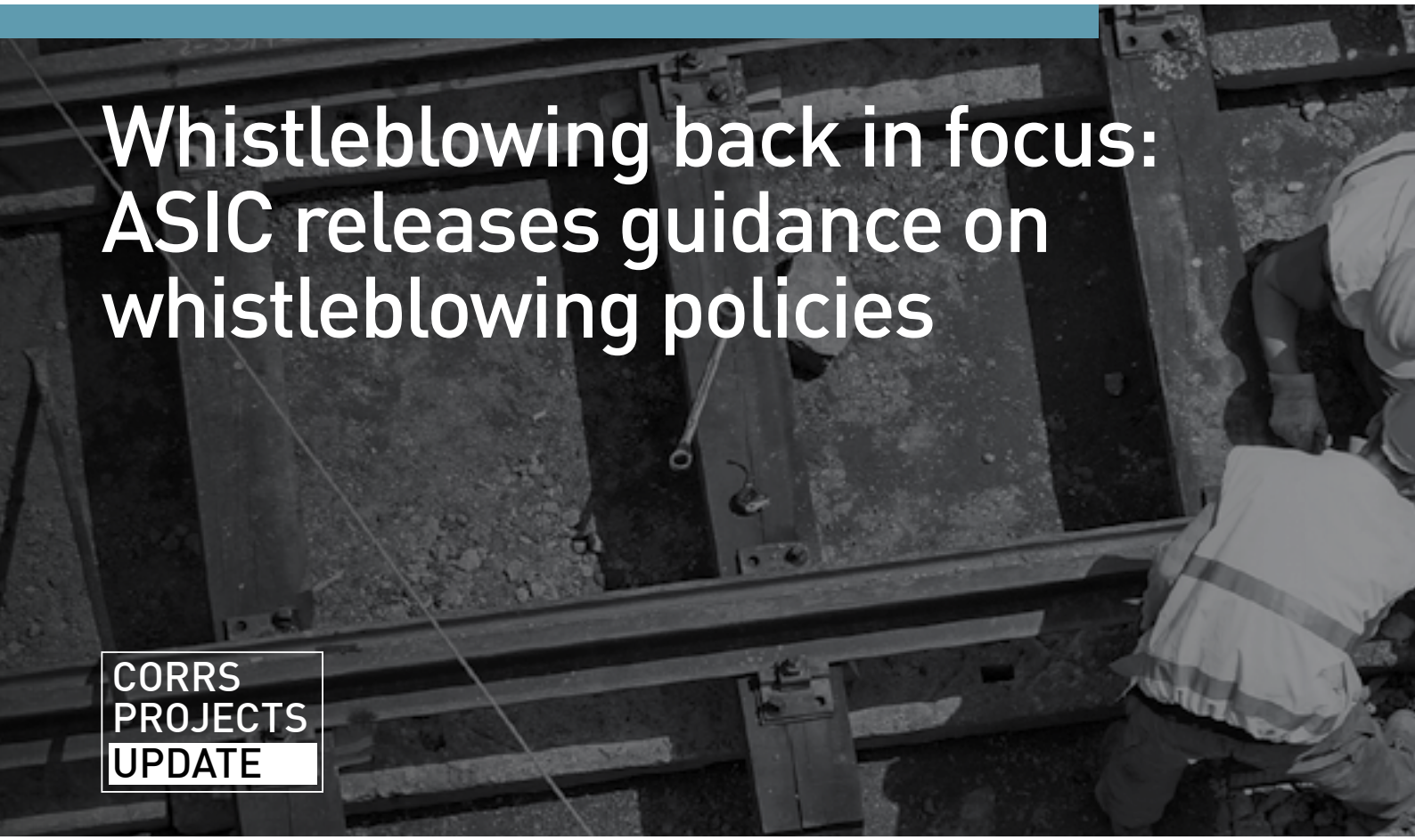
electronic signatures; termination risks

with an essential term of the contract or a representation made to the purchaser.

The recent case of *Harris v K7@Surry Hills P/L* related to an off-the-plan contract for a residential unit. By way of special condition, the contract stipulated that the unit included two car spaces and "*full length*" storage spaces. The vendor then amended the existing plan to include one car park and "*over the bonnet*" (as opposed to "*full length*") storage spaces. At this point the purchaser purported to terminate the contract. The Court held that the purchaser's termination on account of these amendments to the plan was valid for several reasons:

- **Repudiation of contract**: the amendments to the plan amounted to a repudiation of the contract. The parties had expressly identified the car space and storage space special condition as an essential term of the contract. By providing the purchaser with an amended plan that did not reflect this essential term, the vendor had repudiated the contract and, in doing so, given rise to the purchaser's termination right.
- **Material change**: converting the storage spaces from "*full length*" to "*over the bonnet*" constituted a material change to the plan. Due to this material change, the purchaser was entitled to rely on its termination right under section 9AC of the Sale of Land Act.
- **Misleading and deceptive conduct**: the vendor had also engaged in misleading and deceptive conduct under the Australian Consumer Law. The car space and storage space special condition was deemed a representation to the purchaser which, when unfulfilled, was able to justify the purchaser's termination of the contract.

Harris v K7@Surry Hills P/L shows that developers will be unable to rely on their contractual rights to make variations to a subdivision plan when bespoke special conditions and representations have been made to off-the-plan purchasers.



Whistleblowing back in focus: ASIC releases guidance on whistleblowing policies

CORRS PROJECTS UPDATE

The *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019* (**Whistleblower Protections Act**) introduced new obligations in respect of whistleblowing, including the requirement for all public listed companies, large proprietary companies and trustees of registrable superannuation entities to have a whistleblowing policy in place by 1 January 2020.

In our recent article, we considered the draft guidance released by ASIC to assist organisations to implement and maintain a whistleblower policy that complies with the obligations under the *Corporations Act*.

ASIC recently released the finalised Regulatory Guide 270 – Whistleblower policies (**Guidance**), along with its response to submissions received on the draft guidance.

With only weeks to go until the whistleblowing policy requirement comes into effect, we take a look at significant aspects of the Guidance and some of the issues organisations should consider in assessing whether their policies are compliant for 1 January 2020.

Key mandatory requirements

The Guidance makes clear that, in ASIC's view, a whistleblowing policy must include the following:[1]

- the purpose of the policy;
- who the policy applies to (including the identification of persons both within and outside the entity who can make a disclosure that qualifies for protection);
- matters the policy applies to, based on the entity's business operations and practices, as well as the types of matters that are not covered by the policy (in addition, the policy must state the disclosures that are not about "*disclosable matters*" do not qualify for protection under the Corporations Act);
- who can receive a disclosure, including information about how a discloser can obtain additional information (e.g. by contacting the whistleblower protection officer or an independent legal adviser);
- how to make a disclosure, including the different options available and instructions on how to do so (including by anonymous means);
- the legal protections available to the discloser;
- information on support and practical protection for disclosers;
- how the entity will handle and investigate disclosures, including how it keeps the discloser informed and documents, reports internally and communicates to the discloser the investigation's findings;
- information on how to ensure fair treatment of individuals mentioned in a disclosure; and
- ensuring the policy will be made accessible, including to external whistleblowers (notwithstanding that

Keywords:

whistleblower policies; ASIC Guidance

s1317AI(5) only requires entities to make their policy available to officers and employees).

These requirements appear to go beyond the scope of the six matters that a policy must deal with in accordance with s1317AI of the *Corporations Act*.

Changes from the draft guidance

The Guidance differs in several respects from the draft version released by ASIC in August. Some of the significant changes include:

- A hardening of the terminology used in relation to those matters ASIC considers mandatory for a policy to deal with in order to comply with legislation, characterised by a change from the use of the term "*should*" to "*must*" on a number of matters.
- Clarification that a policy must include a range of both internal and external disclosure options.
- New requirements to outline the specific mechanisms for protecting anonymity and confidentiality, as well as protecting disclosers from detriment.
- A limitation on the extent to which an entity may rely on links in the policy to other policies and procedures. ASIC's expectation is that all information required to be included under legislation be expressly included in the policy itself.
- The requirement to highlight the importance for a discloser to understand the criteria for making a public interest or emergency disclosure, and stating that a discloser should contact an independent legal adviser before making such a disclosure.
- Including a requirement to specify the timeframes for handling and investigating disclosures, as part of an overall requirement to provide transparency about how investigations are handled.
- Adding a requirement that the policy state that the entity will provide a discloser with regular updates on the investigation, including (if necessary) through anonymous channels.
- Revisions of the sections dealing with disclosable matters and the definition of personal work-related grievances, indicating ASIC has taken on board concerns raised by submissions regarding the expansive approach the draft guidelines adopted in relation to protected disclosures. The Guidelines clarify that an entity may choose to implement a policy that also applies to a broader range of (non-statutory) disclosures as part of a "*speak up*" culture, and offers organisations more flexibility in how they define and identify personal work-related grievances which are to be excluded from the operation of the policy.

- Removing the requirement that the policy specify the names of the internal reporting points and deleting the section on "*Roles and Responsibilities*", which covered WPOs, WIOs and the nomination of recipients outside the chain of command, among other things. The removal of this section will provide some simplification of an entity's policy.
- Additional "*best practice*" guidance on issues such as the use of independent whistleblowing services to act as an eligible recipient, and providing advice as to how an employee can make a disclosure outside the entity (including to ASIC, APRA or the ATO).
- Requirements in relation to monitoring and reporting on the effectiveness of the policy have been moved and are now set out as best practice suggestions (see section C of the Guidance).

Exemption for small charitable organisations

In addition to the release of the Guidelines, ASIC announced it is granting relief to public companies that are not-for-profits or charities with annual revenue of less than A$1 million from the requirement to have a whistleblower policy. In doing so, ASIC acknowledged that these entities may face a compliance burden that outweighs the benefits a policy might otherwise offer.

Where to from here? Counting down to 1 January 2020

ASIC has indicated that there will be no extensions to the 1 January 2020 start date, and it plans to survey the whistleblower policies of a sample of companies next year to review compliance with the legal requirements.

In light of the adjustments made to the final Guidance, organisations should now consider whether they need to revisit their whistleblowing policies to ensure they are meeting ASIC's expectations. It is clear that short and simplistic policy, which contained links to other polices and guidance will not meet those expectations.

The Guidance is detailed and, in some areas, prescriptive. This is particularly the case in relation to the inclusion of detail on matters such as the length and manner of investigations that will be conducted (even if these are expressed to be "*subject to variation*"). Our experience is that whistleblowing investigations are often complex and administratively challenging, and require adjustments in the investigative approach depending on the issue. This makes it difficult to adhere to any prescriptive process or timeframes.

Adopting the Guidance in its entirety without regard to internal capability, resources and structure may result in an organisation being burdened with a complex and unwieldy policy which is difficult for policy participants to understand and implement. This could in turn lead to breaches of the policy, a loss of confidence by participants in the process and, in severe cases, potential breaches of the confidentiality and other legislative requirements on how whistleblowing disclosures should be handled.

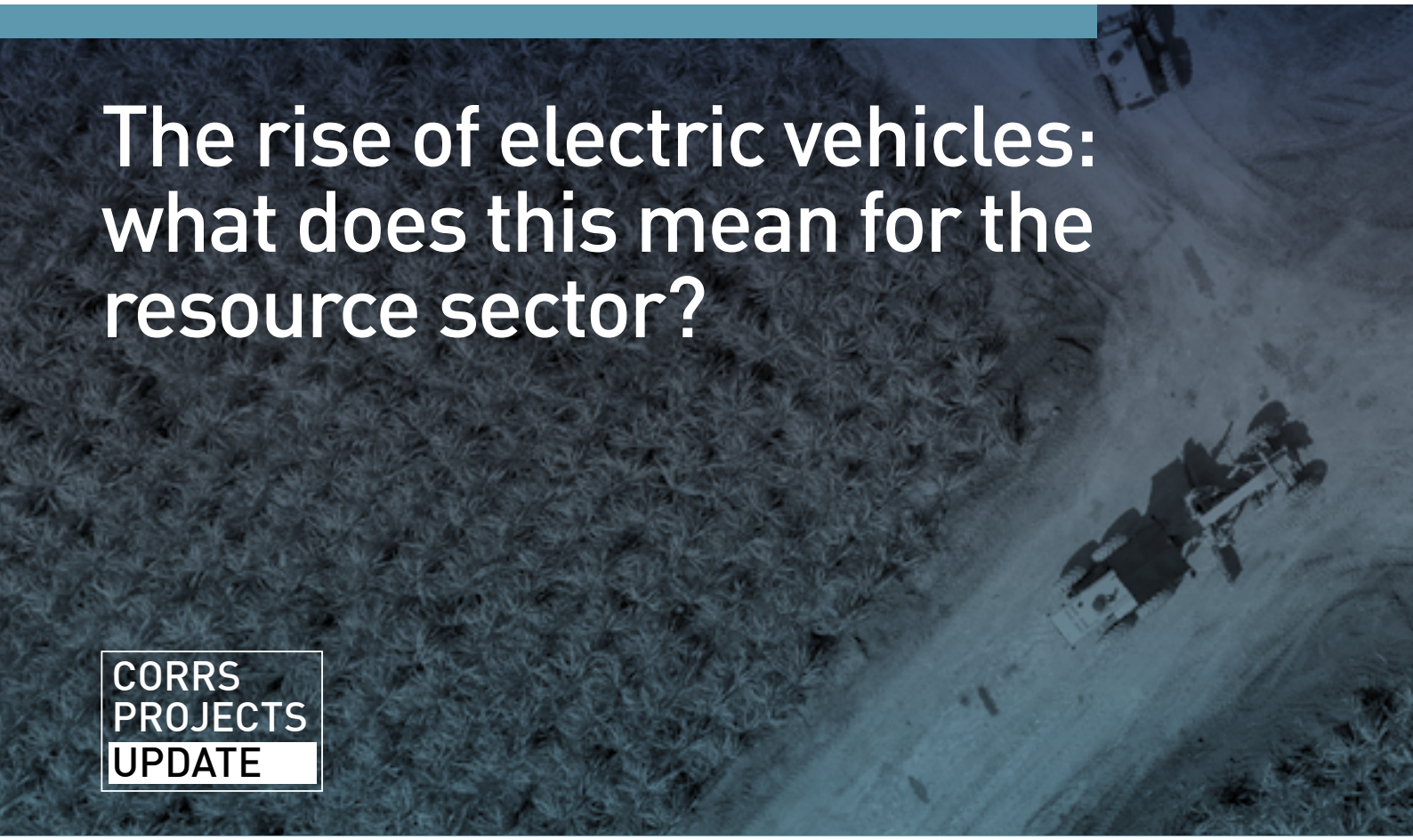
The challenge for organisations will be developing a policy that is clear, practical and adapted to their organisation, but which also meets the expectations of the regulator as indicated in the Guidelines.

Four tips for organisations

1. As a baseline, ensure your policy complies with the mandatory requirements in the Guidance on and from 1 January 2020.
2. Consider whether the Guidance "*best practice*" elements are appropriate and suitable for your organisation. If some aspects are not suitable for inclusion in your policy, identify and document why this is the case.
3. Consider whether there is an urgent need to amend your policy in light of the finalised Guidance, particularly if you have already relied on the draft Guidance in finalising your policy.
4. Exercise caution in drafting policy amendments and rushing them through. If you have only recently rolled out your whistleblowing policy, a further version can lead to employee confusion and errors in version control.

1 See Regulatory Guide 270 – Whistleblower policies, available at: https://download.asic.gov.au/media/5340534/rg270-published-13-november-2019.pdf

The rise of electric vehicles: what does this mean for the resource sector?



CORRS PROJECTS UPDATE

A decade ago, the thought of driving down a street where electric vehicles (**EVs**) outnumber conventional petrol and diesel vehicles may have seemed a world away. But if a report released earlier this year by Bloomberg New Energy Finance is anything to go by, this day might become a reality a lot earlier than you'd think. With worldwide sales of EVs exceeding two million vehicles last year, up from a mere few thousand in 2010, the report predicts that by 2040 more than half of all passenger vehicle sales, and more than 30% of all the cars on our roads, will be EVs.

The exponential uptake in EVs seen across the world has been helped by the price of batteries falling, and the range and efficiency of new models making EVs a more and more attractive option for the everyday consumer. Government policy also continues to play an invaluable role in increasing this uptake, which is particularly true in China – the country with the largest EV market and home to almost half of the world's stock of them – which quite unsurprisingly has some of the most attractive incentives for its citizens to purchase EVs.

So if we really are looking at a future with an estimated 550 million new EVs on our roads by 2040, displacing millions of conventional petrol and diesel vehicles, what might this mean for our resources sector?

Increased number of batteries

Unlike the combustion engines the market has become accustomed to over the last century, each EV comes with an entirely different demand for resources under the bonnet in the form of its battery. While it is true that battery technology is ever evolving, and the mix of materials used has and will continue to change, the batteries used in EVs in the market today typically consist of combinations of lithium, graphite, nickel, cobalt, aluminium, copper, silicon and manganese.

Most batteries in the world use a lithium-ion cell, and Australia is currently the world's largest producer of lithium, producing more than a third of the world's total output. While we may well be the largest producer of the raw mineral, it has been estimated that Australia currently only earns 0.53% of the total lithium value chain, with the rest of the value added through offshore electro-chemical processing. This presents a major opportunity for Australia to gain out of the rise in EVs if local processing plants can add value locally.

Broadly, the lithium-ion cell used in batteries consists of an anode, a cathode, precursor and electrolyte. These parts all have the potential to be manufactured in Australia, especially given the fact that we currently produce all the minerals required to produce most anodes and cathodes. This is with the exception of graphite – although we do have commercial reserves of that.

While it is projected that current lithium supply will be sufficient to supply the market until the mid-2020s

Keywords:

electric vehicles; resource sector; batteries

before expansion of mining is necessary, new cobalt and nickel production capacity will need to be established a lot sooner in order to meet increasing demand.

Cobalt presents a potentially unique opportunity for industry in Australia with this rising demand. The Democratic Republic of Congo (**DRC**) currently produces almost a third of the world's cobalt, but the country's mining of the mineral has come under fire in the media for human rights concerns around unsafe mines, working conditions, and the use of child labour. Australia, however, holds the second largest economic demonstrated resource of cobalt, yet produces less than 5% of what the DRC does. This presents a market ripe for investment and development in Australia, especially in an age where consumers are continually seeking and demanding more responsibly sourced products, at all points along the supply chain.

An often-raised concern about EVs is about what happens to the battery at the end of its useful life. Large heavy batteries clogging up landfill is both a waste of limited resources and an environmental management nightmare. There are however two viable solutions to this: re-purposing and recycling.

Lithium-ion batteries produced today for EVs are able to have a second life after they are no longer efficient to be used in cars, operating typically up to ten more years in alternative systems. These batteries are able to be re-purposed and used to power less demanding systems, like households, lighting and refrigeration. As for recycling, the CSIRO estimates that if recycled effectively, 95% of waste components could be turned into new batteries, or used in other industries.

While these ideas may seem somewhat untenable on a large scale at the moment, as battery production industries expand, the market for recycling and re-purposing is likely to grow too.

Increased demand for electricity

If one of the reasons for us to shift to EVs is to reduce emissions, then the sizeable increase in electricity demand for recharging all these batteries needs to be coupled with an increase in renewable energy infrastructure. Otherwise, this is simply going to increase the amount of fossil fuels currently being burned in order to meet these new electricity needs, which means the potential benefits gained from lowering vehicle emissions will come at the cost of increasing non-renewable electricity emissions. This might well be a win for the fossil fuel industries, but for a population who are demanding more in terms of emissions reduction and alternative energy options, this is unlikely to cut it.

The CSIRO offers an easy household solution to this for Australians, who have the largest per capita uptake of rooftop solar PV installations in the world. According to CSIRO scientists, it would be a perfectly feasible reality

to have a household battery pack charging during the day when the sun is shining, and then you simply plug your EV into the wall when you get home and it's charged and ready for you to drive to work the next morning. A car sitting in your garage, powered for free by the Australian sun – it sounds almost too good to be true.

So, why then aren't Australians lining up to buy these cars at the rate they are in Norway, where 46% of all cars sold last year were EVs? Well, like in China, generous government incentives for EVs that we don't have here in Australia might be one easy answer. Although it's not too far-fetched to imagine that the same kind of incentives which made rooftop solar so popular in Australia could have the same effect here with EVs, there are also some more situational considerations that might factor in to the Norway success story.

For one, clearly Norway is a much smaller country than Australia, and distances between cities are naturally going to be shorter. Although the driving range of EVs is almost incomparably better than it was 10 years ago, no one is pretending that a brand new Nissan Leaf is going to give you even close to the same mileage on a single "*tank*" as your 2009 Toyota Corolla. The technology just isn't there yet – you're still comparing apples and oranges. The so-called "*range anxiety*" of EVs is a genuine concern for consumers in Australia who might love the freedom of being out on the open road going from city to city, but fear becoming stranded without a fuel supply.

This brings us to the next point, charging infrastructure. Someone in their Tesla in Norway driving from Bergen to Oslo would still be on the road for seven hours, however range anxiety would be the least of their worries. That's because the country with the highest percentage of EVs on the roads also has a correspondingly plentiful number of publically available fast charging points for drivers to "*fill up*" along their journeys. Emissions from using these public chargers is similarly not a concern for Norwegians, as their abundant renewable energy industry means 96% of its electricity is generated by hydropower.

Price is another clear reason why Australians haven't been so keen to get on the EV bandwagon, with the cheapest models at the moment – the Hyundai Ioniq and the Nissan Leaf – currently setting customers back around the $50,000 mark (not to mention the additional cost and setup of a home charger). This being said, current estimates predict EVs will reach cost parity with conventional petrol and diesel vehicles by the early 2020s, primarily as a result of batteries becoming cheaper, which is going to give buyers more of a reason to make the switch.

Decreased demand for oil

Simple economics tells us that increasing the percentage of EVs on our roads is going to cause a subsequent decrease in the demand for oil used for road transportation – but how big an impact will this actually have?

By Bloomberg's calculations, the EV industry is expected to displace a combined 13.7 million barrels per day of total oil demand by the year 2040. For comparison, this is more oil equivalent than that used in 2012 by the whole transportation sector in the United States. The global energy consultants at McKinsey share a similar view, claiming oil demand for road transport will peak in 2025 before declining (directly triggered by the increased adoption of EVs) to eventually reduce by a third of current demands by the year 2050.

While these predictions modelled on current data and trends are subject to many assumptions coming true, the potential massive changes in oil demand from EVs would have worldwide ramifications for the oil industry, and key players like BP are taking note. Last year BP acquired Chargemaster (now BP Chargemaster), the largest EV charging company in its home country, the UK, quoting the move as a "*key part of BP's strategy to advance the energy transition*" and "*a true milestone in the move towards low carbon motoring in the UK*".

Oil companies like BP also account for a sizeable chunk of Australia's retail petrol stations, so it's not hard to envision a future where EV fast charging stations start popping up in place of local petrol stations – in fact, BP has already started rolling out its first "*ultra-fast*" chargers in its retail petrol stations in the UK, with plans to roll out 400 of them in the country by 2021.

So, what does the future hold?

Uptake of EVs in Australia has undoubtedly been slow compared to the rest of the world, with only 2,216 of the more than two million EVs purchased worldwide last year being bought in Australia. But this is no reason to discount the potential for large scale uptake of EVs in Australia, or make excuses saying the "*Australian situation*" will remain an outlier to the global trend.

We may not have the same social, political and environmental climate as Norway right now, but our abundance of resources (both in the ground and in the sky) is something that can be leveraged to make the worldwide EV transition both profitable and affordable for Australians. There are gains to be made all across the resource sector, and the sooner that government and industry leads the charge on this, the better.

Corrs Insights

Click the links to our recent articles relevant to your industry

Global arbitral community now awaits a decision from the UK Supreme Court in Deepwater Horizon appeal

By Joshua Paffey (Head of Arbitration), Lee Carroll (Special Counsel), & Virginia Holdenson (Law Graduate)

Queensland to limit political donations and electoral expenditure

By David Anthony (Senior Associate) & Daniel Argyris (Lawyer)

The Conveyancing (Sale of Land) Amendment Regulation 2019: what you need to know

By Natalie Bryant (Partner)

Risky business: why organisations doing business in Australia should re-evaluate their approach to risk management and compliance

By Abigail Gill (Partner), John Tuck (Head of Employment and Labour) & James Whittaker (Partner)

A catalytic effect: inbound investment in PNG set to rise following embrace of international arbitration

By Joshua Paffey (Head of Arbitration) & Vaughan Mills (Head of PNG Practice)

Where next for New Acland?

By Brent Lillywhite (Partner) & Milaan Latten (Lawyer)

NSW Independent Planning Commission refuses development consent for Bylong Valley Coal Mine

By Christine Covington (Head of Environment and Planning), Louise Lee (Senior Associate) & Arielle Mayer (Lawyer)

Hold the phone – ASIC might be listening! The Government consults on new ASIC powers

Michael Chaaya (Partner), & Matthew Dulaney (Lawyer)

Environmental offences: NSW Criminal Court of Appeal decision broadens the definition of 'waste'

By Christine Covington (Head of Environment and Planning) & Arielle Mayer (Lawyer)

Contacts – Brisbane

Rod Dann
Partner
Projects and Arbitration
Tel +61 7 3228 9434
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
Tel +61 7 3228 9860
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
Tel +61 7 3228 9816
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

Bruce Adkins
Partner
Energy & Resources and Corporate M&A
Tel +61 7 3228 9431
bruce.adkins@corrs.com.au

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

Best Lawyer – Mining Law, Oil and Gas Law and Energy Law Best Lawyers Peer Review, 2013 – 2020

Best Lawyer – Natural Resources Law Best Lawyers Peer Review, 2014 – 2020

Leading Individual – Energy & Natural Resources: Mining Chambers Global and Chambers Asia Pacific, 2013 - 2019

Peter Schenk
Partner
Projects
Tel +61 7 3228 9869
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

Frances Williams
Partner
Commercial Litigation and Class Actions
Tel +61 7 3228 9332
frances.williams@corrs.com.au

Lawyer of the Year – Alternative Dispute Resolution, Brisbane Best Lawyers Peer Review 2020

Best Lawyer – Litigation Best Lawyers Peer Review, 2012-2020

Best Lawyer - Construction and Infrastructure Best Lawyers Peer Review, 2014-2020

Best Lawyer – Regulatory Practice/Alternative Dispute Resolution Best Lawyers Peer Review, 2013-2020

Lawyer of the Year - Regulatory Practice, Brisbane Best Lawyers Peer Review, 2018

Joshua Paffey
Partner
Projects and Arbitration
Tel +61 7 3228 9490
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
Tel +61 7 3228 9420
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 MacGinley

Partner
Energy & Resources and Corporate M&A

Tel +61 7 3228 9391
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

Daryl Clifford

Partner
Projects and Real Estate

Tel +61 7 3228 9778
daryl.clfford@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

Tel +61 7 3228 9489
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

Michael Leong

Partner
Environment & Planning and Real Estate

Tel +61 7 3228 9474
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

Tel +61 7 3228 9786
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

Contacts – Melbourne

Joseph Barbaro
Partner
Projects and Arbitration
Tel +61 3 9672 3052
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
Tel +61 3 9672 3500
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
Tel +61 3 9672 3358
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 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

Jane Hider
Partner
Projects and Energy & Resources
Tel +61 3 9672 3218
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
Tel +61 3 9672 3504
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
Tel +61 3 9672 3545
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
Tel +61 3 9672 3326
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
Tel +61 3 9672 3435
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
Tel +61 3 9672 3498
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-for-profit 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 Tuck
Partner
Employment & Labour and Commercial Litigation
Tel +61 3 9672 3257
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

Contacts – Sydney

Andrew Chew
Partner
Projects and Property & Real Estate

Tel +61 2 9210 6607
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

Tel +61 2 9210 6309
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

Tel +61 2 9210 6287
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

Tel +61 2 9210 6428
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

Tel +61 2 9210 6621
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

Tel +61 2 9210 6227
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

Tel +61 2 9210 6192
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

Contacts – Perth

Spencer Flay
Partner
Projects and Arbitration
Tel +61 8 9460 1738
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
Tel +61 8 9460 1606
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
Tel +61 8 9460 1628
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
Tel +61 8 9460 1615
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

Contacts – Papua New Guinea

Vaughan Mills
Partner
PNG and Energy & Natural Resources
Tel +61 7 3228 9875
vaughan.mills@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

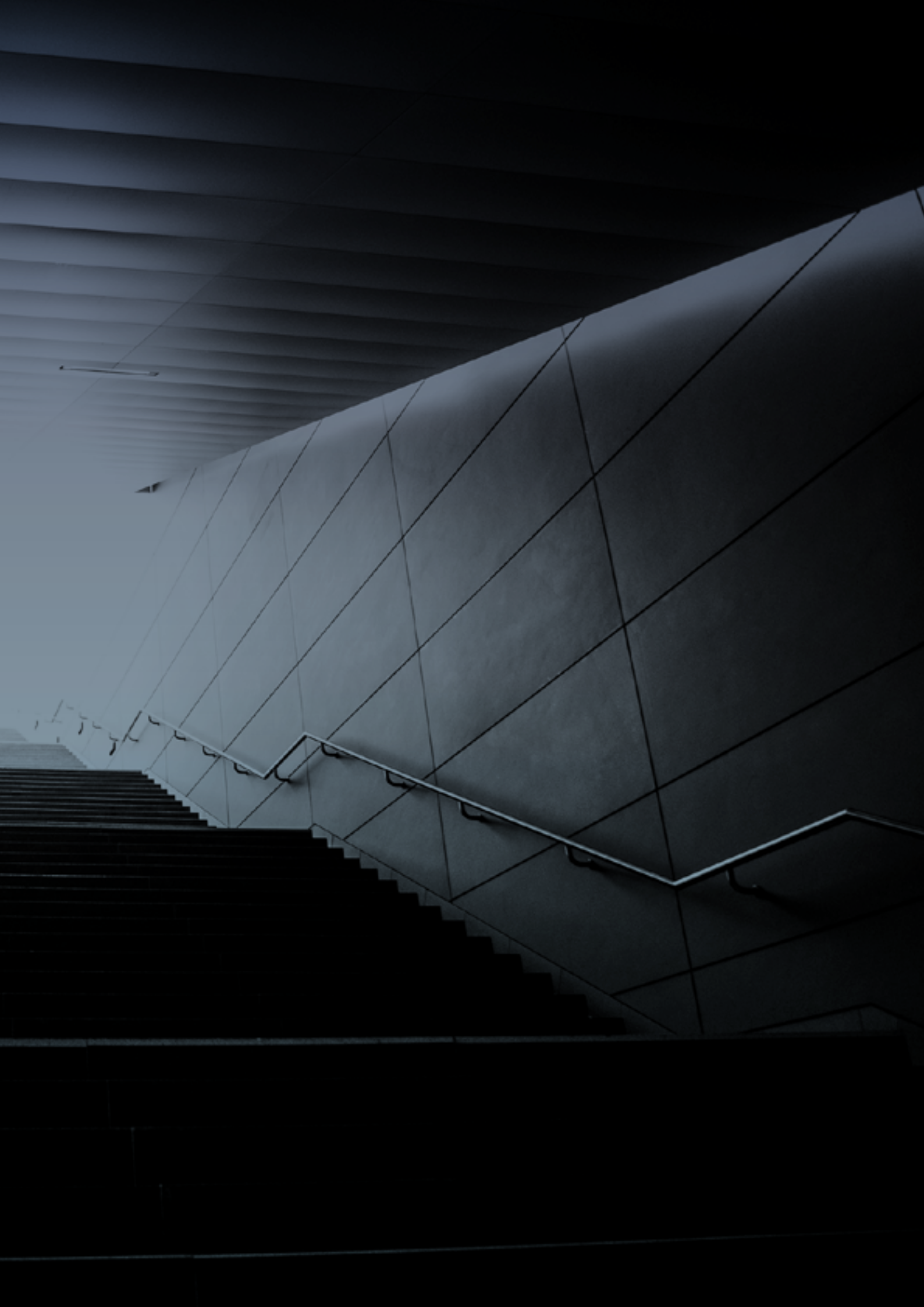
Nick Thorne
Partner
PNG and Energy & Natural Resources
Tel +61 7 3228 9342
nick.thorne@corrs.com.au

"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
is Australia's leading
independent law firm



Sydney

8 Chifley
8-12 Chifley Square
Sydney NSW 2000

Tel +61 2 9210 6500
Fax +61 2 9210 6611

Melbourne

567 Collins Street
Melbourne VIC 3000

Tel +61 3 9672 3000
Fax +61 3 9672 3010

Brisbane

One One One
111 Eagle Street
Brisbane QLD 4000

Tel +61 7 3228 9333
Fax +61 7 3228 9444

Perth

Brookfield Place
Tower 2
123 St George Terrace
Perth WA 6000

Tel +61 8 9460 1666
Fax +61 8 9460 1667

Port Moresby

Level 2, MRDC Haus
Cnr Musgrave Street
and Champion Parade
Port Moresby, NCD 121
Papua New Guinea

Tel +675 303 9800
Fax +675 321 3780

CORRS
CHAMBERS
WESTGARTH