Corrs Projects Update

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Welcome to the latest edition of Corrs Projects Update

Welcome to the latest edition of ***Corrs Projects Update***.

This publication provides a concise review of, and commercially focused commentary on, the latest major judicial and legislative developments affecting the Australian construction and infrastructure industry.

This edition includes:

- **Four feature articles:**
  - ESG and the successful delivery of major projects: key considerations for project proponents;
  - High Court rejects Spain's foreign state immunity claim and reinforces Australia's reputation as 'pro-arbitration';
  - Investment treaties and the energy transition: challenges and opportunities; and
  - 'Gatekeepers' to the board: regulators' changing expectations of general counsel.
- **Concise notes on cases of interest**
- **Other essential reading**

We hope that you will find this edition of *Corrs Projects Update* both informative and thought provoking.

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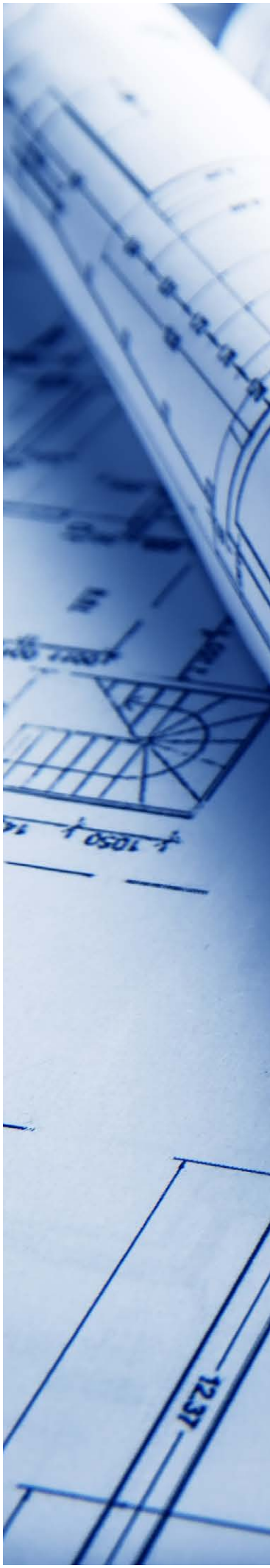
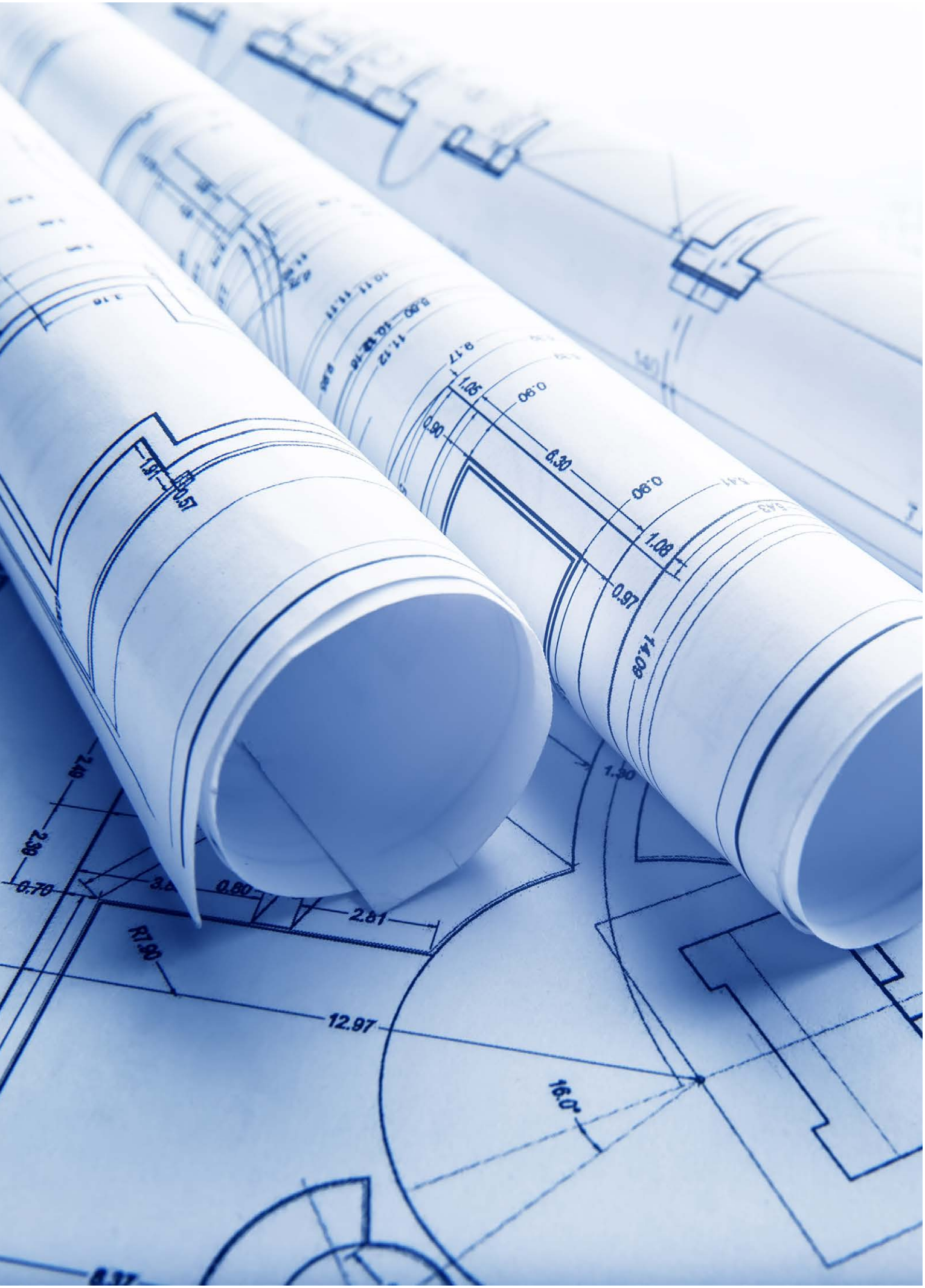
Editors' note: *The information contained in this publication is current as at December 2023.*

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ESG and the successful delivery of major projects: key considerations for project proponents

Key takeaways

Historically, ESG risks and impacts on the development of major projects were considered as non-financial risks but there is now little doubt that many such risks have both commercial and financial implications. Strong ESG risk management during the development of a major project can provide significant benefits, not only to the environment and stakeholders impacted by the project, but also to project proponents.

Keywords

ESG

The development of any successful major project goes through several stages.

Many proposed projects fail at an early stage, usually because they are not economically viable. Others pass through these stages yet fail to achieve their economic objectives, including failing to properly take account of environmental, social and governance (**ESG**) matters.

The various stages of a project include:

1. Acquiring the title or rights which underpin the project
2. Obtaining environmental and planning approval
3. Capital raising
4. Conducting further due diligence on the project's viability, including considerations associated with project finance
5. Obtaining final approvals for the project, including all environmental, development and construction approvals
6. Constructing infrastructure necessary for the project, ensuring that the time, cost and quality of the construction meets required standards to achieve project viability
7. Operating the project
8. Selling or decommissioning the project.

In this article, we explore the ESG matters that should be carefully considered at each of these stages.

Establishing the property rights necessary for the project to proceed

The project proponent must do sufficient due diligence to satisfy itself that it is obtaining clear title to the necessary assets or rights which underpin the economic purpose of the project.

First Nations rights and interests in land are formally recognised over around 50 percent of Australia's land mass. For projects being developed on First Nations lands or seas, genuine engagement with First Nations people is paramount. To protect against the future operational, regulatory, reputational and, ultimately, financial risks, project proponents should identify and consult First Nations people with connections to the land, sea and sites of cultural significance to obtain free prior and informed consent (**FPIC**) before finalising project plans.

FPIC has both procedural and substantive requirements. It is a principle derived from the right to self-determination, articulated in the United Nations Declaration on the Rights of Indigenous People (**UNDRIP**), and required as an indication of respect for Indigenous peoples, to enable them to realise their rights and to ensure their protection. FPIC should be realised before any rights are impacted, which means well before the project begins. Engaging in respectful consultation with impacted First Nations communities to obtain consent will assist in the planning and permit process and help prevent operational delays. It is also an important part of a social licence to operate.

The Federal Court has recently demonstrated a willingness to identify principles consistent with FPIC in legislated consultation processes.[1]

1 See the Federal Court's decision in *Tipakalippa v National Offshore Petroleum Safety and Environmental Management Authority (No 2)* [2022] FCA 1121 (the **NoPSA case**) and the Full Federal Court's clarification of the requirements for consultation on appeal, *Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193. See also Corrs article, FPIC in the Australian context: now and into the future, 1 May 2023.

Fulsome community engagement and a deep understanding of the potential impact of project externalities on the local community more broadly, and in particular more vulnerable members of that community, is also becoming increasingly critical.

This year, some major projects have been affected by injunctions or other allegations that relate to ESG matters. Subsequent claims that there has been a failure to properly take account of ESG issues can lead to very significant delays to the critical path to completion of the whole project. This is particularly so in a current regulatory environment where there has been a significant widening of the gap between social expectations and legal obligations necessary to operate. Delays to completion, and therefore income generation, will lead to a consequential diminution in the net present value of the project. In serious cases, such a delay can result in the assumptions in the business case being falsified to the extent that the project is no longer viable.

Environmental and planning approvals

It is also important to ensure that there are no fundamental environmental issues which will preclude the proposed project. These issues are also important at the time of establishing rights to the necessary property for the project. If there is a known environmental issue that will preclude development, the acquisition should not proceed.

Increasingly, public interest groups are searching for failures by project proponents and regulatory authorities in the approval process. If relevant environmental and planning approvals are not properly obtained, serious delays to the project can occur. Moreover, the existence of an approval from a regulatory authority does not guarantee that the approval will survive judicial scrutiny. Where a challenge is successful, the approval can be effectively scuppered. As has occurred recently in Australia, projects can also stall pending the determination of a legal challenge due to uncertainty about future outcomes, causing delay and loss.

Relatedly, equity participants purchasing an interest in the project after, and in reliance upon, approvals which have been granted, ought to complete their own due diligence to ensure that all proper processes were undertaken by the regulatory authority when issuing the approval and question whether the regulatory regime in the context of the relevant project is fit for purpose. In circumstances where the law in the project approvals space is being tested in novel ways, administrative law appeal risk should be evaluated at the outset and through the assessment and approval process.

Capital raising

Investor engagement over the project lifecycle brings its own ESG demands. In many cases investors are signatories to international standards such as the Equator Principles Association Equator Principles EP4 (July 2020), the International Finance Corporation Environmental and Social Performance Standards (2022), or the United Nations Principles for Responsible Investment (2006). Investors who commit to these standards are required to undertake a level of due diligence and understand project performance across a range of environmental and social standards including climate and biodiversity, labour and working conditions, land acquisition and resettlement, cultural heritage and Indigenous peoples.

There is evidence to show that strong ESG management by the project proponents can lead to a reduced cost of capital of up to ten percent. Investors and financiers have historically relied upon approvals given by regulatory authorities as evidence that any environmental issues associated with the project have been resolved. However, governmental approvals have recently been challenged because the process required of the relevant authority was not followed.[2]

Accordingly, there is a heightened need to ensure that approvals satisfy relevant legal requirements and otherwise satisfy the reasonable expectations of various stakeholders affected by the project. These matters involve issues beyond the satisfaction of strict legal requirements and generally extend to issues relevant to the social licence to operate, as discussed below.

Debt funding

Project financiers will be very interested in ensuring that adequate title to the relevant rights is available and that the interests and rights of First Nations people have been dealt with in a way that ensures the project's success.

Likewise, the financiers will need to be satisfied that the environmental and planning approval process is sufficiently advanced, such that the risks associated with approvals are manageable. Even if the current problems inherent in some vague language used in legislation are resolved, it is apparent that community interest groups will be imaginative in ensuring that there is strict compliance with any relevant ESG requirements mandated by law.

Obtaining final planning and environmental approvals

Prior to construction commencing on site, all of the final environmental approvals and pre-construction certifications are required. These approvals generally relate to minor issues such as how construction is to be performed without unduly disturbing the local environment (for example, regulating construction of a pipeline across an existing stream).

2 See the NoPSA case (above).

Nonetheless, these approvals are important and, if not obtained in an orderly fashion, can delay the project and increase costs or otherwise where not complied with result in actions being taken that are still unlawful.

Construction

The construction of any major project requires a sensitive approach to matters arising under State and Commonwealth legislation. However, environmental and social issues that go beyond legislative and regulatory requirements can arise if stakeholder expectations are not met. This may arise in respect of the expectations of First Nations people regarding certain projects. Nevertheless, the management of these expectations extends to other stakeholders and can relate to matters involving material selection, water consumption, human rights and procurement practices. Despite significant efforts to identify heritage issues prior to commencement of construction, it is necessary to manage new heritage issues which arise as a consequence of discovering matters of Aboriginal heritage during construction.

Unknown heritage issues can also give rise to the abandonment of projects, even after construction has commenced. The proposed construction of the Hindmarsh Island Bridge in South Australia is an extreme example. Objections were raised by Doreen Kartinyeri and others that it would desecrate a site of traditional Aboriginal secret women's business, which could not, for cultural reasons, be disclosed to men. Owing to these heritage issues, in 1994 the Federal Aboriginal Affairs Minister Robert Tickner issued an order stopping the project. But after an unsuccessful High Court challenge by the objectors, construction of the bridge recommenced and it was officially opened on 4 March 2021, a delay of 27 years.[3]

Operation

When operating a project facility, solid environmental and human rights due diligence management plans should be in place. This includes modern slavery due diligence programs that allow the project proponent to be confident that the facility is not exposed to modern slavery and that any modern slavery disclosures are verifiable.

The facility should also consider ensuring operational grievance mechanisms are in place to manage human capital and human rights risks within the workforce, and within the community impacted by the project. Environmental and social impact assessments may no longer suffice to identify all the ESG risks to which a project is exposed.

While not always a legal issue, the social licence to operate is also an important consideration. A failure to have regard to these issues, which in many cases will exceed the legal requirements, may cause significant reputational damage or even loss of the project.

Decommissioning

Issues associated with the decommissioning of projects are becoming apparent, as facilities and infrastructure past their economic life are increasingly being decommissioned. Examples include AGL's decommissioning of the Liddell Power Station and Energy Resources Australia's decommissioning of the Ranger uranium mine in the Northern Territory.

Often overlooked 30 or 40 years ago, the costs of decommissioning are very high and are to be borne by the project proponent(s). The relevant State Government authorities will often require bonds to ensure that the relevant decommissioning work is done properly.

Accordingly, it is important, both at the outset of the project and during its operation, to understand the cost implications associated with decommissioning and to make provision for it. During the course of operation, it may also be appropriate to manage the project in a way which limits decommissioning at the end of the asset's life.

Looking ahead

Strong ESG risk management brings significant benefits, not only to the environment and stakeholders impacted by the project, but also to project proponents. Strong stakeholder engagement can help to identify and address concerns, as well as any issues that arise early in the project cycle.

Consideration of human rights, including FPIC and environmental (including climate and biodiversity) risks, helps minimise any external project impacts and also identifies and mitigates risks that may arise in the development and operation of the project.

In the past, ESG risks and impacts have been considered as non-financial risks. However, there is now little question that many of the risks arising (for example, climate risks) are considered material to the business with both commercial and financial implications. Organisations that ignore the need for strong ESG management do so at their peril.

Note: this article by Andrew Stephenson, Dr Phoebe Wynn-Pope and Dr Louise Camenzuli was previously published online here and has since been published in (2023) 212 *Australian Construction Law Newsletter*.

3 Kumarangk Coalition, 'Stop the Bridge: respect and protect Kumaranggk / Hindmarsh Island', State Library of South Australia, 1994.

High Court rejects Spain's foreign state immunity claim and reinforces Australia's reputation as 'pro-arbitration'

Key takeaways

In April 2023, the High Court of Australia handed down its long-awaited decision in *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l.* [2023] HCA 11, rejecting the application of foreign state immunity from suit to recognition and enforcement of arbitral awards made under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 and reinforcing Australia's reputation as a 'pro-arbitration' jurisdiction.[4]

Keywords

International arbitration; ICSID Convention

The High Court case of *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l.* [2023] HCA 11 was the first contested application in Australia for the recognition and enforcement of an arbitral award made under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 (ICSID Convention).

The Court considered the extent to which Spain's entry into the ICSID Convention constituted a waiver of foreign state immunity under the *Foreign States Immunities Act 1985* (Cth) (**FSIA**) and unanimously dismissed an appeal from the Full Court of the Federal Court, confirming that Spain waived its immunity from the jurisdiction of Australian courts for the purposes of recognition and enforcement proceedings.

Background

From the late 1990s until around 2012, Spain adopted a number of regulatory measures aimed at incentivising investment in Spain's solar power and renewable energy industry, including introducing subsidies for renewable energy producers.

Based on these incentives, Eiser Infrastructure Ltd (**Eiser**), Energia Solar Luxembourg S.à.r.l. (**Energia**), Infrastructure Services Luxembourg S.à.r.l. (**Infrastructure Services**) and Energia Termosolar BV (**Energia Termosolar**) (together, Investors) collectively invested approximately €265.5 million in the Spanish renewable energy market.

Following the global financial crisis and a change in government in 2012, Spain reduced and eventually revoked the subsidy scheme, causing 'substantial harm' to the value of investments in Spain's renewable energy sector.[5]

The Investors claimed that Spain had failed to afford them fair and equitable treatment, as required under Article 10(1) of the European Energy Charter Treaty (**ECT**),[6] and commenced two separate arbitration proceedings under the ICSID Convention in late 2013: the first by Eiser and Energia, and the second by Infrastructure Services and Energia Termosolar. The arbitrations produced findings in favour of the Investors, awarding Eiser and Energia €128 million, and Infrastructure Services and Energia Termosolar €101 million in damages, plus interest.

In 2019, the Investors commenced proceedings in the Federal Court of Australia to have the ICSID awards recognised and enforced in Australia as if they were judgments of the Court, claiming payment of the sums awarded, plus interest and costs.[7] The matters were heard together.

4 Convention on the *Settlement of Investment Disputes between States and Nationals of other States*, opened for signature 18 March 1965, 575 UNTS 159 (entered into force 17 October 1966).

5 *Eiser Infrastructure Ltd v Kingdom of Spain* (2020) 142 ACSR 616 [11].

6 *The Energy Charter*, opened for signature 17 December 1994, 2080 UNTS 95 (entered into force 16 April 1998).

7 *Eiser Infrastructure Ltd v Kingdom of Spain* (2020) 142 ACSR 616 [4]-[6].

Procedural history

Eiser Infrastructure Ltd v Kingdom of Spain (2020) 142 ACSR 616

Spain resisted the application for recognition and enforcement, claiming that it was immune from the jurisdiction of Australian courts pursuant to section 9 of the FSIA. The Investors contended that Spain had waived its jurisdictional immunity by becoming a party to the ICSID Convention. The Investors invoked Articles 53 and 54 of the ICSID Convention, which provide that:

- an ICSID award is binding on the parties and not subject to any appeal or other remedy, except for those found in the ICSID Convention (Article 53); and
- each Contracting State (including Spain and Australia) must "recognise an award rendered pursuant to [the ICSID Convention] as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State" (Article 54).

The waiver argument was based on sections 9 and 10 of the FSIA. They provide that foreign states are immune from the jurisdiction of an Australian court, subject to several exceptions, including where they submit to jurisdiction, for example by way of a treaty (section 10(2)).

At first instance, the Federal Court (Stewart J) agreed with the Investors. Stewart J found that by becoming a party to the ICSID Convention, Spain had submitted to the Court's jurisdiction for the purposes of the awards' recognition and enforcement and thereby waived its ability to rely on immunity in the proceedings on foot. Spain had not, however, waived its immunity from execution.

In respect of immunity from execution, the Stewart J reasoned that this was expressly preserved under Article 55 of the ICSID Convention, which provides that "[n]othing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution".

Spain appealed the first instance judgment to the Full Court of the Federal Court. The award against Eiser and Energia was thereafter annulled and so the appeal was heard only as against Infrastructure Services and Energia Termosolar.

Kingdom of Spain v Infrastructure Services Luxemburg S.à.r.l. (2021) 284 FCR 319

On appeal to the Full Federal Court, Spain argued that the proceedings brought by Infrastructure Services and Energia Termosolar were recognition and enforcement proceedings, and that Article 55 should be read to preserve immunity for 'enforcement'. On this basis, Spain continued to maintain that it was immune from the jurisdiction of Australian courts in the proceedings brought by the Investors.

The Full Court disagreed with Spain although its finding departed from the judgment of Stewart J in one important respect. The Full Court held that Spain's entry into the ICSID Convention amounted to waiver of immunity from a proceeding for the recognition of an award. However this was not the case for execution, and perhaps not for enforcement. Perram J (Allsop CJ and Moshinsky J agreeing) identified "two cumulative reasons" for this conclusion.

Firstly, Article 54(1) and (2) of the ICSID Convention distinguishes recognition proceedings from enforcement proceedings "in a way which is dichotomous".[8] In essence, Perram J reasoned, a party may elect to seek recognition of an award without seeking enforcement.

Secondly, and contrary to Stewart J's characterisation of the proceedings, the Full Court considered that Infrastructure Services and Energia Termosolar sought recognition of the ICSID award only, not recognition and enforcement. Under this characterisation, there was no ambiguity that Spain had submitted to the jurisdiction of Australian courts in a recognition proceeding pursuant to Article 54(2).

On this basis, the Full Court found that Spain was prevented from relying on jurisdictional immunity under section 10(2) of the FSIA.

Having considered that the Federal Court proceedings were merely to recognise the award, it was unnecessary for the Full Court to make findings on whether Spain would be immune from enforcement or execution. The Court did, however, correct the orders of Stewart J because they went beyond the scope of 'recognition only' and 'requir[ed] Spain to do something', namely pay the sums sought. The Full Court made new orders, including for the award to be recognised as binding and for judgment to be entered against Spain for €101 million.

In March 2022, the High Court granted Spain special leave to appeal the Full Federal Court's decision.

8 *Kingdom of Spain v Infrastructure Services Luxemburg S.à.r.l.* (2021) 284 FCR 319 [22].

Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l. [2023] HCA 11

On 12 April 2023, the High Court dismissed Spain's appeal and upheld the orders of the Full Court with one important clarification. The High Court concluded that Spain's entry into the ICSID Convention amounted to waiver of foreign state immunity from the jurisdiction of Australian courts in proceedings to recognise and enforce an ICSID award but not in respect of execution.

The High Court's reasoning

Spain waived its foreign state immunity from jurisdiction

The question before the High Court was whether Spain's entry into the ICSID Convention and concomitant agreement to Articles 53–55 constituted a waiver of foreign state immunity from the jurisdiction of the Federal Court pursuant to section 10(2) of the FSIA.

Spain relied on international authorities to argue that section 10 of the FSIA permits an Australian court to recognise a waiver of foreign state immunity from jurisdiction only where the words of a treaty contain an 'express' waiver. Spain argued that this does not extend to circumstances where waiver is derived by implication from a treaty obligation that requires state parties to recognise awards as binding and enforce the pecuniary obligations imposed by an award, as required under Articles 53 and 54 of the ICSID Convention. Spain argued that the mere act of becoming a party to the ICSID Convention does not amount to a waiver of immunity, as it is not a sufficiently clear and unambiguous act.

The High Court found that a waiver by agreement for the purposes of section 10(2) of the FSIA can be inferred even if an international agreement does not expressly use the word 'waiver', provided that the implication is clear from the words used and the context.[9] Employing this test, the High Court found that Spain's waiver for the purposes of section 10(2) was "unmistakable", and arose out of Spain's agreement to Articles 53–55 of the ICSID Convention – although this did not extend to a waiver from execution.

The meaning of 'recognition', 'enforcement' and 'execution'

The High Court also helpfully clarified the meaning of the terms 'recognition', 'enforcement' and 'execution' in Articles 53–55 of the ICSID Convention. The Court found that these terms have separate and distinct meanings:

- The obligation to 'recognise' in Article 54(1) imposes an obligation to recognise an ICSID award 'as binding' and goes no further.
- The obligation to 'enforce' in Article 54(1) expresses an obligation to enforce "the pecuniary obligations imposed by [the ICSID] award as if [the ICSID award] were a final judgment of a Court in [the Contracting] State".
- The disjunctive 'or' in Article 54(2) 'makes plain that those two obligations … are severable' and a party can seek recognition without seeking enforcement.
- Article 54 distinguishes between 'recognition' and 'enforcement', on the one hand (Article (1) and (2)), and 'execution', on the other hand (Article 54(3)).
- Article 55 makes clear that the obligation in Article 54(2) to 'enforce' the pecuniary obligations imposed by an ICSID award 'stops short of an obligation to ensure their execution'.

The Court adopted the definitions used in the recently approved version of the proposed Restatement of the Law: The US Law of International Commercial and Investor-State Arbitration:

- **Recognition** is a court's "determination ... that an international arbitral award is entitled to be treated as binding", involving a court's "acceptance of the award's binding character and its preclusive effects".
- **Enforcement** is "the legal process by which an international award is reduced to a judgment of a court that enjoys the same status as any judgment of that court".
- **Execution** is "the means by which a judgment enforcing an international arbitral award is given effect. The execution process commonly involves measures taken against the property of the judgment debtor by a law-enforcement official … acting pursuant to a writ of execution".

The Court observed that these definitions and distinctions align with several cases including *Clarke v Fennoscandia Ltd* 2008 SC (HL) 122 and *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533. They also align with academic commentary and the *travaux préparatoires* to the ICSID Convention.

The Court concluded that the orders made by the below courts were properly characterised as orders for recognition and enforcement, and that they should remain undisturbed as such.

9 *Kingdom of Spain v Infrastructure Services Luxemburg S.à.r.l.* (2023) HCA 11 [26].

Impact of the decision

As mentioned previously, the High Court's rejection of the application of foreign state immunity from suit to the recognition and enforcement of arbitral awards reinforces Australia's reputation as a 'pro-arbitration' jurisdiction.

Australia's support for enforcement of the award against Spain was also significant in light of ongoing debate on whether arbitration agreements in intra-EU bilateral investment treaties and the ECT as between the EU Member States, are inconsistent with EU law and unenforceable.

Spain relied on decisions of the Court of Justice of the European Union in *Slovak Republic v Achmea BV* [10] and *Republic of Moldova v Komstroy LLC*,[11] which determined that agreements to arbitrate in intra-EU bilateral investment treaties and the ECT are not applicable to intra-EU investor-state disputes. However, the High Court considered these decisions to be irrelevant because the relevant agreement which gave rise to a waiver of jurisdictional immunity resulted from Spain's entry into the ICSID Convention, not its entry into the ECT.

It is important to bear in mind, however, that from a practical perspective, the High Court's interpretation of Articles 53 and 54 of the ICSID Convention does not have any bearing on award execution, and questions remain as to whether execution will be successful. The High Court noted that:

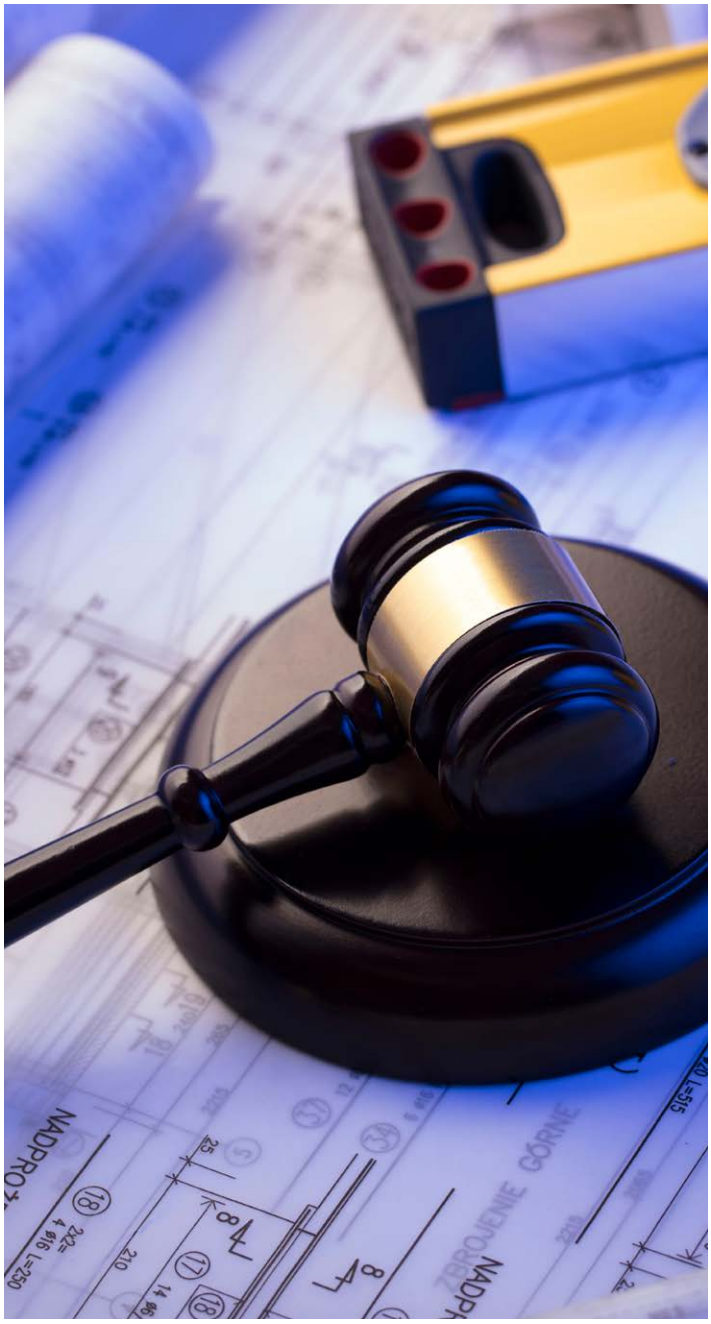
> "… a curiosity of the ICSID Convention is not that it requires recognition and enforcement of awards against foreign states, but that a foreign state which has agreed to arbitration is not deemed to also accept the consequence of execution…the result [is] that Contracting States waive their immunity from jurisdiction in relation to recognition and enforcement but not any immunity that they have from execution." [12]

Under the FSIA, there are exceptions to immunity from execution, including:

- section 32, which allows execution against property, other than diplomatic or military property, which is in use by the foreign state concerned substantially for commercial purposes;
- section 33, which allows execution against immovable property; and
- The Investors will need to establish that one of the exceptions in the FSIA applies to receive payment.

That notwithstanding, it is significant that the Investors secured recognition and enforcement of the ICSID award. It may assist their broader enforcement strategy by applying pressure on Spain. Indeed, since the Federal Court's 2020 judgment on the Investors' application, there have been several other award creditors who have applied to have their ICSID awards recognised and enforced in Australia against the Kingdom of Spain. Time will tell whether these proceedings against Spain will provide relief for the Investors in practice.

Note: this article by Nastasja Suhadolnik was previously published online here.



10 *Slovak Republic v Achmea BV* [2018] 4 WLR 87.

11 *Republic of Moldova v Komstroy LLC* [2021] 4 WLR 132.

12 *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l* [2023] HCA 11 at [73], citing Van den Berg, "Recent Enforcement Problems under the New York and ICSID Conventions" (1989) 5 *Arbitration International* 2 at 13.

Investment treaties and the energy transition: challenges and opportunities

Key takeaways

There is growing recognition that Australia, like other countries around the world, must encourage foreign investment to achieve its clean energy transition goals. Investment treaty protections have long been seen as an important tool for attracting foreign investment. However, amidst concerns about governments' ability to execute on their energy transition goals, this traditional view is increasingly being challenged.

Keywords

Energy transition; investment treaties

Recent developments are prompting a close examination of the role investment treaties play in promoting renewable energy investments and the relevance of investor-state dispute settlement as a risk mitigation tool for foreign investors in renewable energy projects. As traditional energy sources continue to get replaced by renewable ones, one thing is clear – change is on the horizon.

According to Austrade, '[f]oreign direct investment is supporting Australia to lower carbon emissions and move towards sustainable energy sources'.[13] This is consistent with the Paris Agreement, in which Contracting States (including Australia) recognise that finance flows are required to lower greenhouse gas emissions and support climate-resilient development. Globally, the International Energy Agency estimates that in order to reach net zero emissions by 2050, annual clean energy investment worldwide will need to more than triple by 2030 from the current US$1.4 trillion to around US$4 trillion annually.[14]

On the other side of the ledger, we are already seeing new and increasing export markets for Australian energy products – hydro, wind, solar and hydrogen – and for key components of low-emissions technologies, capitalising on Australia's abundant rare earth and critical mineral deposits. As BHP's Chief Executive recently commented, "the chase [for mining investment is] now on and… many other nations are competing for capital". That competition was ramped up in August 2022 by the passage of the Inflation Reduction Act in the United States, which pledges A$520 billion in the pursuit of energy transition.

Recognising the "big risk with the inflation Reduction Act… that you would see capital leave Australia to go to the United States", Prime Minister Anthony Albanese recently struck a compact pursuant to which the United States would recognise Australia as a domestic source for critical minerals and clean energy, allowing qualifying Australian companies to access (via facilitative legislation) subsidies and other benefits under the Inflation Reduction Act.

The compact's emphasis on critical minerals, storage and hydrogen technologies plays to Australia's unique opportunity as the nation with some of the world's largest reserves of the critical materials that will be crucial to the global energy transition. The compact has been backed by the Australian Government's recent A$2 billion commitment to the new Hydrogen Headstart program to ensure that Australian remains in the race to become a global clean energy superpower.

For several decades, robust investment treaty protections were seen as an important tool for attracting foreign investment, and for protecting domestic investors abroad. This is due to investment protections afforded under investment treaties, which effectively restrict the ability of governments to act in certain ways that may impact the economic interests of foreign investors who seek to invest, or who have invested, in those countries.

13 Austrade, 'Foreign investment helping Australia transition to a green future', 18 August 2021.

14 International Energy Agency, 'Net Zero by 2050: A Roadmap for the Global Energy Sector', May 2021.

However, this traditional view is increasingly being challenged due to the chilling effect investment treaty protections can create on government regulation. More recently, this has manifested in a concern about governments' ability to execute on their energy transition goals. The challenge is demonstrated by a series of recent cases where states were faced with investment treaty claims bought by traditional and renewable energy investors following changes in the states' energy policy.

Investment treaty claims can be brought pursuant to a legal mechanism included in some investment treaties which empowers foreign investors that have suffered certain adverse effects by reason of regulatory measures introduced by the host state of their investment to seek compensation by bringing a claim directly against the host state and having that claim determined by an independent panel of arbitrators. If the measure in issue breaches investment treaty protections, the investor may recover damages for both current and future economic loss (in other words, the measure of damages is not constrained by the usual contractual measure that we are accustomed to in common law jurisdictions).

The challenges emanating from the current international investment treaty regime in the context of the energy transition are multi-faceted in that the regime allows claims to be pursued in response to both fossil fuel phase-outs and policies promoting investment in renewable energy.

For example:

- German energy companies Uniper and RWE, owners of coal-fired power plants in the Netherlands, have brought investment treaty claims against the Netherlands in connection with the Dutch government's commitment to reduce the capacity of its remaining coal-fired power stations by 75% and implementing a package of measures to reduce Dutch emissions.[15]
- The UK-headquartered oil and gas company Rockhopper Exploration was successful in its investment treaty claim against Italy in which it challenged Italy's rejection of Rockhopper's application for an offshore exploitation concession based on a new law that introduced a complete ban on offshore drilling in Italy. An arbitral tribunal held in August 2022 that the rejection of the application was an immediate and complete deprivation of Rockhopper's investment in Italy and constituted an expropriation under the applicable treaty (the Energy Charter Treaty).

On the other hand, there have been myriad instances of investors challenging decisions by states to scale back subsidies and other financial incentives originally introduced to attract investment in renewable energy projects. Spain alone has been the respondent in dozens of investment treaty claims after it had retracted some features of its solar energy incentives regime, with many investors arguing that this contravened their treaty-protected 'legitimate expectations' that the favourable regulatory framework would remain in place.

Developments such as these necessitate a close examination of the role investment treaties play in promoting renewable energy investments, and the relevance of investor-state dispute settlement as a risk mitigation tool for foreign investors in renewable energy projects. Several empirical studies have recently been completed or are currently underway looking at these issues. There are also ongoing discussions regarding reforms of the international investment treaty regime, so as to enable it to expedite the energy transition by protecting both foreign investment and climate change regulation.

Several options have been proposed by way of reform. On one extreme, some have called for an abolition of the investment treaty system – although a growing consensus seems to be that the regime (in some form) must be preserved in order to incentivise the investment required to achieve the clean energy transition.

If the investment treaty regime is to be preserved, the existing investment treaties may be amended (and new treaties negotiated) to exclude, or enable Contracting Parties to exclude, protections for fossil fuels in their territories.

Alternatively, provisions may be negotiated that protect Contracting Parties' ability to introduce more ambitious regulations to mitigate climate change, to the extent these are adopted in good faith and are capable of resulting in emissions reduction. Other proposals include amendments to substantive treaty protections by, for example, clarifying that investors will not be protected when foreseeable climate policies are adopted by host states to comply with their Paris Agreement targets, or when host states discriminate between projects based on their climate impact.

15 Uniper has since withdrawn the ECT claim to secure a bailout agreed with the German government in the midst of financial difficulties following the drop in supplies of Russian gas. The RWE claim is currently pending, despite a judgment handed down by a German court in September 2022 declaring the ECT claim to be inadmissible under EU law on the basis that the ECT does not extend to intra-EU investor-state disputes.

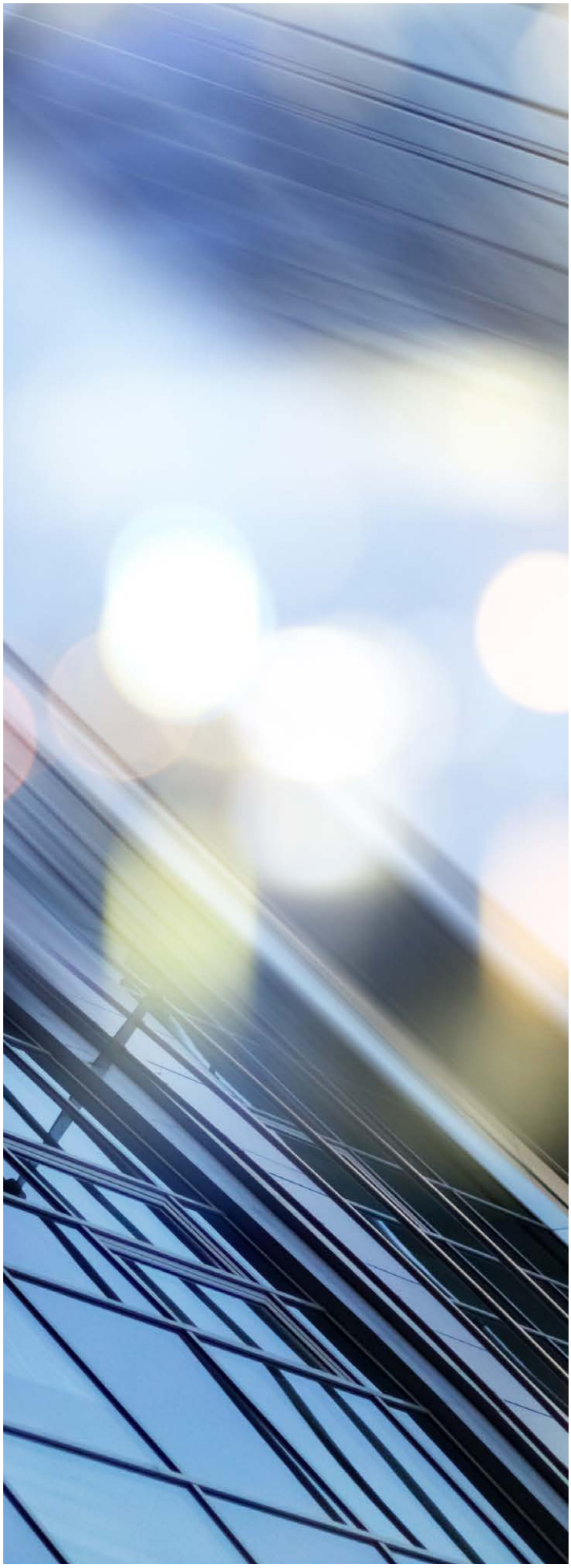
Apart from substantive reforms, some states may opt for limiting access to investor-state dispute settlement. Perhaps in response to experience from overseas, Australia's Federal Government seems to be steering away from dispute settlement provisions in its investment treaties that allow direct claims by investors – in November 2022, shortly after a new Federal Government came to power, Australia's Trade Minister announced that the Government would "not include investor-state dispute settlement in any new trade agreements".

The reality is, however, that while there are a number of alternatives being advanced (including, for example, the establishment of a multilateral investment court), in the absence of an investment treaty including an investor-state dispute settlement mechanism, investors may be left with only domestic (which are limited) or state-to-state dispute resolution options (which are heavily dependent on the political will of the investor's home state). That is typically an unattractive and unrealistic option for most private entities – and one that does not seem to take advantage of the investment promotion potential of investment treaties which is particularly important in the context of the energy transition challenge.

How the anticipated reforms unfold will be important to cross-border investors in new energy projects. Investment treaties that contain investor-state dispute settlement mechanisms can and do play a part in the management of risk for foreign investors. Renewable energy investors will be well advised to explore how best to structure their investments to avail themselves of the most robust investment treaty protections. At the same time, investors with existing investments should consider how amendment or termination of investment treaties which might have underpinned their investment decisions will affect their future ability to enforce treaty protections.

While the ultimate characteristics of a reformed investment treaty regime remain uncertain, it is clear that changes are on the horizon and that they will impact the manner in which the interests of foreign investors are protected as traditional energy sources get replaced by renewable ones.

Note: this article by Nastasja Suhadolnik, Franka Cheung and Samuel Kay was previously published online here.



‘Gatekeepers’ to the board: regulators’ changing expectations of general counsel

Key takeaways

General counsel have never been under such intense scrutiny. Regulators including the Australian Securities and Investments Commission (**ASIC**) are zeroing in on officers like general counsel, whom ASIC regard as ‘gatekeepers’, and seeking to hold them responsible for ensuring the prevention of corporate misconduct.

What are the regulators’ expectations of general counsel in managing and highlighting risk? And how do these dynamics impact the role and the potential liability of general counsel?

Keywords

General counsel

For many years, those interested in the area of governance and directors’ duties have been watching ASIC’s prosecution ‘slate’ waiting for the next big ‘stepping stone’ prosecution.

Many thought it would come out of the Crown Resorts Sydney, Melbourne and Perth casino inquiries, which identified much evidence of senior officers having overseen endemic widespread and serious non-compliance over a number of years – non-compliance that, if not strictly illegal, had caused significant reputational damage and consequent financial loss to the company (including its employees) and its shareholders. Notwithstanding this, there were no cases launched by ASIC against any officers for these missteps.

But then came the Star prosecution, in which ASIC commenced civil penalty proceedings in the Federal Court against 11 current and former directors and officers of The Star Entertainment Group Limited (ASX: SGR) (**Star**) (discussed in detail below). What made Star different? Maybe it was a perfect storm (at least for the 11 individuals involved) of:

- an ASIC Commissioner with a strong belief in ‘Gatekeeper Theory’ and looking to test it as an enforcement thesis (below); and
- ‘serious and systemic’ breaches of federal law occurring over a number of years.

But maybe the biggest issue was the senior management of Star not observing what was happening at Crown and taking immediate steps to stop behaviour that ASIC thinks Star management knew, or ought to have known, gave rise to risks posed by gambling junket Suncity (and junkets generally) in respect of non-compliance with anti-money laundering laws. To ASIC, it seems this foreseeable risk ought to have been better managed by the defendants.

Star – the facts of the case

ASIC commenced civil penalty proceedings in the Federal Court against 11 current and former directors and officers of Star for alleged breaches of their care and diligence duties owed to the company under section 180(1) of the *Corporations Act 2001* (Cth). One of those officers was the former group General Counsel. ASIC alleges that Star’s board and executives failed to give sufficient focus to the risk of money laundering and criminal associations that were inherent in the operation of a large casino with an international customer base.

This is another ‘stepping stone’ case brought by ASIC, and is one of very few cases ASIC has sought to bring under section 180(1) of the *Corporations Act* against officers who are not directors.

The Star prosecution follows the traditional mechanism for a stepping stone case. ASIC alleges that Star’s officers failed to exercise the degree of care and diligence that a reasonable person would have exercised in her or his position during the relevant period to ‘prevent a foreseeable risk of harm to the interests of the company’. These claims align with comments by then Chief Justice Tom Bathurst that directors and officers could be liable for conduct falling short of a strict breach of the law, which is nevertheless inappropriate or unethical, where such conduct results in significant reputational damage with consequent financial implications.

ASIC does not need to establish that Star necessarily breached the law but rather that the officers’ conduct in exposing Star to a potential breach was a breach of the care and diligence obligation.

In particular:

- that the General Counsel of Star should have taken all reasonable steps to ensure that Star complied with its legal obligations and protected Star from legal risks; and
- that the General Counsel failed to take reasonable steps to ensure the board of directors of Star was informed of matters that created or increased a risk that Star would breach its legal obligations.

Cassimatis[16] showed that a contravention of the law is not a necessary precondition to a breach of directors' duties and that the protections of section 180(1) extend to an obligation to protect a corporation's reputation. While ASIC has emphasised corporate reputation in the Star prosecution, it is not suggesting that this is a case solely involving an issue of reputation. The ASIC case alleges that Star was exposed to the risk it would breach the relevant anti-money laundering / counter-terrorism financing (**AML/CTF**) legislation. But ASIC is not seeking to prove breaches of that regime. In that respect the case sits better with *Vocation*,[17] in which it was clear that Vocation breached the *Corporations Act* (i.e. failing to make adequate disclosure). In that case, ASIC showed how, by exposing Vocation to the disclosure breach, the Chair, CFO and CEO had breached their duty of care owed in failing to 'prevent a foreseeable risk of harm to the interests of the company'.

ASIC alleges that the conduct of the officers exposed Star to harm by creating or increasing the risks that:

- Star group entities would fail to meet their AML/CTF obligations;
- Star's relationship with one of its lenders would be undermined;
- Star would suffer significant reputational damage; and
- Star would be exposed to investigations by state and federal regulators and to inquiries and legal proceedings resulting from those investigations.

Business judgment rule and stepping stones

For every officer who finds themselves threatened with a stepping stone prosecution, the question that inevitably arises is whether the business judgment defence (s 180(2) of the *Corporations Act*) will be available. Reliance on this defence requires the individual to show (among other things) that he or she has made a business judgment in good faith, for a proper purpose and rationally believed their judgement to be in the 'best interests' of the company.

Since the onus is on the officer to establish each of the different elements, it has proven quite difficult for officers to rely upon this defence. Unfortunately, the stepping stone cases (and most cases of directors' negligence) contain very few instances where the business judgment rule has aided directors or company officers to avoid liability. This is particularly so in cases where the company's contravention has involved a failure to make disclosure, on the basis that disclosure compliance is not a business judgment matter but instead a question of observing the law.[18]

It is probably not the case that the business judgment defence can never apply to a stepping stone or compliance-based case like Star. In *Mariner*,[19] the Court clearly thought that the compliance and business aspects of the decision were inextricably linked and, accordingly, that a business judgment was made. That said, the business judgment rule defence is unlikely to feature in the Star prosecution since it is hard to suggest that Star was permitted to lawfully decide, as a matter of business judgment, that Star should assume the risk of non-compliance with its AML/CTF obligations. In those circumstances, the relevant officers may be liable as an accessory. What section 180(1) is concerned with in this context is the foreseeable risk that failure to take adequate care in relation to Star's compliance with the law would cause harm to the company.

Reliance

Some of the officers who were not responsible for the day-to-day running of Star may believe that they were entitled to rely on other senior executives charged with managing this issue. In the case of their AML/CTF compliance, they might argue that, as a technical area, the adequacy of the organisation's risk management and compliance systems and processes must be informed by advice from people with technical expertise in that area and it was reasonable for officers to rely on those people in the absence of any evidence that their expertise was lacking, or the processes implemented in reliance on their advice were not working.

That said, it is not enough to merely do as advised. Star's officers were bound to inform themselves about the AML/CTF compliance risks and make an independent assessment of the information or advice provided. In that sense, the reliance must also be 'reasonable'.

A number of sources of information or advice received by the company would likely improve the likelihood of the ability of the officers to rely on the advice. Further, ASIC alleges that the defendants had information available to them that these risks were not being appropriately managed and failed to act, and therefore appear to have had compelling reasons to question any advice to the contrary.

16 *Australian Securities and Investments Commission v Cassimatis (No 8)* (2016) FCA 1023, 26 August 2016.

17 *Australian Securities and Investments Commission v Vocation Limited (In Liquidation)* (2019) FCA 807, 31 May 2019.

18 *Australian Securities and Investments Commission v Fortescue Metals Group Ltd* (2011) 190 FCR 364, 427 [197]; [2011] FCAFC 19 in which Keane CJ commented that disclosure compliance is not a business judgment matter but instead a question of observing the law. In *Vocation* the finding in *Fortescue* was affirmed.

19 *Australian Securities and Investments Commission v Mariner Corporation Limited* [2015] FCA 589, 19 June 2015.

ASIC and gatekeepers

ASIC has suggested that it can achieve its regulatory objectives by focusing on key individuals within a company and holding them to account for the 'sins' of the companies that employ them or which they govern.

The rationale for this theory is that the value an individual attributes to their own personal reputation is such that they will not rationally sacrifice that reputation for a perceived corporate benefit. This places these individuals in a position to prevent corporate misconduct by withholding their validation of poor conduct, thereby mitigating corporate conduct that would expose the company (and expose the officers to a breach of duty claim).

This proposition is a variation of the approach developed in the United States, which focuses on third parties, such as external lawyers and auditors, and emphasises that a corporate gatekeeper is motivated to prevent wrongdoing because the expected liability or reputational harm (arising from failing to prevent misconduct) exceeds the gain in fees received. This model, however, fails to distinguish among gatekeepers or account for how gatekeepers with different incentives respond to legal controls.

The ASIC prosecution theory seems to suggest that investor and financial consumer trust and confidence is likely to be preserved by advancing positive and transparent gatekeeper conduct and culture. Within the group of targeted gatekeepers are company directors and senior executives, including the general counsel.

General counsel clearly play a critical role as a gatekeeper of legal risk and compliance within the organisation. ASIC Commissioner Joseph Longo has observed that "[t]he general counsel is there, frankly, as a gatekeeper, as the conscience of the corporation or the company, and the trusted adviser. It's a privileged position".

The case of the general counsel as a particular officer

As long ago as 2011, the High Court recognised that the general counsel was a particular type of 'officer' and that their responsibilities within a corporation extended to various specific subjects including compliance with all relevant legal requirements and, in particular, with continuous disclosure requirements. Once it was found that their responsibilities extended to those subjects, the question became whether the general counsel undertook those responsibilities with the requisite degree of care and diligence.

In *Shafron*,[20] the High Court found that the functions performed by the General Counsel, Mr Shafron, involved him participating in making decisions that affected the whole or substantial part of the business of James Hardie.

Suggestions that participation in a decision meant that the person must have a role in actually making the decision were rejected.

The High Court distinguished the role of an external adviser who proffered advice and information in response to particular requirements of the company.

Mr Shafron's position was qualitatively different as:

> "...what he did went well beyond his proffering advice and information to the board of the company. He played a large and active part in formulating the proposal that he and others chose to put to the board as one that should be approved. It was the board that ultimately had to decide whether to adopt the proposal but what Mr Shafron did, as a senior executive employee of the company, was properly described as his participating in the decision to adopt the separation proposal that he had helped to devise."

The High Court confirmed that Mr Shafron breached his duty of due care and diligence as an 'officer' of the corporation and endorsed the characterisation of Mr Shafron as having a duty to protect the company 'from legal risk'.

By extension (as seems to be the position ASIC has taken in the Star case) the High Court's decision in *Shafron* suggests senior in-house lawyers advising a board of directors are gatekeepers responsible for:

- promoting the public interest in corporate compliance with continuous disclosure obligations and prohibitions on misleading conduct; and
- making sure that the board of directors is properly informed of matters that created or increased a risk that would breach their legal obligations.

Arguably, compliance with the law and being a good corporate citizen are also in the corporation's interests. Indeed, had the law been complied with, many years of litigation and anger from the community may have been avoided.

Looking ahead

Throughout 2023, ASIC has said that it will have a strong focus on governance and directors' duties failures, enforcement activity targeting sustainable finance practices and disclosure of climate risks, financial scams, cyber and operational resilience, and investor harms involving crypto-assets.

We expect ASIC to continue to focus on gatekeepers such as general counsel both to improve the level of disclosure and reporting and to attempt to hold them accountable for the risk of systemic regulatory breaches. It is an opportune time indeed for all general counsel to take a step back to assess the role they play in advising their boards in this wider context, particularly where they hold executive responsibility for a number of functional portfolios and risk areas beyond legal, and to determine if there is anything more they should be doing to discharge their obligations as gatekeepers going forward.

Note: this article by Mark Wilks, Abigail Gill, Sandy Mak, Andrew Lumsden and Karina Sleiman was previously published online here.

20 *Shafron v Australian Securities and Investments Commission* (2012) HCA 18, 3 May 2012.

Developments

Commonwealth

Impending High Court decision about proportionate liability in arbitration

A builder engaged an engineering firm. Under their contract, disputes were ultimately to be resolved by arbitration. The builder was dissatisfied with the engineers' work and proceeded to arbitration. One element of the engineers' defence was that their liability should be apportioned under proportionate liability legislation. Should the arbitrator apply proportionate liability legislation? The matter is especially pressing in jurisdictions in which parties are not given an express right to contract out of proportionate liability.

The dispute came before the South Australian Court of Appeal. The question to be decided was whether either State or Commonwealth legislation apportioning liability applied to commercial arbitration under the *Commercial Arbitration Act 2011* (SA).

The answer was 'No', according to Doyle JA, with whom Livesey P and Bleby JA agreed.

While the language of the parties' contract and the particular legislation do matter, this conclusion accords with *Aquagenics Pty Ltd v Break O'Day Council* [2019] TASFC 3 and *Curtin University of Technology v Woods Bagot Pty Ltd* [2012] WASC 449.

The engineers sought special leave to appeal to the High Court of Australia. On 19 May 2023, Gordon, Edelman and Gleeson JJ granted leave. The appeal was heard on 15 November 2023.

Tesseract International Pty Ltd v Pascale Construction Pty Ltd Case A9/2023

High Court of Australia to reconsider Cth v Amann Aviation?

In *Commonwealth v Amann Aviation* (1991) 174 CLR 64, the High Court permitted the plaintiff to recover reliance damages for breach of contract. The case is notoriously complex, largely because the Court delivered five judgments. Across those judgments, it is hard to discern unified answers to important questions such as whether it should be assumed that a commercial contract will be profitable, who bears the onus of proving profitability, and whether future uncertain events are relevant.

Given this, it is significant that the High Court has granted special leave to appeal from the decision of the New South Wales Court of Appeal in *123 259 932 Pty Ltd v Cessnock City Council* [2023] NSWCA 21. While both parties conceded that reliance damages were possible, the case offers a good opportunity for the High Court to clarify when they will be permitted. J T Gleeson SC's opening for the applicant illustrates the point well:

> "This Court decided *Amann Aviation* some 32 years ago, where six Justices awarded reliance damages across five separate judgments with significant differences between the judgments as to the applicable principles. In discerning a majority judgment, it appears to be Chief Justice Mason and Dawson, plus Justices Brennan and Gaudron who agreed in the orders as made; Justices Deane and Toohey would have awarded reliance damages on different orders. Even just that brief description indicates that there are significant questions about precisely how reliance damages are to be awarded consistent with the *Robinson v Harman* principle."

Cessnock City Council ABN 60 919 148 928 v 123 259 932 Pty Ltd ACN 123 259 932 Case S115/2023

Attempted bid rigging comes before the Federal Court of Australia

Delta Building Automation Pty Ltd (**Delta Building**) attempted to rig a bid with Logical Electrical Solutions Pty Ltd (**Logical Electrical**) for the contract to supply a replacement building management system for the National Gallery of Australia.

At a brief meeting on 18 December 2018, Delta Building offered to pay Logical Electrical money in return for Logical Electrical not to act as a legitimate competitor, in breach of the *Competition and Consumer Act 2010* (Cth). The attempt failed as Logical Electrical did not accept the offer. Bromwich J considered directly conflicting evidence and ultimately preferred Logical Electrical's account.

The case is an important reminder of the risk of collusion even on substantial government projects.

Australian Competition and Consumer Commission v Delta Building Automation Pty Ltd [2023] FCA 880

High Court news

On 6 November 2023, the Honourable Justice Stephen Gageler AC became Chief Justice of the High Court of Australia. Justice Gageler has served on the Court since 2012 and was previously Commonwealth Solicitor-General.

Also on 6 November 2023, the Honourable Justice Robert Beech-Jones was elevated to the High Court of Australia. Justice Beech-Jones previously served as Chief Judge of the Common Law Division of the Supreme Court of New South Wales and as a Justice of Appeal.

The vacancies arose because of the retirement of the Honourable Chief Justice Susan Kiefel AC. Her Honour had served as Chief Justice, with great distinction, since 2017.

Vale Paul Finn

The Honourable Dr Paul Desmond Finn died on 27 September, aged 77. Dr Finn was a giant of Australian law. After undergraduate study at The University of Queensland, he completed a PhD at The University of Cambridge. He then worked at The Australian National University from 1977-1995, spending some of that time as head of law. His academic work on fiduciary obligations was world-leading.

In 1995, he was appointed a Justice of the Federal Court of Australia, a role he filled with distinction until 2012. Those involved in projects will remember in particular his judgment in *Hughes Aircraft Systems International v Airservices Australia* [1997] FCA 558, which remains Australia's leading authority on tender process contracts. Dr Finn's contribution to the law is explored in Tim Bonyhady's 2016 book *Finn's Law: An Australian Justice*.

Australian Capital Territory

Building and Construction Legislation Amendment Bill 2023 (ACT)

The ACT government has introduced the Building and Construction Legislation Amendment Bill 2023 (ACT). If enacted, the Bill will:

- introduce a code of professional conduct for engineers, similar to those adopted in New South Wales, Queensland and Victoria;
- introduce section 127AA into the *Building Act 2004* (ACT) to provide the option for the minister to appoint a consumer representative (an option currently contained in the Building (Approval Criteria) Determination 2002 (DI2002-49)); and
- make various amendments to safety regulations in respect of medical gas systems and distributed energy resources.

New South Wales

NSW Supreme Court reverses cases on rubber-stamping, holds adjudicators not required to go beyond the grounds included in a payment schedule

Adjudicators must consider the matters identified in section 22(2) of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**SOPA**) when determining an adjudication application. Following dicta of Hodgson JA in *Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd* [2005] NSWCA 228 at [50]-[53], several first-instance judgments had held that the obligation requires adjudicators to investigate the "true construction of the contract" and the "true merits" of the payment claim, even if no reasons have been advanced for paying or not paying the claim.

In the recent *Ceerose Pty Ltd v A-Civil Aust Pty Ltd* case, Payne JA (Ward ACJ and Basten AJA agreeing) overruled these previous 'rubber-stamping' authorities. His Honour held that an adjudicator is not required to consider matters beyond the grounds included in a payment schedule and response. Payne JA referred to the structure of the SOPA and in particular section 20(2B), which limits the respondent in an adjudication to the grounds already included in their payment schedule.

Payne JA rejected the notion that it is jurisdictional error for an adjudicator to fail to address what the adjudicator considers to be the "true construction of the contract" and the "true merits of the claim" outside the limited issues presented by the parties. His Honour concluded that this would amount to an invitation for the reviewing court to embark on an impermissible merits review.

The first instance NSW authorities expressly overruled by this decision are *Pacific General Securities Ltd v Soliman & Sons* [2006] NSWSC 13 (**Pacific General**); *Acciona Infrastructure Australia Pty Ltd v Chess Engineering Pty Ltd* [2020] NSWSC 1423; and *Laing O'Rourke Australia Construction Pty Ltd v Monford Group Pty Ltd* [2018] NSWSC 491. Payne JA also identified several Queensland and Victorian decisions which have followed the erroneous approach in *Pacific General* (see footnote 13 of the *Ceerose* judgment).

Ceerose Pty Ltd v A-Civil Aust Pty Ltd [2023] NSWCA 215

Compensation denied for compulsory acquisition of subsurface land for underground rail facilities

The NSW Court of Appeal has unanimously overturned a Land and Environment Court decision to award Expandamesh $20,000 in compensation following Sydney Metro's compulsory acquisition of the substratum beneath Expandamesh's land. Works in the substratum caused a 1.5 mm subsidence of soil.

Substratum land compulsorily acquired for underground rail facilities under the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) is generally not eligible for compensation, unless:

- the surface of the overlying soil is disturbed;
- the support of that surface is destroyed or injuriously affected by the construction; or
- any mines or underground work in or adjacent to the land are rendered unworkable or are injuriously affected.

In overturning the trial decision, Leeming JA and Griffiths AJA held that the relevant disturbance needs to take place "in a way which has practical significance or is not trivial". Simpson AJA agreed and further noted the oxymoron of an "imperceptible disturbance" (which was a finding of the primary judge).

Whether a particular effect is non-trivial will depend on the facts, including how the land is currently being used or how it might be used in the future. Their Honours noted that a subsidence of 1.5 mm might be trivial on sheep grazing land, but perhaps not land on which a semiconductor factory with sensitive equipment was located.

Sydney Metro v Expandamesh Pty Ltd [2023] NSWCA 200

Man threatened with gun could not rescind agreement he subsequently affirmed by performance

In 2016, Mr Afyouni and Mr Sadek entered into a property development joint venture. In 2018, a labourer employed by Sadek threatened Afyouni with a gun. Over the next few days, Sadek and Afyouni agreed to terminate the joint venture. (This was recorded in a document that neither party signed.) In the months that followed, Afyouni acted in ways consistent with the termination agreement, including by seeking and accepting the agreed termination payment.

Subsequently, Afyouni sought to rescind the termination agreement on the ground of duress.

At trial, Peden J found that Afyouni had entered into the termination agreement under duress. Notably, her Honour found that Sadek either procured the gun attack or acted in a common design with the gunman to bring about the attack on Afyouni. (The case has parallels with *Barton v Armstrong* [1976] AC 104.)

However, Peden J held that affirmation may occur when the victim acts under the potentially voidable contract 'with full knowledge of the circumstances after escaping from the duress and taking no steps to set aside the transaction'. (This test is derived from *Hawker Pacific v Helicopter Charter* (1991) 22 NSWLR 298 at 304.) Here, while Afyouni entered the termination agreement under duress, he later affirmed it by performing it once the duress had ended.

The Court of Appeal determined that Peden J correctly found that Afyouni had affirmed the termination agreement by accepting the termination payments due to him, by resigning his directorship, and by transferring his shares. As a result, the termination agreement was no longer voidable by Afyouni and the remedy of rescission was unavailable.

Elite Realty Development Pty Ltd v Sadek [2023] NSWCA 165

Transport for NSW to pay compensation for nuisance caused by Sydney Light Rail construction

In an action brought by small businesses impacted by the construction of the Sydney Light Rail, Cavanagh J found that Transport for New South Wales (**TfNSW**) was liable for private nuisance caused by construction delays.

While TfNSW did not carry out the construction works, TfNSW was responsible for the interference because the circumstances that led to the harm were "foreseeable and, indeed, predictable".

Importantly, Cavanagh J found that the 'pre-Project Deed documents' indicated that interference was not inevitable. They revealed that:

- TfNSW was aware of the significant impact on local businesses;
- TfNSW was aware it had not discovered all utilities on the route;
- at the time of the Project Deed, TfNSW had not entered into required agreements with utilities providers, which were necessary for required civil works; and
- Ausgrid had warned TfNSW that TfNSW's's plans underestimated the costs and the Early Works timetable was unachievable.

TfNSW raised a statutory authority defence: that it was a statutory authority exercising its statutory functions. To have succeeded in this defence, TfNSW needed to establish that what the light rail construction authorised by the *Transport Administration Act 1988* (NSW) could not be done without creating a nuisance and that the nuisance was not caused by negligence. Cavanagh J found that TfNSW "could have done more to discover unknown utilities and that if it had, the delays in individual fee zones would have been lessened". Accordingly, the defence was not available to TfNSW.

The judgment will likely spur increased attention to the drafting of planning regimes, delay mitigation requirements and delay liquidated damages, and will more generally affect risk allocation negotiations between principals and contractors.

Hunt Leather Pty Ltd v Transport for NSW [2023] NSWSC 840

Capitalised but undefined terms lead to a trip to the Supreme Court

Cirrus Real Time Processing Systems Pty Ltd v Jet Aviation Australia Pty Ltd concerned a contract for software development services. It contained a price adjustment formula. Central to the formula was the Base Date Index Value: a term that was not defined. On the first three occasions the price was revised, the defendant accepted the plaintiff's method of calculating the Formula. However, on the fourth occasion, the defendant disagreed on the meaning of Base Date Index Value. The plaintiff argued that:

- the Base Date Index Value should be interpreted by reference to the defined term Base Date; and
- the defendant's previous acquiescence supported the plaintiff's interpretation.

Ball J rejected the first argument. As Base Date Index Value was capitalised as a single expression and had not been used in another context, it had a particular use, distinct from the Base Date. This was strengthened because Index Date was also not defined. Accordingly, Base Date Index Value took its ordinary meaning in context. His Honour also rejected the second argument, which wrongfully relied on post-contractual conduct to aid the interpretation of a written contract.

The case is an important reminder of the need to check definitions and cross references, particularly after lengthy rounds of drafting. As Ball J noted at [4], the contract "was negotiated over an extended period of time (more than a year) during which it seems various errors, particularly cross-referencing errors, crept into the drafting".

Cirrus Real Time Processing Systems Pty Ltd v Jet Aviation Australia Pty Ltd [2023] NSWSC 464

Building Legislation Amendment Bill 2023 (NSW)

The NSW Parliament has passed the Building Legislation Amendment Bill 2023 (NSW), which will reform several pieces of legislation as part of the government's commitment to improving the construction of residential housing in NSW and restoring public confidence in the construction industry.

The changes include:

- expanding the scope of the Building Commissioner's enforcement powers under the *Home Building Act 1989* (NSW) to include class 1 buildings (standalone, single-dwelling residential buildings) in addition to class 2 buildings (apartment buildings), and increasing the extent of the Building Commissioner's proactive regulatory powers to:
  - issue stop work orders;
  - issue rectification orders; and
  - authorise inspections;
- amending the *Building Products (Safety) Act 2017* (NSW) to increase the safety of building products; and
- amending the *Strata Management Act 2015* (NSW) to provide a framework for decennial liability insurance.

At the time of writing, the Bill was awaiting Royal Assent.

Queensland

Price escalation clause void as an uncertain and unfair contract term

An owner, Perera, engaged Bold Properties to build a house for a fixed sum of $645,370. The parties had earlier entered into an agreement whereby Perera paid a non-refundable deposit to secure this price. Special Condition 7 permitted the builder to vary the price to the builder's current base price for that house type "in the event that commencement has not taken place by the anticipated start date". Bold Properties informed Perera that the price would increase by $51,342 because of significant cost increases over the last 12-18 months.

Judge Barlow KC held that there was no "real constraint or reference criteria by which a price increase may be determined". Special Condition 7 was therefore held to be void for uncertainty and unenforceable. Judge Barlow also held that Special Condition 7 was void as an unfair contract term under Part 2-3 of the ACL. Special Condition 7 was in a consumer contract that was a standard form contract and the term:

- would cause a significant imbalance in the parties' rights and obligations;
- was not reasonably necessary to protect the builder's legitimate rights and interests; and
- would cause detriment to Perera if applied.

The imbalance in the parties' rights was exacerbated as the builder had a unilateral right to change an essential term of the contract without giving Perera a right to terminate. While the case was determined in the District Court, it is a timely reminder of the force of the statutory prohibition on unfair contract terms, which was expanded in November 2023.

Perera v Bold Properties (QLD) Pty Ltd [2023] QDC 99

Victoria

Parties cannot contract out of damages for misleading or deceptive conduct

A recent case from the Victorian Court of Appeal has confirmed that parties cannot contract out of liability for damages for misleading or deceptive conduct.

In purchasing the Viterra group of companies, Cargill found that Viterra regularly sold goods below specifications and did not disclose this to Cargill during the sale. Cargill claimed that Viterra contravened section 18 of the Australian Consumer Law (**ACL**) by engaging in misleading or deceptive conduct. Cargill sought damages under section 236 of the ACL.

Viterra relied on three kinds of clauses as excluding, releasing or limiting its liability for misleading or deceptive conduct:

- exclusion clauses, through which Viterra sought to disclaim all liability for Cargill's losses;
- no representation clauses, in which Viterra asserted that it made no representations and accepted no responsibility for the accuracy and completeness of any provided information; and
- no reliance clauses, in which Cargill agreed to not rely on any representations made by Viterra and instead to rely solely on its own investigations (**Disclaimers**).

Cargill succeeded at first instance. Viterra appealed. The parties accepted that it was not possible to contract out of section 18 of the ACL. Viterra argued that the position was different for the right to damages under section 236 of the ACL. The argument partly relied on the recent High Court decision in *Price v Spoor* (2021) 270 CLR 450.

In the unanimous judgment of Sifris, Walker and Whelan JJA, the Victorian Court of Appeal held that:

- exclusion clauses are ineffective for disclaiming liability for misleading or deceptive conduct as this would be contrary to public policy; and
- while the Disclaimers may not have **excluded** liability, they were evidence which a court may use to determine whether the conduct was misleading or deceptive, or whether the relevant party suffered any loss.

The Viterra decision did not explicitly decide whether parties could contractually limit liability for misleading or deceptive conduct through time bars or liability caps. While there is mixed law on time bars, recent authority from Victoria suggests that time bars will not bar such ACL claims: *Brighton Australia Pty Ltd v Multiplex Constructions Pty Ltd* [2018] VSC 246 at [110]-[137].

In short, the best view of the case law is that:

- it is not possible to contract out of liability under sections 18 or 236 of the ACL (*Viterra Malt Pty Ltd v Cargill Australia Limited* [2023] VSCA 157); and
- time bars on claims or caps on liability are unlikely to work (*Brighton Australia Pty Ltd v Multiplex Constructions Pty Ltd* [2018] VSC 246); however
- disclaimers may help to modify the relevant conduct so that it not misleading under section 18 of the ACL, and no reliance clauses may make it harder for a claimant to show that misleading conduct caused loss or damage under section 236 of the ACL (see generally *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592).

Viterra Malt Pty Ltd v Cargill Australia Limited [2023] VSCA 157

Court of Appeal clarifies the effect of a referral under section 77 of the VCAT Act

The Victorian Court of Appeal's decision in *Krongold v Thurin* ([2023] VSCA 191) clarifies the effect of section 77 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) (**VCAT Act**). Section 77 of the VCAT Act allows a VCAT proceeding to be transferred to a court if the subject matter of the proceeding would be more appropriately dealt with there.

The Court of Appeal's judgment follows:

- its earlier decision in October 2022 (*Thurin v Krongold Constructions (Aust) Pty Ltd* [2022] VSCA 226; 407 ALR 187), in which the Court determined that VCAT does not have jurisdiction to deal with matters involving an issue arising under federal legislation (including the *Competition and Consumer Act 2010* (Cth) and *Insurance Contracts Act 1984* (Cth)); and
- the March 2023 decision of *Vaughan Constructions Pty Ltd v Melbourne Water Corporation* [2023] VCAT 233, in which Justice Delany held that VCAT lacks jurisdiction to determine claims for contribution under Part IV of the *Wrongs Act 1958* (Vic) as VCAT is not a 'court' for the purpose of section 24 of the Wrongs Act (note that this does not apply to apportionment claims under Part IV of the Wrongs Act, which VCAT still has jurisdiction to determine).

In this iteration of the *Krongold v Thurin* litigation, the Court of Appeal clarified that a referral under section 77 of the VCAT Act invokes the transferee court's jurisdiction to hear and determine the referred matter, without the need for any further initiating process such as a new writ. This is a pragmatic result.

A different conclusion (such as that the existing VCAT proceeding was struck out and a new proceeding was required in the County or Supreme Court) would have resulted in some applicants being time-barred and unable to re-initiate their proceedings if the limitation period for building actions (typically 10 years after the issue of the occupancy permit) had expired after the original VCAT proceeding was commenced.

As these proceedings indicate, litigation of domestic building disputes had become byzantine. The case preceded legislative responses, such as the new s 57(2A) of the *Domestic Building Contracts Act 1995* (Vic), which provides that where a domestic building dispute is brought before a Court:

> "The Court is not required to stay an action … if the Court is satisfied that the action raises, or there are reasonable grounds for the Court to consider that the action may in the future raise, a controversy involving federal subject matter (within the meaning of section 57A(1) of the *Victorian Civil and Administrative Tribunal Act 1998*) that VCAT has no jurisdiction to exercise judicial power to resolve."

The practical implementation of these legislative changes remains to be observed.

Krongold v Thurin [2023] VSCA 191

Victorian Supreme Court allows review of adjudication determination based on material non-jurisdictional error of law

Following the High Court's decisions in *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2018] HCA 4 and *Maxcon Constructions Pty Ltd v Vadasz* [2018] HCA 5, it was accepted that jurisdictional error was the only ground for parties to seek judicial review of adjudication determinations under the New South Wales and South Australian security of payment legislation.

However, the recent decision of *Hunters Green Retirement Living Pty Ltd v J.G. King Project Management Pty Ltd* [2023] VSC 536 (***Hunters Green***) is a reminder that a material non-jurisdictional error of law is a ground for review in Victoria, provided judgment to enforce the relevant adjudication certificate has not yet been entered.

Importantly, there is only likely to be a prior judgment if the payee 'gets in early' to obtain a court judgment to compel the payer to pay the amount in the determination.

The divergence in the Victorian approach arises because of section 85(5) of the *Constitution Act 1975* (Vic) (**Constitution**). Section 85(5) prevents legislative ouster of the Supreme Court of Victoria's jurisdiction (including its powers of judicial review) unless the legislation expressly refers to section 85 of the Constitution and the reasons for repealing, altering or varying section 85 are given during the second reading speech of the relevant bill (or provided under certain exceptions prior to the third reading of the relevant bill).

While section 28R of the *Building and Construction Industry Security of Payment Act 2002* (Vic) (as introduced by the *Building and Construction Industry Security of Payment (Amendment) Act 2006* (Vic)) validly ousts the Court's jurisdiction to review adjudication determinations for non-jurisdictional error, it only does so after judgment to enforce the relevant adjudication certificate has been entered.

Accordingly, the Supreme Court of Victoria retains jurisdiction to review adjudication determinations for non-jurisdictional error prior to judgment being entered.

In *Hunters Green*, Attiwill J found that the Court had jurisdiction to review an adjudication determination for error of law on the face of the record. His Honour noted that the Court's decision to grant certiorari is discretionary and will only be granted for 'material' errors of law. Accordingly, it must be established that, but for the error, the decision would or might have been different. Attiwill J found that the adjudicator made a series of errors of law when calculating progress payments, which were material as:

- the calculations were central to the adjudicator's determination;
- the calculations did not accord with the contract; and
- if not for the adjudicator's errors, the adjudicator should have found a 'nil' payment entitlement.

Hunters Green Retirement Living Pty Ltd v JG King Project Management Pty Ltd [2023] VSC 536

Judge Suzanne Kirton appointed to the County Court of Victoria

Judge Suzanne Kirton has been appointed a Judge of the Commercial Division of the County Court of Victoria. Her Honour was previously head of the Building and Property List of the Victorian Civil and Administrative Tribunal. Her Honour was welcomed to the Court on Thursday 12 October.

Western Australia

New climate adaptation strategy

The Western Australian government has published a new policy, 'Climate Adaptation Strategy: Building WA's Climate Resilient Future'.

The strategy has four aims, which are to:

- "produce and communicate credible climate information and resources
- build public sector climate capability and strengthen accountability
- enhance sector-wide and community partnerships to unite and coordinate action
- empower and support the climate resilience of Aboriginal people."

These four aims are reflected in 37 more specific tasks to be performed by an array of government departments.

The strategy is available here.

Other essential reading

Other essential reading

Projects-related publications

Andrew Stephenson and Jey Nandacumaran, Global Arbitration Review Know How: Construction Arbitration (Australian chapter) (2023).

Nastasja Suhadolnik, Introduction to Arbitration: A User's Guide (2023, second edition).

Andrew Stephenson and Harrison Frith, 'Revising Australia's Approach to Delivering Major Public Infrastructure: Recommendations for Change' (2023) 38 *Building and Construction Law*.

Trevor Thomas and Tom Milner, 'The Decommissioning Difference: Unique Challenges in Contracting for Decommissioning Projects' (2023) 38 *Building and Construction Law*.

General interest publications

Corrs Chambers Westgarth's publication Age of Acceleration: Staying at the Forefront of Change in an Evolving Legal Landscape includes many articles relevant to projects, including this selection:

- James North, Andrew Lumsden, Michael do Rozario and Michael Murdocca, 'Getting Incident Response Right in a Changing Cyber Threat Environment'
- Dr Louise Camenzuli, Adam Stapledon, Alison Morris and Samantha Young, 'The Future of Biodiversity Risk Assessment for Corporations'
- Andrew Lumsden, Gaynor Tracey, James North, Dr Phoebe Wynn-Pope, Rhys Jewell, Eugenia Kolivos, Madeleine Kulakauskas, and Michael Murdocca, 'Dynamic Due Diligence: Managing New and Emerging Acquisition Risks'

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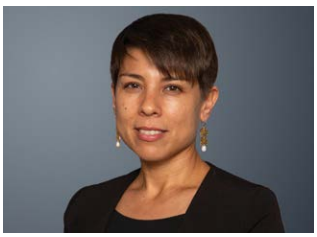

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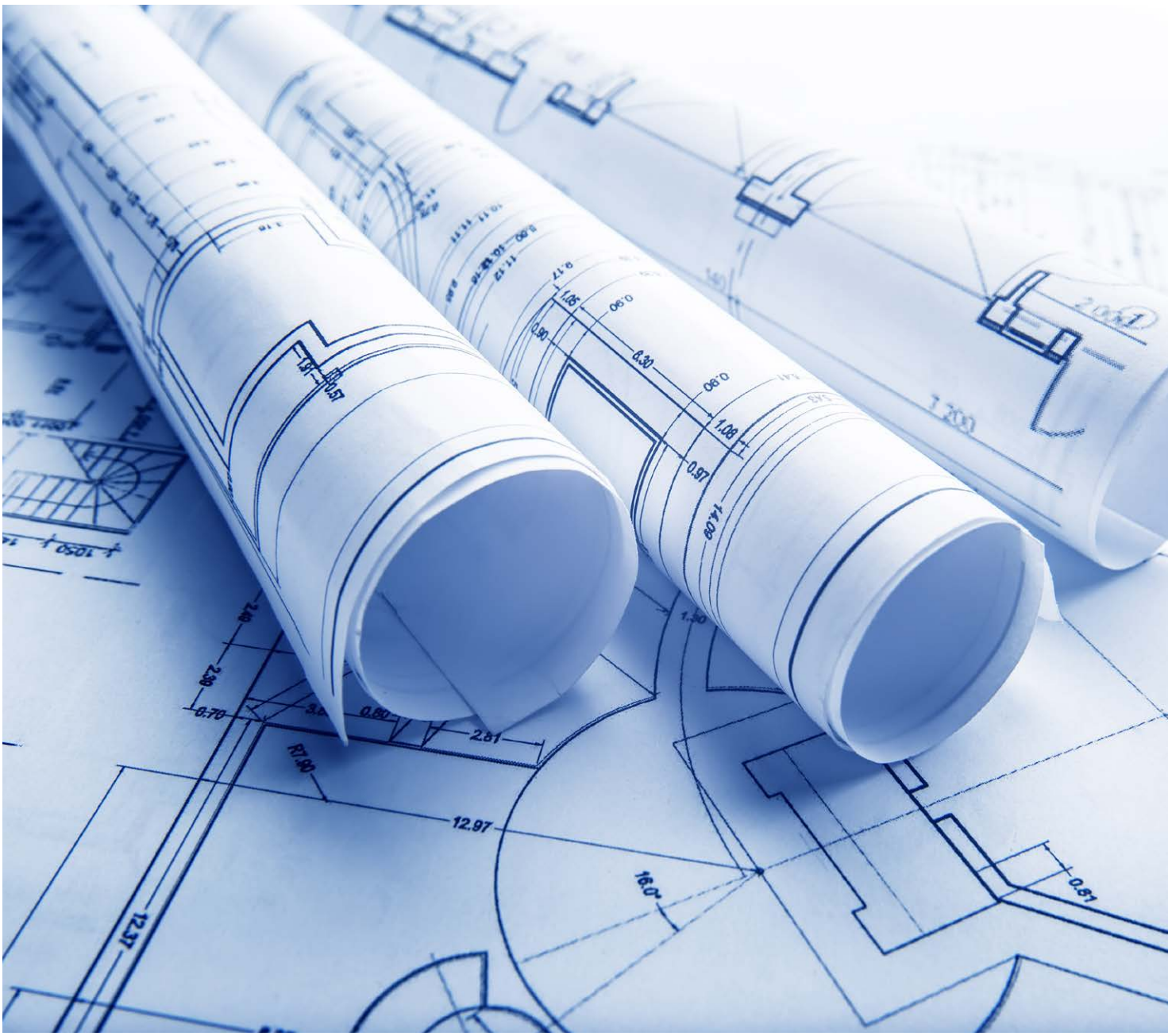

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